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VOLUME 154

PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF THE
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WASHINGTON, COLORADO, MONTANA, ARIZONA
NEVADA, IDAHO, WYOMING, UTAH
NEW MEXICO, OKLAHOMA
AND OF THE COURTS OF APPEAL OF CALIFORNIA
AND CRIMINAL COURT OF APPEALS
OF OKLAHOMA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF PACIFIC CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

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ST. PAUL
WEST PUBLISHING CO.
1916

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⁴ Term expired October 1, 1915.

⁵ Term expired January 15, 1916.

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*Term beginning October 11, 1915.

COURT RULES

SUPREME COURT OF NEVADA

Adopted September 1, 1879, with Amendments of October 25, 1911,
Which Became Effective April 1, 1912

RULE I.

1. Applicants for license to practice as attorneys and counselors will be examined in open court on the first day of the term.

2. *Examination for Attorney at Law*—The Supreme Court, upon application of the district judge of any judicial district, will appoint a committee to examine persons applying for admission to practice as attorneys and counselors at law. Such committee will consist of the district judge and at least two attorneys resident of the district.

The examination by the committee so appointed shall be conducted and certified according to the following rules:

Examination by Committee—The applicant shall be examined by the district judge and at least two others of the committee, and the questions and answers must be reduced to writing.

No intimation of the questions to be asked must be given to the applicant by any member of the committee previous to the examination.

Examination to Embrace—The examination shall embrace the following subjects:

1. The history of this state and of the United States;
2. The constitutional relations of the state and federal governments;
3. The jurisdiction of the various courts of this state and of the United States;
4. The various sources of our municipal law;
5. The general principles of the common law relating to property and personal rights and obligations;
6. The general grounds of equity jurisdiction and principles of equity jurisprudence;
7. Rules and principles of pleadings and evidence;
8. Practice under the Civil and Criminal Codes of Nevada;
9. Remedies in hypothetical cases;
10. The course and duration of the applicant's studies.

Admission of Attorneys from Other Jurisdictions—One who has been admitted upon a creditable examination in any other state, territory, or foreign country requiring such examination, where the common law of England is the basis of jurisprudence, may apply to be licensed in this state, provided his

affidavit of such admission or his certificate showing the same, together with satisfactory evidence of good moral character and a recommendation from a judge before whom he last practiced, may be deemed sufficient to entitle him to admission to practice in all the courts of this state.

3. The examiners will not be expected to go very much at large into the details of these subjects, but only sufficiently so fairly to test the extent of the applicant's knowledge and the accuracy of his understanding of those subjects and books which he has studied.

4. *Examination by Committee*—When the examination is completed and reduced to writing, the examiners will return it to this court, accompanied by their certificate showing whether or not the applicant is of good moral character and has attained his majority, and is a bona fide resident of this state. Such certificate shall also contain the facts that the applicant was examined in the presence of the committee; that he had no knowledge or intimation of the nature of any of the questions to be propounded to him before the same were asked by the committee, and that the answers to each and all the questions were taken down as given by the applicant without reference to any books or other outside aid.

5. *Fee to be Deposited Before Examination*—The fee of thirty-five dollars for license must in all cases be deposited with the clerk of the court before the application is made, to be returned to the applicant in case of rejection.

6. *Oath of Attorney*—In addition to the constitutional oath or affirmation, attorneys, before being admitted to practice, shall take the following oath or affirmation:

1. That I will maintain the respect due to courts of justice and judicial officers;
2. That I will counsel and maintain such actions, proceedings, and defenses only, as appear to me legal and just; except the defense of a person charged with a public offense;
3. To employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never to seek to mislead the judge by any artifice or false statement of facts or law;

4. That I will maintain inviolate the confidence and, at every peril to myself, preserve the secrets of my client;

5. That I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

6. That I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed. So help me God. (As amended, October 25, 1911.)

RULE II.

Filing Transcript—The transcript of the record on appeal shall be filed within thirty (30) days after the appeal has been perfected and the statement settled, if there be one. (As amended, October 25, 1911.)

RULE III.

1. *Appeal may be Dismissed—Can be Restored*—If the transcript of the record be not filed within the time prescribed by rule II, the appeal may be dismissed on motion without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and, upon good cause shown, on notice to the opposite party and, unless so restored, the dismissal shall be final and a bar to any other appeal from the same order or judgment.

2. *How Restored*—On such motion there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of the filing of the undertaking on appeal; and that the same is in due form; the fact and time of the settlement of the statement, if there be one; and also that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded. (As amended, October 25, 1911.)

RULE IV.

1. *Printed Transcripts*—All transcripts of record in civil cases, when printed, shall be printed on unruled white paper, ten inches long by seven inches wide, with a margin on the outer edge of not less than one inch. The printed page shall not be less than seven inches long and three and one-half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folios shall be printed between lines or on the mar-

gin. Nothing smaller than minion type leaded shall be used in printing.

2. *Transcripts in Criminal Cases*—Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only of transcript paper, sixteen inches long by ten and one-half inches in width, with a margin of not less than one and one-half inches wide, fastened or bound together on the left sides of the pages by ribbon or tape, so that the same may be secured, and every part conveniently read. The transcript if written, shall be in a fair, legible hand, and each paper or order shall be separately inserted.

3. *To be Indexed*—The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover.

4. *Cannot be Filed*—No record which fails to conform to these rules shall be received or filed by the clerk of the court. (As amended, October 25, 1911.)

RULE V.

Printing Transcripts—The written transcript in civil causes, together with sufficient funds to pay for the printing of the same, may be transmitted to the clerk of this court. The clerk, upon the receipt thereof shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be prima facie evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this court, subject to be corrected by reference to the written transcript on file.

RULE VI.

1. *Cost of Typewriting or Printing Transcripts*—The expense of printing or typewriting transcripts, affidavits, briefs, or other papers on appeal in civil causes and pleadings, affidavits, briefs, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed or typewritten, shall be allowed as costs, and taxed in bills of costs in the usual mode; provided, that no greater amount than twenty-five cents per folio of one hundred words shall be taxed as costs for printing, and no greater amount than twelve and one-half cents per folio for one copy only shall be taxed as costs for typewriting. All other costs to be taxed by the clerk in accordance with the fee bill.

2. To Serve Cost Bill, When—Either party desiring to recover as costs his expenses for printing or typewriting in any cause in this court, shall within five days after the decision of the cause, file with the clerk and serve upon the opposite party a verified cost bill, setting forth or stating the actual cost of such printing or typewriting, and no greater amount than such actual cost shall be taxed as costs.

3. Mode of Objecting to Costs—If either party desires to object to the costs claimed by the opposite party, he shall, within ten days after the service upon him of a copy of the cost bill, file with the clerk and serve his objections. Said objections shall be heard and settled and the costs taxed by the clerk. An appeal may be taken from the decision of the clerk, either by written notice of five days, or orally and instant, to the justices of this court, and the decision of such justices shall be final. If there be no objections to the costs claimed by the party entitled thereto, they shall be taxed as claimed in his cost bill.

4. Indorsed upon Remittitur—In all cases where a remittitur or other final order is sent to a district court or other inferior tribunal, the costs of the party entitled thereto as taxed by the clerk shall be indorsed upon such remittitur or order, and shall be collected as other costs in such district court, or other inferior court or tribunal, and shall not be subject to retaxation in such district court or other tribunal. (As amended, October 25, 1911.)

RULE VII.

To Correct Error in Transcript—For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same, in writing, to this court, and, upon good cause shown, obtain an order that the proper clerk certify to the whole or part of the record as may be required, or may produce the same, duly certified, without such order. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions—Diminution of Record—Exceptions or objections to the transcript, statement, the undertaking on appeal, notice of appeal or to its service or proof of service, or any technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, and must be noted in the written or the printed points of the respondent, and filed at least

one day before the argument, or they will not be regarded.

RULE IX.

Substitution in Case of Death—Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion in writing to the court on the part of such representative, or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made and the cause shall proceed as in other cases.

RULE X.

1. Calendar to Consist of—Upon Motion—The calendar of each term shall consist only of those cases in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties; provided, that all cases, both civil and criminal, in which the appeal has been perfected and the statement settled, as provided in rule II, and the transcript has not been filed before the first day of the term, may be placed on the calendar, on motion of either party, after ten days' written notice of such motion, and upon filing the transcript.

2. Causes shall be placed on the calendar in the order in which the transcripts are filed by the clerk.

3. The calendar shall be called on the first day of each term and cases set for oral argument upon a day certain, upon request of counsel upon either side of the case, or upon stipulation, subject to the approval of the court. Requests for settings may be made by counsel in open court or by written communication addressed to the clerk. Upon stipulation of counsel, subject to the approval of the court, cases may be submitted on briefs filed without oral argument. Where no request is made by stipulation or otherwise for the setting of a case, the same may be passed or be set by the court of its own motion. (As amended, October 25, 1911.)

RULE XI.

1. Time for Appellant to Serve Brief—Respondent—Within fifteen days after the filing of the transcript on appeal in any case, the appellant shall file and serve his points and authorities or brief; and within fifteen days after the service of appellant's points and authorities or brief, respondent shall file and serve his points and authorities or brief; and within fifteen days thereafter, appellant shall file and serve his points and authorities or brief in reply, after which the case may be argued orally.

2. The points and authorities shall contain such brief statement of the facts as may be necessary to explain the points made.

3. Oral Argument—The oral argument may, in the discretion of the court, be limited to the printed or typewritten points and

authorities or briefs filed, and a failure by either party to file points and authorities or briefs under the provisions of this rule and within the time herein provided, shall be deemed a waiver by such party of the right to orally argue the case, and such party shall not recover cost for printing or typewriting any brief or points and authorities in the case. Counsel shall not read from decisions nor argue more than one hour on each side without permission of the court.

4. No more than two counsel on a side will be heard upon the oral argument, except by special permission of the court, but each defendant who has appeared separately in the court below may be heard through his own counsel.

5. *Optional in Criminal Cases*—In criminal cases it is left optional with counsel either to file written, printed, or typewritten points and authorities or briefs.

6. *When Submitted*—When the oral argument is concluded, the case shall be submitted for the decision of the court.

7. *Stipulation as to Time*—The times herein provided for may be shortened or extended by stipulation of parties or order of court, or a justice thereof. (As amended, October 25, 1911.)

RULE XII.

Printing and Paper to be Uniform—In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE XIII.

Number of Copies to be Filed—Besides the original, there shall be filed five copies of all printed transcripts, briefs, and points and authorities, which copies shall be distributed by the clerk. (As amended, October 25, 1911.)

RULE XIV.

Opinions Recorded—All opinions delivered by the court, after having been finally corrected, shall be recorded by the clerk.

RULE XV.

Rehearing—Remittitur to Issue, When—Time may be Shortened or Extended—All motions for a rehearing shall be upon petition in writing, and filed with the clerk within fifteen days after the final judgment is rendered, or order made by the court, and publication of its opinion and decision. Personal service or service by mail upon counsel of a copy of the opinion and decision shall be deemed the equivalent of publication. The party moving for a rehearing shall serve a copy of the petition upon opposing counsel, who within ten days thereafter may file a reply to the petition, and no other argument shall be heard thereon.

No remittitur or mandate to the court below shall be issued until the expiration of the fifteen days herein provided, and decisions upon the petition, except upon special order. The times herein provided for may be shortened or extended, for good cause shown, by order of court.

RULE XVI.

Opinion To be Transmitted—Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the court below.

RULE XVII.

No Paper to be Taken Without Order—No paper shall be taken from the court room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the clerk.

RULE XVIII.

Writ of Error, or Certiorari—No writ of error or certiorari shall be issued, except upon order of the court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Writ of Error to Operate as Supersedeas—Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof to the opposite party or his attorney, and to the sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

When Returnable—The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

To Apply—The rules and practice of this court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

Time Concerning Writ—The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Concerning Change of Venue—Additional Notice Given—Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties

live within twenty miles of Carson. When the party served resides more than twenty miles from Carson, an additional day's notice will be required for each fifty miles, or fraction of fifty miles, from Carson.

RULE XXIV.

Notice of Motion—In all cases where notice of a motion is necessary, unless, for good cause shown, the time is shortened by an order of one of the justices, the notice shall be five days.

RULE XXV.

1. *Transcripts may be Typewritten—To be Bound in Boards with Flexible Backs*—All transcripts of the record in any action or proceeding may be typewritten. The typewriting shall be the first impression, clearly and legibly done, with best quality of black ink, in type not smaller than small pica, upon a good quality of typewriting paper, thirteen inches long by eight inches wide, bound in boards with flexible backs, in volumes of a size suitable for convenient handling and ready reference, and arranged and indexed as required by the rules of this court. When so typewritten such transcript, in the discretion of the party appealing, need not

be printed, but, if printed, all the rules concerning the same shall still apply thereto.

2. *Briefs may be Typewritten*—Briefs and points and authorities, instead of being printed, may be typewritten upon the same paper and in the same style and form as is prescribed for typewritten transcripts.

3. *Copy to be Served—Two Copies to be Filed*—When so typewritten, but one copy of such transcript need be filed in the case; but a copy thereof shall be served upon the opposite party. Two copies of the briefs and points and authorities—viz., the first impression and a copy thereof—shall be filed with the clerk, and a copy shall be served upon each opposite party who appeared separately in the court below. (As amended, October 25, 1911.)

RULE XXVI.

Payment of Advance Fee Required—Clerk Prohibited from Filing—No transcript or original record shall be filed or cause registered, docketed, or entered until an advance fee of twenty-five dollars is paid into the clerk's office, to pay accruing costs of suit. The clerk of the court is prohibited from filing or registering any record without first having received as a deposit the aforesaid fee.

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THE
PACIFIC REPORTER
VOLUME 154

(171 Cal. 617)

WILSON v. HOTCHKISS. (S. F. 6786.)

(Supreme Court of California. Dec. 24, 1915.
Rehearing Denied Jan. 20, 1916.)

1. FRAUDS, STATUTE OF § 89 — SALE OF GOODS—ACCEPTANCE—WORDS.

Under the statute of frauds providing that sales of personal property for a price of \$200 or more shall be invalid unless there be some written memorandum, except where the buyer, accepts part of the goods, the mere words of the buyer, who was already the pledgee in possession, or proof of his acts of dominion over the property inconsistent with his former rights as pledgee, might establish a transfer of possession from that of a pledgee to that of complete ownership.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.]

2. FRAUDS, STATUTE OF § 89 — SALE OF GOODS—POSSESSION.

Where sale of personal property is made to a buyer in possession, the statute of frauds does not require him to quit it and to retake possession as the new owner.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 165-173; Dec. Dig. § 89.]

3. FRAUDS, STATUTE OF § 159 — SALE OF GOODS — TRANSFER OF POSSESSION — SUFFICIENCY OF EVIDENCE.

In an action for the price agreed on a parol sale of stock for a price more than \$200, to a buyer already in possession as pledgee, evidence held to make the buyer's acceptance of possession as complete owner a question for the jury.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 378; Dec. Dig. § 159.]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Virginia E. Wilson against W. J. Hotchkiss. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

Titus, Creed & Dall, of San Francisco, for appellant. Franklin P. Bull, of San Francisco, for respondent.

HENSHAW, J. The first trial of this cause resulted in a verdict and judgment in favor of the plaintiff. Defendant's appeal was considered by the District Court of Appeal of the Third District, where every legal

consideration pressed upon the attention of that court is clearly, fully, and satisfactorily disposed of. *Wilson v. Hotchkiss*, 21 Cal. App. 892, 182 Pac. 88. That court very properly ordered a reversal of the judgment and a new trial for the failure of the trial court to give any instructions touching the statute of frauds and its applicability to the contract under consideration. Upon the new trial such instructions were given. Again the verdict of the jury was for plaintiff, and once more defendant appeals. It may not be questioned but that the court quite fully and quite accurately instructed the jury as to the nature of the acts by a vendee under a parol contract within the statute of frauds which would be sufficient to satisfy the requirements of that statute.

[1, 2] But complaint is made over the court's refusal to give the following:

"Mere words are not sufficient to prove a receipt or acceptance of the personal property to take an oral contract of sale of personal property, for a price exceeding \$200, out of the statute of frauds."

It is said that this refused instruction embodies an unquestioned principle of law, first declared in New York in *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316, and approved in this state in the very early cases of *Gardet v. Belknap*, 1 Cal. 399, and *Malone v. Plato*, 22 Cal. 103. These cases and the principle of law for which appellant contends therefore demand examination. *Shindler v. Houston* was a sale by oral contract of lumber in the possession of the vendor, and piled on a dock. Standing in front of the lumber, the vendor and the vendee agreed upon the price and the plaintiff then said "the lumber is yours." There was absolutely no other delivery, no change of possession, and the true meaning of the decision is that where delivery and change of possession are necessary to comply with the statute of frauds, an oral declaration does not alone constitute such delivery. To precisely the same effect is *Gardet v. Belknap*, where there was not the slightest pretense that the brandy which the defendant orally purchased had ever been removed from the plaintiff's store, or that the defendant had exercised or attempted to exercise any dominion over it, the plaintiff resting his case solely upon the oral declara-

tion of the vendee at the time of the purchase and as a part of the contract of purchase. In *Malone v. Plato* defendant was charged with having purchased horses of the plaintiff. The transaction rested wholly in parol, defendant saying: "I will take them. I will be back in half an hour and pay for them." The horses remained in plaintiff's stable. Defendant refused to complete this oral contract, and pleaded the statute of frauds. This court again said that it appears to be entirely settled that to comply with the requirements of the statute of frauds "the transfer of possession must be evidenced by acts and cannot be effected by mere words." With the soundness of these declarations as bearing upon the facts to which they were applied, no criticism can be made. But what were the essential facts? They were that for their validity each contract required a delivery of the article sold, and the holding is merely that the language of the vendor that "the property is yours," or the language of the vendee, "I will take the property," does not measure up to the requirement of the statute.

This principle and these decisions have no bearing on or relationship to cases such as the one at bar—cases where the actual possession is in the vendee and the real question is whether that possession has been transformed from that of bailment or pledge to that of complete ownership. Where a sale is made to a vendee in possession, whatever may have been the nature of his prior possession, the law does not require a quitting of it and a retaking of possession as the new owner. *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814. All that is required is evidence showing that the possession is retained by the vendee in his new capacity of owner. And what evidence will establish this? Manifestly it may be established by proof of acts of dominion over the property inconsistent with his former holding as bailee or pledgee, but equally may it be established by his declarations that he so holds the property as owner. On principle this must be so, for it would indeed be strange if a pledgee, formally reciting the oral contract by which he had purchased the property and declaring that he held possession of it no longer as pledgee but as absolute owner, could have the evidence of these declarations excluded from the consideration of the jury upon the ground that they were mere declarations and not a part of his acts or conduct in dealing with the property. They are essentially a part of his acts and conduct, and so we find it declared as "well settled that any acts of the parties indicative of ownership by the vendee may be given in evidence to show the receipt and acceptance of the goods to take the case out of the statute of frauds. Conduct, acts, and declarations of the purchaser may be given in evidence for that purpose." *Garfield v. Paris*, 96 U. S. 557, 24 L. Ed. 821. And with-

out multiplying citations, reference may be made to *Browne Statute of Frauds*, § 321e, where he states:

"The conduct of the buyer showing an acceptance * * * may be drawn * * * from what he says."

And again quoting from the same author, page 433, footnote:

"An examination of the cases will show that evidence has uniformly been received even in New York of the conduct of the parties; i. e., what they did and said, without in any way discriminating between acts of doing and acts of saying."

See, also, *Mecham Sales*, § 382; *Williston Sales*, § 87. It follows that the court ruled correctly in refusing to give the proffered instruction.

[3] Plaintiff's evidence went to establish that her assignor in selling his stock ceased to have any connection with the corporation and so forfeited his position as manager; that he was temporarily retained by the defendant purchaser in his managerial position at an increased compensation, the increase being paid by the defendant himself; that defendant was the pledgee of the stock at the time of the sale; that the vendor was jointly liable with the vendee upon certain promissory notes; that as a part of the consideration the vendor was to be released from liability on those notes; that in fact the vendee did pay those notes and never made demand upon the vendor for recoupment; that the vendee publicly declared that he had bought the vendor's stock; and that the vendor no longer had any interest in the company. Here certainly is enough and more than enough evidence to justify the submission of the cause to the jury, whose verdict will not here be disturbed. *Shumway v. Rutter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

The judgment and order appealed from are therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.

(171 Cal. 600)

TURNER v. WILSON. (Sac. 2417.)

(Supreme Court of California. Dec. 21, 1915.)

1. ELECTIONS ⇐194 — BALLOTS — DISTINGUISHING MARKS.

Under Pol. Code, § 1211, subd. 4, declaring that no mark upon a ballot which is unauthorized, shall be held to invalidate it unless placed thereon to identify the ballot, ballots will not be refused because a voter, after making pencil crosses, had stamped a cross over such crosses, or because he stamped a cross in the voting squares opposite a blank space under the name of a candidate for Governor, nor because he stamped crosses in the voting squares opposite a proposition submitted; for the purpose of the section which was added in 1903 was to prevent the rejection of ballots containing unauthorized marks, not the result of an intent on the part of the voter to identify his ballot.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 166, 167; Dec. Dig. ⇐194.]

2. ELECTIONS — 186 — BALLOTS — MARKS.

As under Pol. Code, § 1211, subd. 1, a cross is not essential in the case of a name written on a ballot, the fact that a voter, after writing in a name, placed a cross opposite it, will not warrant the rejection of the ballot.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. ¶ 186.]

3. ELECTIONS — 186 — BALLOTS — DISTINGUISHING MARKS.

Because a voter wrote in the words "Yes" or "No" in the voting squares opposite a bond proposition, instead of stamping such squares with the appropriate cross, will not warrant the rejection of the entire ballot, whatever the effect may be on the vote as to the bonds.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. ¶ 186.]

4. ELECTIONS — 305 — ELECTION CONTEST — DETERMINATION.

Where the finding that the contestee received the highest number of votes was correct, it will not be disturbed because the finding as to the number of votes received by each candidate was incorrect.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 317-332; Dec. Dig. ¶ 305.]

In Bank. Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Election contest by J. L. Turner, Jr., against W. C. Wilson. There was a judgment for contestee, and contestant appealed. The judgment of affirmance by the District Court of Appeal was vacated, and the cause transferred to the Supreme Court. Affirmed.

Ostrander, Tuttle & Ostrander, of Merced, for appellant. F. W. Henderson, of Merced, for respondent. Thomas P. Boyd, of San Rafael, and W. H. Early, of Petaluma, amici curiæ.

ANGELLOTTI, O. J. This is an action to determine whether the contestant or contestee was elected constable of township No. 4, Merced county, at the election on November 3, 1914. At the canvass of the votes by the board of supervisors the return made was that each candidate had received 168 votes, and that neither of them was elected. At the hearing in the superior court it was found that contestee (Wilson) had received 165 votes and the contestant (Turner) 160 votes, and it was there adjudged that the contestee was elected. The contestant appeals from the judgment on a bill of exceptions. At the election contestant's name was the only name printed on the ballot for the office of constable; the supporters of contestee being able to express their preference only by writing his name upon the ballot.

[1] 1. This cause was originally decided by the District Court of Appeal of the Third District, which, in view of the provisions of our Constitution, has appellate jurisdiction in the matter of election contests. Upon petition for a hearing in this court after decision by the District Court of Appeal, the decision of the latter court was vacated, and the cause transferred to this court, the members of this court not being satisfied that the

views of the District Court of Appeal as to the rejection by the trial court of certain ballots on the ground that the same contained distinguishing marks were correct.

The ballot marked "Contestee's Objection No. 1," containing a vote for Turner, was rejected by the trial court because of the fact that the voter had stamped a cross in the voting square opposite the blank space under the name "Hiram W. Johnson," candidate for Governor.

The ballot marked "Contestee's Objection No. 9," containing a vote for Turner, was rejected because of a cross stamped by the voter in the voting square opposite the blank space under the name of "Lucien Shaw," candidate for Justice of the Supreme Court.

The ballot marked "Contestee's Objection No. 12," containing a vote for Turner, was rejected because of such a cross in the voting square opposite the blank space under the name of "U. S. Webb," candidate for Attorney General.

The ballot marked "Contestee's Objection No. 26," containing a vote for Turner, was rejected because of a similar cross placed in the voting square opposite the blank space under the name of "William M. Conley," candidate for Chief Justice of the Supreme Court.

The ballot marked "Contestee's Objection No. 8," containing a vote for Turner, was rejected because the voter, having written in the name of "L. S. Cardwell" as a candidate for justice of the peace in the blank space left for that purpose on the ballot, had first placed a pencil cross in the blank space provided for that purpose, and had then stamped over said pencil cross a cross with the stamp.

The ballot marked "Contestee's Objection No. 19," containing a vote for Turner, was rejected because the voter had marked his cross with a pencil in the proper place in the case of the first four offices on the ballot, and then, apparently perceiving his mistake, had used the voting stamp for the whole of his ballot, placing the stamped crosses in the case of the candidates already marked with pencil over the pencil crosses.

The ballot marked "Contestee's Objection No. 25," containing a vote for Turner, was rejected because the voter had apparently stamped a cross in each of the voting squares of the twenty-second proposition, there being a cross opposite "Yes," and also a cross opposite "No."

The District Court of Appeal concluded that the action of the trial court in rejecting these ballots was correct, except in the case of the ballot marked "Contestee's Objection No. 8."

We are satisfied that none of these ballots should have been rejected, and that all of them should have been counted for Turner.

In the year 1903 our election law relating to the canvass of votes and marked or spoil-

ed ballots was amended by the addition of subdivision 4 to section 1211, Political Code, reading as follows:

"No mark upon a ballot which is unauthorized by this act shall be held to invalidate such ballot, unless it shall appear that such mark was placed thereon by the voter for the purpose of identifying such ballot."

This provision has ever since been in force. The only purpose thereof was to prevent the rejection of ballots containing some unauthorized mark which was not the result of an intent on the part of the voter to identify his ballot. Theretofore the very stringent provisions regarding the marking and rejecting of ballots had been so construed by the courts as to result in the exclusion of numerous such ballots, although it was perfectly clear from an inspection of the ballots themselves that the mark was made without evil intent of any kind. The effect of the amendment is that, where there is no evidence whatever before the trial court, other than the ballot itself, unless such ballot is so marked as to warrant an inference by the trial court that the marking was designedly made by the voter for the purpose of identifying his ballot, the ballot must not be rejected on the ground that it bears a distinguishing mark. We so intimated in withholding our approval of a portion of the opinion of the District Court of Appeal in *Gray v. O'Banion*, 23 Cal. App. 468, 479, 138 Pac. 977, 981, citing this very provision of our law. Decisions relative to distinguishing marks rendered prior to the amendment we have referred to must be read in the light of the law as it then was. We find on none of the seven ballots to which we have referred anything warranting the inference that the unauthorized mark was placed thereon by the voter for the purpose of identifying the ballot, and there was no other evidence as to the intent of those marking the ballots. Counting these 7 ballots for Turner would give Wilson 165, and Turner 167.

2. Certain ballots counted by the trial court for Wilson, marked "Contestant's Objections A, E, I, J, M, P, U, X, A4, A5, A8, A9, and A10," were properly so counted. As to all of these except the ballot marked "Contestant's Objection P" we are satisfied with the views expressed by the District Court of Appeal in its opinion in this case. The District Court of Appeal held that the trial court should have rejected said ballot "P" on the ground that the same was really a vote for "W. E. Walson" instead of "Wilson," but an inspection of the ballot satisfies us that the trial court was warranted in concluding that the second letter was an "I" instead of an "A," making the name "Wilson." The same may be said as to certain ballots claimed to read "Welson" instead of "Wilson."

3. We have examined the other ballots referred to in the bill of exceptions as to

which objections were made, and from our examination we have concluded as follows: The ballot marked "Contestant's Objection D," containing a vote for Wilson, which was rejected by the trial court, should have been counted for Wilson. The same is true of ballots marked "K, L, N, Q, S, A2, and A3." It is obvious from the inspection of the ballot that the alleged identification mark on ballot "D" was not placed thereon with any intent to identify the ballot.

[2] The same is true of the pencil cross on ballot "L," opposite the name of "W. C. Wilson," written in by the voter. A cross is not essential in the case of a name written on the ballot (see subdivision 1, § 1211, Pol. Code), and the pencil cross cannot invalidate unless it appears that it was placed there for the purpose of identifying the ballot. The same is true of ballot "N." The name written on ballot "K" for constable was clearly that of "Wilson." Ballot "Q" is exactly like ballot "D." Ballot "S" furnishes no support for the conclusion that the pencil mark was placed there for the purpose of identifying the ballot. Ballots "A2 and A3" contain nothing making it appear that the alleged distinguishing marks thereon were placed thereon by the voter for the purpose of identifying the ballots. This makes 8 additional votes for Wilson, bringing his vote to 173.

[3] 4. Ballots marked "Contestee's Objections 16 and 17," each of which contained a vote for Turner, were rejected by the trial court. They should have been counted for Turner. In one case the voter had written in one of the voting squares provided for the vote on certain bond questions the word "Yes"; there being four such propositions so voted on by him. In the other case the voter had attempted to vote on such propositions by writing the word "No" in said voting squares. Whatever may be held to be the effect of this manner of voting on these particular propositions, it is perfectly clear that the word "Yes" in the one case and the word "No" in the other case were not placed on the ballot by the voter for the purpose of identifying his ballot. The addition of these two votes makes Turner's vote 169. It is to be noted that, in so far as alleged distinguishing marks are concerned, there was no evidence whatever before the court as to the intention of the voter saving and excepting the ballot itself. As to all of the ballots referred to in the bill of exceptions that we have not particularly discussed or mentioned we find that the trial court committed no error.

[4] There is no necessity for a new trial of this case. The bill of exceptions purports to contain an appropriate reference to all the ballots to which objection was made and the rulings of the court thereon, and it is clear that, counting such ballots as should be counted for Wilson and such ballots as should be counted for Turner, and excluding all bal-

lots that should not be counted for either party, Wilson has 173 votes, and Turner 169 votes. The findings that contestee did receive the highest number of votes cast in such judicial township for said office of constable, and that it is not true that contestant received a majority of said votes, are fully supported by the evidence, and the mere fact that the findings are incorrect as to the exact number of votes received by each of the parties does not require a reversal.

The judgment appealed from is affirmed.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.; LAWLOR, J.

SHAW, J. I concur in the opinion of the CHIEF JUSTICE. I think, however, that something additional should be said in regard to the seeming conflict between subdivisions 4 of section 1211 of the Political Code and the preceding portions of the chapter bearing on the subject of improper marks on the ballot.

With respect to all these inconsistencies the case calls for the application of the rule expressed in section 4484 of the Political Code that, where there are conflicting provisions in different sections of the same chapter or article, "the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article." The rule is founded in reason, and it exists independently of the Code. It therefore for like reasons applies to conflicting provisions of different subdivisions of a section. 1 *Suth. Stat. Const.* § 268.

There is also the rule that specific provisions relating to a particular branch of a subject must govern that branch, "as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate." *Harrigan v. Home Ins. Co.*, 128 Cal. 537, 58 Pac. 180, 61 Pac. 99; *Franzden v. San Diego*, 101 Cal. 321, 35 Pac. 897; *Earl v. Bowen*, 146 Cal. 762, 81 Pac. 133; *Healy v. Superior Court*, 127 Cal. 662, 60 Pac. 428.

Since subdivision 4 is later in numerical order than any of the provisions conflicting therewith, it must, under the rule first stated, prevail over them, and, since it specifically provides that the intention of the voter to identify his ballot must appear before it could be declared invalid because of an unauthorized mark thereon, and there is no other specific provision on that precise subject, it must govern that subject, under the rule last stated.

Applying these rules, we will see that the provision of subdivision 1 of section 1211 declaring that "in canvassing the votes any ballot which is not made as provided in this act shall be void" must yield to the later and specific provision of subdivision 4 which re-

quires that the intention on the part of the voter to identify the ballot must appear. Similar reasons may be given regarding all of the other provisions supposed to conflict with subdivision 4 aforesaid.

It may be further said, with respect to the provision of subdivision 8 of section 1197, as amended in 1911 (*St. 1911*, p. 404), and of subdivision 10 of the amendments of 1913 (*St. 1913*, p. 1157) and 1915 (*St. 1915*, p. 272), providing that there shall be printed on the ballot certain instructions to voters, one of which is that distinguishing marks and erasures make the ballot void is not an enactment of substantive law at all, but a mere provision that certain cautions shall be given to the voter himself. These instructions to voters have been carried down in the same form from the time when the statute provided that every distinguishing mark should invalidate the ballot, and it apparently has not been perceived that subdivision 4 aforesaid changes the rule in that respect.

(171 Cal. 553)

In re VANDERHURST'S ESTATE.
JACOBS et al. v. VANDERHURST et al.
(S. F. 7258.)

(Supreme Court of California. Dec. 16, 1915.
Modification of Opinion Jan. 12, 1916.)

1. APPEAL AND ERROR ⇐1178—REVIEW—DEGREE OF DISTRIBUTION.

While Code Civ. Proc. § 1714, abolished new trials in probate proceedings except in will contests, an appellate court may, on appeal from a decree of distribution, order the doing of anything which the probate court should have done in the exercise of its jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. ⇐1178.]

2. WILLS ⇐761—CONSTRUCTION—ADMISSIBILITY OF ACCOUNTS.

A will declared that the testator had made advances to his deceased son, and to the son's children as shown by his books of account, that he had made advances to other children, as evidenced by their notes, and that it was the testator's will that such advances should be deducted from the shares of such children. The books of account showed payment by the testator of monthly allowances to his two daughters, and also contained credits in favor of the daughters, practically balancing their accounts. The daughters admitted that they had not made any payments to the testator. *Held*, that where there were no notes of the daughters showing advancements, the books of account were not admissible to charge them with the amounts paid as monthly allowances, the credits being disallowed, for the description of the notes were sufficiently definite to be binding.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1968, 1969; Dec. Dig. ⇐761.]

3. WILLS ⇐759—LEGACIES—ADEMPTION.

Under Civ. Code, §§ 1351, 1397, declaring that advancements shall not be taken as ademption of general legacies unless such intention is expressed, and that all gifts are made as advancements if expressed in the gift to be so made, payments by testator of monthly allowances to his daughters, which were not evidenced by promissory notes, cannot be treated as advancements, where the testator declared that the

advancements to his children were evidenced by notes.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961-1966; Dec. Dig. ¶759.]

4. WILLS ¶759 — ADVANCEMENTS — ADEMP-TION.

Advancements made before a will was executed cannot be considered in distributing the estate, unless specified in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961-1966; Dec. Dig. ¶759.]

5. WILLS ¶487 — CONSTRUCTION — FORMAL WILLS.

In construing a will, a former will which was revoked cannot be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1028-1032; Dec. Dig. ¶487.]

6. WILLS ¶719 — "CONTESTS" — WHAT ARE.

That legatees opposed the petition of other legatees for distribution, claiming that they were not entitled to share under the will, does not show a contest of the will, but a proceeding for its construction; therefore the opponents will not be denied right to take under a provision, if any legatee or devisee should contest the will, his share should be \$1.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1722-1725; Dec. Dig. ¶719.]

For other definitions, see Words and Phrases, First and Second Series, Contest.]

Department 2. Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

In the matter of the Estate of William Vanderhurst, deceased. Petition by Mary A. Jacobs and another for distribution, opposed by William M. Vanderhurst and another. From the decree of distribution, petitioners appeal. Reversed.

Joseph J. Webb, of San Francisco (John K. Alexander, of Salinas, of counsel), for appellants. Vincent Surr, of San Francisco, and J. A. Bardin, of Salinas, for respondents. Alexander & Alexander, of Salinas, for executors.

MELVIN, J. Mary A. Jacobs and Lillian M. Vanderhurst, daughters of William Vanderhurst, deceased, appeal from a decree of distribution in the estate of said deceased person.

The principal matter involved in this appeal is the action of the probate court in charging the two appellants with certain advancements. Miss Vanderhurst was thus debited with a sum in excess of \$9,000 and Mrs. Jacobs with something over \$2,000.

[1] Respondents make a preliminary objection to the consideration of the appeal. They say that appellants may only receive the aid which they seek by a new trial; that motions for new trial have been abolished in probate proceedings except in will contests (section 1714, Code Civ. Proc.), and that on an appeal from a decree of distribution the court may not order a retrial of the issues, but is limited to discovery of discrepancies (if any exist) between the findings and the decree and a modification of the decree to con-

form to the findings. The cited section as amended merely fixes the procedure in a case of this sort by doing away with the cumbersome process of a motion for a new trial. It does not deprive this court of the right to examine the record and to direct the lower court to do anything which may be proper in the exercise of its probate jurisdiction. The amendment to section 1714, Code of Civil Procedure, merely conformed to the declarations of this court that usually in probate litigation motions for new trials and appeals therefrom needlessly raised difficult questions. Estate of Geary, 146 Cal. 107, 79 Pac. 855; Estate of Franklin, 133 Cal. 587, 65 Pac. 1081.

[2] William Vanderhurst originally had a family of seven children. When his will was made in 1912, two of his sons had died, leaving children. The will was an elaborate one. After providing for certain specific legacies and gifts it bequeathed and devised to each living child one-seventh of the residue, and provided for two trusts, each of one-seventh of the said residue, for the benefit of the children of the two deceased sons. The tenth paragraph was the one about which the disagreement arose. It was as follows:

"Inasmuch as I have from time to time, made advances to my deceased son Robert Lee Vanderhurst, and to his three children, named herein, amounting to the full sum of \$4,954.50, as is shown by my books of account, and to others of my children, which advances to them, is represented by their promissory notes now in my possession: It is my will, intention and desire that in the settlement and distribution of my estate, that the amounts so advanced by me as herein set forth, to my said children and grandchildren, shall be deducted from any money or other property that would come to them, or either of them, and that represented by the trust estate mentioned and described in the 'eighth' and 'ninth' sub-divisions of this my last will, and that the surplus thus arising, be given and distributed to my children, and said trustees for my grandchildren, in the same shares and proportions as I have indicated in and by this my will, to the end that none of my children or grandchildren shall have or receive more than an equal share of my estate."

The court interpreted this provision as meaning that the books of account might be examined for all purposes, and that all charges made therein against the two daughters might be regarded as advancements to them. The books, despite the objections of counsel for appellants, were admitted in evidence, not only to show the charges against Robert Lee Vanderhurst and his children and against those heirs who had given promissory notes, but for all purposes. The accounts showed that to each of the daughters William Vanderhurst had given a monthly allowance, and had credited each with a like amount, so that according to the books their accounts were practically closed; the balances being merely nominal. The court, however, permitted evidence, which was drawn by respondents from the appellants themselves, that they had paid no money to their father,

and thereupon the court disregarded the credits, but charged the two daughters with all sums received from their father. Commenting upon this ruling, counsel for respondents says in his brief:

"Indeed, were the will silent as to the father's full intent to treat his children with exact justice, a stranger might blunder into the error of supposing that the artificial credits shown in the ledger were placed there to absolve these fair debtors from their obligations."

We fail to see how any other conclusion could be reached, after reading the will and examining the accounts, than that the testator intended to do that very thing—"to absolve" his daughters from all charges. But under the interpretation of the tenth clause of the will which we feel bound to give, the book of account was not admissible for the purpose of showing advancements to the appellants. The language of the will very aptly limits and specifies funds to be charged with payments made in the testator's lifetime as advancements. These are the trust estate created for the benefit of Robert Lee Vanderhurst's children, and the shares of those who had given notes to the testator. By no method of construction which we are able to discover may the language be given any other meaning. Advancements are to be charged against the shares of Robert Lee Vanderhurst and his children in accordance with the book accounts, and all notes are to be regarded as evidences of advancements. Respondents contend that the closing words of the paragraph compel a different interpretation. By the first part of the tenth paragraph the testator had provided a method of determining the amounts to be subtracted before division of the property and the words "to the end that none of my children or grandchildren shall have or receive more than an equal share of my estate" merely declare his purpose in charging these advancements. The mere fact that the court believed the method chosen might not achieve the purposed end would not justify charges against certain heirs which were not directed in the will. Such impositions may not be made by the court in an effort to achieve equal distribution. To permit such a course would be equivalent to allowing the court to make a will for the decedent. If the closing words of the tenth clause would justify the court in going to such lengths to achieve equal distribution, then might the specific legacies to the daughters with like reason be disregarded, because such legacies, in a sense, were opposed to an evenly divided bestowal of decedent's estate.

[3] Respondents contend that the descriptions of the notes contained in the will are too vague to be of binding force, and in this behalf they cite certain cases. One of these is *Estate of Plumel*, 151 Cal. 82, 90 Pac. 192, 121 Am. St. Rep. 100, which correctly states the rule that reference in a will may be of such character as to exclude parol testimony;

as, where it is to papers not yet existent, or where the reference is so vague as to be inapplicable to any particular instrument. But this court adopts the language of the Court of Appeals of New York in *Brown v. Clark*, 77 N. Y. 369, to the effect that any testamentary document may be incorporated into a will by reference, provided the language of the will clearly identifies the paper or renders it capable of identification. And the court in the *Plumel* matter was discussing not a mere evidence of debt, but a solemn instrument of testamentary nature, which was held to be incorporated into another such writing by reference. The will specified "notes now in my possession." Surely such allusion to notes was capable of being made certain. It was quite as definite as the reference to "books of account." We find no language in the will, therefore, which justifies the action of the court in charging the shares of Mrs. Jacobs and Miss Vanderhurst in their father's estate with debts shown on the books of account, or in striking out credits formally entered by Mr. William Vanderhurst in favor of his daughters. Advancements are not to be taken as adoptions of general legacies unless such intention is expressed by the testator in writing. Section 1351, Civ. Code. Section 1397 of the Civil Code is as follows:

"All gifts and grants are made as advancements, if expressed in the gift or grant to be so made; or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir."

There were no promissory notes produced at the hearing in the probate court which the appellants, or either of them, had executed in favor of the testator. The will itself, as we have seen, did not charge them with any sums paid to them as advancements, and no writing was produced whereby they were chargeable under section 1397 of the Civil Code. Surely there was nothing in the books of account which would justify their admission under section 1397, Civil Code, or by which the testator evinced any intent to charge the items against his daughters as advancements rather than gifts or loans. *Estate of Hayne*, 165 Cal. 573, 133 Pac. 277, Ann. Cas. 1915A, 926. On the contrary, the credits indicated that Mr. Vanderhurst intended the payments as gifts, except, perhaps, the trifling balances against the daughters, and those may be regarded as loans rather than advancements.

[4] Moreover, it is a general rule that advancements made before the will was executed cannot be considered in distributing the estate unless specified in the will, because it is presumed that the testator had in view all previous advancements when he made his will and acted accordingly, so as to make the final division conform to his actual wishes. *Estate of Hayne*, supra; 1 A. & E. Enc. of Law (2d Ed.) p. 760, § 2; *Bowron v. Kent*, 190

N. Y. 432, 83 N. E. 472; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85.

The judgment must be reversed because of the errors in charging appellants with any sums as advancements. This conclusion makes it unnecessary for us to discuss all of the matters appearing in the briefs. Some of them, however, require attention.

[5] The court erred in admitting in evidence a former will executed by Mr. Vanderhurst in 1906 and revoked by the later will. The will before us must be interpreted by the language used therein, and cannot be varied or explained by an instrument executed several years earlier. *Estate of Tompkins*, 182 Cal. 175, 64 Pac. 268.

[6] There was a provision in the will that in case any legatee or devisee contested it his or her share of the estate should be \$1. Appellants argue that the respondents William M. and George B. Vanderhurst contested the will. The mere statement of this contention refutes it. They opposed the petition for distribution, but they did not seek, in any way, to contest the will. They merely sought interpretation of it.

No other alleged errors merit discussion.

The decree of distribution is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

Modification of Opinion.

PER CURIAM. Good cause appearing therefor, it is hereby ordered that the judgment of this court in the matter of the above-entitled appeal be and hereby is amended to read as follows:

"It follows herefrom that the court erred in charging the appellants with these advancements. Wherefore, and to this extent, the decree of distribution is reversed, with directions to the court in probate to modify its decree in accordance with this opinion and judgment."

(171 Cal. 538)

ROBSON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 7001.)

(Supreme Court of California. Dec. 17, 1915.)

1. NEW TRIAL §163—EFFECT OF AWARD OF NEW TRIAL TO CODEFENDANT.

Where, in a suit to foreclose a mortgage, in which successive purchasers of the mortgaged property, who had severally assumed payment of the mortgage, were made defendants, and a deficiency judgment was rendered against all of the defendants, one of the defendants who had filed no cross-complaint, and in whose favor no affirmative relief had been given, could not be affected by the award of a new trial to one of the defendants in so far as his liability on the deficiency decree as formerly rendered was concerned.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 330-332; Dec. Dig. §163.]

2. PROHIBITION §15—PERSONS BENEFICIALLY INTERESTED.

In such case a defendant other than the one to whom a new trial was awarded was not beneficially interested, and was not entitled to

maintain prohibition to prevent a trial of the issues between the plaintiff and the defendant to whom a new trial was awarded.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 57-60; Dec. Dig. §15.]

3. PROHIBITION §9 — WRIT—WHEN ISSUABLE.

In such case, where the application for writ of prohibition to prevent trying the case anew as to the other defendants contained the undenied allegation that the court was about to retry the case as to all defendants, the defendants other than the one who moved for a new trial were entitled to a writ of prohibition.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 85; Dec. Dig. §9.]

In Bank. Proceeding in prohibition by Kernan Robson against the Superior Court of the State of California in and for the City and County of San Francisco and others. Writ issued.

Jas. P. Sweeney, of San Francisco, for petitioner. J. J. Lermen, of San Francisco (Chas. L. Tilden, of San Francisco, of counsel), for respondents.

MELVIN, J. This is a proceeding in prohibition. The petition was addressed to this court originally, and an alternative writ was issued. The facts are as follows:

In September, 1908, the Hibernia Savings & Loan Society sued to foreclose a mortgage on real property. The original mortgagor was Theresa Lewin. Jacob Lewin was joined as her husband, and the other defendants, sued as successors to the interest of Mrs. Lewin in the order in which they were named and as persons who had assumed the payment of the note secured by the mortgage, were Kernan Robson (petitioner herein), Michael O'Toole, Curtis Hillyer (sued as C. H. Lieutemps), John G. Hoyt, the corporation known as Tilden, Swayne & Co., and Louis James. Other defendants were designated by fictitious names. The cause was tried, and judgment was given in favor of plaintiff. The court found that there had been successive conveyances, as pleaded, with corresponding assumptions of the indebtedness, and drew the conclusions of law that plaintiff was entitled to foreclosure and to a judgment declaring Theresa Lewin, Robson, O'Toole, Hillyer (sued as Lieutemps), and Hoyt personally liable for the amount of the mortgage debt. The judgment was entered October 5, 1911.

On December 7, 1911, the motion of Hoyt for a new trial was served and filed. On December 8, 1911, the foreclosure sale took place, the plaintiff becoming the purchaser, and a deficiency judgment, which, on April 2, 1912, amounted to more than \$14,000, was on that date docketed against Theresa Lewin, Robson, O'Toole, Hillyer, and Hoyt. The deed of the commissioner to plaintiff was executed December 18, 1912. Hoyt's motion for a new trial was denied on February 21, 1913. When said motion was called on the court's

calendar on that date, Hoyt did not answer, because he had agreed with a member of the firm of lawyers representing plaintiff that there should be a continuance. This agreement was not known to the representative of that firm who appeared in court on February 21, 1913, and he asked that the matter be submitted. Thereupon the court denied the motion. On February 27, 1913, on the ex parte application of the plaintiff, the court set aside the order of February 21, 1913. On April 4, 1913, the court made and entered an order granting a new trial. This was based "upon stipulation filed," which stipulation was in the following language:

"It is hereby stipulated that the judgment heretofore made, rendered and entered in the above-entitled action in favor of plaintiff may be vacated and set aside, and that a new trial may be granted in the above-entitled action. Dated April 4, 1913. Tobin & Tobin, Attorneys for Plaintiff."

It is conceded that the petitioner, Robson, had no notice of the application which resulted in the order of February 27, 1913, setting aside the order denying Hoyt's motion for a new trial, nor had he notice of the stipulation upon which was based the order of April 4, 1913.

Respondents contend that the order setting aside the previous order by which Hoyt's motion for a new trial had been denied was fully within the jurisdiction of the court and was made in pursuance of a well-recognized power. The case of *Whitney v. Superior Court*, 147 Cal. 536, 82 Pac. 37, fully supports this view. In that case, as here, the court was dealing with an order made upon ex parte application of counsel, setting aside its former order denying the defendant's motion for a new trial. In that case, as here, the motion for a new trial had been called up by plaintiff's counsel in the absence of counsel for the moving party and in violation of the stipulation that it should not be brought to the attention of the court in that manner. Upon the theory that the court had lost jurisdiction to set aside the order denying the motion for a new trial, the successful litigant in the lower court (or his assignee) asked for a writ of execution, in spite of the fact that after restoration of the defendant's motion to the calendar and formal argument thereof the prayer of defendant had been granted, and a new trial had been ordered. This court declined to give a writ of mandamus to compel the clerk of the superior court to issue execution. Speaking of the litigation in the superior court, Mr. Justice Van Dyke, delivering the opinion of this court, said:

"The motion for new trial in that case was by the defendant. He was the moving party. It was brought up, as appears, in the absence of the defendant's attorney, without any argument, or opportunity upon the part of the defendant to be heard, and under the circumstances it was right and proper for the court to do as it did—set aside the order denying the motion for a new trial, and thereupon give the moving party an opportunity to present the motion. In *Mor-*

ris v. De Celis, 41 Cal. 331, it is said: 'If a motion for a new trial is decided by the court before it has been submitted, the order denying or granting the new trial should be set aside as improvidently made, if application is made therefor.' In *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605, it is said: 'There is no doubt that the court in which an irregular order is made and entered may, where the irregularity is apparent, on suggestion, motion, or ex mero motu, set it aside at any time before an appeal is taken from it.' In *Hayne on New Trial*, vol. 2, § 199, the author says: 'Where an appealable order was improvidently or inadvertently made, the aggrieved party may move the court below to set it aside, and may appeal from the order denying his motion. Thus, where a motion for a new trial was granted without any submission of the motion, and before the record upon the motion was completed, it was held to be proper practice for the aggrieved party to move upon affidavits to have the order granting the new trial set aside, and the order denying such motion was reversed [referring in note to case of *Morris v. De Celis*, 41 Cal. 331]. The fact that the order was made irregularly takes it out of the general rule.' See, also, 2 *Spelling on New Trial and Appellate Practice*, § 379. The late case of *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11, one of the cases relied upon by the petitioner, after stating the general rule that an order granting or refusing a new trial regularly made and entered cannot be set aside by the trial court, states that, if the orders 'have been entered prematurely or by inadvertence, they may be set aside on a proper showing. *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 170, 4 Pac. 1173, and cases cited.'"

It is suggested that *Whitney v. Superior Court*, supra, may be distinguished from the case at bar because, after the motion had been restored to the calendar, the counsel of the respective parties to the litigation appeared and took part in the proceedings in the hearing of the motion for a new trial, and the plaintiff appealed from the order granting a new trial. But the court in that case was dealing with a question of jurisdiction which may not be conferred by acquiescence. It was clearly held that the court had the power to correct its action with reference to defendant's motion. The fact that after his objection to the jurisdiction of a court the litigant proceeds in the usual manner to try the cause or the proceeding does not preclude him from questioning the power of the court to proceed further. *Arroyo Ditch & Water Co. v. Superior Court*, 92 Cal. 52, 28 Pac. 54, 27 Am. St. Rep. 91. It was not the theory of the *Whitney Case* that the plaintiff in the litigation in the superior court was estopped to deny the jurisdiction of the court to set aside its own order inadvertently made. We see no reason to forsake the doctrine of the *Whitney Case*, which has been the settled law for more than a decade. That case was carefully considered and the opinion of Mr. Justice Van Dyke received the concurrence of four of the justices who are still on this bench.

It is suggested, however, that the inadvertence which resulted in the entering of the order denying the motion for a new trial was an inadvertence of a party relief from which might have been obtained under section 473, Code of Civil Procedure, upon due applica-

tion after proper notice. But the inadvertence was not that of Hoyt. He had done nothing he should not have done. He had omitted nothing which he should have done. It was not his fault that some one unauthorized to submit his motion had done so. Petitioner insists that there was nothing within the knowledge of the court which should have given notice to the judge of that tribunal that an improper order was being made. Undoubtedly the court may dismiss a motion for a new trial when the moving party fails to prosecute, and it is also true that such a motion may be brought on for hearing by either party. Section 600, Code Civ. Proc. The court knew that Hoyt's counsel and Robson's counsel were not present when the order of February 21, 1913, was made. It was the duty of the court to permit Hoyt to present his motion unless he waived his right by failing to appear. When, therefore, the court learned that the motion had been called for hearing under circumstances which deprived Hoyt of his right to a hearing, it became manifest that the court, and not counsel for the injured party, had acted inadvertently, and therefore that of its own volition the court could restore the motion for new trial to the calendar without any application having been made under section 473, Code of Civil Procedure. The Whitney Case has settled that matter.

[1, 2] The next question presented is whether or not the court erred in making the order of April 4, 1913, granting the new trial on stipulation of plaintiff and defendant Hoyt, without giving notice to the petitioner, Robson. The position of respondents is this: Robson and Hoyt were not adversary parties to the action of foreclosure; therefore the judgment in favor of the plaintiff is not *res judicata* as to any issue between Robson and Hoyt, and the bank could, accordingly, stipulate with Hoyt as it pleased. This contention is correct. The bank sued the defendants and alleged against each of them separately that each in purchasing the land has assumed the payment of the mortgage. Robson and Hoyt filed separate answers. Robson filed a pleading called a "cross-complaint," but in it he asked no affirmative relief against Hoyt. The findings contain the statement, among others, that the case came to trial upon the cross-complaint of Robson against O'Toole and Hillyer. No reference is made to Hoyt. Clearly the superior court did not look upon the pleading as a cross-complaint against Hoyt. Counsel for petitioner virtually concedes that there was no cross-complaint against Hoyt; for he uses the following language in one of the briefs:

"The cross-complaint was filed as a precautionary measure, for in advance it was not known how plaintiff would act, and whom plaintiff would seek to hold or release, but, in view of the findings of the court, all necessity of the cross-complaint ceased, its existence is of no importance, it affects no right of the parties, and discussion of it is closed."

It should be noted also that no judgment was rendered in favor of Robson. The true position of these two defendants is therefore to be found by eliminating all thought of the so-called "cross-complaint." The true rule is well illustrated by the following quotation from *Hibernia Bank v. Dickinson*, 167 Cal. 619, 140 Pac. 265:

"Where a complaint is directed against two persons, and the liability of one involves some facts which are not material to the liability of the other upon the cause of action declared upon, and they answer separately, neither is required to answer those allegations which relate solely to the liability of the other. The present case illustrates this proposition. The action was upon the note and mortgage executed by Dickinson alone. His liability was shown by the allegations of the execution and nonpayment of the note and mortgage. Montgomery did not execute them. He was a proper party because he was a subsequent purchaser of the land. But his personal liability for the debt and to a deficiency judgment was founded on the extraneous fact that he had assumed payment of the mortgage debt. This fact had no relation whatever to the original liability of Dickinson. It was not a fact material to the cause of action stated against Dickinson, either to obtain a foreclosure or to obtain a deficiency judgment."

The effect of granting a new trial of the issues between the bank and Hoyt will not disturb the judgment against Robson. Section 578, Code Civ. Proc.; *Fowden v. Pacific Coast Steamship Co.*, 149 Cal. 155, 86 Pac. 178; *Nichols v. Dunphy*, 58 Cal. 607. Hoyt was asking for a new trial as to the issues between him and plaintiff, and as to such issues only. Petitioner is not an aggrieved party because in the event of Hoyt's escaping a judgment all of the liability might fall upon him. The conclusion of the court in the suit for foreclosure of the bank's mortgage will not be binding in any action which Robson may bring against Hoyt. The decree in favor of the bank fixed none of the rights or obligations of the defendants among themselves. Robson is not an interested party in the proceedings for a new trial of the issues between plaintiff and Hoyt. In *Estate of Heydenfeldt*, 127 Cal. 459, 59 Pac. 839, it was held that persons who were on the same side in a former proceeding may not invoke the principle of estoppel as between each other based upon findings in that said former proceeding. We need not analyze the many authorities from other states cited by respondents, because the rule is well understood. It is well stated, however, in *Wilttrout v. Showers*, 82 Neb. 779, 118 N. W. 1080. The action was for breach of contract whereby defendant agreed to pay a note and mortgage executed by plaintiff in favor of a third person. The holder of the note sued both Wilttrout and Showers. The former defaulted, and Showers was successful as against the holder of the obligations. Wilttrout paid the judgment, and then sued Showers, who pleaded the former judgment as *res judicata*. The court said:

"As between the two defendants in that action no issue was joined. Wilttrout and Show-

ers were not adverse parties. The question of liability of Showers on the oral contract to assume and pay the notes was not litigated and determined as between Wiltrott and Showers. The rule of law is well settled that parties to a judgment are not bound by it in a subsequent action unless they were adverse parties in the original action. 1 Freeman, Judgments (4th Ed.) § 158; 2 Black, Judgments (2d Ed.) § 599; Pioneer Savings & Loan Co. v. Bartsch, 51 Minn. 474 [53 N. W. 764, 38 Am. St. Rep. 511]. The bar of former adjudication can only be raised between those who were adverse parties in the former suit, and the judgment in the former suit settles nothing as to the relative rights or liability of the codefendants as between themselves unless their conflicting claims were put in issue by cross-petition or adverse answers, and were actually litigated and adjudicated. 23 Cyc. 1279; Whitesell v. Strickler, 167 Ind. 602 [78 N. E. 845, 119 Am. St. Rep. 524]."

It follows that Robson's rights are not dependent upon the determination of the issues between the plaintiff and Hoyt in the foreclosure suit. Of course, the court below will confine itself in the new trial to the single issue of the alleged assumption by Hoyt of the payment of the mortgage.

[3] But it is alleged in the petition that the respondent court and the judge thereof are about to "try said action as to all defendants," and there is no denial of this allegation in the answer. The petitioner is entitled to a writ prohibiting respondent from trying any issues except those arising on the pleadings between the plaintiff bank and defendant Hoyt.

Let such a writ issue.

We concur: HENSHAW, J.; LORIGAN, J.

SLOSS, J. I concur in the judgment. It is clearly shown by the opinion of Mr. Justice MELVIN that the petitioner, Robson, would not be affected by a new trial of the issues raised between the plaintiff in the foreclosure suit and Hoyt. This being so, the petitioner is not a party "beneficially interested," and is not, therefore, in a position to seek a writ of prohibition against the trial of such issues. Code Civ. Proc. § 1103. He is, however, directly interested in preventing another trial of the action against himself as defendant. By the judgment he is made liable for a deficiency in the proceeds of the sale. The property has been sold on foreclosure, and the amount of the deficiency ascertained. In the event of a new trial, a new judgment, and a new sale, the deficiency for which Robson is liable may be greatly increased.

It follows that, as is held in the foregoing opinion, any new trial should be confined to the issues between the bank and Hoyt, leaving the judgment of the bank against Robson standing as a final adjudication. This was precisely the effect of the writ of prohibition directed on the former submission of the present proceeding. The correctness of the conclusion is conceded by the respondents in their brief filed since their petition for rehearing was granted. If, as they claim,

and as we hold, Robson was not an adverse party to Hoyt, and could not be affected by a new trial granted to Hoyt, there is no occasion to consider whether the court properly set aside, as to Hoyt, the order denying a new trial. But, as this question is discussed in Mr. Justice MELVIN'S opinion, I deem it proper to say that I do not assent to the views expressed by him with respect to the right of a court to vacate, on an ex parte application, an order granting or denying a new trial. On this point I adhere to what I said in the former opinion, from which I quote:

"The petitioner takes the position that, when an application for a new trial has been made in due form and the court has passed upon it, the order made is conclusive so far as the court making it is concerned, and that court cannot afterwards vacate the order and again decide the motion. As a general proposition, this contention is unquestionably sound. *Coombs v. Hibberd*, 43 Cal. 452; *Odd Fellows' Sav. Bank v. Deuprey*, 66 Cal. 168, 4 Pac. 1173; *Dorland v. Cunningham*, 66 Cal. 484, 6 Pac. 135; *Lang v. Superior Court*, 71 Cal. 491, 12 Pac. 306, 416; *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174; *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11. The 'statute,' says the court in *Dorland v. Cunningham*, supra, 'authorizes but one motion for a new trial, and makes the ruling thereon final, so far as the superior court is concerned.' If error has been committed in granting or denying the motion, the proper mode of seeking redress is by appeal, as in the case of any final order or judgment of the superior court. The objection that the lower court has improperly vacated its final order is one that goes to the jurisdiction of the court. *Lang v. Superior Court*, supra; *Carpenter v. Superior Court*, supra; *Holtum v. Greif*, supra. * * *

"An order granting or denying a motion for a new trial is, of course, like other orders, subject to be set aside under section 473 of the Code of Civil Procedure. But the granting of such relief implies an application to the court by the party against whom the proceeding was taken, upon notice to the adverse party and upon a proper showing, and it is not claimed that in this case there was any attempt to invoke or to exercise the power conferred on the court by section 473.

"There is one further limitation upon the rule prohibiting the court from vacating its order once made, and upon this the respondents place their reliance. Where an order has been made 'irregularly and through inadvertence,' the court has power, of its own motion or on application of a party to set the order aside. *Morris v. De Celis*, 41 Cal. 331; *De Gaze v. Lynch*, 42 Cal. 362; *Hall v. Polack*, 42 Cal. 223; *O. F. Sav. Bank v. Deuprey*, supra, and cases cited; *Holtum v. Greif*, supra; *Whitney v. Superior Court*, 147 Cal. 536, 82 Pac. 37. This rule has been applied in cases where the order was prematurely made, as, for example, where a statement to be used on the motion has not been settled, or there had been no submission of the motion. In such cases the court has acted irregularly and inadvertently in undertaking to pass upon a motion which had not been brought before it, and its improvident action may be set aside. This does not mean that an order may be vacated because the court concludes, after making it, that it erred in matter of law or fact, or because one of the parties was guilty of some inadvertence which resulted to his disadvantage. The inadvertence which will justify the setting aside of an order (except under section 473) is the inadvertence of the court, not of a party.

"We think there was here no basis for the court's action in setting aside its order denying

a new trial. The notice of intention had been served and filed, the bill of exceptions had been duly settled and was on file, and the motion appeared regularly on the calendar of the court for argument on February 21, 1913. On that day, there being no appearance for the moving party, Hoyt, the motion was called and answered 'ready' by counsel for plaintiff, who submitted the motion, which was thereupon denied. All of this was perfectly regular, and the court did not act improvidently or inadvertently. It appears, however, that there had been an oral understanding between counsel for Hoyt and a member of plaintiff's firm of counsel that the hearing of the motion should be continued. This was not known to the attorney who appeared for plaintiff on February 21st. The misunderstanding in this regard would unquestionably have supported a claim of inadvertence or surprise on the part of Hoyt, but we cannot see that it tended to show any inadvertence or irregularity on the part of the court. If the disregard of oral stipulations or misunderstandings between counsel could authorize the court of its own motion, or on an ex parte application, to set aside judgments or orders as improvident, the finality of judicial determinations would be seriously impaired. Reasons like these are typical illustrations of the grounds upon which relief should be sought under section 473."

I do not stop to discuss the question whether *Whitney v. Superior Court*, 147 Cal. 536, 82 Pac. 37, can be successfully distinguished from the case at bar. If there be no valid ground of distinction, I think the decision in the *Whitney Case* is in conflict with the rules established by a long line of prior decisions, and with fundamental principles governing the finality of judicial determinations.

I concur: SHAW, J.

ANGELLOTTI, C. J. I concur in the judgment on the ground that the petitioner would not be affected by a new trial of the issues raised between the plaintiff in the foreclosure suit and Hoyt, and that, this being so, he is not in a position to seek a writ of prohibition against the trial of such issues. He is beneficially interested in prohibiting the trial of other issues, and therefore it is properly ordered that a writ issue to prohibit any such trial.

(171 Cal. 570)

HIHN-HAMMOND LUMBER CO. v. ELSOM et al. (S. F. 6707.)

(Supreme Court of California. Dec. 17, 1915.)

1. MECHANICS' LIENS — 196 — STATUTE — CONSTITUTIONALITY.

Code Civ. Proc. § 1194, declaring that laborers and materialmen shall have preference over subcontractors in participation in the amount applicable to mechanics' liens, is not violative of Const. art. 20, § 15, providing that mechanics, materialmen, artisans, and laborers of every class shall have a lien for labor or material furnished, since such provision serves merely to place on an equal footing mechanics, materialmen, artisans, and laborers who personally perform work.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 337-341; Dec. Dig. ¶ 196.]

2. MECHANICS' LIENS — 196 — PERSONS ENTITLED — CLASSIFICATION — STATUTE — "LABORER" — "SUBCONTRACTOR" — "ORIGINAL CONTRACTOR" — "MATERIALMAN."

Under the Mechanics' Lien Law (Code Civ. Proc. § 1194) prior to the amendment of 1911, declaring that laborers and materialmen should have preference over subcontractors in participation in the amount applicable to mechanics' liens, a firm which lathed and plastered a house, furnishing the material; a firm which constructed most of the floors and walls, furnishing the material; a company which erected part of the walls of bathrooms, furnishing the necessary tile; a company which put on a mission tile roof, furnishing the material; a firm which laid the flooring in certain rooms, furnishing the material; and a person who erected the tin work and galvanized iron and copper work, a substantial part of the structure, furnishing the materials—were all "subcontractors" under the statute, which divides the liens assertable against the property into four classes, laborers', materialmen's, subcontractors', and original contractors', the "original contractor" being the person who agrees with the owner to construct a building on his property, "laborers" being those who perform labor in the construction of the building, "materialmen" being persons who merely furnish material to the contractors to be used in the construction of the building, and "subcontractors" being all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner, although literally a "subcontractor" is one who agrees with another to perform a part or all of the obligation which the second owes by contract to a third person.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 337-341; Dec. Dig. ¶ 196.]

For other definitions, see *Words and Phrases*, First and Second Series, Laborer; Materialman; Original Contractor; Subcontractor.]

3. APPEAL AND ERROR — 934 — PRESUMPTIONS FAVORING COURT BELOW.

All intendments favor the judgment of the court below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3782; Dec. Dig. ¶ 934.]

4. MECHANICS' LIENS — 290 — FORECLOSURE — FINDING — SUPPORT BY LIEN CLAIM.

In a consolidated action to foreclose mechanics' liens, where the lien claims of certain firms stated that they had respectively performed labor on the building, the claim of one stating that its members had performed certain labor in the construction of the house, and also had furnished certain materials used therein, a finding ranking such parties as materialmen or laborers was sufficiently sustained by the respective claims of lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 591-597; Dec. Dig. ¶ 290.]

Department 1. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action to foreclose liens by the Hihn-Hammond Lumber Company against R. W. Elsom and others. From a judgment assigning their respective ranks as lienors, and from an order denying their motion for new trial, Thomas J. Guilfooy and certain others appeal. Judgment and order affirmed.

W. P. Netherton, of Santa Cruz, for appellants. Wyckoff & Gardner, of Watsonville, for respondent Hihn-Hammond Lumber Co. H. A. Van C. Torchiana, of San Francisco, and W. P. Netherton, of Santa Cruz, for defendant Williamson & Garrett. Charles B. Younger, of Santa Cruz, for defendants W. R. Van Wagner and F. P. Van Wagner, and for respondents A. D. Houghton, and George H. Cardiff. I. F. Chapman, of San Francisco, for defendant White Bros. W. P. Netherton, of Santa Cruz, for defendants E. B. & A. L. Stone Co., California Artistic Metal & Wire Company, Simpson & Fisher, F. A. Angell, H. V. Angell, and H. W. Truman. Charles M. Cassin, of San Jose, for defendants Henry Willey Co., George G. Byrne, Walter C. Byrne, and Daniels Santa Cruz Transfer Co. C. R. Taylor, of Los Angeles, for defendant Granite Rock Co. Rittenhouse & Johnston, of Santa Cruz, for defendants L. W. Rickey, George H. Leroy, Louis H. Wessendorf, George C. Staffier, H. F. Faneuf, C. H. Heath, Fred A. Bright, and W. F. Bright. Greg S. McEvers, of San Francisco, for defendants William Ross and D. MacLeod. A. E. Bolton, of San Francisco, for defendants William T. Sesnon, B. F. Porter Estate, J. Harry Blohme, and Clarence B. Ward. W. M. Gardner, of Santa Cruz, for defendant R. W. Elsom.

SHAW, J. A number of persons, each claiming a mechanic's lien on the same property, began separate actions to foreclose the liens. These actions were consolidated for trial and resulted in a joint judgment of foreclosure. The building, on account of which the liens accrued, was erected prior to the enactment of the amendment of 1911 to the mechanic's lien law, in pursuance of a contract which was valid under the prior law. The liens amounted to more than the balance found due from the owner to the contractor. This made it necessary to apportion the balance to the respective claimants, and to declare the rank of each lien and the order of its payment out of the fund. Six of the lien claimants, namely, Thomas J. Gullfof, Waterhouse-Price Company, Floodberg & McCaffery, W. W. Montague & Co., N. Clark & Sons, and Ford & Malott, being dissatisfied with the rank assigned to them by the judgment, have appealed from the judgment and from an order denying their motion for a new trial. The court found that each of these appellants was a subcontractor and, for that reason, assigned them a rank subordinate to that of laborers and materialmen. The provisions of section 1194 of the Code of Civil Procedure, as it then existed, declared that laborers and materialmen should have preference over subcontractors in participation in the amount applicable to liens under that law.

[1] The first point urged by the appellants is that section 1194, in so far as it gives such preference to laborers and materialmen, is unconstitutional. This question was consid-

ered by this court in *Miltimore v. Nofziger, etc., Co.*, 150 Cal. 790, 90 Pac. 114. It was there declared that the section did not violate the Constitution by reason of this preference, but only so far as it gave laborers a preference over materialmen. Some members of the court dissented on the ground that the priorities given to laborers over materialmen was valid. But there was no difference of opinion regarding the power of the Legislature to prefer these two classes to subcontractors. We are not disposed to go over the ground again to demonstrate the soundness of this decision. Upon the authority thereof we hold that the point is not well taken.

[2, 3] Another proposition advanced in support of the appeal is that the findings of the court, with respect to each of the appellants, that it was a subcontractor and not a materialman, are contrary to the evidence.

The facts relating to each of them are as follows: The building erected was a large two-story dwelling house. The contract price was \$27,685.20. R. W. Elsom & Co. were the contractors for the erection of the building. Gullfof agreed to furnish and set in place in the building "all tin, galvanized iron, and copper work, including copper sash bars, galvanized iron caps, copper flashings at back of wall, two rows of cross bars and a half bar at wall line, the full length," all according to the plans and specifications of the building prepared by the architect. The cost of the material for this work amounted to \$943.50. The cost of the labor was \$247.50. The Waterhouse-Price Company agreed to furnish the tile for the walls of four bathrooms and a toilet and set the same in the building, the setting to be done by experienced workmen from San Francisco, all as required by the plans and specifications. The material therefor amounted to \$227.50 and the labor, \$37.50. Floodberg & McCaffery agreed to furnish the material and labor necessary to complete the lathing and plastering upon the building according to specifications attached to the contract. The material amounted to \$1,600 and the labor to \$1,363.20. Montague & Co. agreed to furnish and place in the building 360 square feet of tile for the front porch, 250 square feet of tile, and the cove around the walls with plinth blocks at doors, for four bathrooms and floors of toilets on the second floor; also, to furnish the materials and place in the building four fireplaces made of brick or tile in different rooms in the building, and to place 75 square feet of tile and wire spaces in the pantry. For all this the material amounted to \$500 and the labor to \$423. Clark & Sons agreed to deliver and lay in place the tile roof with scalloped iron at the eaves, in accordance with the plans and specifications. The material amounted to \$1,350 and the labor \$335. Much of the tile had to be cut and fitted on the premises. Ford & Malott agreed to lay the fiber stone flooring and furnish the material

therefor in the breakfast room and on the south and west lower porches. The material amounted to \$340 and the labor to \$300.

The question whether one who claims a lien upon a building is a contractor or materialman has been several times considered by the court. A brief statement of the cases in which the decisions have been rendered will assist in elucidating the principles to be applied. In *Hinckley v. Field, etc., Co.*, 91 Cal. 139, 27 Pac. 594, it was held that one who constructs, before delivery, "a steam plant consisting of boilers, engine, heater, feed pipe," etc., for a cracker factory, delivers them and puts them in place in the factory building, is a materialman, and not a contractor. It was said that the work of putting these materials in place "was only the completion of their contract to deliver such finished machinery." In *Roebing Co. v. Humboldt Co.*, 112 Cal. 290, 44 Pac. 568, the same rule was made concerning a contract to make and set up ready for use in a building an electrical plant "consisting of dynamos, converters, switchboard, lamps, etc., with the necessary wiring and connections," although in order to set them up it was necessary to put in the building a foundation for the dynamos and to install the wires and lamps. In *Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684, 54 Am. St. Rep. 354, the same rule was followed with respect to a contract to furnish mantels, tiles, and grates and set them in a building under construction. Each tile pertaining to the mantels had to be set in separately and some bricklaying around the mantels was necessary as a part of the setting thereof. In *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637, the court held that a person contracting to build ice tanks, including steel molds, pipes, pumps, and connections, and to set them up in an ice factory, was a materialman, and not an original contractor. In *Smith v. Bradbury*, 148 Cal. 41, 82 Pac. 367, 113 Am. St. Rep. 189, it was held that one who contracted to do the plastering in a building at a stated price per yard was a subcontractor and not a materialman. So in *La Grill v. Mallard*, 90 Cal. 373, 27 Pac. 294, one who contracted to paper and decorate a number of rooms in a dwelling house, where the actual work was done by employes, was held to be an original contractor. The only rule of general application announced in any of the above-mentioned decisions was stated in *Bennett v. Davis*, supra, 113 Cal. 339, 45 Pac. 685, 54 Am. St. Rep. 354, as follows:

"The main consideration after all is whether the labor bestowed upon the article (in setting) was simple and trifling in comparison to the price."

Literally, a "subcontractor" is one who agrees with another to perform a part or all of the obligation which the second party owes by contract to a third party. With respect to the mechanic's lien law in question, however, the word has a much narrower meaning. Section 1194 divides the liens which can be

asserted against property under the mechanics' lien law into four classes, to wit, laborers, materialmen, subcontractors, and original contractors. The meaning of the term "subcontractors," as there used, must be determined by reference to this classification and to the subject to which it relates. The "original contractor" is the person who agrees with the owner to construct a building on his property. Those who perform labor in the construction of the building come within the first class, as "laborers." Persons who merely furnish material to the contractors to be used and which are used in the construction of the building come within the second class, as "materialmen." The term "subcontractor" embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner. We think something more than a mere comparison of the cost of the labor of attaching material to the building with the total price of the work and materials is necessary in many cases to a determination of the question whether a claimant is a subcontractor or a materialman. Generally speaking, it would be held that one who, under an agreement with the contractor, enters upon the premises and there, with material furnished by himself, erects a definite part of the structure composing the building, is a subcontractor within the meaning of this section, regardless of the comparative cost of labor and material. The cases above cited which hold the claimant to be a materialman go upon the theory that the claimant agreed with the owner or the contractor to construct, outside of the building, or away from the premises, some completed article, machinery, or apparatus to be thereafter placed in or attached to the building by the person who furnished it. The contention was that the work of attaching it to the building constituted a part of the construction of the building itself, and therefore made the claimant either an original contractor with the owner or a subcontractor with the contractor. The substance of the decisions is that the work of attaching and placing the thing in the building was merely a part of the delivery, and that the essence of the agreement was to furnish a finished article as material to be placed in the building. But in the other cases it was clear that the work of the claimant was that of constructing a part of the building itself with his own materials, under an agreement with the original contractor, and he was held to be a subcontractor.

Under the decision in *Smith v. Bradbury*, supra, there can be no doubt that the status of Floodberg & McCaffery, who did the lathing and plastering and furnished the material therefor, was that of a subcontractor. The work of Montague & Co. consisted of furnishing the material and constructing in the

building a considerable part of the floors and walls thereof. The Waterhouse-Price Company was to furnish the necessary tile and erect a part of the walls of the bathrooms. Clark & Sons, a corporation, was to furnish the material and put on the building a mission tile roof. Ford & Malott were to furnish and lay the flooring in certain rooms. All these constituted substantial and important parts of the building and of the work of constructing it. These parties were, in our opinion, subcontractors, under the principles we have just stated. It is somewhat difficult to determine, from the meager record on the subject, what part of the building was constructed by the claimant Guilfooy. Enough appears to show that he was to furnish the materials and erect in the building the tin work, galvanized iron, and copper work required by the plans and specifications. The plans and specifications are not set forth in the record. It is at least not improbable that the metal work of this character constituted a substantial part of the structure. If so, Guilfooy would be a subcontractor within the rules above stated. As all intendments are in favor of the decision of the court below, and no evidence of a different condition is presented by the record, we must sustain the finding that Guilfooy was a subcontractor.

In *Bennett v. Davis*, *supra*, the claimant, who contracted to furnish mantels for the building with the tiles and grates connected therewith and to set them all in the building, was held to be a materialman. A part of the work of Montague & Co. consisted of the building of four fireplaces in the house, using brick and tile. This work is in some respects similar to that which was held to be the furnishing of materials in *Bennett v. Davis*. But here we have no plans or specifications or other description of the work, and we cannot say that the fireplaces did not constitute a very substantial part of the structure of the building in question. In *Bennett v. Davis* the mantels, which are usually finished outside as a complete structure and thereafter taken to and set in the building by the person who makes them, were the principal subject of the agreement and the setting was a mere incident and of very slight cost compared with the price of the mantels. It was in this case that the court said that the comparison of the labor of setting with the price was the main consideration. The work done by Montague & Co. constituted nearly half of the sum they were to receive for furnishing the material and erecting these porch floors, fireplaces and other things in the building. The cost of the different parts of their job is not stated. There is therefore no means of making comparison of the cost of the labor with the total cost of the fireplaces, and we cannot interfere with the finding that they were subcontractors.

[4] The appellants further contend that

certain other claimants, namely, Faneuf & Heath, Wessendorf & Staffer, Bright Bros., and the Daniels Santa Cruz Transfer Company, were erroneously ranked as materialmen or laborers when they should have been classed as subcontractors. Their claims were small, amounting in all to \$181.79. Each of these parties filed a claim of lien stating that they, respectively, had performed labor on the building. The claim of Faneuf & Heath states that they performed certain labor in the construction of the house and also that they furnished certain materials which were used therein. There is nothing in the record to show the character of the work done by either of these claimants, or of the materials they furnished. The finding is sufficiently sustained by the respective claims of lien, and, as there is no evidence to the contrary in the record, the findings must be upheld.

The judgment and order are affirmed.

We concur: SLOSS, J.; LAWLOR, J.

(171 Cal. 528)

ROYSTONE CO. v. DARLING et al.
(L. A. 4072.)

(Supreme Court of California. Dec. 15, 1915.
Rehearing Denied Jan. 13, 1916.)

1. CONSTITUTIONAL LAW § 89—MECHANICS' LIENS § 3—CONTRACTOR'S BOND—STATUTE—CONSTITUTIONALITY.

Act May 1, 1911 (St. 1911, p. 1313), amending Code Civ. Proc. § 1183, provides that persons working upon a building or furnishing materials shall have a lien for the value of the labor and materials, and that in case the original contract shall be filed in the office of the county recorder, together with the bond of the contractor in an amount not less than 50 per cent. of the contract price, which bond shall be conditioned for the payment of the claims of all persons performing labor or furnishing materials on the work, and shall also be made to inure to the benefit of all laborers or materialmen on the work described in the contract, to give them a right of action to recover upon the bond in any suit to foreclose the mechanics' liens or in a separate suit brought on the bond, then the court, where it would be equitable to do so, may restrict the recovery under such liens to an aggregate amount equal to that found to be due from the owner to the contractor, and render judgment against the contractor and sureties on the bond for any deficiency. Const. art. 1, § 1, guarantees the right of contract. Article 20, § 15, provides that mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished materials, and that the Legislature shall provide for the speedy enforcement of such liens. *Held*, that the provision of the mechanic's lien act requiring the contractor's bond is not unconstitutional as invading the right of contract, since it allows the owner of property to contract freely for its improvement and upon such terms as he may deem for his best interest, merely exacting from him as a condition of exemption from liability to subcontractors and materialmen in excess of the contract price for the work, that he should provide a reasonable security for the constitutional lien given for labor and materials furnished by his contractor, a requirement with-

in the scope of the constitutional provision conferring such liens, and of the police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. ¶89; Mechanics' Liens, Cent. Dig. § 4; Dec. Dig. ¶3.]

2. BONDS ¶35 — VALIDITY — STATUTORY BONDS.

A bond given solely to comply with a statute which is itself void, or which does not require the bond as supposed, is without binding force.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 40, 40½; Dec. Dig. ¶35.]

3. STATUTES ¶85 — CLASS LEGISLATION — CONTRACTOR'S BOND.

Act May 1, 1911 (St. 1911, p. 1313), amending Code Civ. Proc. § 1183, to require a contractor's bond securing materialmen and laborers as a condition to the owner's exemption from liability thereto in an amount in excess of the contract price, is not unconstitutional as class legislation, since a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction which has some reasonable relation to the legislation respecting the class, which is the case, as to persons furnishing labor or materials for the construction of buildings, under the constitution conferring their liens thereon.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 94, 95; Dec. Dig. ¶85.]

4. MECHANICS' LIENS ¶227—CONTRACTOR'S BOND—CONSTRUCTION—RECOVERY IN EXCESS OF PENALTY—STATUTE.

Act May 1, 1911 (St. 1911, p. 1313), amends Code Civ. Proc. § 1183, to require that a contractor shall file a bond securing materialmen and laborers as a condition to the owner's exemption from liability thereto in an amount in excess of the contract price, and fixes the penalty of the bond at not less than one-half the amount of the contract price, subsequently providing that after applying to the payment of liens the sum due from the owner to the contractor, lien claimants may, in suit on the bond recover the unpaid balance of their claims. *Held*, that such a bond could not be construed, because of the last provision of the statute, as authorizing a recovery in excess of its penalty.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 410; Dec. Dig. ¶227.]

5. APPEAL AND ERROR ¶907—PRESUMPTIONS FAVORING COURT BELOW.

In a suit to foreclose mechanics' liens, where the propriety of an allowance for extras to a materialman depended upon the specifications, which were not incorporated in the bill of exceptions or elsewhere in the record, the finding of the court below must be sustained on presumption.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2916, 3673, 3674, 3676, 3678; Dec. Dig. ¶907.]

6. APPEAL AND ERROR ¶181—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF OBJECTION BELOW.

An objection made in appellant's brief, but not made on trial or in the court below, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141-1151, 1157, 1158, 1160; Dec. Dig. ¶181.]

In Bank. Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Roystone Company against Thomas Darling and the American Surety

Company of New York and others. From a judgment against it, the defendant American Surety Company appeals. Affirmed.

Bickaler & Smith, of Los Angeles, for appellant. Irwin, White & Rosecrans and Randall & Bartlett, all of Los Angeles, for respondents Darling. Ernest E. Nichols, of Los Angeles, for respondent Joseph Musto Sons-Keenan Co. R. L. Horton, of Los Angeles, for respondent Hammond Lumber Co. Gray, Barker & Bowen, of Los Angeles, for respondent Schultz Lumber Co. Shaw & Stewart, of Los Angeles, for respondent Stead. Willis O. Tyler, of Los Angeles, for respondent James. Schweltzer & Hutton, of Los Angeles, for respondent Western Commercial Co. Alfred Wright, of Los Angeles, for respondent Eager Hardware & Paint Co. C. W. Pendleton, Jr., of Los Angeles, for respondents H. W. Johns-Manville Co. and J. C. Crawford. Jones & Weller, of Los Angeles, for respondent Patten & Davies Lumber Co. Arthur Wright, of Los Angeles, for respondent Hughes Mfg. & Lumber Co. Waterman & Green, of Los Angeles, for respondent Neely.

SHAW, J. This is an appeal taken from the judgment within 60 days after its entry, the American Surety Company being the sole appellant. The judgment was rendered in a consolidated action to foreclose mechanics' liens. Nineteen separate complaints embracing 22 claims of lien were included in the order of consolidation.

On June 19, 1912, the defendant Thomas Darling, being the owner of a lot in Santa Monica, Los Angeles county, entered into a contract with the defendant J. M. Thomas for the erection of an apartment house on said lot. The contract price was \$13,279, payable in installments. Five of these installments of \$1,659 each were payable at intervals during the construction of the building, the sixth, of the same amount, was to be paid at completion thereof, and the seventh, \$3,320, was made payable 35 days after the filing of the notice of completion in the recorder's office. The remaining \$5 are not accounted for. On the 20th day of June, the contractor, Thomas, and the appellant, American Surety Company, executed and delivered to Darling a bond in the sum of \$6,640, being 50 cents in excess of one-half of said contract price. This bond conformed in every particular to the requirements of section 1183 of the Code of Civil Procedure, as amended in 1911. The contract and the bond aforesaid were duly filed and recorded in the office of the recorder of said county on June 21, 1912, the day after the execution of the bond. In pursuance of the contract, Thomas immediately began the erection of the building and completed it on December 14, 1912. Extra work of the value of \$183.50 was ordered by Darling and performed by Thomas. On December 14, 1912, Darling filed in the record-

er's office a notice of completion as provided in section 1187 of the Code of Civil Procedure. Prior to November 1, 1912, Darling paid Thomas five installments, as provided in the contract, amounting to \$8,295. The remainder of the contract price, \$4,984, together with the value of the extra work \$183.50, a total of \$5,167.50 remains unpaid. The several claims of lien found to be valid by the court amounted to something over \$10,000, being more than \$8,000 in excess of the balance due from the owner to the contractor as aforesaid.

The court below was of the opinion that said sum of \$5,167.50 due from Darling to Thomas on the contract was applicable to these liens, and that liens should be declared and enforced on defendant's property in favor of each claimant for his pro rata share of this sum and for no greater amount. Seven of these claimants were declared to have no right to further relief except against the contractor. The court held that the other 15 claimants were each entitled to a judgment against the American Surety Company upon the bond aforesaid for the excess of their respective claims over their respective shares of the fund due to the contractor aforesaid. Judgment was given in accordance with these conclusions.

As will be seen from the foregoing statement the contract between Darling and Thomas was made in 1912. The case is therefore governed by the provisions of the mechanic's lien law, as revised by the act of May 1, 1911 (Stats. 1911, p. 1318). This revision made some radical changes in the law, and it presents new questions for decision. It will aid in the understanding of the purpose and meaning of this act if we call to mind, as briefly as may be, the history of the mechanic's lien laws in this state and the state of the law on the subject at the time the amendments in question were enacted.

Prior to the adoption of the Constitution of 1879 the lien of mechanics and materialmen for work done and materials furnished in the erection of buildings was entirely a creature of the Legislature. The former Constitution contained no declaration on the subject. Numerous decisions of the Supreme Court had declared that all such liens were limited by the contract between the owner and the contractor, and could not, in the aggregate, exceed the contract price. The doctrine that the right of contract could not be invaded by legislative acts purporting to give liens beyond the price fixed in the contract between the owner and the contractor, or regardless of the fact that the price had been wholly or partially paid, was so thoroughly established that litigation involving it had virtually ended. Section 1183 of the Code, as amended in 1873, declared that every person performing labor or furnishing materials to be used in the construction of any building should have a lien upon the same for such work or material. It did not limit the liens

to the contract price. In this condition of the law the Constitution of 1879 was adopted. It provides as follows:

"Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." Art. 20, § 15.

In 1880 section 1183 was again amended by inserting a direct declaration that "the lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party." This amendment of 1880 first came before the Supreme Court for consideration in *Latson v. Nelson*, 11 Pacific Coast Law Journal, 589, a case not officially reported. The court in that case considered the power of the Legislature to disregard the contract of the owner with the contractor and give the laborer or materialman a lien for an amount in excess of the money due thereon from the owner to the contractor. In effect, it declared that section 15, article 20, of the Constitution was not intended to impair the right to contract respecting property guaranteed by section 1, article 1, thereof, and that the provisions of the Code purporting to give a lien upon property in favor of third persons, in disregard of and exceeding the obligations of the owner concerning that property, was an invalid restriction of the liberty of contract. Although it is not very clearly stated, the theory of that decision is, and it has always been understood to be, that section 1 of article 1, declaring that all men possess "certain inalienable rights," among them the right of "acquiring, possessing, and protecting property," is a guarantee which includes the right to contract concerning the use, enjoyment, and disposition of property, and which cannot be taken away or restricted by the Legislature except by reasonable regulations made in the exercise of the police power. See on this point *Kellogg v. Howes*, 81 Cal. 177, 22 Pac. 509, 6 L. R. A. 588; *Stimson Mill Co. v. Braun*, 136 Cal. 125, 68 Pac. 481, 57 L. R. A. 726, 89 Am. St. Rep. 116. *Latson v. Nelson* was approved and followed in *McCants v. Bush*, 70 Cal. 126, 11 Pac. 601; *Wiggins v. Bridge*, 70 Cal. 438, 11 Pac. 754, both decided in 1886, and in *Walsh v. McMenomy*, 74 Cal. 359, 16 Pac. 17, in 1887. In the meantime the Legislature of 1885 (St. 1885, p. 143), apparently recognizing and conceding the force of the decision in *Latson v. Nelson*, undertook to secure and enforce the constitutional lien by other means, that is, by regulating the mode of making and executing contracts, rather than by disregarding the right of contract. It amended sections 1183 and 1184 of the Code by providing that in all building contracts the contract price should be payable in installments at specified times after the beginning of the work, that at least one-

fourth thereof should be made payable not less than 35 days after the completion of the work contracted for, that all such contracts exceeding \$1,000 should be in writing, subscribed by the parties thereto, and should be filed in the office of the county recorder before the work was begun thereunder, that if these regulations were followed, liens upon the property for the erection of the structure should be confined to the unpaid portion of the contract price, but that all contracts which did not conform thereto, or which were not filed as provided, should be void, that in such case the contractor should be deemed the agent of the owner, and the property should be subject to a lien in favor of any person performing labor or furnishing material to the contractor upon the building for the value of such labor or material. This law, with some amendments not material to our discussion, remained in force until the enactment of the revision of 1911, aforesaid.

In the meantime the Supreme Court has followed the rule established by the cases last cited and has uniformly declared, with respect to such liens, that if there is a valid contract, the contract price measures the limit of the amount of liens which can be acquired against the property by laborers and materialmen. The following cases declare the doctrine directly: *Stimson Mill Co. v. Braun*, supra; *McDonald v. Hayes*, 132 Cal. 495, 64 Pac. 850; *Snell v. Bradbury*, 139 Cal. 382, 73 Pac. 150; *Kellogg v. Howes*, supra; *Greig v. Riordan*, 99 Cal. 319, 33 Pac. 913; *Hampton v. Christensen*, 148 Cal. 736, 84 Pac. 200; *Hoffman-Marks Co. v. Spires*, 154 Cal. 116, 97 Pac. 152; *Butler v. Ng Chung*, 160 Cal. 438, 117 Pac. 512, Ann. Cas. 1913A, 940; *Marshall v. Vallejo Bank*, 163 Cal. 474, 126 Pac. 146; *Ganahl Co. v. Weinsveig*, 168 Cal. 669, 143 Pac. 1025; *Clark v. Beyrle*, 160 Cal. 314, 116 Pac. 739. In addition to these express declarations there are many cases in which the rights of the parties were adjudicated upon the assumption that this proposition constituted the law of the state. Each one of the large number of decisions regarding the priorities of liens in the unpaid portion of the contract price, each decision respecting the right to reach payments made before maturity under such contract, each decision as to the formal requisites of contracts under the amendment of 1885, and each decision as to the apportionment under section 1200, Code of Civil Procedure, upon the failure of the contractor to complete the work, constitutes an affirmation of the doctrine that the contract, legally made, limits the liability of the owner to lien claimants. There has been scarcely a session of this court since the enactment of that amendment at which one or more cases have not been presented and decided which, in effect, amounted to a repetition of this doctrine. The Legislature has also rec-

ognized the doctrine by subsequent amendments following out the theory of the amendment of 1885.

The scheme of regulation embodied in the amendments of 1885 and continued until 1911, did not work well in practical operation. Disputes frequently arose concerning the terms of contracts, the time of maturity of installments, the making of payments, the time of beginning the work, with respect to the filing of the contract for record, and many other details which, under the somewhat elaborate plan of the statute, would affect the validity of the contract, or the right to a lien to the unpaid part of the price when the contract was valid. Our reports show many decisions on these questions. Amendments to the statute were made from time to time, but, upon the whole, conditions were not improved. The act of 1911 was obviously designed for the purpose of removing, as far as possible, the objections to the former law.

The plan differs in important particulars from the previous statute. It amends the entire chapter with the exception of sections 1186, 1188, 1189, 1191, 1191a, 1196, 1198, 1199, and 1201. The provisions of these sections harmonize with either scheme. Sections 1183a, 1200, and 1203a are repealed. The amended sections do not prescribe the form of building contracts, nor do they fix the time or the manner of payment of the contract price or require its payment in installments. All these things are left to the will of the owner and the contractor as they may agree. They do not require that one-fourth of the contract price, or any part thereof, shall be made payable after completion. The parties are at liberty to contract for payment in advance, or in specific property. Such contracts are not declared void by the present law. Section 1183 allows the contract to be filed before the work is begun under it, and provides that there may be filed with it a bond executed by the contractor with good sureties in an amount at least one-half of the contract price, conditioned for the payment in full of all claims on account of labor performed for, or materials furnished to, the contractor in the work, and giving to such persons a right of action on said bond for such claims. Other changes are made, but as they are not material to the decision as to the extent of the lien and the validity of the provision for a contractor's bond, we leave them to be noticed on the discussion of the questions to which they may relate.

[1, 2] The first point urged by the appellant in support of its appeal is that the portion of the statute providing for the execution and filing of the bond by the contractor is unconstitutional and void. It is necessary here to state more fully the statutory provisions regarding the same. Section 1183, after declaring that persons who work upon a building or furnish materials, shall have a

lien upon the property for the value of the labor done and materials furnished, proceeds as follows:

"The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided."

It then provides that such liens shall not extend to any labor or materials not embraced within the original contract, or modification thereof, if the claimant has had actual notice thereof before the performance of labor or furnishing of material. It further provides, with respect to such notice, that the filing of the contract, or modification thereof, in the office of the county recorder before the commencement of the work, shall be equivalent to actual notice thereof to lien claimants. Then follows the important provision of the section in these words:

"In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit * * * to foreclose the liens provided for in this chapter or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both. No change or alteration of the work or modification of any such contract between the owner and his contractor shall release or exonerate any surety or sureties upon any bond given under this section. It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided. It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem satisfactory."

Section 14 of the revising act is as follows:

"The provisions of this act shall be liberally construed with a view to effect its purpose. They are not intended as a re-enactment of the provisions of former statutes, with the policy heretofore impressed upon the same by the courts of this state, but are intended to reverse that policy to the extent of making the liens provided for, direct and independent of any account of indebtedness between the owner and contractor, thereby making the policy of this state conform to that of Nevada and the other Pacific coast states."

The court below found that the bond was given in pursuance of section 1183 aforesaid. It is not claimed by the respondents that it is good as a common law bond, or that there was any consideration for its execution other than the belief that it was required by said section. The contention of the appellant is that the entire scheme of the provision is invalid because it invades the right of contract preserved by section 1, article 1, of the Constitution, and that, even if its provisions are otherwise valid, the requirement of a bond is beyond the legislative power and void, and that, for these reasons, the bond is without any consideration, and is unenforceable. If the premises are correct the conclusion that the bond creates no obligation would follow. The principle that a bond given solely to comply with a statute, which is itself void, or which does not require the bond as supposed, is without binding force is settled by the cases of *Powers v. Chabot*, 93 Cal. 270, 28 Pac. 1070, *Coburn v. Townsend*, 103 Cal. 235, 37 Pac. 202, *Reay v. Butler*, 118 Cal. 115, 50 Pac. 375, and similar cases, and, on the other hand, if the statute is valid in this respect it would necessarily follow that there was a sufficient consideration for the bond, and that it was binding upon the surety. The validity of the act as a whole and the provision requiring such bond in particular are, therefore, questions necessary to the determination of the case.

We have shown that when this act was passed it was the established doctrine of this state that the Legislature cannot create mechanic's liens against real property in excess of the contract price, where there is a valid contract, but that it is within the legislative power, in order to protect and enforce the liens provided for in the Constitution, and so far as for that purpose may be necessary, to make reasonable regulations of the mode of contracting, and even of the terms of such contracts, and to declare that contracts shall be void if they do not conform to such regulations. This court has never in any case departed from this doctrine. The case of *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391, and similar cases holding that, although a contract not in conformity with the statutory regulations is void, and therefore does not limit the lien claimant to the contract price, that it is binding in controversies between the contractor and owner to fix the amount of the contractor's recovery in assumption for the value of the work he has done, are not in conflict with this doctrine, but in recognition of it. *Merced L. Co. v. Bruschi*, 152 Cal. 372, 92 Pac. 844, and *Burnett v. Glas*, 154 Cal. 249, 97 Pac. 423, had to do with invalid contracts. They do not impugn the doctrine stated; they assert and enforce it. Nor is there any suggestion contrary thereto in the recent case of *Martin v. Becker*, 169 Cal. 301, 146 Pac. 665.

The portions of the act of 1911 above quoted clearly show that the Legislature did not intend thereby to depart from this doctrine,

but that, on the contrary, the design was to follow it and to protect lienholders by means of regulations concerning the mode of contracting and dealing with property for the purposes of erecting improvements thereon. The first declaration on the subject is that the liens provided in the chapter shall be "direct liens" (whatever that may mean), and that persons, other than the contractor, shall not be limited by the contract price "except as hereinafter provided." The proviso referred to is found in the following declaration in the same section:

"It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties, in the amount and upon the conditions as herein provided."

A plainer declaration of the intent to make the contract price the limit of the owner's liability, where the bond and contract have been filed as required by this section, could scarcely be made. The rather vague statement in section 14 of the revising act of 1911 that said act is intended to make the liens therein provided for "direct and independent of any account of indebtedness between the owner and contractor," should not be interpreted as in contravention of section 1183, unless no other reasonable construction is apparent. It is not difficult to find a better application of the expression. Section 1183 describes two classes of liens. One class consists of liens in cases where the bond has not been filed, in which case, the state of accounts between the owner and contractor, and even the contract price, are immaterial to the lien, except as to the contractor. The other classes consist of all cases in which the proper bond and contract are duly filed. In these cases, by the express language of the section, the contract price is made to control, and the account of the indebtedness thereon from the owner to the contractor is decisive of the amount of the liens which can be adjudged against the property. The above-quoted clause of section 14 is therefore obviously applicable only to the first-mentioned class of liens, those where the bond and contract are not filed. To apply it to the other class of liens would work a practical repeal of very many of the elaborate provisions of the chapter as revised, since, for the most part, they would be wholly unnecessary and useless. The intent of the statute is to restrict liens to the contract price in all cases where the provisions of the statute regarding the bond are observed, and to impose upon the owner the penalty of paying all liens to the extent of the value of the work done and materials furnished where he shall neglect to comply with the statute.

The effect is that persons contracting for the erection of buildings or structures on their property must require the contractor to furnish such bond and must file the same with the contract in the recorder's office, or

as an alternative, he must see to it that the value of the work and materials used in the building by the contractor is paid to the persons who furnish the same. A contract not accompanied by such bond is not declared to be invalid, but it furnishes no protection to the owner against liens for labor and material on the building. Do these regulations come within the doctrine of *Latson v. Nelson*, supra, and the other cases above cited?

The amendment of 1880 to section 1183 purported to confer liens for work and material on buildings without any regard whatever to the contract between the owner and the contractor. It gave the owner no method of exercising his right to contract with the builder for improvements on his property, without practically assuming total responsibility for all failure of such builder to pay for the labor and material thereon. It provided no means whereby he could avoid liens placed upon the property for the value of such work and materials. The right of persons to contract in that manner respecting their property was, to that extent, taken away. This was held to be a violation of the inalienable right to acquire and possess property guaranteed by section 1, article 1, of the Constitution. The revision of 1885 also interfered with the right of contract. Under its provisions the owner of property, in all proceedings to have improvements placed thereon by a builder, was not allowed to make payment in advance of the work. He was required to make his contract provide that three-fourths of the contract price should be paid in installments as the work progressed, or at completion, and one-fourth 35 days or more after completion. Falling in this he was declared to have made no contract at all, and the property was made subject to all claims for work and material used in the structure erected. This, although clearly a destruction, pro tanto, of the right of the owner freely to contract for the improvement of his property, was held to be a reasonable and permissible regulation of the right of enjoying property and of making contracts in relation thereto. The difference in the decisions upon these two differing laws points to the solution of the first part of the question. In view of the fact that our Constitution itself gives to workmen and materialmen a lien upon property for the value of the work and materials they bestow upon it and directs the Legislature to provide for the efficient enforcement of such liens, it is obvious that any legislative provision to that end which offers to the property owner a reasonable and practical mode of improving his property through a contractor at a fixed price and without further liability, should be considered as a legitimate exercise of the constitutional mandate. The plan of the amendment of 1880 was deemed unreasonable because it deprived the owner of all right to contract for improvements on his property for a sum fixed by his contract with the builder,

while the amendment of 1885 was considered reasonable because it provided a practical method for the making of improvements under such contracts, although it did to some extent infringe upon liberty of contract. This theory has not been put in this way nor fully expressed in the several decisions on the subject. But the discussion therein plainly points to this as the true reason for the differentiation of the two enactments. The case of *Latson v. Nelson*, and others following it, construing the amendment of 1880, and the case of *Stimson Mill Co. v. Braun*, *supra*, holding that the Legislature may not require such contracts to be made payable only in money, go far toward the limit of reason on the point that section 15, article 20, of the Constitution, is subordinate to the Declaration of Rights in section 1, article 1. The law of 1911 here involved does not deprive the owner of the right to contract for the improvement of his property. It allows him to contract freely for such improvement and upon such terms as he may deem for his best interests. All it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor. It is not an unreasonable burden. It is one which we think the people have the power to impose and which we believe to be within the scope of the constitutional mandate in the section conferring such liens, and of the police power.

Upon the point that any provision requiring a bond to secure such liens, whether given by the contractor or the owner, is unconstitutional, the appellant cites a line of cases beginning with *Gibbs v. Tally*, 183 Cal. 373, 65 Pac. 970, 60 L. R. A. 815. The other cases are *Shaughnessy v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; *San Francisco, etc., Co. v. Bibb*, 189 Cal. 192, 72 Pac. 964; *Snell v. Bradbury*, 189 Cal. 380, 73 Pac. 150; *Montague v. Furness*, 145 Cal. 206, 78 Pac. 640; and *Hampton v. Christensen*, 148 Cal. 729, 84 Pac. 200.

In 1893 the Legislature amended section 1203 by requiring a bond to be filed to secure claims of workmen and materialmen on a building. The foregoing cases construe this section. It provided that every contract required to be filed by the mechanic's lien law should be accompanied by a bond in the sum of at least 25 per cent. of the contract price, which should be made to inure to the benefit of persons performing labor and furnishing materials for the building. To this was added a provision that a failure to file such bond should render the owner and contractor liable in damages to any person entitled, under the mechanic's lien law, to a lien upon the property affected by the contract. *Gibbs v. Tally* involved the consideration of the latter clause of the section. The other cases

involved the validity of the bond thus required, and held that this provision for a bond is in violation of the inalienable right to acquire and possess property and contract in relation thereto. The section did not specify who should file the bond, nor to whom it should be made payable, nor who should execute the same. In *Gibbs v. Tally* the contract for the building was valid under the lien law as it then existed, and the persons who filed claims of lien had foreclosed the same, and had caused all of the contract price remaining unpaid from the owner to the contractor to be applied upon their liens, but it was not sufficient to pay them in full. *Gibbs*, one of the lien claimants, then began the action against *Tally*, the owner, to recover the damages which the statute purported to allow in case of the failure to file the required bond. The gist of the decision is that to allow such recovery, where there was a valid contract between the owner and the contractor, would make the owner liable for a debt which he did not owe, for an amount in excess of the contract price and which he had not agreed to pay. This, it was declared, was an unlawful infringement of section 1, article 1, of the Constitution. The facts involved in the case have no necessary bearing upon the question whether or not the Legislature could in any case require the contractor to file a bond for the benefit of persons having claims against him regarding the same before entering upon the work.

In *Shaughnessy v. American Surety Co.*, *supra*, the question of the power of the Legislature to require the bond specified in section 1203 was directly involved. It was said that the requirement of such a bond was entirely outside of any protection of the constitutional lien given to mechanics and materialmen, and that it was in violation of the constitutional right of contract respecting property. The other cases above cited merely follow the decision in *Shaughnessy v. American Surety Co.* without further discussion of the subject. There is a marked difference between the law denounced as void in these cases and the act of 1911. The provisions of section 1203 do not appear to have had any direct relation to the validity or invalidity of the contract for the building. It was an additional requirement, an additional burden upon the parties. It had no connection with or relation to the constitutional mechanic's lien. The bond required to be given by the act of 1911, on the contrary, is provided for the express purpose of enabling the owner to escape liability for his building in any sum in excess of the contract price. It has a direct relation to the constitutional lien and to the effect of the contract for the improvement. The efficacy of the contract as a protection against such liens is made to depend directly upon the act of securing and filing the bond with the building contract. We think these differences are sufficient to distinguish

this case from the line of cases above cited. We are unable to perceive any constitutional objection to the expedient of providing that by the execution and filing of such bond the owner may be protected against the delinquencies of his contractor while, at the same time, lien claimants are afforded a security for the payment of their claims. We therefore hold that the foregoing decisions are not applicable, and that the provision for requiring this bond is not unconstitutional or invalid.

[3] Some minor points remain to be noticed. It is urged that the provisions of the act requiring persons who make building contracts to file a bond, while no such requirement is made of any other person who may wish to make other kinds of contracts, creates a lack of uniformity and is class legislation. There is an intimation to this effect in *Shaughnessy v. American Surety Co.*, supra, but the point was not directly involved, and the case does not hold to that doctrine. It is not sustained by authority. The rules regarding legislation respecting classes have been thoroughly settled in this state. The case most often cited is *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604. The decision in that case has been followed in very many cases since it was rendered. The principle announced is that a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. To this it has been added, in some cases, that the distinction must have some reasonable relation to the legislation enacted respecting the class. The fact that the Constitution confers upon persons performing labor or furnishing materials for the construction of a building the right to a lien thereon, at once establishes these persons as a class and makes a constitutional distinction between them and all other persons making contracts. This justifies legislation for the benefit of such claimants and governing the conduct and contracts of the owner of the property and the person contracting to construct buildings thereon. There is no improper classification.

[4] The claim that the terms of the bond, as prescribed in section 1183, would authorize a recovery on the bond for the full amount found due to lien claimants and in excess of the sum named therein as the penalty thereof, is untenable. The penalty of the bond is to be not less than one-half the amount of the contract price. This measures the obligation and the liability of the surety. The subsequent statement that after applying to the payment of liens the sum due from the owner to the contractor, such claimants may, in a suit on the bond, recover the unpaid balance of their claims, cannot be construed to authorize a recovery on the bond of more than the penal sum thereof. The provision must be construed as an entirety. So con-

strued it seems that the recovery, being had in a suit on the bond, is necessarily limited to the penalty thereof. The fact that such suit may be joined with a suit to foreclose the liens does not make it any the less a suit on the bond. The statement that the bond must be "conditioned for the payment in full of the claims" of lienholders, is the usual phraseology of the obligation of a bond at common law. This is not understood to create an obligation in excess of the penal sum named, but only an obligation to pay such claims in full, provided they do not exceed the penal sum. The statute, being descriptive of the terms of a bond, should be given the same meaning.

[5, 6] The objection to the allowance of \$144 to the respondent Hughes Manufacturing and Lumber Company, for extras on its subcontract for wall beds in the building cannot be sustained on the record before us. That company agreed with Thomas, the contractor, to furnish the wall beds, of a kind described as No. 40, for \$600. While they were being installed, the architect interfered, stating that the specifications of the contract called for wall beds known as No. 29, and directed that No. 29 wall beds be placed in the building, which was done, with the consent of Thomas. The \$144 was the additional charge on account of this change. The plans and specifications were attached to and filed with the general contract, as a part thereof, but they are not set forth in the bill of exceptions, nor elsewhere in the record. Therefore the finding of the court must be sustained on the presumption that the court below, upon examining the specifications, ascertained that they call for No. 29 wall beds, and that there was no change in the original contract nor any departure therefrom. The objection that the allowance of \$144 includes some small amount, not inquired into at the trial or shown by the record, charged for the labor of making the changes, which would not be chargeable to the owner, or to the surety on the bond, is made in appellant's brief, but it was not made at the trial, or in the court below, and for that reason we refuse to consider it on appeal.

Our conclusion that the revision of 1911, as a whole, and the part thereof requiring the bond are valid enactments, disposes of all other points urged by the appellant.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; LORIGAN, J.; LAWLOR, J.

HENSHAW, J. I concur in the foregoing judgment, but solely for the following reasons: It would seem when the Constitution of this state declares, as it does, that "mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property * * * for the value of such labor done and material furnished" that it was

wholly beyond the power of the Legislature to destroy or even to impair this lien. The Legislature, controlling all procedures in courts of justice, could prescribe reasonable regulations with which the lien claimant must comply in the matter of the enforcement of his lien and declare in effect that for a noncompliance with these reasonable regulations the lien claimant shall be deemed to have waived his lien. Again, as a part of its powers in this matter, it may interpose between the lien claimant and the property owner some other fund and exact of the lien claimant that he first exhaust this fund before enforcing his lien upon the property. But it would also seem that there is a well-defined limitation upon the Legislature's power in the matter of this lien so solemnly guaranteed by the Constitution itself, and that limitation is that if the interposed fund (or bond) shall prove inadequate, the Legislature cannot say to the lien claimant that he must be satisfied with this fund, though he do not receive from it all that the Constitution has guaranteed him. But by a long course of judicial decisions, beginning with what I believe to be a mistaken view, first announced in the unreported case of *Latson v. Nelson*, this court has held that the legislative powers are greater than those I have indicated, and that those powers go to the extent of permitting the Legislature to impair or even to destroy the lien. It is too late, perhaps, for this court to recede from what I believe to have been the mistaken view thus forced upon it. The fact still remains, however, that under our decisions the Legislature can and does control the whole matter. Thus, if the Legislature desires to do so, it may give the lien claimant all the rights touching his lien, which the Constitution guarantees him.

It would appear that by the new act here under review the Legislature undertook to do this thing. The act to begin with declares as to the right to a lien in the very language of the Constitution. It does away with much of the pre-existing technical law of filing contracts, etc., and in its last section declares:

"Sec. 14. The provisions of this act shall be liberally construed with a view to effect its purpose. They are not intended as a re-enactment of the provisions of former statutes, with the policy heretofore impressed upon the same by the courts of this state, but are intended to reverse that policy to the extent of making the liens provided for, direct and independent of any account of indebtedness between the owner and contractor, thereby making the policy of this state conform to that of Nevada and the other Pacific Coast states."

By this language it would appear that the Legislature had at last decided to give to these lien claimants everything that the Constitution declares they should have. But by a most singular interpolation by way of an amendment to this act as originally proposed the question is again thrown into confusion. By the language of this interpolated amendment it is declared:

"If the original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties, in an amount not less than fifty per cent of the contract price named in said contract * * * then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found due from the owner to the contractor."

The owner may have paid the contractor (and he is not prohibited from so doing) everything that is due, and in such case this language would limit the right of the recovery of the lien claimant to what he could obtain under the bond. In short, he would have no lien upon the property at all. Here is as radical a denial of the constitutional lien as is found in any of the earlier statutes. The inconsistency between this language and other parts of the act is too apparent to require comment. Yet, as this seems to have been the deliberate design of the Legislature, it is perhaps incumbent upon this court under its former decisions to give that design legal effect. If the Legislature in fact means to give claimants the rights which the Constitution guarantees them, as it declares its desire to do in section 14 above quoted, it alone has the power to do so by language which will make it apparent that a lien claimant may still have recourse to the property upon which he has bestowed his labor if the interposed intermediate undertaking or fund shall not be sufficient to pay him in full. This court is, however, justified I think in waiting for a plainer exposition of the Legislature's views and intent in the matter than can be found in this confused and confusing statute.

I concur: MELVIN, J.

(171 Cal. 599)

Ex parte UDELL. (Cr. 1993.)

(Supreme Court of California. Dec. 20, 1915.)

1. HABEAS CORPUS §54 — APPLICATION — SUFFICIENCY OF.

Under Pen. Code, § 1475, an application for a writ of habeas corpus should state whether a previous application has been had and what the proceedings thereon were.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 51; Dec. Dig. §54.]

2. HABEAS CORPUS §120 — ISSUANCE OF WRIT—POWER OF JUDGE.

While under certain circumstances the court may feel warranted in entertaining a second application for a writ of habeas corpus, no single member of the court after the denial of a writ may entertain a second writ.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 121; Dec. Dig. §120.]

In Bank. Application by Alva Udell for a writ of habeas corpus. Application denied.

Alva Udell, of San Francisco, pro se.

ANGELLOTTI, C. J. This is an application for a writ of habeas corpus by one Alva Udell who is now in the custody of the sher-

liff of the city and county of San Francisco under a judgment of the superior court thereof adjudging him guilty of contempt of court. The application is addressed to the Chief Justice, and not to the court.

[1] The petition is defective in that it does not state whether any prior application has been made to any court for a writ in regard to the same detention or restraint, and, if there was any such application, does not show the proceedings therein. Section 1475, Penal Code. As a matter of fact, a prior application in regard to the same detention or restraint was made by petitioner to this court, as our records show, on December 1, 1915, and such application was denied by the court on December 2, 1915. Not only was such application in regard to the same detention or restraint, but the grounds of the former application were the same as those now urged, with a greater degree of elaboration.

[2] While it may be that under certain circumstances the court itself might feel warranted in entertaining a second application from a party regarding the same detention or restraint, it is manifest that no single member of the court, be he Chief Justice or Associate Justice, is warranted in granting a writ where the same has been denied as to the same detention or restraint by the whole court in bank.

The application to me for a writ of habeas corpus is denied.

(171 Cal. 607)

In re WENKS' ESTATE,

WENKS v. GEHRING.

(S. F. 7315.)

(Supreme Court of California. Dec. 22, 1915.)

**1. EXECUTORS AND ADMINISTRATORS § 314—
ORDER OF DISTRIBUTION—SCOPE OF RELIEF.**

Where appellant as heir of his father sought to reach property which he claimed was the community property of his father and testatrix, who was the father's second wife, such claim should either be asserted by an action by appellant as heir or by the administrator of the father's estate, and cannot be presented on objections to an order of distribution of the estate of the testatrix.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.]

**2. EXECUTORS AND ADMINISTRATORS § 314—
ORDERS OF DISTRIBUTION—CONTESTS—COMMUNITY PROPERTY.**

Civ. Code, § 1886, subd. 8, authorizing, in a proceeding for the distribution of the property of a decedent, contests arising out of the community property, applies only in case of intestacy.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.]

Department 2. Appeal from Superior Court, Alameda County; William S. Wells, Judge.

In the matter of the estate of Elizabeth Wenks, deceased. Contest by Joseph Wenks

against an order of final distribution in favor of Edward E. Gehring. From an order refusing to entertain the contest, contestant appeals. Affirmed.

Carl L. Lindsay and H. C. Lucas, of Oakland, for appellant. Burton Jackson Wyman, of Oakland, for respondent. Gutsch & Lempke, of San Francisco, for residuary legatees.

HENSHAW, J. [1] Elizabeth Wenks died testate, disposing of all her property by will. Joseph Wenks, appellant, is her stepson, the son of her predeceased husband. During his lifetime that husband conveyed to her a piece of real property. No administration was had upon the estate of the husband of Elizabeth Wenks. Upon her death his son appeared and filed a contest in the matter of the final distribution of the estate, alleging that his father, the husband of Elizabeth, in his lifetime conveyed to Elizabeth certain real property which was community property; that the character of the property as community property was not changed by this conveyance, and that it remained the community property of the two spouses until the death of the husband; that after the death of the husband Elizabeth sold this property, and that the property of her estate for which distribution is sought is the proceeds of this sale. The court refused to entertain the contest or to hear the proffered evidence in support of these allegations.

In this the court was clearly right. Appellant had abundant opportunity to establish the facts which he here asserts by appropriate action as an heir of his deceased father, and it was his duty to have brought or to have caused the bringing of such an action either by himself as heir or by the administrator of his father's estate. His claim here presented is a claim of title adverse to that of the estate, and "the law does not contemplate or provide for the distribution of property or money in the hands of the executor or administrator to persons who may claim adversely to the estate, but leaves all such questions to be determined by an action on behalf of or against the executor." *Estate of Rowland*, 74 Cal. 523, 16 Pac. 815, 5 Am. St. Rep. 464.

[2] Moreover, section 1886, subdivision 8 of the Civil Code, upon which appellant apparently bases his right to be heard, is applicable only to cases of intestacy. *Estate of Brady*, 151 Pac. 275. Here the deceased died leaving a will disposing of all of her property. No support can be found for appellant's position in *Estate of McCauley*, 138 Cal. 546, 71 Pac. 458. There the court declared that under this section, in case of intestacy, the named relatives of the spouse first deceased are heirs so far as concerns the common property of the spouse last dying intestate. The decision then proceeds to

show that there was a small amount of common property, amounting only to \$499, in the estate of Jennie McCauley undisposed of by her will. This appears from the first paragraph of the decision, where it is pointed out that the distributable value of the estate is \$67,000, and the total value of the property disposed of by will amounts to \$62,000. The conclusion therefore properly followed that Jennie McCauley died intestate as to the small amount of community property, which would therefore descend, under the rules of succession, to the relatives of her husband, she having left no next of kin.

For these reasons the order appealed from is affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(23 Cal. A. 730)

NATIONAL LUMBER CO. v. KENNEDY
et al. (Civ. 1771.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. MECHANICS' LIENS §132 — BUILDINGS — COMPLETION.

That after a building was completed and occupied by the owner, a skylight proved defective and was remedied, does not show that the building was incomplete until the skylight was repaired.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. §132.]

2. APPEAL AND ERROR §1011 — REVIEW — FINDINGS.

A finding of the court on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. §1011.]

3. MECHANICS' LIENS §132 — TIME OF FILING — NOTICE OF COMPLETION.

Code Civ. Proc. § 1187, declares that the owner of any building must, within 10 days after its completion, or 40 days after cessation from labor upon any unfinished contract, file with the county recorder a notice thereof, that a failure to file such notice shall estop the owner and persons derailing title from him from asserting, in foreclosure of a mechanics' lien, the defense that the lien was not filed within time, and that all claims for liens "must be filed within 90 days after completion." *Held*, the failure of the owner to file the notice of completion will not excuse a materialman's failure to file his lien claim within 90 days after completion, such provision fixing the ultimate time within which liens may be filed.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. §132.]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by the National Lumber Company against James Kennedy and another. There was a judgment for the named defendant, and from an order denying new trial, plaintiff appeals. Affirmed.

R. L. Horton, of Los Angeles, for appellant.
E. H. Jolliffe, of Ontario, Cal., for respondent.

SHAW, J. Action to foreclose an alleged lien for materials sold by plaintiff to defendant Miller for use in the construction by him, as contractor, of a building for defendant Kennedy. Miller made default. Kennedy answered, and upon trial judgment was entered for said defendant. The appeal is by plaintiff from an order overruling its motion for a new trial. No record was made of the contract, which was for a sum exceeding \$1,000.

Two questions are presented: First, was the lien filed within the time required after the completion of the building, as provided in section 1187, Code of Civil Procedure? If not, did the acts and conduct of Kennedy as owner of the building estop him from urging such ground as a defense to the action?

The court found that the building was fully completed on October 15, 1909, but that no notice of its completion was ever at any time filed with the county recorder; that plaintiff's claim and notice of lien was not filed until March 15, 1910, which was 151 days after the completion of the building; that Kennedy did not, between November 3d and November 15, 1909, as alleged in the complaint, or at any time, state to plaintiff that said building was not complete according to the plans and specifications; nor is it true that plaintiff delayed filing its claim of lien because of any statements or representations made by Kennedy.

As we understand appellant's brief, it attacks all of these findings, except that as to defendant's failure to file a notice of the completion of the building.

[1] That the building was fully complete and occupied on October 15, 1909, is conclusively shown by the evidence. The only reason suggested for claiming otherwise is the fact that a skylight put in by the contractor proved defective, and later, some time in January, 1910, the defendant's tenant, being authorized so to do, employed another workman who installed a skylight in place of the one originally put in under the terms of the contract by Miller, the cost of which substituted skylight was, some time in March, paid for by Kennedy.

[2] Appellant, basing its contention upon the case of *Hubbard v. Lee*, 6 Cal. App. 602, 92 Pac. 744, insists that the acts and conduct of Kennedy estop him from basing any defense to the validity of the lien on account of its not being filed within time. In support of this theory plaintiff offered testimony to the effect that in response to a letter requesting him so to do, Kennedy, some time between November 3d and November 15th, called at its office, and in a conversation with its agents concerning the bill for materials furnished to Miller, and wherein the filing of a lien being mentioned, he asked them not to file any lien on the property, that the building was not yet completed, and that Miller

would pay the bill. With reference to this conversation, one of plaintiff's witnesses, who at the time represented it, testified as follows:

"Q. And you didn't file your lien because you expected I. S. Miller to take care of the amount coming to you? A. Yes, sir. Q. That is the reason you did not file your lien? A. Yes, sir. Q. Didn't Mr. Kennedy tell you that I. S. Miller had the money to settle these claims and would settle them, and for you not to file any lien? A. Yes, sir. Q. And on that account you didn't file any lien? Now, isn't that the exact reason? A. Yes."

In addition to the general effect of plaintiff's evidence being weakened by this testimony, the defendant Kennedy denies that he ever said the building was not completed, but, on the contrary, stated to plaintiff that the building was completed, and that I. S. Miller had the money to pay their bill and told them to go and see him. Conceding that plaintiff's testimony, if believed by the court, might have constituted an estoppel against defendant, nevertheless there was a sharp conflict between the evidence on behalf of plaintiff and that given by defendant, as to which the determination of the court thereon must be deemed final. In the Hubbard Case, as here, the owner neglected not only to record the contract, but also to file for record the notice of actual completion of the work as required by the statute, and it was sought to prove that not only the owner, but the architect, repeatedly stated and represented to the materialman and lienor that the buildings were not completed, and that he had not accepted them and would not until certain other work was done, and that plaintiff, relying thereon, had delayed filing his notice of lien, to all of which the court sustained objections, and it was held to be error. The facts in the case at bar easily distinguish it from the Hubbard Case.

[3] Appellant next insists that, notwithstanding the expiration of more than 90 days, to wit, 151 days, following the completion of the building, it nevertheless was entitled to file its notice of lien by reason of the provisions of section 1187, Code of Civil Procedure, to the effect that the owner may, within 10 days after completion of any contract, or within 40 days after cessation from labor thereon, file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date when the same was completed, or on which cessation from labor occurred. The section further provides that "in case such notice be not so filed, then the said owner and all persons deraigning title from or claiming any interest through him, shall be estopped in any proceedings for the foreclosure of any lien provided in this chapter from maintaining any defense therein, based on the ground that said lien was not filed within the time provided in this chapter"—followed by this proviso: "That all claims of

lien must be filed within ninety days after the completion of any building, improvement, or structure." In support of its contention, appellant cites the case of *Robinson v. Mitchell*, 159 Cal. 531, 114 Pac. 994. But there the court, with reference to this latter clause, say:

"This would seem to fix a time limit within which all liens must be filed regardless of whether the owner has filed his notice of completion or not. * * * But this question it is not necessary here to resolve."

Clearly the purpose of the provision was to give to persons interested therein notice of the completion of the work, in order that they might in due time file their claims of lien. Filing the notice of completion is not mandatory, but failure to file it extends the time for filing claims of lien for a period of 90 days after the actual completion of the work. The Legislature deemed such period ample time for otherwise obtaining information as to the time of completion. The provision that "all claims of lien must be filed within ninety days after the completion of any building," could serve no purpose other than to terminate the time within which the claim of lien might be filed. Such is the plain import of the language used. As found by the court, the building was completed about October 15, 1909. In the absence of the filing of notice of its completion, plaintiff had until about the middle of January within which to file its lien, which, as stated, was not filed until March 15th thereafter. It appears from the record that plaintiff's agents passed the building daily, and from October 15th knew that it was occupied and had every appearance of being completed. In our opinion, the findings of the court attacked are fully sustained by the evidence.


Since the plaintiff was not entitled in any event to enforce its claim of lien, the alleged errors due to rulings upon the admission and rejection of testimony could in no event have been prejudicial to the rights of plaintiff.

The order appealed from is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(23 Cal. A. 789)

HILBORN v. BONNEY et ux. (Civ. 1777.)
(District Court of Appeal, Second District, California. Nov. 13, 1915.)

ELECTION OF REMEDIES  **14—FRAUD—MONEY JUDGMENT.**

Defendant fraudulently procured the conveyance of plaintiff's property to him in exchange for worthless stock. Plaintiff instituted an action at law to recover damages against defendant for fraud, in which she obtained a judgment. Meanwhile, defendant had sold plaintiff's land and invested the proceeds in land upon which defendant's wife filed a declaration of homestead. Plaintiff then instituted the present action to have the declaration canceled as a cloud on the property purchased with and representing the property fraudulently obtained from her which obstructed an execution under her money judgment. *Held*, that plaintiff, hav-

ing elected to pursue her remedy at law for damages for the fraud, was estopped from again proceeding on the same facts for equitable relief.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 16; Dec. Dig. ¶ 14.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Grace A. Hilborn against Frank R. Bonney and Ella Bonney, his wife, to annul a declaration of homestead by the wife. Judgment for plaintiff, and defendants appeal. Reversed.

E. J. Fleming and S. L. Carpenter, both of Los Angeles, for appellants. Frank L. Muhleman, Jones & Evans, and Earl T. Miller, all of Los Angeles, for respondent.

SHAW, J. It appears from the complaint filed August 20, 1912, that plaintiff had theretofore, on August 9, 1912, in an action instituted against defendant Frank R. Bonney to recover damages for alleged fraud, obtained a judgment against him in the sum of \$4,000, upon which she caused to be issued an execution and a levy thereof made upon certain real estate described as lot 22 of the Huston tract, in Los Angeles county, title to which real estate was at the time in the name of defendant Ella Bonney and upon which she, prior to the entry of the judgment against her husband, had filed a declaration of homestead. The complaint then alleges the fraudulent acts of Frank R. Bonney by means of which he induced plaintiff to convey to him certain real estate then owned by her in exchange for certain valueless corporate stock, which acts were made the basis of the action wherein judgment was rendered against him and in favor of plaintiff; that after thus obtaining such real estate from plaintiff he sold the same and invested the proceeds thereof in said lot 22 of the Huston tract, which, prior to the rendition of the judgment against him, he caused to be conveyed to his wife, Ella, who, as stated, filed a declaration of homestead thereon. The prayer of the complaint is to have this declaration canceled and annulled; the reason assigned therefor being that it constitutes a cloud upon the property, thereby obstructing plaintiff in enforcing collection of her judgment against Frank R. Bonney by sale of the property under execution so levied thereon. A general demurrer interposed to this complaint was overruled. Judgment went for plaintiff, from which defendants appeal.

The only question involved is the ruling of the court upon the sufficiency of the complaint. The theory of respondent (plaintiff here) is that since, as adjudged in the action wherein she had a judgment for damag-

es against him, the conveyance of her property was obtained by the fraudulent acts of Frank R. Bonney, neither it nor lot 22, bought with the proceeds of the sale thereof, could, as to her judgment, be the subject of a declaration of homestead by the wife; in other words, that by reason of the manner in which the property was obtained, it was impressed with a trust in favor of plaintiff. Conceding, upon the facts stated, plaintiff might have brought an equitable action to impress a trust upon the property or to have a lien declared thereon, and thus have obtained relief, she chose instead to sue at law for a money judgment. Having elected to pursue this course, we are unable to perceive that she has any greater or different rights with reference to the property than any other general judgment creditor of Bonney. The case presented is almost identical with that of Hanly v. Kelly, 62 Cal. 155, wherein it was said:

"Under such circumstances, plaintiff must be held to have elected his remedy at law, and to be estopped from pursuing in equity the fund into the homestead."

To the same effect is *Barker v. Barker*, 14 Wis. 142; *Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198; and *Harding v. Atlantic Trust Co.*, 26 Wash. 536, 67 Pac. 222. Section 1240, Civil Code, provides that "the homestead is exempt from execution or forced sale, except as in this title provided," and section 1241 designates the circumstances which must exist in order to render a homestead subject to execution or forced sale in satisfaction of judgments obtained. The sale sought of the property is under an execution issued upon a general judgment, and, as stated, plaintiff's rights with reference to the homestead in no wise differ from the rights of any other general judgment creditor. Under the doctrine of election, she chose to assert her rights in an action for damages against defendant Bonney, thus electing to enforce her claim generally against his property, and is now estopped from again, upon the same facts, asking for equitable relief. In *Fitzell v. Leaky*, supra, the Supreme Court says:

"It (the homestead) is not invalid because made during the progress of litigation, which subsequently results in an ordinary money judgment against the homesteader, or because made at any time before the entry and docketing of such a judgment. The law authorizes a debtor to erect a barrier around the home, over which the sheriff, although armed with final process under such a judgment, cannot pass. With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead."

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(28 Cal. A. 777)

TINGEY v. CALLAHAN CONST. CO.
(Civ. 1761.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. APPEAL AND ERROR ¶874—RESERVATION OF GROUNDS OF REVIEW—NECESSITY FOR APPEAL.

Where no appeal was taken from the judgment, orders overruling a demurrer to an amended complaint and denying a motion to strike out portions thereof, will not be considered on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530-3540; Dec. Dig. ¶874.]

2. APPEAL AND ERROR ¶548—RESERVATION OF GROUNDS OF REVIEW—OBJECTION TO EVIDENCE—SPECIFICATION.

Where various exceptions were taken to the introduction of testimony, which were again urged in the briefs on appeal, the general point being made that the evidence heard was insufficient to sustain the findings, the bill of exceptions containing no particular specification pointing out the weakness of the testimony as to any of the facts in issue, the question of the propriety of the evidence was not presented where there was sufficient evidence, unchallenged, to support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. ¶548.]

3. APPEAL AND ERROR ¶1050—PREJUDICIAL ERROR—ADMISSION OF EVIDENCE.

Errors in receiving testimony cannot be deemed to have been prejudicial to defendant when, disregarding the incompetent matter, enough remains in the record to sustain the cause of action as alleged in the complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶1050.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by C. H. Tingey against the Callahan Construction Company. Judgment for plaintiff, and from an order denying its motion for new trial defendant appeals, presenting the appeal upon a bill of exceptions. Order denying motion for new trial affirmed.

A. J. Morganstern, of San Diego, for appellant. Crouch & Harris, of San Diego, for respondent.

JAMES, J. Judgment was awarded plaintiff in this action. The defendant appealed from an order made denying its motion for a new trial and presents the appeal upon a bill of exceptions.

[1] The action was based upon a contract whereby plaintiff's assignor agreed with the defendant to do certain excavating and grading work for a specified sum per cubic yard. The cause of action was stated in brief form, it not appearing from the allegations thereof whether the contract sued upon was written or oral. The defendant by its answer, after denying that plaintiff's assignor had performed the work described in the complaint, alleged that the contractual relation between

the parties depended upon a writing which was set up as an exhibit attached to the answer. In the course of the trial plaintiff was allowed leave to amend his complaint by incorporating therein the written contract as alleged by the defendant, and alleging other facts showing that the oral agreement under which the work was commenced was incorporated in the writing which was signed at a later date, but before the alleged completion of the work; that at the time the preliminary negotiations were closed it was agreed that the contract should be reduced to writing; and that the delay occasioned in that regard was because of the failure of the defendant to prepare the writing. There was a demurrer to this amended complaint and a motion to strike out portions thereof. However, these points cannot be considered, as no appeal was taken from the judgment. Under our practice the taking of such an appeal is necessary before questions of the kind suggested would be presented for review. See *Stewart v. Stewart*, 156 Cal. 651, 105 Pac. 955, and cases therein cited.

[2, 3] At the trial various exceptions were taken to the introduction of testimony, which objections are again urged in the briefs of counsel on this appeal. The general point is made that the evidence heard was insufficient to sustain the findings of the court. In the bill of exceptions there is no particular specification, as is required, which points out the weakness of the testimony as to any of the facts in issue. The objection that a sufficient specification is lacking is not answered by saying that it is the claim of appellant that there is no evidence upon which to sustain the decision of the trial court, for there is evidence as to the making of the contract and the entering upon the work, which stands undisputed and unchallenged. We may say that there is some evidence shown in the record to sustain all of the findings of the trial judge. The defendant offered no testimony whatsoever in opposition to the case presented by the plaintiff. An examination of the evidence, as the bill of exceptions presents it, shows, we think, sufficiently that the claim of the plaintiff was just and that he was entitled to enforce his demand. Any errors committed by the court in receiving testimony cannot be deemed to have been prejudicial to defendant's right to a fair trial, when, disregarding the incompetent matter, enough remains in the record, as we conclude there does, to sustain the cause of action as alleged in the amended complaint. In other words, it is not shown in this case that there has been a miscarriage of justice within the meaning of the constitutional amendment.

The order denying the motion for a new trial is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(28 Cal. A. 774)

PEOPLE v. RIVERA. (Cr. 390.)

(District Court of Appeal, Second District, California. Nov. 12, 1915.)

1. LARCENY \Leftrightarrow 55—EVIDENCE—SUFFICIENCY.
In a prosecution for cattle theft, evidence held insufficient to warrant conviction.[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169; Dec. Dig. \Leftrightarrow 55.]2. CRIMINAL LAW \Leftrightarrow 1036—APPEAL—OBJECTIONS BELOW—NECESSITY.

Error cannot be predicated on the admission of evidence not objected to below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. \Leftrightarrow 1036.]3. CRIMINAL LAW \Leftrightarrow 829—EVIDENCE—INSTRUCTION.

The refusal of requests covered by the charges given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. \Leftrightarrow 829.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Joe Rivera was convicted of grand larceny, and, from the judgment of conviction and an order denying new trial, he appeals. Affirmed.

H. A. Pierce, of Los Angeles, for appellant.
U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

JAMES, J. Defendant, together with Bert Rivera and John Cassou, was charged with having committed the crime of grand larceny by stealing a heifer belonging to Elias Munz. The theft of the animal was claimed to have been committed in the cattle-raising district of Los Angeles county, near Elizabeth Lake. Appellant was convicted of the charge and sentenced to serve a term of imprisonment in the state prison. He appealed from an order denying a motion for a new trial and from the judgment.

[1] As a principal contention involved in a consideration of the appeal is that the evidence was insufficient to warrant the jury in finding a verdict of guilty, it will be proper to review briefly the testimony introduced by the prosecution as the typewritten record shows it: At the time of the alleged theft appellant resided at a ranch which appears to have been owned or controlled by his brother and codefendant. Several miles away was the ranch of complainant Munz. Shortly before the 20th of April, 1914, Munz drove two cows, or rather a black cow and the heifer which was alleged to have been stolen, onto a nearby range, where they were left in charge of one Babcock. They were then upon an open range, and at about the 20th of April they had come down near to Babcock's house, and he drove them back into the hills where there was a small canyon and a spring of water. This point where he left them was approximately between $6\frac{1}{2}$ and 8 miles from the Rivera ranch. Im-

mediately after the 20th of April Babcock missed the two animals hereinbefore referred to which belonged to Munz. Munz, being informed of their absence, began a search in an endeavor to locate the animals. He went down upon the Rivera ranch and was proceeding, with the aid of a neighbor, to search in a thicket of willows that grew there. While so engaged, Joe Rivera, the appellant here, came hastily down to where the men were, appearing in an excited state. He cursed Munz and told him to "get off the place" and not to search there without a search warrant. Munz deemed it best to follow the advice of Rivera and proceeded at once to Lancaster, which was 20 miles away, where he procured a search warrant and came back and resumed the search. It was observed that a pathway which led into the thicket of willows had been covered with leaves (apparently for the purpose of giving it the appearance of not having been disturbed). Following this pathway into the thicket, Munz and his companion found evidences that something had been buried there, and they soon unearthed what appeared to them to be the entrails of two cows, the remains of an unborn calf, together with a cow's head. This cow's head bore a resemblance to the head of the larger cow which had been taken from Babcock's range. Shortly thereafter another neighbor, who was about to embark with his boat on the body of water known as Elizabeth Lake, noticed a gunny sack close to the shore and he took possession of it. In this sack was a hide, evidently that of a cow. Later another hide was found in a similar sack at the bottom of the lake near the shore. These hides were exhibited to Munz, who identified them, not only on account of the color of the hair which appeared clinging thereto, but because also of the fact that a brand appeared on the hides which he identified as being his own and one which his family used in marking their cattle. Munz testified that the brand on the younger animal had only been placed there about two months prior to the time of its disappearance. Witness Chandler was the keeper of a hotel at the town of Elizabeth Lake, which was about $2\frac{1}{2}$ miles northeast from the ranch of appellant. Chandler testified that on the night of the 20th of April, 1914, John Cassou came into his place, asking if there were any cows in the yard. It was about 8 or 8:30 o'clock in the evening and very dark and cloudy; a rain was threatening. Chandler testified that he took two lanterns and went out into the yard, and that he there saw a young cow or heifer of a fawn color, and also a big dark-colored cow. (The heifer which Munz claimed to have been stolen from him by appellant was a light-colored Jersey heifer.) Witness Lindstrum was a next-door neighbor of Chandler's and as Chandler went out that night into his

yard he first called to Lindstrum. Lindstrum heard the call, but did not go farther than his front gate. Cassou drove the animals out of Chandler's yard and left the place. Lindstrum testified that, when he came to his front gate in answer to Chandler's call, Joe Rivera, the appellant, was there seated upon a horse; that they exchanged greetings; that Rivera continued on his way; and that there was the noise of something proceeding ahead of him. Witness Andrade, who lived about one mile from the Riveras, on the same night and at a time not far from that mentioned by Chandler in his testimony, hearing the barking of a dog, went out into his front yard and there saw this appellant and Cassou driving two cows. The animals had stopped at a watering trough that stood by the roadside. At a later date a man named Burns shipped a carcass of beef to Lapham, a butcher at Lancaster. The witness Andrade testified that some time after the alleged theft of the heifer he was present when Harry Burns reported to appellant that "they" had found the hides in the lake, and that Rivera had replied to him, "They won't know who put them there, anyhow." In the face of this testimony, the claim that there was a lack of sufficient evidence to warrant the jury in convicting impresses us with but little force. We think that, upon the state of facts as the testimony for the prosecution presented them, there was ample evidence to show the commission of the crime alleged and the participation of this appellant in it. It is said by counsel in the briefs that it is altogether improbable that Joe Rivera and John Cassou could have driven the cattle from the place where Babcock left them, a distance of seven or eight miles, within the period of time from sunset or thereabouts until they were seen at Chandler's and Andrade's places. The witnesses in this case, as is usual in courtroom experience, did not attempt to state the time exactly, and, even though they had, the question as to the probability of the cattle having been driven the distance mentioned was one peculiarly for the jury to pass upon. No such state of improbability is presented by the evidence as to warrant this court in interfering with the verdict on that ground.

[2] We find it urged also in the brief of appellant that the court improperly allowed testimony of the selling of the carcass of an animal or animals by Burns to Lapham. We find that objection was made to but little of this testimony, and that the main facts of the occurrence adverted to were given without any protest being heard from the appellant.

[3] Some complaint is made on account of the refusal of the court to give certain instructions offered by the appellant. Those instructions, in so far as they may be said

to have correctly stated the law, were pointed to the purpose only of emphasizing and laying stress upon matters which were, by other instructions given by the court, very fully stated to the jury.

We have given no attention to claims for error which are not supported by argument in the briefs. It seems clear enough that on the merits the case against appellant was fairly presented, and that no error was committed which may be said to have produced a miscarriage of justice.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(28 Cal. A. 786)

POLLOK v. EVENING HERALD PUB. CO.
(Civ. 1774.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. LIBEL AND SLANDER \S 86—WORDS NOT ACTIONABLE PER SE—INUENDO.

Where defendant published an article saying that plaintiff's theater manager was guilty of immoral conduct, the charge specifically mentioning the name of the theater, but not specifically referring to the plaintiff, nor susceptible of a meaning injurious to him; the words were not actionable, since the innuendo could not supply to them a meaning which they of themselves did not contain.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. \S 205-208; Dec. Dig. \S 86.]

2. LIBEL AND SLANDER \S 32 — GENERAL DAMAGE—WORDS NOT LIBELOUS PER SE.

Where the words used were not libelous per se, merely alleging that the manager of the plaintiff's theater was guilty of immoral conduct, no general damage could be shown, since the injury suffered, if at all, was due to the extrinsic circumstances set forth by way of innuendo.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. \S 112; Dec. Dig. \S 32.]

3. LIBEL AND SLANDER \S 89 — WORDS ACTIONABLE—WORDS NOT LIBELOUS PER SE.

Where an alleged libelous article merely alleged that the manager of plaintiff's theater was guilty of immoral conduct, but made no specific reference to the plaintiff, and the complaint failed to charge any special damage, such as loss of patronage at the theater, no recovery could be had, since special damage must be shown to warrant recovery for words not actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. \S 213, 214; Dec. Dig. \S 89.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Fred A. Pollok against the Evening Herald Publishing Company, a corporation. From a judgment for defendant upon an order sustaining his demurrer to the third amended complaint, plaintiff appeals. Affirmed.

Jesse A. Gyger and Wesley H. Beach, both of Los Angeles, for appellant. Denis & Loewenthal, of Los Angeles, for respondent.

SHAW, J. Action for libel. Plaintiff prosecutes this appeal from a judgment rendered in favor of defendant upon an order of court sustaining the latter's demurrer, both general and special, interposed to the third amended complaint.

It appears from the complaint that on October 21, 1912, plaintiff became the lessee and manager of a place of amusement in the city of Los Angeles, known as the Princess Theater; that at that time defendant was a corporation engaged in the publication of a newspaper of general circulation, known as the Los Angeles Evening Herald; that on November 14, 1912, defendant published in the regular issue of said newspaper an article as follows:

"Theater Manager Accused in Court. Girl Says George E. Ryan Forced Her to Accept His Attentions.

"May Thomas, whose stage name is Ladene Earl, who several days ago swore to an affidavit charging Guy Eddie, city prosecuting attorney, with forcing his attentions upon her, appeared in Judge Wilbur's court this morning as prosecuting witness against George E. Ryan, manager of the Princess Theater.

"According to the testimony of Miss Thomas, Ryan contributed to her delinquency. She stated that she was employed by Ryan as a chorus girl at the Princess and that two days after she went to work he told her that she would be discharged unless she accepted his attentions. She also stated that he promised her a raise in salary provided she would look with favor upon his advances.

"According to Deputy District Attorney H. S. G. McCartney, Ryan has made a business of forcing his attentions upon girls working in the chorus. He avers that when Ryan's trial is called he will produce at least six girls who have complained to him of Ryan's treatment."

By way of innuendo, it is then alleged that by the publication of said article defendant intended to and did charge, and by the readers of said paper was understood as charging, that Ryan was the manager of said theater at the time of the publication of the article, to wit, November 14, 1912, and that Ryan was and had been for some time, as such manager, in the employ of plaintiff, who had allowed him as his agent to employ chorus girls in said theater, and that plaintiff had allowed said Ryan to act in an indecent, outrageous, and criminal manner in the course of the performance of his duties as plaintiff's manager, and that plaintiff was a person of low character, and allowed his business to be operated in a low and criminal manner. It is further alleged that plaintiff had never employed Ryan in any capacity, and that at no time subsequent to said October 21, 1912, when plaintiff acquired the Princess Theater, had Ryan been manager thereof; that said publication, as understood by the general public and by defendant intended to be understood, exposed plaintiff to hatred, contempt, and ridicule by imputing to him a low and base character similar to that of an owner of a brothel; "that by reason of the publication aforesaid plaintiff was thereby injured in his theatrical business to his damage in the sum of \$15,000."

[1] It must be conceded that as to plaintiff, to whom the article made no reference, the language thereof is not actionable per se. Recognizing this fact, plaintiff seeks, by way of innuendo, to show that by the article defendant intended, and was understood to intend and mean, to charge him in effect with being an accomplice of Ryan in the commission of the misdeeds imputed to the latter. From no angle, in our opinion, is the language used susceptible of such meaning or application. As said by Lord Kenyon in a very early case:

"The injury is much too remote to be the foundation of an action." *Ashley v. Harrison*, 1 Esp. 48.

"If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action." *Grand v. Dreyfus*, 122 Cal. 58, 54 Pac. 389.

While it may serve to point a meaning to precedent matter, it can never be resorted to for the purpose of establishing a new charge. At most, the article erroneously describes Ryan's calling as manager of the Princess Theater. Quoting from *Odgers on Libel and Slander* (5th Ed.) p. 134, it is said:

"Where the words can bear but one meaning, and that is obviously not defamatory, then no innuendo or other allegation on the pleadings can make the words defamatory. * * * No parol evidence is admissible to explain the meaning of ordinary English words, in the absence of any evidence to show that in the case before the court the words do not bear their usual signification."

[2] Moreover, while it is alleged that the article was published for the purpose of and did damage plaintiff and injure him in his business and calling, the article itself makes it apparent that no general damage could have been sustained. This for the reason that, as stated, the language used was not libelous per se, the alleged injury suffered being due solely to the extrinsic circumstances set forth by way of innuendo.

[3] It appears to be the rule that "in order to maintain an action upon words which are not libelous * * * per se, the plaintiff must have suffered some special damage, and the recovery is limited to compensation therefor." 18 Am. & Eng. Ency. of Law, p. 1085; *Harris v. Burley*, 8 N. H. 216; *Hirshfield v. Bank*, 83 Tex. 452, 18 S. W. 743, 15 L. R. A. 639, 29 Am. St. Rep. 660. Such damage might be predicated upon the loss of patronage and attendance upon entertainments given by him at the Princess Theater. There is nothing in the complaint, however, showing any falling off in such attendance, nor any allegations upon which special damages could be predicated. Our conclusion is that, since the article was not libelous in itself, no recovery could be had thereon for the general damages prayed for; and, while plaintiff might have alleged facts upon which to base a claim for special damage, no such averments were made, and therefore the complaint states no cause of action for the re-

covery of such damage. *Newbold v. Bradstreet & Son Co.*, 57 Md. 38, 40 Am. Rep. 426; *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; *Wilson v. Fitch*, 41 Cal. 386; *Harris v. Burley*, supra; *Dun v. Maier*, 82 Fed. 169, 27 C. O. A. 100.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(28 Cal. A. 784)

NEWELL v. NEWELL. (Civ. 1537.)

(District Court of Appeal, Second District, California. Nov. 13, 1915.)

1. DIVORCE \Leftrightarrow 255—ALIMONY—DECREE.

Where the complaint of plaintiff wife suing for divorce alleged that she and defendant had contracted to settle their property rights, whereby defendant agreed to pay plaintiff, as alimony, the sum of \$75 per month during her life, or until she should remarry, praying that defendant be required to pay plaintiff such sum, a decree ordering that defendant pay such sum monthly, until the further order of the court, for the support of the plaintiff, was not open to attack on the ground that the relief granted was without the issues tendered and prayed for.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 722-724; Dec. Dig. \Leftrightarrow 255.]

2. DIVORCE \Leftrightarrow 240—ALIMONY—DECREE.

Where plaintiff wife, suing for divorce, alleged a contract settling the property rights of the parties, whereby the husband agreed to pay \$75 a month alimony, praying that he be required to pay her that sum monthly as alimony, the decree ordering that defendant pay \$75 per month until the further order of the court, the amount to be for the maintenance and support of plaintiff, even if defendant were bound both by the order and the agreement to pay the amount, so that upon default plaintiff might have concurrent remedies in enforcing payment, the decree was not improper as effectuating a double award.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678, 680; Dec. Dig. \Leftrightarrow 240.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action for divorce by Kate Elizabeth Newell against William D. Newell. Judgment for plaintiff, and defendant appeals. Affirmed.

Jones & Weller, of Los Angeles, for appellant. K. B. Campbell, of Los Angeles, for respondent.

SHAW, J. [1, 2] This was an action for divorce. In addition to the grounds therefor, plaintiff alleged that she and defendant had entered into a contract in writing whereby they had settled and adjusted all their property rights, making a division of all community property belonging to them, and whereby, among other things, defendant agreed to pay plaintiff as alimony the sum of \$75 per month during her life, or until she should remarry. The prayer of the complaint was:

"That the bonds of matrimony heretofore and now existing between herself and defendant be dissolved, and that defendant be required to pay to the plaintiff the sum of \$75 on the first day of each and every month during her life, or until she shall remarry."

To this complaint defendant made default, and upon the trial of the case the court found:

"That a divorce ought to be granted as prayed for in said complaint, and that the defendant pay \$75 per month for the support and maintenance of plaintiff as hereinafter directed."

The appeal is prosecuted from that part of the decree wherein:

It is "ordered and decreed that defendant William D. Newell pay to plaintiff on the first day of each and every month, beginning on the 15th day of November, 1912, the sum of \$75 per month, until the further order of this court; the said sum of \$75 to be for the maintenance and support of plaintiff, Kate Elizabeth Newell."

As we gather from appellant's argument, his contention is that the court went outside of the complaint and beyond the allegations thereof in ordering that defendant pay alimony to plaintiff; that, since the complaint alleged an agreement for a division of the community property and under which defendant had agreed to pay plaintiff the sum of \$75 per month as alimony, the effect of the decree is to require defendant to pay the \$75 per month alimony as ordered by the court, leaving him bound under his contract with plaintiff to pay her an additional \$75 month, making in all \$150 per month. The prayer of the complaint was that defendant be required to pay plaintiff the sum of \$75 per month alimony, and the decree and order are in strict accordance with the prayer of the complaint. Defendant therefore had due notice of the specific relief demanded by plaintiff, and hence, since the complaint alleged his agreement to pay the same, cannot say the relief granted was without the issues tendered and prayed for. Nor do we see any merit in the contention of appellant to the effect that he is bound by his contract to pay \$75 per month as alimony, and also bound by the decree to pay an additional \$75 as alimony. Conceding that he may be bound by both the order and agreement to pay said sum, and upon default plaintiff might have concurrent remedies in enforcing payment, nevertheless the payment of \$75 per month would not only satisfy his obligation existing by virtue of the agreement made with plaintiff, but at the same time satisfy the obligation imposed upon him by the order and decree made in accordance with the terms of the agreement and pursuant to the prayer of the complaint.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(28 Cal. A. 793)

PEOPLE v. CANFIELD. (Cr. 415.)

(District Court of Appeal, Second District, California. Nov. 15, 1915.)

1. FALSE PRETENSES § 31 — INDICTMENT — SUFFICIENCY—STATUTE.

Under Pen. Code, § 952, requiring a statement of the particular circumstances of the offense when they are necessary to constitute an offense, where an indictment for obtaining money by false pretenses described no natural or causal connection between the false representations alleged and the delivery of the property to defendant, such indictment was demurrable, since an indictment for the offense must show that the property was obtained by means of the false pretenses alleged, so that, when no natural connection appears between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 38-41; Dec. Dig. § 31.]

2. FALSE PRETENSES § 31 — INDICTMENT — SUFFICIENCY.

There may be averments in an indictment for obtaining money by false pretenses from which the connection between the pretense and the obtaining of the property can be inferred, so that the indictment is sufficient without direct averment of the connection.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 38-41; Dec. Dig. § 31.]

3. INDICTMENT AND INFORMATION § 60 — NECESSARY CONTENT.

An indictment or information must set forth all the facts and circumstances necessary to constitute the crime sought to be charged, as such matters cannot rest in presumption.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. § 60.]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Leonard C. Canfield was indicted for obtaining money by false pretenses, and from a judgment sustaining his demurrer, the people appeal. Affirmed.

U. S. Webb, Atty. Gen., Robert M. Clarke, Deputy Atty. Gen., and Tracy C. Becker, Deputy Dist. Atty., of Los Angeles, for the People. Paul W. Schenck, of Los Angeles, for respondent.

SHAW, J. Defendant was indicted for obtaining money by false pretenses. His demurrer, interposed upon both general and special grounds, was sustained, and from the judgment following such ruling, the people appeal.

The indictment is quite lengthy; the substance thereof being that defendant, with intent to defraud Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and Title Insurance & Trust Company, a corporation, out of their, and each of their, money, represented that he was Helmer E. Rabild, the owner and legal holder of a certain promissory note of the face value of \$10,000, made by one Justin E. Cook to him, said Helmer E. Rabild, payment of which was secured by a mortgage duly executed by said Cook upon certain real estate in Los Angeles county,

which real estate it was represented had been conveyed to one Earl M. McLaughlin, and that \$7,000 had been paid upon the principal of said note, and \$350 paid on account of interest accrued thereon, all of which representations so made to said persons, it is alleged, were at the time made, false, and known by defendant to be false and untrue; "that by reason of the aforesaid false and fraudulent representations and pretenses, so made as aforesaid by the said Leonard C. Canfield to the said Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and the Title Insurance & Trust Company, a body corporate, the said Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and the Title Insurance & Trust Company, a body corporate, relying upon the said false representations and pretenses, and believing same, were thereby induced to, and on the 3d day of September, 1914, did, at and in the county of Los Angeles aforesaid, pay over and deliver to the said defendant, Leonard C. Canfield, \$2,739.20 lawful money of the United States of the moneys and personal property of them, the said Caroline Schertz, Flora B. Schertz, Ernest H. Lockwood, and the Title Insurance & Trust Company, a body corporate, and they were and each of them was thereby then and there defrauded out of said sum of \$2,739.20 of the personal property" of said persons.

[1] In addition to the general demurrer, it was also alleged that the indictment did not conform to the requirements of sections 950, 951, and 952 of the Penal Code, and that it was not direct and certain, in that it could not "be determined what, if any, causal connection there is or was between the alleged false representation, and the parting with money by any one, if any was parted with." It appears the trial court deemed the indictment obnoxious to the ground last stated. In thus sustaining the demurrer the court followed the case of *People v. Kahler*, 26 Cal. App. 449, 147 Pac. 228, wherein this court, in discussing a like objection urged against an information, said:

"It is merely alleged that defendant, knowing the same to be untrue, falsely represented to Richard J. Cogan that he had contracts for furnishing orchestras to certain cafes and theaters; that Cogan, believing the representations to be true, and relying thereon, paid and delivered to defendant the sum of \$75. For what purpose is not disclosed. Conceding the representation made by defendant to have been false, there is no causal connection between the payment of the money and the representation. * * * We are unable to perceive any connection between the alleged false representation and the paying or giving to defendant the \$75, nor how, in the absence of further allegations, such representations should have been induced, or were calculated to induce, Cogan to pay defendant \$75 in money."

We deem the language there used likewise applicable here. For aught that appears to the contrary, defendant retained and still holds the note. Then for what purpose was

the money paid over and delivered to him? It is left entirely to conjecture. In the absence of any allegation to that effect, we cannot assume the prosecuting witnesses were, by reason of the false representations, induced to pay their money to defendant in consideration of a transfer by him to them of this promissory note and mortgage. Conceding the representations were, as believed, all true, why should they induce these persons to give their money to Rabild? That they delivered the money to him relying upon the representation that he was Rabild is as inconceivable as that they should have paid it to him because of a false representation that he was Dr. Cook and had been to the north pole.

"The indictment must show that the property was obtained by means of the false pretense alleged. Accordingly, when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged." 19 Cyc. 429; *People v. White*, 7 Cal. App. 99, 93 Pac. 683.

In the absence of an allegation showing that the prosecutors were induced to purchase the note and mortgage or lend money thereon, there appears to be no natural connection between the false representations and the delivery of the property to defendant.

[2] While such facts should be directly pleaded, nevertheless there may be averments from which the connection between the pretense and the obtaining of the property can be inferred, as in the case of *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681; where the defendant was charged with false pretenses in obtaining from one Spence certain hogs by falsely pretending to Spence that he, the defendant, had in bank a certain sum of money for which he delivered to Spence his check. So, in the case of *People v. Haas*, 151 Pac. 672, recently decided by this court, and wherein the court, through Mr. Justice James, distinguished the facts therein from those in the *Kahler Case*, an examination of the information upon which Haas was prosecuted exhibits facts from which the court was fairly justified in inferring that the money of the prosecuting witness was, by reason of the false pretenses, paid over to defendant, in consideration of a transfer to her of certain property alleged to be owned by Haas. In the case of *People v. Hines*, 5 Cal. App. 122, 89 Pac. 858, cited by appellant, the information, by indirect allegations, disclosed the money of the prosecuting witness was paid over to defendant in consideration of a conveyance of property which he represented he owned.

[3] It is a well-settled rule that an indictment or information must set forth all the facts and circumstances necessary to constitute the crime sought to be charged. In the absence of such allegations, or statements from which such facts may be fairly deduced,

the court cannot indulge in the presumption that acts were committed which constitute a crime. The prosecuting witnesses herein may by reason of such representations have been induced to pay the money over to defendant as a contribution to some charitable object, in which case we do not mean to say it would not constitute the offense charged. Section 952, Penal Code, requires a statement of the particular circumstances of the offense when they are necessary to constitute a complete offense. Measured by this provision, the indictment is insufficient, since it fails to disclose any natural or causal connection between the false representations alleged and the delivery of the property to defendant.

The judgment and order from which the appeal is prosecuted are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(28 Cal. A. 766)

PEOPLE v. TURNER. (Cr. 592.)

(District Court of Appeal, First District, California. Nov. 12, 1915.)

1. CRIMINAL LAW \S 1186—APPEAL AND ERROR—HARMLESS ERROR—STATUTE.

Under Const. art. 6, \S 4½, providing that no judgment shall be set aside in any criminal case unless the court shall be of opinion that the error complained of resulted in a miscarriage of justice, in a prosecution for libel, where, at the conclusion of the preliminary hearing, the magistrate merely announced and caused to be entered in his docket, without signing it, an order that the defendant should be held to answer in the superior court to a charge of libel, fixing his bail, in contravention of Pen. Code, \S 872, providing that, if it appears on examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty, the magistrate must make or indorse on the complaint an order signed by him to that effect, it not appearing that defendant was injured by the failure of the magistrate to make the required indorsement upon the complaint before the information was filed, judgment of conviction after fair trial will not be set aside for the omission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3215-3219, 3221, 3230; Dec. Dig. \S 1186.]

2. LIBEL AND SLANDER \S 145 — CRIMINAL PROSECUTION—STATUTE—"LIBEL."

Under Pen. Code, \S 248, declaring that a libel is a malicious defamation, expressed by printing, tending to impeach the honesty, integrity, virtue, or reputation of one, and thereby expose him to public hatred, contempt, or ridicule, where a newspaper proprietor published an oath alleged to be required of all fourth degree members of a fraternal association, which oath was of such a character as to impeach the members' loyalty as citizens, though not directly impeaching their honesty and integrity, he was guilty of libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. \S 404; Dec. Dig. \S 145.

For other definitions, see Words and Phrases, First and Second Series, Libel.]

3. LIBEL AND SLANDER \S 145 — CRIMINAL PROSECUTION — LIBEL UPON MEMBERS OF FRATERNAL ORDER.

Where a newspaper proprietor published a libel in the form of an oath alleged to be

required of fourth degree members of a fraternal organization, although the publication was intended to apply only to persons who were candidates for public office at the time, it was libelous as to all members of the order of the degree named, since a libel may be upon a class of persons if the tendency of the publication is to stir up riot and disorder.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 404; Dec. Dig. ¶145.]

4. CRIMINAL LAW ¶824 — TRIAL — INSTRUCTIONS — REQUESTS.

In a prosecution for libel, where no instruction was requested or given on the subject of privileged communication, the omission to specifically instruct the jury as to defendant's contention that, since his publication related to an election, it was privileged under Pen. Code, § 256, was not ground for reversal, since, as the jury are judges of both the law and the facts in criminal libel cases, the defendant should have requested a specific instruction if he desired to have the jury more directly advised as to his contention in regard to privilege than it was by the evidence or argument of counsel.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ¶824.]

5. LIBEL AND SLANDER ¶148 — CRIMINAL PROSECUTION — PRIVILEGE — LIBEL OF CANDIDATE FOR OFFICE — STATUTE.

Pen. Code, § 256, providing that a communication made to a person interested in the communication by one who was also interested, or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication, did not render privileged a libelous publication in a newspaper impeaching the loyalty of citizens who were candidates for public office, since a candidate for office is as much entitled to protection from defamation as any other citizen, and a public journal or individual who indulges in defamatory assertions in respect to him is equally responsible for his acts with those committing the same offense against private individuals.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407-411; Dec. Dig. ¶148.]

6. CRIMINAL LAW ¶1166½ — APPEAL AND ERROR — HARMLESS ERROR — REMARK OF COURT.

In a prosecution for libel, where the court, in the presence of the jury, stated that the publication might fairly be interpreted to state that all persons admitted to the fourth degree of a fraternal order had taken the published oath, which was libelous, and then explained to the jury that the remarks were not directed to them, but solely to counsel incidentally to the denial of a motion to dismiss, repeatedly admonishing the jury thereafter that they were not in any way to be influenced in reaching their verdict by the court's observations, that they were the sole judges of the facts, and that the interpretation of the language of the publication was a matter for them, the error in the court's statement was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. ¶1166½.]

Appeal from Superior Court, Santa Cruz County; W. A. Beasley, Judge.

Henry S. Turner was convicted of libel, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Ralph H. Smith, of Santa Cruz, and Aaron L. Sapiro, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and Frank L. Guertena, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of libel, and was tried and convicted. This appeal is from the judgment of conviction, and from an order denying defendant's motion for a new trial.

Upon his arraignment the defendant moved the court to set aside the information upon the ground that he had not been legally committed for trial by a magistrate. The motion was denied. Such denial is the first of the grounds urged by the appellant for the reversal of the judgment.

[1] Section 872 of the Penal Code provides that, if it appears upon an examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty thereof, the magistrate must make or indorse on the complaint an order, signed by him, to that effect. Under the authorities, in so far as the section requires that the order shall be indorsed upon the complaint, it may be regarded as directory; and it is sufficient if the indorsement be reduced to writing and signed by the magistrate and entered upon his official docket, or upon the complaint or deposition. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *People v. Wilson*, 93 Cal. 377, 28 Pac. 1061. In this case the order of commitment was neither indorsed upon the complaint or deposition, nor was the entry of such order in the magistrate's docket, made by his stenographer, signed by the magistrate until after the motion to dismiss the information was filed. In other words, the record discloses that prior to the filing of the motion the magistrate did nothing more at the conclusion of the preliminary hearing than to announce and cause to be entered in his docket an order that the defendant should be held to answer in the superior court to a charge of libel, and fixing the bail.

While it is no doubt true that the terms of section 872 of the Penal Code should be complied with before the district attorney is warranted in filing an information against a person, still it does not appear that the defendant was deprived of any substantial right by reason of the omission of the magistrate. If the motion had been granted, another preliminary examination could have been held under the provisions of sections 997-999 of the Penal Code (*Ex parte Baker*, 83 Cal. 84, 25 Pac. 966; *People v. Breen*, 130 Cal. 72, 62 Pac. 408), wherein the omission now complained of could have been supplied. Under the provisions of section 4½, art. 6, of the Constitution, it not appearing that the defendant was injured by the failure of the magistrate to make the required indorsement

upon the complaint before the information was filed, we cannot now, after a fair trial, set aside the judgment of conviction because of such omission.

[2] Defendant demurred to the information on the ground that it did not state facts sufficient to constitute a public offense. The demurrer was overruled, and he now challenges the correctness of such ruling.

The question presented is whether or not the publication complained of comes within the definition of the offense found in section 248 of the Penal Code. That section, in so far as it is pertinent to the offense here involved, declares:

"A libel is a malicious defamation, expressed * * * by * * * printing * * * tending * * * to impeach the honesty, integrity, virtue, or reputation * * * of one * * * and thereby expose him to public hatred, contempt or ridicule."

The information charges that the defendant, the proprietor and publisher of a certain newspaper called the "World-Issue," committed the crime of libel, in that on the 22d day of August, 1914, he unlawfully and wrongfully caused to be printed and published in said paper in Santa Cruz county, of and concerning the prosecuting witnesses, who lived in that county, and who were members of the fourth degree of that certain fraternal organization known and called the Knights of Columbus, the following article:

"Can you vote for a man for public office who subscribes to the following?

"Knights of Columbus Oath.

"(Extracts—4th Degree.)

"I do now denounce and disown any allegiance as due to any heretical king, prince or state, named Protestant or Liberals, or obedience to any of their laws, magistrates or officers.

"I do further promise and declare that I will have no opinion or will of my own or any mental reservation whatsoever, even as a corpse or cadaver (*perinde ac cadaver*), but will unhesitatingly obey each and every command that I may receive from my superiors in the militia of the Pope and of Jesus Christ.

"That I will in voting always vote for a Knight of Columbus in preference to a Protestant—especially a Mason—and that I will leave my party to do so; that if two Catholics are on the ticket I will satisfy myself which is the better supporter of Mother Church and vote accordingly.

"That I will not deal with or employ a Protestant if in my power to deal with or employ a Catholic. That I will place Catholic girls in Protestant families of the heretics.

"That I will provide myself with arms and ammunition that I may be in readiness when the word is passed, or I am commanded to defend the church as an individual or with the militia of the Pope."

"To the quiet, law-abiding, liberty-loving American citizen it is almost unbelievable that any fellow citizen or body of them can seriously undertake or hope to overthrow our present form of government and replace it with an absolute monarchy. It is still more unbelievable that such a proposed monarchy should be dominated by a foreigner, and that such a change be brought about under the guise of religion. Yet if such a citizen will but open his eyes to the condition existing under his very eyes, and open his ears to the open, avowed purpose of

the Roman Catholic Church, he will no longer rest easily in his present peaceful slumber."

It would seem that a mere statement of the published oath, coupled with an averment that it was false and malicious, would be sufficient to bring the publication within the terms of section 248 of the Penal Code. It would be a severe reflection upon the condition of the law of libel if it permitted to go uncondemned the publication of articles such as this, if false. It is clear that the published oath, if believed by the community to be taken by the members of the fourth degree of the Knights of Columbus, would have a tendency to expose those persons to hatred, contempt, or ridicule. While the publication may not, as claimed by the defendant, directly impeach their honesty and integrity, it does in a most direct and vital way assail their loyalty as citizens by charging them with the taking of an obligation which is in itself a violation of their oath of allegiance and of the essential duties and bonds of American citizenship, and thus in a general sense impeaches their reputations, and exposes them to those attitudes of public feeling described in the section of the Penal Code.

[3] At the time of the publication of the article in question it appears from the record that there was a political campaign in progress in Santa Cruz county, where the article was published; and perhaps it is fair to infer from the record that some of the candidates for election were members of the fourth degree of Knights of Columbus, but none of the prosecuting witnesses were such candidates. With the record in that condition defendant contends: First that the publication was not of and concerning the prosecuting witnesses; and, secondly, that the alleged libelous matter applies to a class or generally to all of the members of the fourth degree in the fraternal order mentioned, and therefore has no individual application, and that for these reasons the judgment of conviction cannot stand.

While the published matter may have been intended to apply only to persons who were candidates for office at that election, nevertheless, in terms and in effect, it refers to each and every member of the order of the degree named. It is undisputed that the publication was false, that the prosecuting witnesses were members of the society of the degree in question, and the inevitable conclusion to be drawn from the article is that every member of the order of the fourth degree had taken and subscribed to the published oath. The article asperses the character of such members, and ascribes to them base and dishonest motives, and as to them its publication constituted criminal libel, whether at that time a candidate for public office or not. The points presented by defendant might be urged with some force in a civil action in mitigation of damages, but we do

not believe they are good in a criminal prosecution for libel, for, as is said in the case of *State v. Brady*, 24 Pac. 948, 949:

"The law is elementary that the libel need not be on a particular person, but may be upon a family or a class of persons if the tendency of the publication is to stir up riot and disorder and incite to a breach of the peace. It is obvious that a libelous attack upon a body of men, though no individual may be pointed out, may tend as much or more to create a public disturbance as an attack on one individual, and a doubt has been suggested whether the 'fact of numbers does not add to the enormity of the act.'"

This statement is a correct exposition of the law and of the causes of its existence. *People v. Crespi*, 115 Cal. 50, 46 Pac. 863.

[4, 5] The defendant next contends that the court erred in denying his motion for a new trial. He argues that the record supports the theory that the publication was made for the purpose of enabling the voters at the approaching election to cast their ballots more intelligently, and that therefore, under the terms of section 256 of the Penal Code, the publication must be deemed a privileged communication. That section provides:

"A communication made to a person interested in the communication, by one who was also interested or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is not presumed to be malicious, and is a privileged communication."

Assuming for the moment that this publication comes within the privilege of that section, still we are satisfied that this case should not be reversed upon the ground stated. No instruction was requested or given upon the subject of privileged communications of the sort defined by that section, but the record shows that the defendant was relying upon this form of privilege in presenting his defense, and, since the jury are the judges of both the law and the facts in criminal libel cases, the defendant should have requested the specific instruction if he desired to have the jury more directly advised as to his contention than it was by the evidence or argument of counsel. We are further satisfied, however, that section 256 of the Penal Code has no application to cases of this character. Whatever the rule may be in other jurisdictions, it has been expressly decided in this state that a candidate for office is as much entitled to protection from defamation as any other citizen, and that a public journal or an individual who indulges in defamatory assertions about candidates for office is equally responsible for his acts with those who commit the same offense against private individuals, and that such libelous matter published against a candidate for a public office is not a privileged communication. *Jarman v. Rea*, 137 Cal. 341, 350, 70 Pac. 216; *Edwards v. San Jose Pr. & Pub. Co.*, 99 Cal. 431, 34 Pac. 123, 37 Am. St. Rep. 70; *Aldrich v. Press Pr. Co.*, 9 Minn. 133 (Gil. 123), 86 Am. Dec. 84; *Sweeney v. Baker*, 13 W. Va. 158, 31

Am. Rep. 757; *King v. Root*, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 818 and cases noted. In the present case it is not disputed that the publication was false. It was therefore not privileged.

[6] During the trial of the case, in denying a motion made by the defendant to dismiss, the court gave his reasons therefor in the presence of the jury, and, among other things, said that, examining the publication by its four corners as one would a contract, it might fairly be interpreted to state that all persons who were admitted to the fourth degree of the Knights of Columbus had taken the published oath; "In fact, the court thinks the paper is fairly interpreted to mean just that." This remark, defendant insists, constituted error on the part of the learned trial judge, for which the case must be reversed. At the time, upon attention being called to the apparent inadvertence, the court explained to the jury that the remarks were not directed to them, that they were addressed solely to the counsel in the case, and made incidental to the denial of the motion before the court. Subsequently in the instructions the jury were repeatedly admonished that they were not to be in any way influenced in reaching their verdict by the observations of the court, that they were the sole judges of the facts in the case, and that the interpretation of the language of the publication was a matter to be wholly determined by them. It will, of course, be presumed in this behalf that the jury followed the plain admonition of the court, and hence that in the matter suggested the defendant suffered no injury.

Other points made by the appellant relate to the admission or rejection of evidence, and to instructions given to the jury. We have examined them, but without finding therein anything upon which to ground appellant's argument for a reversal of the judgment.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(28 Cal. A. 796)

CARTER v. HOLT et al. (Civ. 1766.)

(District Court of Appeal, Second District, California. Nov. 16, 1915. Rehearing Denied by Supreme Court Jan. 13, 1916.)

1. TRUSTS §95—CONSTRUCTIVE TRUST—CONTRACT AS SUBJECT-MATTER.

Where, by fraud, defendant obtained money from plaintiff and therewith paid part of the purchase price of an automobile on a contract of sale to him on the installment plan, plaintiff could impress a constructive trust, arising from defendant's fraud, upon such contract, since in proper case there is no reason why a contract or lease, as well as any other property, may not be subject to a constructive trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 145-147; Dec. Dig. §95.]

2. TRUSTS §371 — GENERAL DEMURRER — CONSTRUCTIVE TRUST.

In an action to impress a constructive trust upon a contract of sale of an automobile on the installment plan, the allegation of the complaint that an assignment was made to a defendant by the defendant who fraudulently obtained money from plaintiff without consideration "after knowledge by (the assignee) that said automobile had been purchased with plaintiff's money and funds," was sufficient, in the absence of special demurrer, as alleging that prior to the assignee's acquisition of the automobile and contract of purchase he had knowledge of plaintiff's rights.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588-599; Dec. Dig. §371.]

3. TRUSTS §356—CONSTRUCTIVE TRUST—NOTICE TO ASSIGNEE OF RES—EFFECT.

Where the assignee of a contract of sale of an automobile on the installment plan took the same with knowledge that it had been paid for with funds fraudulently procured from plaintiff, his position as to money loaned or paid on the contract to the assignor thereof was that of a second lienor, subordinate to the rights of the defrauded party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 529-538; Dec. Dig. §356.]

4. ATTORNEY AND CLIENT §88 — RIGHT OF ATTORNEY TO CONDUCT OWN CASE.

Where an attorney who was sued appeared in court by an attorney of record who conducted the case to a point where defendant proposed to cross-examine plaintiff's witness, it appearing that he would be a witness in his own behalf, the court properly denied him the right to cross-examine.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 161-163; Dec. Dig. §88.]

5. APPEAL AND ERROR §1170 — REVIEW — HARMLESS ERROR.

Under Const. art. 6, § 4½, providing that no judgment shall be set aside or new trial granted for any error in procedure, unless, after the court shall be of opinion that the error complained of resulted in a miscarriage of justice, where an attorney, defendant in an action, was represented by an attorney of record who conducted the case until defendant desired to cross-examine a witness, which leave was refused him because it appeared that he would testify in his own behalf, the action of the court, if erroneous, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. §1170.]

6. TRUSTS §373 — CONSTRUCTIVE TRUSTS — SUIT TO ENFORCE—EFFECT OF FINDING.

In an action to impress a constructive trust upon a contract of sale of an automobile on the installment plan, the court's finding that when the assignee of the contract presented the assignment to the seller, it recognized and approved the same in writing, whereupon the assignee paid the installment due, and that thereafter the seller with knowledge that the money paid it by the purchaser was plaintiff's money, attempted to rescind the contract, was sufficient to negate the allegation of the answer that the assignee purchased the automobile from the company by an independent contract after it had repudiated the assigned contract.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 604-606; Dec. Dig. §373.]

7. TRUSTS §372 — CONSTRUCTIVE TRUST — SUBTERFUGE IN SALE—SUFFICIENCY OF EVIDENCE.

In an action to impress a constructive trust on a contract of sale of an automobile on the installment plan, evidence held sufficient to show

that a new deal between the seller, the original contractor for the car, who had paid part of the price with money fraudulently obtained from plaintiff, and his assignee, purporting to cancel the assigned contract and to make a new contract of sale direct with the assignee, was a mere subterfuge.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600-603; Dec. Dig. §372.]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Grace M. Carter against Ira W. Holt and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendant Linney appeals. Judgment and order affirmed.

Robt. T. Linney and Kendrick & Ardis, all of Los Angeles, for appellant. Ralph W. Schoonover and Harriman, Ryckman & Tuttle, all of Los Angeles, for respondents.

SHAW, J. The complaint shows that, by means of fraud and false representations defendant Holt obtained from plaintiff the sum of \$1,151.37; that he entered into a contract with an automobile company for the purchase of an automobile for the sum of \$1,375, and of the money so fraudulently obtained from plaintiff he paid thereon \$625; that thereafter, and before the filing of the complaint herein, Holt was arrested, charged with the embezzlement of said sum of money so procured from plaintiff; that he employed defendant Linney as attorney to defend him upon said charge of embezzlement, and to whom he assigned said contract for the purchase of the automobile upon which he had paid \$625 of plaintiff's money; "that said assignment was made without consideration and after knowledge by said Linney that said automobile had been purchased with plaintiff's money and funds as aforesaid"; that the automobile is in the possession of Holt and Linney. In addition to general relief asked, the prayer of the complaint, so far as appellant is concerned, is that plaintiff be declared the owner of said contract and automobile to the extent of the application of plaintiff's money in the purchase thereof so made by Holt.

The court, among other things, found that plaintiff was entitled to an equitable lien upon the automobile to the extent of \$625 so invested therein, and that Linney held the car charged with such lien. Judgment followed, from which, and an order denying his motion for a new trial, Linney appeals.

[1, 2] Appellant's first contention is that the complaint (to which no demurrer was interposed) fails to state facts sufficient to constitute a cause of action against him. This for two reasons: First, it is not alleged that title to the automobile passed to Holt, but that he merely held a contract in the form of a lease for its purchase. No ground is assigned for this contention, and

we perceive no reason why, in a proper case, a trust might not be impressed upon a contract or lease, as well as upon other property. Second, it is claimed the complaint fails to show that prior to Linney's acquiring the automobile and contract of purchase he had knowledge of plaintiff's rights therein. In the absence of a special demurrer, we think the allegation that the assignment was made to him by Holt without consideration and "after knowledge by said Linney that said automobile had been purchased with plaintiff's money and funds as aforesaid," was a sufficient showing of the fact. The words "as aforesaid" refer to the fraudulent acts of Holt by means whereof he obtained the money and invested it in the automobile, all of which, it is alleged, was known to Linney.

[3] It is next claimed that the judgment is not supported by the findings, in that it appeared that after Linney acquired the contract upon which Holt had paid the \$625, he paid thereon \$260, and the judgment accorded plaintiff a lien thereon for her \$625 which was declared prior to any rights of Linney by reason of the \$260 so paid by him. Since Linney took the contract with knowledge of plaintiff's rights thereunder, his position as to money loaned or paid thereon must be deemed that of a second lienor, just as if he had a second mortgage on the property.

[4, 5] Defendant Linney appeared in court by an attorney of record, who conducted his case to a point in the proceedings where defendant Linney proposed to cross-examine one of plaintiff's witnesses; whereupon, it appearing that he would be a witness in his own behalf, the court denied him the right to cross-examine the witness. Thereupon his attorney of record continued the conduct of the case, cross-examining the witness. It is claimed this was reversible error. Had appellant had no attorney of record representing him, no doubt exists as to his right to appear in propria persona and conduct his case, and notwithstanding the incidental inconvenience, he could also have appeared as a witness. But where a party appears in court as a litigant represented by an attorney of record, the court may insist that such attorney and not his client, appearing as a party litigant only, conduct the trial. *Boca, etc., R. R. Co. v. Superior Court*, 150 Cal. 153, 88 Pac. 718. Indeed, courts have not infrequently insisted that where more than one attorney appears, one only shall conduct the examination of witnesses. But, however this may be, and conceding the ruling was error, it is impossible to perceive how defendant was prejudiced thereby, and hence it may be disposed of by applying thereto the provisions of section 4½, article 6 of the Constitution.

[6] There is no merit in the contention that the court failed to find upon an issue tendered by the answer, to the effect that appellant purchased the auto from the Stude-

baker Company by an independent contract after it had repudiated the contract made with Holt and which he had assigned to Linney. As to this the court, in effect, found that upon Linney presenting the assignment to the company it, in writing, recognized and approved the assignment; whereupon Linney paid the installments thereon then due; that thereafter the company, having knowledge that the \$625 paid to it by Holt was plaintiff's money, and after the assignment made to Linney with its approval, attempted to rescind the contract after Holt had assigned the same to Linney who had, by reason of said assignment, paid the arrearage. The finding is sufficient to negative the allegation made in the answer.

[7] Appellant attacks as being without support a number of findings based upon and in accordance with facts, which the evidence and fair inferences to be drawn therefrom tended to prove. The evidence tends to establish the fact that appellant, when he acquired the assignment from Holt, knew the manner in which the latter had obtained plaintiff's money, and knew that he had wrongfully and in violation of the trust reposed in him invested \$625 thereof in the automobile, upon which there were some installments due and unpaid. Linney, accompanied by Holt, went to the office of the Studebaker Company, the seller of the car, where the assignment of the contract was made, Linney stating that he desired to get the car the possession of which it appears Holt had theretofore delivered to the company. Upon the making of the assignment and Linney paying the installments then due and unpaid, the company indorsed thereon, "We, the Studebaker Company, consent to the assignment, and fully release Mr. Holt hereunder," signed by William J. La Casse, sales manager, and thereupon delivered the automobile to Linney. Several days afterwards, all the parties ignoring this completed transaction, made a new deal which purported to cancel the contract so assigned by Holt to Linney and pursuant to which the company had delivered the car to Linney, and a new contract was made direct with Linney which, so far as it concerned the amount, terms, and conditions, was identical with the terms and conditions contained in the contract made with Holt and by him assigned to Linney. The company recognized the existence of its contract with Holt and his right to assign the contract, pursuant to which it delivered the car to Linney and released Holt from further liability thereon. The court was justified, under all the circumstances, in its conclusion that this was a mere subterfuge.

The judgment, which appears to be a righteous one, and the order denying appellant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

(55 Okl. 686)

ST. LOUIS & S. F. RY. CO. v. CLAMPITT.*
(No. 5148.)(Supreme Court of Oklahoma. Nov. 30, 1915.
Rehearing Denied Jan. 11, 1916.)*(Syllabus by the Court.)***1. APPEAL AND ERROR §971—DISCRETIONARY ACTS — EXAMINATION OF WITNESS — QUESTIONS BY JUDGE.**

The practice of the trial judge taking charge of a witness, and conducting a long cross-examination, is not to be commended. Still it is the duty of the judge to see that the facts are brought out; and, unless it is apparent that there has been an abuse of discretion, and that the trial judge has shown his belief in the untruthfulness of the witness, or has given an intimation of his opinion on the facts, it is not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. § 971.]

2. MASTER AND SERVANT §265, 285—INJURY TO EMPLOYE—NEGLIGENCE—PRESUMPTION.

The mere happening of an accident to an employé does not raise a presumption of negligence, but where an accident happens to an employé resulting in his death, the manner of the occurrence and its surroundings may be shown, from which the jury may infer the manner and cause of the accident, if the inference is a reasonable one.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 965, 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 265, 285.]

3. MASTER AND SERVANT §285—INJURY TO BRAKEMAN—CAUSE OF ACCIDENT—QUESTION FOR JURY.

Where the evidence tends to show that a brakeman was killed by falling under a moving train, from which he had alighted in the performance of a duty, and there was evidence that the platform on which he alighted was defective in a manner that might have caused him to fall under the train, the question was properly left to the jury, although there was no direct evidence that the condition of the platform caused him to fall.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.]

4. TRIAL §169 — DIRECTION OF VERDICT—EVIDENCE.

It is only when the evidence, with all the inferences that the jury can reasonably draw therefrom, is insufficient to support a verdict that the court is authorized to direct a verdict for the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. § 169.]

5. MASTER AND SERVANT §274 — DEATH OF BRAKEMAN—EVIDENCE OF CUSTOM.

Evidence that it was the habitual practice of brakemen at stations to alight from moving trains in the performance of their duties is admissible, especially when it is shown that it is impractical to perform such duties without getting on and alighting from moving trains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.]

6. MASTER AND SERVANT §270—INJURY TO BRAKEMAN — EVIDENCE—SUBSEQUENT CONDITIONS.

Evidence of the condition of a platform three weeks after the accident is admissible when it is shown that no change has been made

therein, except the usual wear occasioned by the elements.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.]

7. INSTRUCTIONS.

The charge in this case examined, and found free from error.

8. TRIAL §260—REFUSAL OF INSTRUCTIONS COVERED.

Where special instructions are requested, which are fairly covered by the charge, it is not error to refuse to give them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.]

9. TRIAL §348—SUBMISSION OF SPECIAL INTERROGATORIES—RIGHT.

Under the provisions of article 7, § 21, of the Constitution, defendant is not entitled to have special interrogatories submitted to the jury, in addition to the general verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 822, 823, 827; Dec. Dig. § 348.]

10. MASTER AND SERVANT §297—DEATH OF SERVANT—ACTION UNDER EMPLOYERS' LIABILITY ACT—APPORTIONMENT OF DAMAGES.

Under the provisions of Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), the jury may return a general verdict in favor of the personal representative, and need not apportion the damages among the beneficiaries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.]

Commissioners' Opinion, Division No. 2.

Error to District Court, Garfield County; James W. Steen, Judge.

Action by Amanda V. Clampitt, administratrix and personal representative of the estate of B. F. Clampitt, deceased, against the St. Louis & San Francisco Railway Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

This was an action brought by the defendant in error as administratrix of the estate of B. F. Clampitt, deceased, for damages resulting in the death of her intestate, by the negligence of the defendant, and the action is brought under federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665). The petition is in the usual form, alleging that the plaintiff in error is a railroad corporation, engaged in interstate commerce, and that the intestate was a brakeman on a certain train which was carrying interstate shipments. The negligence on which the case was tried was that a platform at the station of Thomas, Okla., on the line of the road of the plaintiff in error, was defective, and when the plaintiff's intestate attempted to alight from the train at that point, owing to the defective condition of the platform, he fell under the cars of the train, and received injuries which resulted in his death. The answer was a general denial, and alleges contributory negligence, assumption of risk, and also pleads certain rules of the plaintiff in error, regulating the conduct of its employes.

The evidence on the part of the plaintiff

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Second petition for rehearing denied February 29, 1916.

disclosed that the plaintiff's intestate was a brakeman on the freight train, engaged in interstate commerce, and that on arriving at the station of Thomas, he was riding on the engine; that arriving at Thomas, preparatory to taking water, he alighted from the engine at the station of Thomas for the purpose of examining the records in the bill box, to see if there were any cars at Thomas which the train on which he was employed was required to take up and carry forward in transit so as to get to their destination. The evidence further showed that the platform at this place was a timber platform, which had been constructed in 1902, and was about 14 inches above the rails at this point; that the planks at this place where the plaintiff's intestate alighted were some of them rotted, and had holes in them, and that there were some nails at this point protruding above the surface of the platform, one of them as much as an inch and a half. There was also evidence that the planks in the platform would spring when a person trod upon them, as much as an inch and a half, which was caused probably by the stringers or sleepers under the platform being rotten. There was also evidence that the life of a platform of this character was from 10 to 12 years, and that this platform had been erected in 1902, and the accident occurred in January, 1912. There was no direct evidence as to how the plaintiff's intestate fell under the train, the evidence on the part of the plaintiff tending to establish that it was on account of the defective condition of the platform, by striking his foot against a protruding nail, or by reason of the spring in the platform, or by reason of some of the planks in the platform being higher than others; that is, some thicker planks than those used in the platform had been placed there in repairing it, which caused its surface to be elevated above the general level of the platform. The evidence of the defendant tends to contradict this evidence, and to show that the platform was in good condition; that there were no protruding nails, and that the cause of the fall of the plaintiff's intestate was that he lost his balance in alighting from the engine, and reeled along the platform for some 30 feet until he fell between the cars. The plaintiff in error also introduced its rules, which, as far as it pleads them, and therefore as we assume, are germane to the questions, are as follows:

"General Notice.

"To enter or remain in the service is an assurance of willingness to obey the rules.

"Obedience to the rules is essential to the safety of passengers and employes, and to the protection of property.

"Employes in accepting employment assume its risks.

"Rule No. 630. All persons entering into or remaining in the service of this company are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it. Their attention is especially called to the fact that

they are employed and retained with the express understanding and agreement that, in consideration of the compensation paid them, they will assume all risks of injury, which may result to them by reason of any act, negligent or otherwise, done by any person employed by the company in the operation or maintenance of its railway, regardless of what department or line of service such person may be engaged in.

"Rule No. 631. Each employe is required to be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows. Employes of every rank and grade are wanted to see for themselves before using them that the rolling stock, machinery or tools which they are required to use are in safe condition or that they are so put before using.

"Rule No. 632. The company does not require or expect its employes to incur any risk from which, by the exercise of their judgment and personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety.

"Rule No. 636. It is alike dangerous to assume that signals given to the engineman or fireman have been seen, and if seen will be obeyed—when obedience to those signals on the part of the engineman or fireman is essential to the safety of an employe in the performance of his duty. He must know that the signal has been seen, understood and obeyed, before placing himself in a dangerous position—otherwise, without such knowledge he assumes all risks of danger arising from any misunderstanding or disregard of signals.

"Rule No. 637. Employes are forbidden to stand on track and jump on engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed or to go between cars in motion to uncouple them, or to follow other dangerous practices."

After the evidence was in, the court charged the jury, and among its instructions excepted to are the following:

"(4) You are instructed that under the federal law it is further provided that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability from negligence of the kind here charged by the plaintiff against the defendant, shall to that extent be void; but you are instructed that if, in fact, the said B. F. Clampitt knew, or by the use of ordinary care should have known, of the risks and hazards in question that resulted in his injury or death, if any, then the plaintiff could not recover. Nor could she recover if Clampitt's death resulted from the ordinary dangers of his occupation, as these risks he assumed; but any peril due to the neglect and carelessness of the defendant and of which the said Clampitt could not learn by the use of ordinary care were not assumed by him.

"No. 5. Before you can find for the plaintiff it must appear from the evidence that the said B. F. Clampitt did not assume, as herein explained, any of the risks or dangers that resulted in his injury and death, and that at the time of such injury and death, the said B. F. Clampitt was injured and killed as the result of a defective platform of defendant's as charged, while assisting the defendant railroad company in carrying on interstate traffic, that is, traffic between one or more states, and in maintaining and operating an interstate railway belonging to defendant; that is, a railway extending continuously from one state to another, including the state of Oklahoma, and upon which the defendant was engaged in carrying on an interstate business as charged."

"No. 2. You are instructed that by virtue of an act relating to the liability of common carriers of a railroad to their employes enacted by

the Senate and House of Representatives of the United States of America, it is provided that every common carrier by railroad, while engaged in commerce between any of the several states of the Union, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, or other equipment; and it is further enacted that the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages (in case of plaintiff's recovery) shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. Now, so far as the foregoing law applies to the rights of plaintiff to recover herein, you are instructed that the railway company was required to use ordinary care to furnish its employes a reasonably safe place in which to perform their work; and, in this connection, you are instructed that, if you find from a preponderance of the evidence that at the time and place of the alleged injury to and death of the said B. F. Clappitt, the defendant's said depot platform at Thomas, Okla., was, and for some weeks prior thereto had been, to the knowledge of the defendant, defective and unsafe for ordinary use by defendant's brakeman and employes while rightfully engaged in the performance of their duties, because of loose boards therein, containing rotten places and protruding nails at the particular places in question, as charged, and that the defendant was negligent, as charged, in so maintaining said platform in said condition, and that such negligence directly, proximately, and materially contributed to the death of said Clappitt, as charged, then you may find for the plaintiff and against the defendant, subject, however, to all of the other instructions herein given you."

The plaintiff in error also requested the following instructions, which were refused, and their refusal is assigned as error:

"One who voluntarily enters the employ of another assumes all of the ordinary risks incident to such employment and if injured while so employed by reason of a risk assumed, he cannot recover; neither can his personal representative recover in the event of his death."

"In entering the employ of the defendant, the deceased impliedly agreed, aside from his written agreement, to assume all of the risks incident to his employment as a brakeman. If the station platform at Thomas was in a defective condition at the time the deceased was injured and he knew of its being in such condition, or by the exercise of ordinary care he should have known of such condition, and he voluntarily remained in the service of defendant, then he assumed the risk of being injured therefrom and, if injured while so employed, the plaintiff herein cannot recover."

"In this connection, gentlemen of the jury, you are further instructed that, even though you believe that the station platform at Thomas was defective, and believe that the defendant was negligent in the maintenance of same, still your verdict should be for the defendant unless you find, by a fair preponderance of the evidence, that the negligence of the defendant, with respect thereto, was the direct and proximate cause of the death of deceased. You cannot return a verdict against the defendant upon mere speculation or conjecture—your verdict must be based upon the facts disclosed by the evidence."

"You are further instructed that if a servant has two ways of performing his work, one a comparatively safe way, and the other danger-

ous, and he adopts the dangerous way and is injured, he is held to have assumed the risk of being injured thereby, and cannot recover. If you believe from the evidence in this case, therefore, that the deceased had two ways of performing his work at the station of Thomas on the day he was injured, one of them comparatively safe and the other dangerous, and that he adopted the dangerous way and was thereby injured, then the plaintiff is not entitled to recover herein and your verdict must be for the defendant."

At the close of the evidence the plaintiff requested certain special interrogatories to be submitted to the jury in addition to their general verdict, which was refused and exceptions saved.

W. F. Evans, of St. Louis, Mo., and R. A. Klenschmidt and J. H. Grant, both of Oklahoma City, for plaintiff in error. J. D. Houston and C. H. Brooks, both of Wichita, Kan., and C. H. Parker and P. C. Simons, both of Enid, for defendant in error.

DEVEREUX, C. (after stating the facts as above). [1] The first assignment of error is that, owing to irregularity in the proceedings and conduct of the court, the defendant was prevented from having a fair trial. This assignment of error is based on the cross-examination of several of the defendant's witnesses by the court, but it is not necessary to set the cross-examination out at large. But we are not prepared to say that it constitutes reversible error. The practice of the trial court taking charge of a witness and indulging in a long cross-examination is not to be commended. In *N. Y. Transportation Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285, it is held:

"It must be admitted that a continual interposition by the trial judge in the examination of witnesses may prejudice the jury to the extent claimed. Still the trial judge has a right, and, indeed, it is his duty, to see that the facts of the case are brought intelligibly to the attention of the jury, and to what extent he will interfere, for this end is a matter of discretion."

In commenting on this case in *Berwind-White Coal Mining Co. v. Firmont*, 170 Fed. 151, 95 C. C. A. 1, the Circuit Court of Appeals for the Second Circuit, says:

"We found no abuse of discretion in that case. In the case at bar the cross-examination by the court was much more extended, and, presumably through some errors either in the stenographic report or in its transcription into the case on appeal, there are passages where it is difficult to tell whether a particular statement is made by a witness in response to the court's questions, or is a summary by the court of what he understood the witness to have already testified to. Nevertheless, on a careful study of the record, we do not feel warranted in reversing on this exception. It may be proper, however, to expand somewhat the statement made in the *Garside* Case. Cases occasionally present themselves where a plaintiff or defendant is represented by incompetent counsel, and where the ends of justice require the trial judge to secure, so far as he can, a fair and full presentation of the case, so that the party who came into the court, expecting to have a full, fair, and just examination of the facts in controversy, will find his expectation realized. But where a party is represented by competent counsel—as the brief

and oral argument demonstrate this plaintiff was—it would seem that the conduct of his side of the case had better be left to his own counsel. It is not unreasonable to assume that such counsel's study of the case and the information he possesses as to the personal equation of the different witnesses called against his client may make him a more competent cross-examiner than the trial judge, who never knew of the issues in the case till the pleadings were opened. Indeed, it might sometimes happen that a well-laid plan to discredit a hostile and unfair witness would be disarranged and rendered futile by premature cross-examination. The safer course would seem to allow the examination by counsel—direct, cross, redirect, and recross—to conclude, and then, if anything is obscure, if some point seems to be overlooked, or if suspecting false swearing, * * * the judge can, and indeed ought to, intervene so that the ends of justice may be subserved. Where, however, he takes the cross-examination out of the hands of competent counsel, there is danger that the jury, from this fact alone, may draw conclusions unfavorable to the witness and to the party on whose behalf the witness is called."

We think the above is the sound rule on this question; and, while trial judges have the undoubted right to interrogate witnesses, and in certain cases it is their duty so to do, yet care should be taken to frame the questions in such a manner as not to intimate to the jury that the judge has any opinion as to the facts of the case or the credibility of the witness. While much of the evidence brought out by the court in its examination was not pertinent to the issues in the case, yet we cannot say, from an inspection of the record, and especially from the charge, that it probably resulted in a miscarriage of justice, or constituted a substantial violation of a constitutional or statutory right. *Rev. Laws 1910, § 6005*. Plaintiff in error relies on the city of *Newkirk v. Dimmers*, 17 Okl. 525, 87 Pac. 603, but that case is distinguishable from the case at bar, as there the trial judge clearly intimated that the testimony of the witness was false, and that she had been procured by the plaintiff in error to falsely testify, but the record before us does not disclose matter to bring the case within the rule established by that decision.

The next assignment of error is that the court erred in overruling the demurrer to the evidence, and under this assignment we will also consider the refusal of the court to direct a verdict.

[2] The question is not presented that the happening of an accident, in case of an employé, raises a presumption of negligence, and consequently the case of *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, does not apply, for while there is no direct evidence showing what caused the deceased to fall, there was evidence showing the condition of the platform, from which the jury might draw the inference that it was the condition of the platform that was the proximate cause of the death of the plaintiff's intestate. In *Waters-Pierce Oil Co. v. Deselms*, 18 Okl. 107, 89 Pac. 212, it is held:

"Where an accident has occurred resulting in the death of all the persons immediately connect-

ed therewith and there is no direct proof as to how the accident occurred, the manner of its occurrence may be shown by circumstantial evidence from which the jury may infer the manner and cause of the accident if the inference is a reasonable, although not a necessary, one.

And this case was affirmed on writ of error by the Supreme Court of the United States in 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453. In *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352, it is held that what is the proximate cause of an injury, whether it be the original negligence of one party or the intermediate negligence of another party, is ordinarily a question for the jury, to be determined from the minor associated facts and circumstances. In *Booker Tobacco Co. v. Walker*, 38 Okl. 47, 131 Pac. 537, it is held:

"It is only when the evidence, with all the inferences that the jury could * * * draw from it, will be insufficient to support a verdict for plaintiff that the court is authorized to direct a verdict for defendant; and, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions."

And see *Creek Bank & Trust Co. v. Johnson*, 33 Okl. 696, 127 Pac. 480, and *St. L. & S. F. R. Co. v. Long*, 41 Okl. 177, on page 212, 137 Pac. 1156, Ann. Cas. 1915C, 432.

[3, 4] Applying the principle decided by these cases, it cannot be said that there was no evidence to go to the jury in this case. The plaintiffs' evidence tended to prove that the platform was out of repair; that at the place where plaintiff's intestate alighted from the train there were nails protruding above the surface of the platform; that some of the boards had holes in them; some would spring when trodden upon, and some were rotten at the edge next to the track. In the absence of direct evidence as to what caused the plaintiff's intestate to fall, it was within the province of the jury to consider this evidence, and the inference drawn by them that it was these defects that caused the accident is not an improbable one.

[5] The next assignment of error is to the admission of certain testimony. Among other things the plaintiff was allowed to show that it was the habitual practice of brakemen to get on and off moving trains at stations, and this was admitted on the ground that the practice was so open and notorious that the superior officers of the corporation must have known of it. This evidence was competent, because it was in evidence that it was not practicable to do switching around stations, without the brakeman getting on and off moving trains, and the rule of the plaintiff in error, introduced in evidence, only prohibits employes getting on and off trains or engines moving at a high rate of speed. The evidence was clearly admissible. In *U. P. Railway Co. v. Springstwen*, 41 Kan. 724, 21 Pac. 774, it is held:

"A railway company by a rule prohibited conductors and engineers from making flying switches. The deceased, a brakeman, working under the direction of an engineer, was not guilty of contributory negligence when the manner of switching by which he was killed had been the usual and customary way of doing the same, though he knew of the rule."

And see *K. C. Ry. Co. v. Kier*, 41 Kan. 662, 671, 21 Pac. 770, 18 Am. St. Rep. 311; *A. T. & S. F. R. Co. v. Slattery*, 57 Kan. 499, 46 Pac. 941; *Karns v. Railway*, 87 Kan. 154, 123 Pac. 758.

[8] Other evidence objected to was that the plaintiff below was allowed to show that it was not practical to do switching at depots, unless the brakeman got on and off moving trains, and that plaintiff was allowed to show the condition of the platform three weeks after the accident, there being no evidence that its condition had changed, except the natural depreciation from the elements. No extended discussion is necessary to show that this evidence was competent, nor do the other exceptions to the admission of evidence require extended notice, for, even admitting the violation of the rules, if there was any under the express words of the rule that employes must not alight from trains moving at a high rate of speed, the question was fairly left to the jury.

[7] The next assignment of error is to the charge as given, and also to the refusal to give certain specific instructions asked by the defendant.

[8, 9] We have carefully examined the entire instructions given by the court to the jury, and also those requested by the defendant, and we find the instructions as given to present the questions fairly and impartially, and, as far as those requested were applicable, they are covered by the instructions given. The court did not commit any error that this court can review in refusing to submit the special interrogatories to the jury in addition to the general verdict. See section 21, art. 7, of the Constitution, construed in *King v. Timmons*, 23 Okl. 407, 100 Pac. 536; *Cook v. State*, 35 Okl. 653, 130 Pac. 300.

[10] The last assignment of error is that the jury did not apportion the amount of the recovery between the wife and child of the deceased, but this very question was decided adversely to the plaintiff in error in *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, where it is held:

"A general verdict for the plaintiff may be returned by the jury in an action brought by the administratrix under the federal Employers' Liability Act (35 Stat. at L. c. 149), for the benefit of the widow and minor children of the deceased employe, without apportioning the damages between the beneficiaries."

We, therefore, recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(33 Okl. 11)
AMERICAN BANKERS' INS. CO. v. THOMAS.
AS. (No. 4750.)

(Supreme Court of Oklahoma. Oct. 12, 1915.
Rehearing Denied Jan. 11, 1916.)

(Syllabus by the Court.)

1. INSURANCE — §136 — LIFE INSURANCE — DELIVERY OF POLICY — WAIVER OF CONDITION.

On December 5, 1910, the insured made application in writing to defendant at S., through its special agent, for the policies sued on, therein representing his health to be good. The special agent recommended the acceptance of the risk, sent the same to the home office at Chicago, where policies issued and were sent to the bank at S., pursuant to an arrangement with the bank to turn them over to any one having the right to receive them on payment of the premiums, which, when paid, were to be credited to the account of defendant by the bank as its depository. At the time the policies arrived M. was the local soliciting agent of the defendant at S., under agreement with defendant for a certain per cent. of the first year's premium on business written with his aid. Having assisted in securing the business in question, and being entitled to part of the premiums on delivery of the policies, M., on February 8, 1911, with knowledge that deceased was in ill health, instructed H., a collector for the bank, to turn the policies over to the insured on payment of the premiums if he so desired; whereupon H., with the permission of the cashier, after banking hours entered the bank, left a check for the amount of the premiums, took the policies, and caused them to be delivered to the insured, who died next day. *Held*, the policies providing that they "shall not take effect until the same shall be issued and delivered by the company, and the first premium paid thereon in full when my health is in the same condition as described in this application," the good health of the insured was a condition precedent to the delivery of the policies. *Held*, further, that the local soliciting agent was without authority to waive such condition, and that on the facts stated no risk attached under the contract of insurance.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 219-230; Dec. Dig. §136.]

2. INSURANCE — §141—LIFE INSURANCE—ACTION ON POLICY—DEFENSE—ESTOPPEL.

But where, in addition to the facts stated, the check given in payment of the premiums was collected and the proceeds placed to the credit of defendant, pursuant to a prior arrangement with the bank, and, being thus received, has since been retained by defendant with knowledge of all the facts, *held* to constitute a waiver of such condition precedent, and that defendant is estopped to urge that no risk attached under the contract of insurance.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 75, 253-262; Dec. Dig. §141.]

Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by Belle D. Thomas against the American Bankers' Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank C. Rogers, of Chicago, Ill., and C. A. Galbraith and Halner, Burns & Toney, all of Oklahoma City, for plaintiff in error. J. F. McKeel, of Ada, for defendant in error.

TURNER, J. On January 3, 1912, in the district court of Pontotoc county Belle D. Thomas, defendant in error, sued the American Bankers' Insurance Company, plaintiff in error, on two life insurance policies issued by it, one insuring the life of Bowline F. Thomas, her husband, in the sum of \$2,000, and the other insuring his life for \$1,000, both in her favor. The policies were issued upon application made by him as part of the contract both of which provide that the same "shall not take effect until the same shall be issued and delivered by the company, and the first premium paid thereon in full, while my health is in the same condition as described in this application," which was therein stated to be good. The petition substantially states that, although at the time the policies were delivered the insured was sick and died the next day, defendant is estopped to urge that the same did not take effect by reason of certain facts alleged in the petition as constituting a waiver. After demurrer thereto had been filed and overruled and defendant had answered, in effect, a general denial and certain special pleas and plaintiff had joined issue by reply, there was trial to a jury, and judgment for plaintiff for the amount of both policies with interest and defendant brings the case here.

Both sides concede that the liability of the company turns upon the question of whether the risk attached. Defendant says it did not because it is urged one Martin, who delivered the policies, was without authority so to do, or to waive the condition, precedent therein, that risk would not attach unless the same was delivered while the insured was in good health.

[1] There is no dispute as to the essential facts. The evidence discloses that on December 5, 1910, the insured made application in writing to defendant at Stonewall, through one Edgar D. Smith, its special agent, for the policies in question, therein representing his health to be good. Smith recommended the acceptance of the risk and sent the same to the home office at Chicago. There the policies were issued and sent to the First National Bank at Stonewall, under an arrangement with the bank to turn them over to any one having a right to receive them on payment of the premiums, which was to be credited to the account of the company by the bank as its depository. At the time the policies arrived H. B. Martin was the local soliciting agent of the defendant theretofore appointed by Smith under an agreement in writing with the company for a certain per cent. of the first year's premium on business written and settled for by himself, and for another per cent. of the premium on business written as a result of his personal assistance. He could receive no money due or to become due except in exchange of premium receipts signed by an executive officer of the company. Having assisted Smith in securing the application in question, and being entitled to part

of the premium due him on the delivery of the policies in question, and also having theretofore received from Smith a letter requesting him not only to make settlement on certain policies that had come in, but also on "any other policies that may come in," Martin, while the insured was in good health, being informed that the policies were at the bank for delivery, on about February 1st, informed the deceased where they were, and if they wanted them they would go get them, whereupon they went to the bank. There Martin left the insured outside and went into the bank and got them, but, on his return some 45 minutes later, the insured was gone. He was taken sick on February 3d, and no further effort was made to deliver the policies until February 8, 1911. On that day N. T. Heard, who was collecting for the bank, having in his possession a key thereto, learned that the insured was sick and so informed Martin, who requested him to ascertain whether insured wanted the policies, and, if so, to get them from the bank and deliver them. Upon learning that the insured wanted the policies, Heard, after banking hours, telephoned the cashier to that effect, and that the insured was sick, whereupon the cashier told him to go to the bank and get the policies and leave the premium, which he did by entering with his key and leaving with the bank a check for the amount thereof, drawn by the son of the insured, which was paid, and its proceeds the next day placed to the credit of the defendant company. Upon receiving the policies Heard took them to his safe, and the next morning turned them over to one Bishop, who delivered them to the insured, who died the next day. Under this state of facts no risk attached.

That part of the policy which provides that the same shall not take effect until it is delivered by the company while the insured is in good health prescribes a condition precedent to the attachment of the risk under the policy. 1 Oooley's Briefs on the Law of Insurance, p. 451. Recognizing it to be such, plaintiff properly pleaded a waiver thereof by setting up the facts as stated. *Western, etc., Ins. Co. v. Coon*, 38 Okl. 453, 134 Pac. 22; *Anders v. Life Ins. Clearing Co.*, 62 Neb. 585, 87 N. W. 331. Favoring liability, she contends that the knowledge of Martin of the ill health of the insured at the time the policy was delivered was the knowledge of the company and a waiver of the condition. Not so. Assuming that Martin was the agent of the company at that time, with authority to deliver the policies, it failing to appear that he had anything to do with the execution thereof or the acceptance of the risk, his knowledge was not that of the company. In *Merchants' & Planters' Ins. Co. v. Marsh*, 34 Okl. 453, 125 Pac. 1100, we held that the knowledge of the agent was the knowledge of the company only where the authority of such agent, derived from the company, was to solicit applications and execute and deliver

contracts of insurance as an alter ego of the company, and that it was only in such case that he had power to waive the conditions of the policy. In that case the agent was, as here, a local or soliciting agent, and there the policy sued on was, as here, a "home office policy," or one issued direct by the president and secretary of the company as distinguished from one issued by the local agent. There, in the syllabus, we said:

"A local agent of an insurance company, whose only power is to solicit applications for insurance, and forward them to the company for approval, when, if approved, the company issues the policy and causes it to be delivered to the insured, has no power to waive any of the provisions of the policy so delivered. * * *"

Also in keeping with this rule is *Des Moines Ins. Co. v. Moon*, 33 Okl. 437, 126 Pac. 753. There we said:

"* * * Where the local agent has the power to accept a risk and deliver a policy of insurance, and is advised and has full knowledge, at the time of the delivery of the policy, that certain conditions of the policy, which may be waived, are violated, such policy is binding upon the company, notwithstanding the fact that it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing, indorsed upon the policy. This case, unanimously concurred in by the members of the court, settles the rule in this jurisdiction as to contracts of insurance written after the admission of the state. * * *"

Of course if the local agent had not power, as here, to accept the risk, he had no power to waive the condition precedent in the policy. Cases relied on by plaintiff which hold the contrary practically under the same state of facts fail to draw this distinction, and seem to hold that the knowledge of a mere soliciting agent of the company of the ill health of the insured at the time of the delivery of the policy is the knowledge of the company, and hence a delivery with such knowledge constitutes a waiver of the condition under consideration. They are *Roe v. National Life, etc., Co.*, 137 Iowa, 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144; *Connecticut, etc., Ins. Co. v. Grogan* (Ky.) 52 S. W. 959; *N. W. Life Ins. Co. v. Findley*, 29 Tex. Civ. App. 494, 68 S. W. 695; *National Life Ins. Co. v. Twiddell* (Ky.) 58 S. W. 699; *Home Forum Ben. Order v. Varnado* (Tex. Civ. App.) 55 S. W. 364, and others. But the distinction is referred to in *Bell v. Ins. Co.*, 166 Mo. App. 390, 149 S. W. 33. In that case the insured, who was plaintiff's brother, died at Nogales, Ariz., as a result of injuries received while working as a telegraph lineman. On July 17, 1909, he made application to defendant for a policy of life insurance, payable in event of his death to plaintiff. He made it to defendant's soliciting agents at that place, and paid the first annual premium cash in hand. The application was forwarded to defendant by mail, and duly received in St. Louis, Mo., on July 23, 1909. The policy was conditioned the same as here. On July 27th, the application was duly accepted, and the policy issued and was mailed August 4, 1909, to the soliciting agents for delivery to the

insured. Upon its arrival on August 8, 1909, pursuant to instructions, the policy was deposited for him in the safe of the soliciting agents, along with other private papers of the insured kept there by him. Two days before that time the insured received a fatal injury from which he died on the night of August 11th. On August 6th, one of the soliciting agents visited the insured and knew of his injury. The court said:

"There can be no doubt that it is competent for the parties to stipulate in the application for insurance, as here, that the policy shall not be effective or binding until delivered to, and accepted by, the insured while in good health and the payment of the first premium is made. It is said that a contract of life insurance is not complete until the last act necessary to be done by the insured, under the conditions of the contract, after acceptance of the application by the company, has been done by him, and the courts, therefore, in proper cases, sustain such agreements which operate to postpone the taking effect of the policy until the delivery and premium payment while the insured is in good health. See 1 Bacon, *Life Ins.* (3d Ed.) § 272; *Kilcullen v. Met. Life Ins. Co.*, 108 Mo. App. 61, 82 S. W. 968; *Misselhorn v. Mutual Reserve, etc., Life Ins. Co.*, 30 Mo. App. 589; *McGregor v. Met. Life Ins. Co.* [143 Ky. 488] 136 S. W. 889. But though such be true, the provision for thus suspending the policy, as an effective contract, until the first premium is paid and its delivery, while the insured is in good health, is for the benefit of the insurer, and obviously may be waived by it or by its agent possessing authority with respect to that matter. See *Rhodus v. Kansas City, etc., Ins. Co.*, 156 Mo. App. 281, 137 S. W. 907. * * * But it is insisted that a mere soliciting agent, such as Cummings, is without authority to waive the condition in the policy here relied upon, and, for the purpose of the case, the proposition may be conceded as true."

Whereupon the court proceeded to consider whether the company, under the facts in that case, had waived the condition in the policy relied upon. We are therefore of opinion that Martin was without authority to waive the condition relied on and that plaintiff cannot recover unless defendant is estopped to deny that liability attached by reason of receiving and retaining the premiums as alleged in the petition. Joining issue on these allegations, defendant by answer in effect admitted accepting the premiums as stated, but pleaded in avoidance that it tendered them back to a representative of the assured and demanded a return of the policies, which was refused, and for that reason, it is urged, defendant is not estopped to assert that no liability attached under the policies.

[2] On this point there is no conflict in the evidence. It discloses that the check which paid the premiums was drawn by Duard Thomas, the son of plaintiff and the assured; that it was received by the bank, cashed, and the proceeds placed to the credit of the company, as directed by the company, and there it remains, so far as this record discloses. Martin, the local agent, knew of the death of the insured on the day it occurred, and communicated it to the company, but just when the record does not disclose. That he did so

is disclosed in a letter dated Chicago, March 28, 1911, addressed to him and signed by Edgar D. Smith, in which Smith informed him that the company would resist the claim. Heard informed the company through Frank C. Rogers, their attorney, on March 11, 1911, receipt of which is acknowledged in a letter from him to Heard, dated Chicago, March 15, 1911, in which he informed Heard that the secretary of the company had recently visited Stonewall and made an investigation of the facts in the case and the board of directors had authorized him to state, "that they will refuse to pay the policy"; also that:

"The company has offered to return the money paid to the First National Bank of Stonewall, by B. E. Thomas & Co., as first year's premium upon the policy, and has asked for a return of the policy. The offer to return the premium upon delivery of the policy to the company or its authorized agent is still open."

As the record fails to disclose that the company had done any such thing, of course no such offer was "still open." Thus the matter stood, the company still retaining the premiums when in a letter, dated Chicago, October 28, 1911, said attorney informed plaintiff's attorney, Mr. McKeel, that:

"In reply to your esteemed favor of the 24th inst., beg to state that nothing has arisen since last spring to cause a change in the attitude of this company as expressed in our favor of March 15th, to Mr. N. T. Heard"

—and that:

"Shortly after Mr. Thomas' decease the company caused a careful investigation to be made of all the circumstances attending his application for insurance, * * * and therefore, "under these circumstances, this company could do nothing but instruct the bank with which Mr. Thomas' representative had deposited the money in payment of his premiums to return the same to his estate."

The record wholly fails to disclose that the company ever instructed the bank to do any such thing, much less that the bank ever attempted to do as instructed. The evidence fails to support the allegations in the answer that the premiums were tendered or offered to be returned to any one. It takes no citation of authority to support the proposition that this condition precedent, being for the benefit of the company, may be by the company waived, and is waived by its accepting and retaining the premiums with knowledge of all the facts. 1 Cooley's Brief on the Law of Insurance, at page 610, says:

"In accordance with the general rule that estoppel may arise from the acceptance and retention of benefits is the principle that an insurer, by receiving and retaining the premiums on a contract of insurance, is estopped to deny its power to issue a policy, or that liability attached thereunder. *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Ins. Co. of North America v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Esch v. Home Ins. Co.*, 78 Iowa, 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Watts v. Equitable Mut. Life Ass'n*, 111 Iowa, 90, 82 N. W. 441; *Powell v. Factors' & Traders' Ins. Co.*, 28 La. Ann. 19; *Hoge v. Dwelling House Ins. Co.*, 138 Pa. 66, 20 Atl. 939."

In *Pacific Mut. Life Ins. Co. v. McDowell*, 42 Okl. 300, 141 Pac. 274, this court, in an opinion by Harrison, C., in the syllabus said:

"1. Where a policy insures against accident for a period of one month only, but provides that it may be renewed and kept in force from month to month by the payment of monthly premiums on a certain day of each month, and that it shall be void and of no force and effect if such payments are not made on or before the day mentioned in the policy, such forfeiting provisions, being inserted solely for the benefit of the insurance company, may be waived by the company if it so desires, and such waiver on the part of the insurance company may be inferred from acts, as well as words.

"2. Although a policy may provide for the payment of monthly premiums on or before 12 o'clock noon of the first day of each month, and that all premiums are due without grace at the time specified, and that the policy shall be void unless such premiums are so paid, and contains the further provision that no alterations or waiver of the contract shall be valid unless made in writing at the company's home office and signed by the president or vice president and secretary or assistant secretary, yet if such company, in dealing with a certain class of policy holders in a certain district, establishes a custom with such policy holders of accepting the premium payments at a later date because of the fact that such policy holders receive their monthly pay at a later date, and receives such premiums and appropriates them and recognizes the policies as continuing in force by accepting the premiums, such acts on the part of the company constitute a waiver of the provision that the policy shall be void unless the premiums are paid on the first day of the month.

"3. Where such monthly premiums are collected and retained by the company month after month, and the policies continued in force, such acts constitute a waiver on the part of the company itself, and not a waiver on the part of its local agents and collectors."

In *Life Ins. Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862, the policy sued on contained the same condition precedent as here, which good health was required to be in accordance with the health certificate and premium receipt accompanying same. Plaintiff admitted that no such certificate had been furnished, and insisted that such requirement had been waived by the defendant. After the policy had been delivered, the second premium became due and payable July 5th. It was not paid until August 4th, when the wife of assured procured a draft for the amount and sent it to the home office at St. Paul. There the draft was received on August 6th, and immediately cashed, and a receipt therefor duly signed by the president of the company, bearing date July 5th, was mailed to her. On August 14th, insured died, and on the 18th the defendant company sent plaintiff a draft, informing her that the policy of her husband had never been in force, and that the money sent for the premiums had been kept on deposit awaiting the delivery of the health certificate mentioned in the contract. Holding such to be a waiver of the condition there under consideration, the court said:

"The letter accompanying the remittance stated in plain language that it was sent as payment of the second installment of the premium; and the defendant did not receive it on deposit. It

received it as payment; for it so states in its receipt. The recital of that document is that the money was received for 'the quarterly premium due July 5, 1893, * * * on policy No. 2143, insuring the life of Sigmund Altschuler.' Indeed, according to a familiar principle of law, the defendant could not have retained the money except on the terms and for the purpose it was tendered. By the mere act of converting plaintiff's draft into money and retaining the same, the defendant accepted it as payment of the premium then due. The idea of holding it as a deposit was manifestly an afterthought, suggested by information of Altschuler's death. It is then undisputedly established that, with full knowledge of the fact that the health certificate had not been furnished, the company collected and retained, until after the death of the assured, the premium which became due on July 5, 1893. Having done so—having treated the contract as valid for the purpose of collecting premiums—it cannot now, when sued by the beneficiary, insist that it was void from the beginning. The company, with full knowledge of all the facts, dealt with the assured, during his lifetime, on the assumption that his contract of insurance was in force, and it cannot, now that he is dead, be heard to assert that he was deluded by its agents into purchasing and paying for a still-born policy. To hold that the company could escape liability under such circumstances would shock the crudest sense of justice."

And so we say this defendant cannot receive and retain these premiums and all the benefits of the contract of insurance without assuming its burdens. This, for the reason the evidence discloses that it was accepted by the company and retained by it, and never tendered or offered to be returned to any one, and that if defendant instructed the bank to make such tender or offer to return and the bank failed to do so, this defendant must suffer the consequences of the neglect of its own agent.

We are therefore of opinion that the judgment of the court was right, and should be, and the same is, affirmed. All the Justices concur.

(49 Okl. 620)

**INSURANCE CO. OF NORTH AMERICA
et al. v. WELCH, Ins. Com'r, et al.
(No. 7581.)**

(Supreme Court of Oklahoma. Nov. 9, 1915.
Rehearing Denied Jan. 4, 1916.)

(Syllabus by the Court.)

**1. CONSTITUTIONAL LAW §240, 276, 296—
INSURANCE §3 — DUE PROCESS — EQUAL
PROTECTION—POWER TO CONTRACT—STATU-
TORY REGULATIONS.**

Chapter 174, Sess. Laws 1915, p. 340, creating a state insurance board and providing for the regulation and control of rates of premiums on insurance, and for other purposes therein specified, is not in violation of any rights of the companies affected thereby doing business in this state secured to them by the Fourteenth Amend. to the Constitution of the United States, and is within the legitimate police power of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697-699, 825-838, 840-846; Dec. Dig. §240, 276, 296; Insurance, Cent. Dig. § 3; Dec. Dig. §3.]

2. INSURANCE §3—POWER TO REGULATE.

The business of insurance affected by the provisions of said act is of such a nature and affected with such a public interest as to justify legislative regulation thereof and of the rates charged by the companies engaged in such business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 3; Dec. Dig. §3.]

**3. CONSTITUTIONAL LAW §62—LEGISLATIVE
POWER—DELEGATION.**

It is within the power of the Legislature to create a state insurance board, and to require every fire, tornado, and plate glass insurance company and every insurance company granting insurance against the liability of employees to file with said board a schedule of rates charged by it for such risks, and to prohibit a change in such rates except after ten days' notice to said board of such contemplated change, and authorizing said board, when it shall determine that any rate is excessive or unreasonably high, or that said rate is inadequate to the safety or soundness of the company granting the same, to direct said company to file a higher or lower rate, commensurate with the risk and further requiring that in every case the rate shall be reasonable, when provision is made for a review of the orders of said board by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. §62.]

**4. INSURANCE §4 — STATUTE CREATING
STATE INSURANCE BOARD—VALIDITY.**

Chapter 174, Sess. Laws 1915, p. 340, is not violative of the provisions of sections 22, 23, and 24 of article 6 of the Constitution, creating the insurance department and the office of insurance commissioner, nor does such act deprive the insurance commissioner of any powers or duties conferred upon him by the Constitution.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 4; Dec. Dig. §4.]

**5. CONSTITUTIONAL LAW §26 — CONSTRU-
TION—GRANT OF POWERS.**

The grant to the Legislature of specific authority by section 19, art. 9 of the Constitution to vest in the Corporation Commission additional powers and duties in connection with the visitation, regulation, or control of corporations, or with prescribing and enforcing rates and charges to be observed in the conduct of any business, where the state has the right to prescribe the rates and charges in connection therewith, does not deprive the Legislature of its power to regulate and control such matters nor to create the state insurance board and vest it with the powers enumerated in said chapter 174, Sess. Laws 1915.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. §26.]

**6. CONSTITUTIONAL LAW §42 — CONSTITU-
TIONALITY—DETERMINATION BY COURTS.**

This court will not pass upon the constitutionality of an act of the Legislature nor of any of its provisions until there is presented a proper case in which it is made to appear that the person complaining is entitled to the benefits of said act or about to be subjected to some of its burdens or penalties.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 39, 40; Dec. Dig. §42.]

**7. CONSTITUTIONAL LAW §240—EQUAL PRO-
TECTION — INSURANCE—STATUTORY REGULA-
TIONS.**

Exempting domestic mutual fire insurance companies and reciprocal associations and mutual insurance companies and reciprocal associations doing business in this state from the provisions of said act does not render such legisla-

tion invalid as to other insurance companies, as denying them the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. § 240.]

8. STATUTES § 125 — TITLE AND SUBJECT-MATTER—INSURANCE.

The title of the act is sufficiently comprehensive to embrace the various provisions thereof.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 187-191; Dec. Dig. § 125.]

9. INJUNCTION § 7 — ADEQUATE REMEDY AT LAW—RIGHT OF APPEAL—ORDER OF STATE INSURANCE BOARD.

Provision having been made for an appeal to this court from any regulation, order or rate adopted by said board, said provision gives a speedy and adequate remedy, and an injunction will not lie to restrain said board from proceeding in a matter within its lawful jurisdiction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 6, 34; Dec. Dig. § 7.]

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by the Insurance Company of North America and others against A. L. Welch, Insurance Commissioner, and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiffs in error. S. P. Freeling, Atty. Gen., and J. H. Miley and Smith C. Matson, Asst. Attys. Gen., for defendants in error.

HARDY, J. Plaintiffs in error brought suit in the district court of Oklahoma county, on behalf of themselves and others similarly situated, against defendants in error, seeking to enjoin defendants in error, as the state insurance board, from enforcing the provisions of an act of the Legislature, referred to as House Bill No. 70, being chapter 174, Sess. Laws 1915, p. 340, which created a state insurance board, prescribed the powers and duties thereof, and prescribed certain regulations in reference to the conduct of insurance within this state. The parties will be referred to as they appeared in the trial court.

Plaintiffs alleged that the Insurance Company of North America was an insurance company duly incorporated under the laws of the state of Pennsylvania, and that it had complied with all the laws of this state, and was licensed to do business within the state during the year 1915; that plaintiff Ludlow was its general agent, having charge of its business within this state, and that plaintiff McDaniels was the local agent of said company in the city of Norman, Okl. The petition then alleged the passage of House Bill No. 70, creating the state insurance board, to be composed of the insurance commissioners, fire marshal, and a third member to be appointed by the Governor, and that in pursuance thereof the Governor had appointed Hon. W. R. Samuels as secretary

of said insurance board, which board had thereafter organized and promulgated certain rules and regulations for the government of said board and the insurance companies and their agents doing business within this state. The case came on for hearing on the application of plaintiffs for a temporary injunction, on the 7th day of August, 1915, at which time evidence was introduced, when the court denied the temporary injunction, and plaintiffs bring error.

[1] The petition attacks the validity of said House Bill No. 70 because it is in violation of the Constitution of the United States and of this state, an unwarranted interference with the power of plaintiffs to contract, a deprivation of property without due process of law, and a denial of the equal protection of the laws. Counsel in their brief and oral argument concede the right of the state to regulate the rates charged by insurance companies, but do not concede the validity of other regulations prescribed by the act.

[2] The power of the state to regulate the business of insurance has frequently been before the courts in recent years. This question was presented to the Circuit Court of the United States for the District of Kansas in the case of German Alliance Ins. Co. v. Barnes (C. C.) 189 Fed. 769. The Legislature of Kansas had passed a law conferring upon the superintendent of insurance of that state authority very similar to the authority conferred upon the state insurance board by House Bill No. 70. The Kansas act was in many respects similar to House Bill No. 70, and some of its sections identical with those of the latter act. The plaintiff in that case sought to enjoin the superintendent of insurance from proceeding in or enforcing the provisions of said act, and urged as a reason therefor that said act was an interference with the right of plaintiff to contract, and that it was an appropriation by the state of private property within the prohibition of the Fourteenth Amendment, and that it was beyond the police power of the state to regulate the rates charged by insurance companies doing business in that state. This contention was denied by the court, and the injunction refused; the court being of the opinion that said act was not subject to the objections enumerated. The case was appealed to the Supreme Court of the United States, and in German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, the judgment of the Circuit Court was affirmed, and Mr. Justice McKenna in a very learned opinion set at rest the authority of the state in the exercise of its police power to regulate the business of insurance and the rates and charges exacted by insurance companies in the conduct of their business.

In Citizens' Insurance Co. v. Clay (D. C.)

197 Fed. 435, in the United States District Court for the Eastern District of Kentucky, an act of the Legislature of that state was under review which created a state insurance board empowered to require certain data to be furnished by companies doing business in the state, and therefrom to establish rates for such companies. The court there stated the principle that the business of insurance was one which from its character was of a quasi public nature and subject to reasonable state regulations, and that said act was not violative of the federal Constitution as depriving plaintiff of its property without due process of law, or denying it the equal protection of the laws.

The Supreme Court of Nebraska, in *State ex rel. Martin v. Howard*, 96 Neb. 278, 147 N. W. 689, following the opinion of the Circuit Court for the Eastern District of Kansas and the Supreme Court of the United States in *German Alliance Ins. Co. v. Lewis*, supra, held that an act of the Legislature of that state regulating the business of insurance was valid.

In *Welch v. Maryland Casualty Co.*, 147 Pac. 1046, not yet officially reported, this court said:

"That the state, in the exercise of its police power, may fully and completely regulate the insurance business is no longer a debatable question. This proposition is too well settled to require citation of authority to sustain it."

The power of the state, then, to regulate the business of insurance and the rates to be charged by the companies engaged in that business seems not to admit of doubt, and it cannot be successfully urged that it is not within the police power of the state to prescribe reasonable regulations affecting this business.

[3] The act is further challenged because the powers therein enumerated are conferred upon the state insurance board, and because, such powers being legislative in their character, the Legislature may not delegate them. We recognize the principle that it is not within the power of the Legislature to delegate its legislative functions or its exclusive authority to declare what the law shall be, but it is generally established at this time that the Legislature may enact a law which is complete in itself, having for its aim the accomplishment of some general public purpose, and may, in order to secure the just and equitable operation of the law thus enacted, delegate the power within definite and valid limitations to make necessary investigations, determine preliminary facts, and prescribe suitable rules and regulations intended to accomplish the operation and enforcement of the law in accordance with the express legislative will. A familiar illustration of the exercise of this power is where the Legislature enacts a law prescribing that rates for services by railroads and other common carriers shall be reasonable, and creates a board or commission with power

to investigate and fix rates for such services, subject to review by the courts. The reasoning of the opinions is usually based upon the extensive and complex character of the business, involving a multitude of detail, and requiring expert knowledge to intelligently conduct the numerous separate investigations and the necessity for frequent changes and adjustments in the rates and services, which would render it impossible for the Legislature to acquire the necessary information and to fix just and reasonable rates applicable to the varying conditions and circumstances. Direct legislative control has been tried and abandoned because found impossible, for the reason that the business of the common carrier has grown and extended and become such a large and indispensable factor in our complicated social and economic life that the cumbersome methods of direct action is no longer adequate or possible. *Railroad Com. Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Ga. Railroad et al. v. Smith et al.*, 70 Ga. 694; *Hopper et al. v. C. & St. P. Ry. Co.*, 91 Iowa, 639, 60 N. W. 487; *Railroad Commission v. H. & T. C. Ry. Co.*, 90 Tex. 340, 38 S. W. 750; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; *State ex rel. Railroad & Warehouse Comm. v. M. & St. P. Ry. et al.* 80 Minn. 191, 83 N. W. 60 89 Am. St. Rep. 514; *State v. Atlantic Coast Line Railroad Co.* 58 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639.

In recent years the business of insurance has grown to such an extent that its ramifications extend to practically every phase of business in the commercial world, and the necessity for regulation of the business has become more and more apparent, until legislation having that purpose was enacted and brought into review before the courts, with the result that the right of the state to regulate the same has been finally determined. The difficulty of direct legislative regulation is equally present in the insurance business as it is in the business of common carriers. To illustrate: In order to properly prescribe rates for the business of fire insurance that will be just and reasonable, it becomes necessary to know the location of the property, the character of the neighborhood in which it is situated, whether city, town, or country, and, if in a town or city, the fire protection which has been provided, the extent of the water supply, and other physical conditions. It is necessary to know the character of the property to be insured, and, if a building, the size, material of which it is constructed, the manner of its construction, the character of the occupancy, the construction and location of adjacent buildings, the occupancy and contents thereof, and the manner in which the contents are stored. All these matters enter into a consideration of the question as to what rates are just and reasonable. It is

thus seen that it would be a physical impossibility for the Legislature, which ordinarily meets but once in two years, and sits for a limited period of time, and is composed of members from all of the varying walks and occupations of life, to make the necessary investigations, ascertain the necessary facts, and prescribe rates that are just and reasonable and rules and regulations that would apply to the varying conditions and circumstances, which would necessarily have to be considered in the proper exercise of its powers in this regard. So legislation which has delegated this power to a board or other officials, in connection with proper statutory enactment, has been upheld. *German Alliance Ins. Co. v. Barnes*, Supt. of Ins. (C. C.) 189 Fed. 769; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Citizens' Ins. Co. v. Clay et al* (D. C.) 197 Fed. 435; *State ex rel. Martin v. Howard*, 96 Neb. 278, 147 N. W. 689.

[4-7] Plaintiffs insist that House Bill No. 70, in so far as it attempts to confer upon the state insurance board power to supervise and regulate rates of insurance and the granting and revoking of insurance agents' license and power to determine the form of policy that should be used and to cancel licenses of the companies and agents, is void because said act is in conflict with sections 22, 23, and 24 of article 6 of the Constitution, which are as follows:

"Sec. 22. *Insurance Commissioner—Duties.*—There is hereby established an insurance department, which shall be charged with the execution of all laws now in force, or which shall hereafter be passed, in relation to insurance and insurance companies doing business in the state.

"Sec. 23. *Insurance Commissioner—Term—Qualifications.*—There shall be elected by the qualified electors of the state, at the first general election a chief officer of said department, who shall be styled 'the insurance commissioner,' whose term of office shall be four years: Provided, that the first term of the insurance commissioner, so elected, shall expire at the time of the expiration of the term of office of the first Governor elected. Said insurance commissioner shall be at least twenty-five years of age and well versed in insurance matters.

"Sec. 24. *Insurance Commissioner—Additional Duties.*—The insurance commissioner shall give bond, perform such duties, and possess such other qualifications as may be prescribed by law."

The argument is made that, because section 23 provides for the election of an insurance commissioner, who shall be "the chief officer of said department," thereby the Legislature is prohibited from creating other and additional offices in said department than that of insurance commissioner, and imposing duties upon such additional officers, unless they be subordinate to the insurance commissioner, and plaintiffs cite in support of this argument many cases in which were applied the rule that, where an office is created by or imbedded in the Constitution, and the duties thereof are defined by that instrument, or where the office antedated the Constitution, and its

duties were enumerated by the statute at the time the Constitution was adopted, or where the office owed its origin to the common law, and had certain well-recognized duties attached thereto, or inherently connected therewith, or forming a substantial part thereof, it was not within the power of the Legislature to transfer such duties to an office of its own creation or to an officer selected and chosen in a manner different from that by which the constitutional officer was named. Conceding the correctness of the rule contended for, it cannot have any controlling application here, because by section 22 of article 6 an insurance department is created, which is charged with the execution of all laws not in force or that may be hereafter passed in relation to insurance and insurance companies doing business in the state, and no duties are prescribed by the Constitution for the insurance commissioner, but, on the contrary, by section 24 it is expressly provided that he shall perform such duties as may be prescribed by law, thereby indicating an intention upon the part of the people to leave to the Legislature the determination of what duties should be imposed upon the commissioner, but expressly asserting an intention that the execution of all laws now in force or which should hereafter be passed should be executed by the insurance department. The argument is made that the commissioner is the department. This argument does not appear to be sound; for, if it had been the intention of the people in adopting the Constitution to prohibit the creation of any other officers in this department, it would have been an easy matter to say so and to have created only the office of insurance commissioner, and not to have created the insurance department. The fact that the department was created and that the commissioner was designated as the chief officer would imply on the contrary permission to add other officers to the department, and the department so constituted, as distinct from the insurance commissioner, should be charged with the execution of the laws upon the subject of insurance. In determining the effect to be given to the words, "chief officer," as applied to the commissioner, we are not aided by citation to any authorities where a similar question has been considered by the courts, nor in our investigations have we found any. We therefore turn to the Constitution and the laws in force at the time of its adoption in order to ascertain, if possible, the effect to be given to these words as used in the connection indicated. Section 3942, Stat. 1893, being section 4715, Rev. Laws 1910, provides that a summons against a corporation may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer of such corporation, and, in the event its chief officer is not found in the county, upon certain other officers designated therein. Here the president, mayor, or chairman of

the board of directors or trustees is referred to as the chief officer of such corporation, but no one would contend that such officer was the only officer of such corporation, or that he possessed supreme power as such. Section 6, art. 7, provides for the election of a Chief Justice of the Supreme Court, whose duties are well known. Section 2, art. 6, provides that the supreme executive power of the state shall be vested in a chief magistrate, who shall be styled the Governor of the state of Oklahoma, but the Constitution created other officers in the executive department, and conferred upon them certain powers and duties independent of the Governor, and has provided for the creation of certain boards of which the Governor is a member with the same authority as any other member of the board, as may be noted in the following instances: Commissioners of the land office (article 6, § 32); state board of equalization (article 10, § 21); state board of education (article 13, § 5). And the Legislature in various instances has created certain boards and commissions of which the Governor is a member, possessing like powers and duties as any other member; for example: State game and fish commission (section 3293, Rev. Laws 1910). By section 8779, Rev. Laws 1910, the state treasurer, by and with the consent of the Governor and Attorney General, is authorized to select depositories of the public funds, and the three officials named are authorized to approve securities offered for such deposits. So, by chapter 6, Sess. Laws 1907-08, p. 125, the Governor was created a member of the state banking board. The law creating the banking board, providing for insurance of deposits, was under consideration by the court and its validity sustained in *State ex rel. West v. Farmers' Nat. Bank of Cushing*, 150 Pac. 212; *Noble State Bank v. Haskell*, 22 Okl. 48, 97 Pac. 590.

Here we have constitutional and legislative construction of similar terms which support our conclusion in the present instance. The powers and duties of the various executive officers, with three exceptions, are defined in the Constitution, and in the following cases provision is made that additional duties may be prescribed by law: Article 14, creating a banking department and placing same under the control of the bank commissioner; also section 17, art. 6, prescribing certain duties to be performed by the secretary of state, and which further provides: "He shall perform such other duties as shall be prescribed by law." In article 6, § 19, creating the office of state examiner and inspector, certain duties are prescribed, and it is then provided: "Other duties and powers may be added by law." Article 6, §§ 28, 29, creates the office of commissioner of charities and corrections, prescribing certain duties, and by section 30 it is provided that the Legislature shall have the power to alter, amend, or add to the duties or grant additional authority to such

commissioner. In the provisions in reference to the commissioner of labor and chief mine inspector no duties are prescribed for them by the Constitution, the provision as to their duties being similar to that in the case of the insurance commissioner, thus leaving to the Legislature to prescribe what duties shall be performed by such officers. The right of the Legislature to create an office and to prescribe the powers and duties thereof is one that is not open to question in the absence of any constitutional limitation. By article 5, § 36, it is provided:

"Scope of Authority of the Legislature.—The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."

That the creation of an office and the prescribing of its duties and powers is a rightful subject of legislation is stated in 29 Cyc. 1368. The office of fire marshal was created by chapter 46, Sess. Laws 1910-11, p. 114, and by that act he was required to report to the insurance commissioner, and his salary and expenses were to be paid out of a special tax upon the gross premium receipts of fire insurance companies. Thus it is seen that the fire marshal was already an officer of the insurance department. House Bill No. 70, which creates the insurance board, names the insurance commissioner and fire marshal as two of its members, and provides for the appointment of a third member of the board, designated as secretary, whose duties have reference to insurance, and nothing else. The board is therefore a part of the insurance department, and includes in its personnel all the officers of that department as now constituted, and the duty of executing the laws relating to insurance is rightfully imposed upon the board. The insurance commissioner, as such, did not exist at the time of the adoption of the Constitution, but the secretary of state was by section 6553, Wilson's Rev. & Ann. Stat., required to discharge certain duties under then existing laws in reference to insurance. He was not authorized to regulate rates of insurance companies, nor in the main discharge the duties imposed by House Bill No. 70 upon said insurance board. Therefore it cannot be said that the act in question comes within the rule of the authorities relied upon by plaintiffs; and the said act is not unconstitutional in the respects under consideration. Even though the duties imposed upon the insurance board by House Bill No. 70 had been a part of the duties of the superintendent of insurance at the time of the adoption of the Constitution, it was within the power of the people to redistribute the executive powers of the state government in any manner they saw fit, and to confer the duty of enforcing the laws relating to insurance upon the insurance department, instead of an insurance commissioner, as they have

done by that instrument, and previous conditions existing in Oklahoma Territory, had they been different, could not have the effect of preventing the exercise of such power nor have any weight with the court, except as they may have been considered in framing the Constitution.

There is nothing in the provisions of article 9, § 19, of the Constitution that prevents the enactment by the Legislature of the act under consideration. That portion of the section cited declares that:

"The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the state has the right to prescribe the rates and charges in connection therewith. * * *"

It is apparent that the power to regulate the rates and business of insurance was not by the provision quoted delegated to the Corporation Commission, nor has the Legislature, under the authority therein given to delegate such powers, seen fit to do so, and the mere fact that specific authority is conferred upon the Legislature to vest the commission with such additional powers and duties does not deprive the Legislature of authority to pass a law which is complete in itself, regulating the business of insurance, and, in order to insure a practical operation of the law, delegating to the insurance board administrative authority to make the necessary investigations, ascertain the necessary facts, and prescribe such reasonable rules and regulations as may be necessary, when, as in this case, a review of the orders of the board in this regard is provided for in the Supreme Court. Article 5, § 36, Constitution.

[8] Various provisions of the act are attacked because it is said the subjects therein embraced are not included within the title. The provisions under consideration in this respect all have reference to the regulation of the business of insurance and insurance companies and their agents. The argument is made that the title of the act is not sufficiently broad to justify legislation of this character. The title of the act is as follows:

"An act creating a state insurance board, providing for the regulation and control of rates of premiums on insurance and to prevent discriminations therein, and the granting and revoking insurance agents' license and repealing all laws or parts of laws in conflict herewith, and declaring an emergency."

This title is sufficient to include within its terms a law generally regulating the business of insurance, insurance companies, and insurance agents. In *Conn. Mut. Life Ins. Co. v. State Treas.*, 31 Mich. 6, the title of the act was "An act to establish an insurance bureau." In determining that the provisions of the act there were within the title, the court said:

"In declaring in the language of the title that the act was one 'to establish an insurance bureau,' the Legislature must be understood as saying that it was made up of such provisions and details as were deemed suitable for the object; and under such title, and in keeping with, and in furtherance of, the single object expressed, it was competent to go further than to enact mere organic provisions. It was certainly admissible to include any just and pertinent regulations respecting the course of action to be observed by the bureau as a state agency towards those engaged in the business of insurance; and it was equally admissible to include any just and appropriate provisions for prescribing the duty due to the state in the matter of taxation from insurance companies. The fundamental principle of the law was the marking out the reciprocal rights and duties of the state and those carrying on insurance, and to provide the machinery for administration, in so far as the state by a political agency might properly supervise."

This opinion was concurred in by Mr. Justice Cooley, author of an able work on Constitutional Limitations.

In the case of *State v. Matthews*, 44 Mo. 523, the title of an act under consideration was "An act to create an insurance department," and in sustaining the validity of the act therein involved the court said:

"The act 'to create an insurance department' defines the duties and powers of the superintendent. It invests him with certain authority and power necessary to enable him effectively to execute and enforce the law, and make it subserve the object for which it was passed. For the purpose of obtaining information and thoroughly understanding the condition of insurance companies, they were required to furnish him with certain statements and facts; and a refusal to comply with that duty was made a misdemeanor. Therefore, whenever they fail to comply with or violate the provisions of the said thirteenth section, they are liable to be proceeded against for a misdemeanor. * * *

So in the organization of the insurance department it was necessary, in order to carry out the act, to empower the superintendent to do certain things; but the power would have been fruitless without authority to enforce it. To say that a separate chapter must be enacted for every provision in the framework of a law, with a distinct title, would be almost impossible and wholly ridiculous."

The title of the act involved in *Hickman v. State*, 62 N. J. Law, 499, 41 Atl. 942, was "An act to provide for the incorporation and regulation of insurance companies," and it was held in that case that the title warranted legislation regulating the business in that state of foreign insurance companies and the prosecution of their agents for unlawfully transacting business in their behalf. So in the case of *State v. Twining*, 73 N. J. Law, 683, 64 Atl. 1073, 1135, under an act entitled "An act concerning trust companies," it was held that the title was sufficiently broad to include within the object of the act legislation including not only trust companies, but also safe deposit and trust companies exercising trust powers, and any regulation deemed proper to enforce the provisions of the act by penalties or prosecution. In the case of *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492, the title of the act was "The Bank Commissioner's Act," and it was held to be sufficiently

general in its scope to warrant legislation regulating the banking business and provisions for the enforcement thereof.

The rule in this state with reference to the title of an act was stated in *City of Pond Creek v. Haskell*, 21 Okl. 711, 97 Pac. 338, as follows:

"Under this clause of the Constitution, the title of a bill may be very general, and need not specify every clause in the statute, it being sufficient if they are all referable and cognate to the subject expressed; and, when the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in and authorized by it."

See, also, *In re County Com'rs*, 7th Jud. Dist., 22 Okl. 435, 98 Pac. 557; *State v. Hooker*, 22 Okl. 712, 98 Pac. 964; *Holcomb v. C., R. I. & P. R. Co.* 27 Okl. 667, 112 Pac. 1023; *Coyle v. Smith et al.*, 28 Okl. 121, 113 Pac. 944; *Binion, Sheriff, v. Okl. Gas & Elec. Co.*, 28 Okl. 358, 114 Pac. 1096; *Jefferson v. Toomer*, 28 Okl. 658, 115 Pac. 793; *Rea, County Clerk, v. State*, 29 Okl. 708, 119 Pac. 235; *Leatherock v. Lawter*, 147 Pac. 324 (not yet officially reported); *Ex parte Ambler* (Cr. App.) 148 Pac. 1061 (not yet officially reported).

The fact that penalties are imposed for violation of the provisions of the act does not render these sections void as being without the title; for it would be a natural complement to the act regulating the business of insurance to include any just and proper provisions for enforcing the duties imposed upon the persons and companies affected, and to prescribe penalties for the violation thereof. *Plumb v. Christie*, 103 Ga. 700, 30 S. E. 759, 42 L. R. A. 181; *State v. Matthews*, supra; *State v. Bernheim*, 19 Mont. 512, 49 Pac. 441; *Gothard v. People*, 32 Colo. 11, 74 Pac. 890; *Hartford Fire Ins. Co. v. Raymond, Ins. Com'r*, 70 Mich. 485, 38 N. W. 474. And it is also permissible to make the provisions of said act applicable to the agents of the companies affected, and requiring obedience upon their part to said law, and prescribing punishment for a violation thereof. It cannot be said that such provisions interfere with the right of contract or deprive the agents affected of property without due process of law. Corporations organized under the laws of other states to engage in and carry on the business of insurance cannot carry on said business in this state without permission from the state, express or implied, nor have they any right to take risks or transact such business in this state without first having complied with the laws of the state. It has been repeatedly held that corporations of one state have no right to exercise their franchises in another state without the consent of the state and upon such terms as may be imposed by the state in which their business is carried on, not inconsistent with the federal Constitution; such conditions being within the discretion

of the Legislature. The authorities upon this point are collected in the second volume of the Digest of United States Supreme Court Reports, published by the Lawyers' Co-operative Publishing Company, under the title "Corporations" (section 761). Such corporations must act through agents, and the penalties of a restrictive statute affecting them may fairly be visited upon their agents. Such provision is incidental to the general object of the regulation of the business of insurance, and, if this power be denied, the regulation becomes ineffectual. *Hickman v. State*, 62 N. J. Law, 503, 41 Atl. 942; *State v. Morgan*, 2 S. D. 32, 48 N. W. 314; *Insurance Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474.

It was not necessary that the provision authorizing appeal should be expressed in the title; such provision being incidental to and a necessary requisite to the regulation intended, preserving to the companies and individuals affected the right to a review in the courts of any order, rule, or regulation that might be prescribed by the insurance board. *Ex parte Ambler* (Cr. App.) 148 Pac. 1061. The general scope and purpose of the act being to regulate the business of insurance, and the various provisions being cognate to the subject, and properly connected therewith and necessary to an effectual regulation, such as is intended by said act, we think the title thereof was sufficient to embrace within its general scope the various provisions challenged. Section 19 is assailed upon the theory that it is class legislation and an unjust discrimination between classes of companies therein enumerated. This question was involved in the case of *German Alliance Ins. Co. v. Lewis*, supra, where complainant attacked the statute of Kansas as discriminating against complainant because it excluded from its provisions Farmers' Mutual Insurance Companies organized and doing business under the laws of that state, and insuring only farm property. In holding adversely to this contention, the court said:

"There are special provisions in the statutes of Kansas for the organization of co-operative companies, and, if the statute under review discriminates between them, the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense—that is, outside of that wide discretion which a Legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co. v. Union County Nat. Bank*, 202 U. S. 623, 26 Sup. Ct. 768, 50 L. Ed. 1176. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the Legislature. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552."

A similar classification was upheld in *Citizens' Insurance Co. v. Clay et al.*, supra, where the Kentucky state insurance rate law excepted from its operation purely mutual or profit-sharing companies, or co-operative companies not operating for profit, and church insurance companies. The objection that the section mentioned is class legislation cannot be sustained.

Subdivision C of section 10, which provides a penalty for any insurance company, foreign or domestic, requiring any person as a condition precedent to his appointment as agent or retaining an agency for said company to refuse or surrender the agency of any domestic insurance company, is assailed as being in contravention of section 2, art. 2, of the Constitution, which provides:

"All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry."

And a portion of section 12 is also assailed as being an infringement of the rights of an insurance agent, granted to him by said section of the Constitution. Upon this question it is sufficient to say that plaintiff is not in position to raise these objections to the sections challenged, and therefore we will not consider same for this reason. *Rea v. State*, 29 Okl. 708, 110 Pac. 235; *Robertson et al. v. Board of Commissioners*, 14 Okl. 407, 79 Pac. 97; *Stine v. Lewis, Sheriff, et al.*, 33 Okl. 616, 127 Pac. 396.

[9] Complaint is also made of the action of the insurance board in refusing to approve the form of policy submitted by plaintiff because same appears to be a joint policy issued by it and another company, and has indorsed on the filing back thereof in large letters the words "PHILADELPHIA UNDERWRITERS' DEPARTMENT," and immediately following and in connection therewith, but in small letters, the words "Of Both Companies." It does not appear from the pleadings or evidence that plaintiff has used or will use such form of policy without the approval of the board, and therefore there is no cause for interference until a case shall be presented where actual relief may be granted. Plaintiff is not entitled to the relief demanded, for the additional reason that, the act conferring authority upon the insurance board to act in the premises being valid, and provision being made therein for an appeal to this court, the plaintiff is not entitled to resort to a court of equity for injunctive relief, but must pursue the remedy provided by the statute, which in this case appears to us to be plain, speedy, and adequate. *Ellis v. Akers et al.*, 32 Okl. 96, 121 Pac. 258; *Harris et al. v. Smiley*, 36 Okl. 89, 128 Pac. 276.

For the foregoing reasons, the order of the trial court denying the temporary injunction is affirmed. All the Justices concur.

(49 Okl. 643)

INSURANCE CO. OF NORTH AMERICA
et al. v. WELCH, State Insurance
Com'r. (No. 7582.)

(Supreme Court of Oklahoma. Nov. 9, 1915.
Rehearing Denied Jan. 4, 1916.)

(Syllabus by the Court.)

MANDAMUS \S 87—INSURANCE AGENTS—DUTY
TO ISSUE LICENSES—MANDAMUS.

Under the provisions of chapter 174, Sess. Laws 1915, p. 840, the duty of issuing licenses to insurance agents is imposed upon the state insurance board, and mandamus will not be awarded against the insurance commissioner directing him to issue such license.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 189-194; Dec. Dig. \S 87.]

Error from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Mandamus by the Insurance Company of North America, a corporation, and others against A. L. Welch, Insurance Commissioner of the State of Oklahoma. Judgment for defendant, and plaintiffs bring error. Affirmed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiffs in error. S. P. Freeling, Atty. Gen., and J. H. Miley and Smith C. Matson, Asst. Attys. Gen., for defendant in error.

HARDY, J. This is an action by the plaintiff Insurance Company of North America and certain of its agents for the purpose of compelling A. L. Welch, insurance commissioner of the state of Oklahoma, to issue to such agents licenses authorizing them to represent the plaintiff company and issue policies on its behalf. The petition alleged that the plaintiff had been licensed to do business in the state of Oklahoma for the year 1915, and had in all matters and things complied with the laws of the state and with the insurance department thereof, and that certain persons named in its petition and in an exhibit attached thereto had been appointed by it as its agents in this state for the year 1915, which list of agents had been filed with the insurance department of the state and with the defendant as insurance commissioner; that the necessary fees had been tendered, setting forth compliance with all of the provisions of the law in reference to the appointment and licensing of agents on behalf of plaintiff and its agents; that it had requested the defendant, as insurance commissioner, to issue said licenses, which he had refused to do.

Upon filing the petition an alternative writ of mandamus was issued and served upon the defendant, who within due time filed his answer and return, justifying himself under the provisions of House Bill No. 70, contending that, under said law, the authority and power to issue licenses to agents of insurance companies was vested in the state insurance

board, and that defendant had no authority under said law to do so.

At the trial it was admitted that defendant, Welch, had refused to issue the licenses to the agents named, and at the close of the trial judgment was rendered for the defendant. Motion for new trial filed and overruled, and exceptions saved, and plaintiffs bring error. The determination of this case is controlled by the decision in *Insurance Co. of North America et al. v. Welch, Insurance Commissioner, et al.* (No. 7581) 154 Pac. 48, this day decided.

By the provisions of chapter 174, Sess. Laws 1915, p. 340, the power and duty to license insurance agents is conferred upon the state insurance board; and, having determined this act to be a valid exercise of legislative authority, it follows that the defendant as insurance commissioner is without authority to issue the licenses demanded by plaintiffs, and no duty is imposed upon him to do so, as said licenses should be issued by the state insurance board.

The judgment of the trial court refusing the writ of mandamus is therefore affirmed.

(54 Okl. 531)

FREEMAN v. STATE BOARD OF MEDICAL EXAMINERS. (No. 5854.)

(Supreme Court of Oklahoma. Dec. 7, 1915.
Rehearing Denied Jan. 11, 1916.)

(Syllabus by the Court.)

1. PHYSICIANS AND SURGEONS §11—REVOCATION OF LICENSE—PROCEEDINGS—PARTIES.

The state is not a necessary party to a proceeding before the state board of medical examiners to revoke the license of a physician.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.]

2. PHYSICIANS AND SURGEONS §10—"UNPROFESSIONAL CONDUCT"—"INCURABLE DISEASE."

In the second clause of section 6905, Rev. Laws 1910, defining "unprofessional conduct" of a physician as "the obtaining of any fee on the assurance that an incurable disease can be permanently cured," the words "incurable disease" mean any disease which has reached an incurable stage in the patient afflicted therewith, according to the then general state of knowledge of the medical profession.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 14; Dec. Dig. § 10.]

For other definitions, see *Words and Phrases*, First and Second Series, Unprofessional.]

3. PHYSICIANS AND SURGEONS §10—UNPROFESSIONAL CONDUCT—VALIDITY OF STATUTE.

The second clause of section 6905, Rev. Laws 1910, is valid, and defines an offense against professional conduct on the part of physicians.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 14; Dec. Dig. § 10.]

4. PHYSICIANS AND SURGEONS §11—PROCEEDINGS TO REVOKE LICENSE—COMPLAINT.

The state board of medical examiners in a proceeding before it to revoke the license of a

physician acts in an administrative, and not a judicial, capacity, and the same strictness in pleadings and practice is not required before it as before a judicial tribunal. It is sufficient if the accused is informed by the complaint of the wrong charged against him and the particular instances of its perpetration charged, and has an opportunity to defend against proof of such charges, and the proceedings are free from prejudice, fraud, or oppression.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.]

5. PHYSICIANS AND SURGEONS §11—PROCEEDINGS TO REVOKE LICENSE—EVIDENCE—ADVERTISEMENT.

An advertisement published by a physician held properly admitted in evidence against him upon a charge of obtaining a fee on the assurance that an incurable disease can be permanently cured by him, as tending to prove the assurance of permanent cure, where such assurance is denied by the physician.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.]

6. APPEAL AND ERROR §1071—HARMLESS ERROR—FINDINGS OF FACT—EVIDENCE.

It is error for the court to make a finding of fact upon a matter upon which all evidence was excluded, but, where the other findings of the court are supported by the evidence, and are sufficient to sustain the judgment of the court, such error is not so prejudicial as to warrant a reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.]

7. PHYSICIANS AND SURGEONS §11—REVOCATION OF LICENSE—SUFFICIENCY OF EVIDENCE—CERTIORARI.

Evidence considered, and held to sustain the judgment of the court.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 15; Dec. Dig. § 11.]

Commissioners' Opinion, Division No. 1. Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Certiorari by R. W. Freeman against the State Board of Medical Examiners. Writ quashed, and plaintiff brings error. Affirmed.

Hatchett & Ferguson, of Durant, for plaintiff in error. S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for defendant in error.

RUMMONS, C. The questions involved in this appeal raised in the brief of plaintiff in error necessary to be considered consist of four propositions: First. Is the state a necessary party to this proceeding? Second. Is the clause in section 6905, Revised Laws 1910, defining "unprofessional" conduct of a physician as follows: "Second. The obtaining of any fee on the assurance that an incurable disease can be permanently cured"—void and of no effect? Third. Whether or not the proceedings before the state board of medical examiners and the district court were regular and free from prejudicial error? Fourth. Was the evidence sufficient to support the judgment of the trial court?

The plaintiff in error, a duly licensed physician, was informed against before the state board of medical examiners upon a charge of being guilty of unprofessional conduct. He was thereafter duly cited to answer the complaint, and did answer the same, denying specifically the acts complained of. Thereafter, at one of its regular quarterly meetings, the state board heard the complaint, and, after plaintiff in error had unsuccessfully moved to dismiss the complaint, demurred thereto, and moved to strike, proceeded to take testimony upon the complaint. The state board found against plaintiff in error, and ordered that his license as a physician be revoked. Thereupon plaintiff in error filed his petition in the district court of Bryan county praying a writ of certiorari to issue to the state board of medical examiners to review their action upon the complaint aforesaid. The writ was issued, and thereafter the cause came on before the district court of Bryan county, and a trial was had to the court, without the intervention of a jury, upon the complaint filed with the state board of medical examiners and the answer of plaintiff in error thereto. The trial court found against plaintiff in error, and quashed the writ of certiorari and affirmed the action of the state board of medical examiners.

[1] Plaintiff in error insists that this proceeding should have been dismissed for the reason that the state of Oklahoma is a necessary party to a proceeding like this. We cannot agree with this contention of plaintiff in error. The case of *Gulley v. Territory of Oklahoma*, 19 Okl. 187, 91 Pac. 1037, does not sustain the contention of the plaintiff in error, because that case was begun and tried under the laws then in force in the territory of Oklahoma providing that the district court shall upon the complaint of any member of the territorial board of health have power to cancel the license of any physician found guilty, etc. Under this statute the proceedings to revoke the license of a physician were judicial, had to be commenced upon the complaint of a member of the territorial board of health, and were thus officially controlled, and the court rightfully held the state to be a proper party in such a proceeding. The case of *State v. Estes*, 34 Or. 190, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25, cited by plaintiff in error, also fails to sustain the contention of plaintiff in error. In that case it was held that the state was a proper party in a proceeding to revoke the license of a physician, and that, notice of appeal having been served upon the state, it need not be served upon the State Board.

Our statutes (sections 6901, 6903 and 6904, Revised Laws 1910) provide the procedure for revoking the license of a physician. The proceeding to revoke the license may be commenced by any one upon a sworn complaint; and thereupon it is the duty of the state board of medical examiners to issue citation to the party complained of to answer within

20 days after the filing of the complaint, and to proceed thereafter to try and determine the issues raised.

Section 6913, Revised Laws 1910, further provides:

"Any person who has been aggrieved by any act, rule or regulation of said board shall have his right of action to have such issue tried in the district court of the county in which some member of the board shall reside."

It will be seen that under no provision of the statute does the state of Oklahoma or any official thereof have exclusive authority to institute proceedings for the revocation of the license of a physician, nor is there any authority in the statute by which the state of Oklahoma can control such proceedings. The proceeding may be instituted by any one, and the state of Oklahoma or the Attorney General would be wholly without authority to dismiss such proceeding or cause it to be discontinued. Therefore we are of the opinion that, while the state of Oklahoma, through its Attorney General, might appropriately institute such a proceeding, yet it is not such a necessary party to the proceedings as to require it to be in court before the matter could be proceeded with.

[2, 3] Is the provision of section 6905, Revised Laws 1910, above quoted void and of no effect? Upon this proposition counsel for plaintiff in error cite the case of *Graeb v. State Board of Medical Examiners*, 55 Colo. 523, 139 Pac. 1099, 47 L. R. A. (N. S.) 1063. The Colorado statute provides as a ground for revoking the license of a physician " * * * The obtaining of a fee on the representation that a manifestly incurable disease can be permanently cured." Section 6068, Rev. St. 1908. Our own statute makes the ground for the revocation of license " * * * the obtaining of any fee on the assurance that an incurable disease can be permanently cured." The two statutes are identical, except for the word "manifestly" used in the Colorado statute. A majority of the Colorado Supreme Court in the case cited held that the statute quoted was too indefinite and uncertain to be valid. The court, in passing upon this question, uses the following language:

"The position of the board is very clearly stated in this respect in their brief in *Hamilton v. Board* (Colo.) 143 Pac. 1145, to which brief we are referred and asked to consider in connection with this case. This is as follows: 'If the question were in controversy in this case as to whether the words "manifestly incurable disease" is so indefinite as to be unenforceable, we would welcome the issue, but we hesitate to burden this court with a vast number of authorities on a point not in issue. Suffice it to say that the words last quoted do not refer to any diseases per se, but to a condition of the patient suffering from almost any disease. It is true that consumption is not "a manifestly incurable disease" in itself, but an invalid suffering from consumption may have reached a stage in which the disease is "manifestly incurable." Under our statute, a physician might lawfully take money for representing that he could cure one case of consumption and at the same time be committing an offense for taking money under a

similar representation as to another case of the same disease which had manifestly gone beyond the curable stage.' This argument is also advanced in this case, but not so clearly stated as in the above quotation. This position is not tenable. If the statute had intended a manifestly incurable person, or a manifestly incurable diseased condition, it would doubtless have so recited. But the language is a 'manifestly incurable disease.' Clearly the descriptive words 'manifestly' and 'incurable' apply to the disease, and not to the person or the condition of the person afflicted with the disease. This is likewise the charge in the complaint; for it alleges 'that a manifestly incurable disease could be cured * * * the disease known as consumption.' Counsel for the board have cited no authority justifying such construction of the language used in the statute as that for which they contend, and we do not see how language so clear and explicit can be so tortured. If there is no disease known and understood to be manifestly incurable, then the statute states no offense in that particular, and the board was without jurisdiction in the premises."

Mr. Justice Gabbert, writing the dissenting opinion for the minority of the court, uses the following language:

"When is a disease manifestly incurable? Clearly when it is evident it has reached the stage that it cannot be made to yield to medical treatment. That is what laymen, as well as the medical profession, understand from the expression 'a manifestly incurable disease.' The intent of the law is to be considered in its interpretation, and, in ascertaining such intent, the evil against which it is directed must be considered. It is common knowledge that one suffering from disease can easily and readily be imposed upon by those who, by reason of the fact that they have obtained a license to practice medicine, are presumed to possess that degree of skill in the treatment of disease which will enable them to accomplish that which they represent they can. The object of the statute is to prevent what would be nothing less than extortion by members of the medical profession, obtaining money from persons or the relatives and friends of those suffering from disease by promising a cure when it is apparent that the patient is beyond the reach of medical science. Such being the object of the statute, the words employed to express it should not be given such a narrow construction as will result in destroying its beneficent purpose, when from such language, and the general understanding of what it means, it is apparent that the Legislature intended to prevent the helpless ill being imposed upon by the promises of a cure when it was evident their condition was such that it could not be accomplished."

This case is the only one cited by counsel, and the only one which we have been able to find, which passes directly upon the point raised by plaintiff in error. The majority opinion undoubtedly sustains the contention of plaintiff in error. While the Colorado statute uses the words "manifestly incurable" instead of the word "incurable" as in our statute, we do not regard this as affecting the applicability of the majority opinion of the Colorado court, since the court there holds that the words "manifestly" and "incurable" must be taken as applicable to the disease per se, and not to the condition of the patient suffering with the disease at the time his treatment is undertaken by the physician. The record in the case at bar discloses that the diseases which the plaintiff in error is

charged with having undertaken to treat upon assurance of effecting a permanent cure were not considered by the witnesses for the complainant to be incurable per se; in fact, it may be doubted if the medical profession recognizes any disease as incurable per se—that is, beyond the reach of medical skill at any stage in the progress of the disease. We think, however, that the majority opinion of the Colorado court does not rightly construe the statute, and we prefer to follow the dissenting opinion in that case, as we think the dissenting opinion correctly interprets the statute in question, and that such interpretation is equally applicable to our own statute.

To sustain the contention of the plaintiff in error upon this proposition would be to nullify that section of our statute, and to hold that the Legislature, adopting it, did a vain and useless thing. The universal rule of statutory construction is that, when the intent of the Legislature can be determined from the statute, it is the duty of the courts to follow and enforce such intent. In construing statutes consideration is always given to the mischief to be corrected and the remedy to be afforded. As we regard this section of our statute, we think that it is not aimed at any unethical practices of physicians as interpreted by the medical fraternity, but was aimed to prevent acts on the part of physicians which are universally regarded as immoral and against good conscience, not only by the medical profession, but by laymen as well, and for which under the style of obtaining money under false pretenses our Criminal Code has provided the penalties of the law. The gist of the offense of which it is claimed plaintiff in error was guilty is duping the credulous and taking advantage of the afflicted by taking money from them with an assurance that they can be permanently cured when, in fact, their condition is incurable according to the general state of knowledge of the medical profession at that time. The word "incurable" is defined:

"Not curable; beyond the power or skill of medicine." 22 Cyc. 74. "Not susceptible of cure; applied to both patients and disease." Dunglison's Medical Dictionary.

Section 2914, Revised Laws 1910, provides:

"Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears."

Section 4642, Revised Laws 1910, provides:

"* * * But the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any * * * statute of Oklahoma; but all such statutes shall be liberally construed to promote their object."

Under these definitions and under the rules of construction laid down as above in our statutes we must conclude that the word "incurable," in the section of the statute in question, is to be interpreted in its ordinary acceptance, and that the Legislature, in adopt-

ing that section, did not intend to do a useless thing, but intended the statute to be enforced in accordance with an interpretation based upon the ordinary understanding of the words used, both by laymen and physicians. In that view of the case we are clearly of the opinion that the words "incurable disease" in the section of the statute in question apply to the state of the disease which a patient may have at the time the treatment of it is undertaken by the physician, and that, if a physician undertakes to treat a patient who is suffering from a disease which has in its progress reached an incurable state according to the then general state of knowledge of the medical profession, and accepts a fee from the patient upon the assurance that he can effect a permanent cure of such disease, he would be guilty of unprofessional conduct as defined in that section of our statute.

[4] Plaintiff in error complains of irregularity and error in the proceedings before the state board of medical examiners and in the trial before the district court. He particularly complains of the sufficiency of the complaint filed before the state board. It is practically held unanimously by all the courts that such boards, in proceedings similar to the one at bar, do not act judicially, and are not judicial bodies, but that their action is merely administrative. It is also held that it is within the police power of the state to grant powers such as are sought to be exercised in this case to such boards as a part of the administrative arm of the government, and to provide for summary proceedings to be taken by such boards in cases similar to the one at bar. It is also held that it is not necessary in a trial under such a complaint that the proceedings shall be conducted with that degree of exactness which is required in trials before ordinary tribunals of justice, and that a complaint filed before a state board of health for the purpose of revoking the license of a physician is sufficient if it informs the accused not only of the nature of the wrong charged, but of the particular instances of its alleged perpetration. *Munk v. Frink*, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. (N. S.) 439; *Meffert v. Packer*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350; *State Medical Board v. McCrary*, 95 Ark. 511, 130 S. W. 544, 30 L. R. A. (N. S.) 783, Ann. Cas. 1912A, 631; *State Board of Health v. Roy*, 22 R. I. 538, 48 Atl. 802; *State v. Chapman*, 34 Minn. 387, 26 N. W. 123; *State v. Feller*, 34 Minn. 391, 26 N. W. 125.

In view of the fact that the controversy is narrowed down to the one charge that plaintiff in error accepted a fee for the treatment of an incurable disease with the assurance that he could effect a permanent cure, we are of the opinion that the paragraph of the complaint which charges plaintiff in error with that offense against professional conduct is

sufficient, since it advises him of the particular diseases the treatment of which he is charged with having undertaken, especially as plaintiff in error did not seek to have these charges made more definite and certain.

[5] The plaintiff in error complains of the admission in evidence by the trial court of an advertisement which is admitted to have been published by plaintiff in error. Plaintiff in error says that he was not charged with making grossly improbable statements, calculated to mislead the public, in advertising his business. While this is true, we do not think the court erred in the admission of this advertisement, since it tended in some degree to throw light upon a question properly before the court; i. e., whether or not plaintiff in error gave assurances of effecting permanent cures of incurable diseases.

[6] Plaintiff further complains that the trial court in its findings in this cause found plaintiff in error guilty of a charge upon which the trial court, upon the objection of plaintiff in error, had excluded all evidence. The record seems to bear out the contention of plaintiff in error in this particular. While this is error, yet, as we have concluded that the judgment of the trial court was right, the fact that he may have included in his findings a conclusion which was not supported by the evidence, since he did make findings that are supported by the evidence and which sustain the judgment, we will not disturb the judgment of the court therefor.

[7] Plaintiff in error further contends that the findings of the court are not supported by sufficient evidence. We have examined the record upon the propositions complained of by plaintiff in error, and we find sufficient evidence to sustain the findings of the court as to the incurable nature of the diseases undertaken to be treated by plaintiff in error, as to his assurances of effecting a permanent cure, and as to his accepting a fee therefor. It is urged by plaintiff in error that the written guaranty which was introduced in evidence, and which is as follows:

"Absolute Guarantees.

"—, Okla., —, 191—.

"I, R. W. Freeman, M. D., party of the first part, do hereby agree to refund all moneys paid to me by H. S. Hawkins, party of the second part, should he fail to receive a complete cure by my treatment.

R. W. Freeman.

"I, H. S. Hawkins, party of the second part, do hereby agree to follow the directions given by R. W. Freeman, M. D., party of the first part, through a period of time sufficient as deemed by him to effect a complete cure. Should I fail to follow the directions as given by him, then I agree that this agreement becomes null and void.

H. S. Hawkins."

—is not a guaranty of a cure, but only a guaranty to refund the fee in the event the treatment prove unsuccessful. We consider this contract to be a mere subterfuge, and have no doubt that it was drawn for the very purpose of protecting plaintiff in error in a case like this. But a reading of the entire

contract shows that it holds out to the patient an assurance of a permanent cure. And, aside from this contract, the record contains evidence of assurances made by plaintiff in error of effecting a permanent cure to his patients orally. This evidence was perfectly competent, since this action is not based upon the contract above quoted, and oral evidence tending to prove or disprove the matter at issue was admissible.

We conclude that there is no prejudicial or reversible error in the record, and that the judgment of the court below was right, and should be affirmed.

PER CURIAM. Adopted in whole.

WADSWORTH et al. v. CRUMP et al.
(No. 5687.)

(Supreme Court of Oklahoma. Oct. 19, 1915.)
Rehearing Denied Jan. 25, 1916.)

(Syllabus by the Court.)

INDIANS \S 18 — ALLOTMENT — DESCENT AND DISTRIBUTION.

Louis Cox, a Seminole citizen, died on July 4, 1901, before selecting his allotment. His surviving widow was a Creek, and she and their two children were duly enrolled as Creek citizens. Held, under the act of Congress, known as the Supplemental Seminole Treaty, passed and approved June 2, 1900, c. 610 (31 U. S. Stat. L. 250), the allotment in the Seminole Nation set apart by the government as the distributive share of the said Louis Cox did not descend to his said widow or children, for the reason that under the terms of the act above referred to his allotment could descend to his heirs only who were Seminole citizens.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. \S 49; Dec. Dig. \S 18.]

Commissioners' Opinion, Division No. 4. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by Annie Wadsworth and others against George C. Crump and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. S. Severson, of Broken Arrow, for plaintiffs in error. Davis & Patterson, of We-woka, for defendants in error.

MATHEWS, C. This action was instituted by plaintiffs in the district court of Seminole county and submitted to the court upon the following agreed statement of facts:

"Agreed Statement of Facts.

"The plaintiffs appearing by their attorney, J. S. Severson, and the defendants appearing by their attorney, B. F. Davis, waive a jury in said cause, and agree that the court may determine the issues thereof on the following agreed statement of facts, to wit: (1) That the land in controversy was set apart by the government of the United States as the distributive share of Louis Cox, who appears on the final rolls of the Seminole Tribe of Indians as a member of said tribe, opposite roll No. 1721. (2) That the said Louis Cox died intestate on July 4th, 1901, and before selecting his allotment, and before the said allotment, being the land above describ-

ed, was set apart by the government of the United States as his distributive share of the communal property of said Seminole Tribe of Indians. (3) That at the time of his death he was lawfully married to one Annie Cox, now Annie Wadsworth, one of the plaintiffs herein, and as issue of said marriage he was survived by his two daughters, Maggie Cox, who is now plaintiff Maggie Beamore, and Nancy Cox, who is now the plaintiff Nancy Alexander; that his said wife and two daughters, the plaintiffs herein, are members of the Creek Tribe of Indians, and duly enrolled opposite Creek Indian roll Nos. 7555, 7556, and 7557, respectively; that no conveyance has ever been made by said plaintiffs to any one. (4) It is further stipulated that the only Seminole relative surviving Louis Cox was one Lucy Wildcat, whose name appears upon the approved Seminole roll opposite roll No. 400, and under whom the defendants claim title by virtue of divers conveyances."

The court found the issues against the plaintiff and for the defendant, and that under the Seminole Agreement (31 Stat. L. 250), relative to descent and distribution of said nation in force at the demise of the said Louis Cox, deceased, whose allotment is in controversy in this case, no one but citizens of the Seminole Nation could inherit a Seminole citizen's allotment from the allottee.

The only question here presented is whether or not the plaintiffs in error, who are the legal widow and the only two surviving children of the decedent, Louis Cox, a duly enrolled citizen of the Seminole Nation, his said widow being a duly enrolled Creek citizen and their said two children being also enrolled as Creek citizens, the said Louis Cox having died before his allotment was made, can inherit the land allotted to the said Louis Cox out of the lands of the Seminole Nation. The decision in the case rests upon the construction of an act of Congress known as the Supplemental Seminole Treaty, passed and approved the 2d day of June, 1900 (31 U. S. Stat. L. 250), in reference to the enrollment of members of the Seminole Tribe of Indians and the descent and distribution of their property under certain conditions, which, omitting the introductory and concluding parts, consists of two sections as follows:

"First. That the Commission to the Five Civilized Tribes, in making the rolls of Seminole Citizens, pursuant to the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, shall place on said rolls the names of all children born to Seminole citizens up to and including the thirty-first day of December, eighteen hundred ninety-nine, and the names of all Seminole citizens then living; and the rolls so made, when approved by the Secretary of the Interior, as provided in said act of Congress, shall constitute the final rolls of Seminole citizens upon which the allotment of lands and distribution of money and other property belonging to the Seminole Indians shall be made, and to no other persons.

"Second. If any member of the Seminole Tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money, and other property to which he would be entitled if living shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribu-

tion of the state of Arkansas, and be allotted and distributed to them accordingly; provided that in all cases where such property would descend to the parents under said laws the same shall first go to the mother instead of the father, and then to the brothers and sisters, and their heirs, instead of the father."

Defendants contend that these two sections have already received a settled construction by this court in the cases of *Bruner et al. v. Sanders et al.*, 28 Okl. 673, 110 Pac. 730, and *Helker-Jarvis Seminole Co. v. Lincoln et al.*, 33 Okl. 425, 126 Pac. 723, while the plaintiffs contend that the question as to whether or not the children of a Creek woman, they being also Creek allottees, are prohibited from inheriting the allotted lands of their father, he being a Seminole citizen, was not decided in the above two cases. In the case of *Bruner v. Sanders*, supra, the facts were on all fours with the case at bar, with the one exception that the allottee received his allotment before his death, while in the case at bar the allottee died before the allotment was made. The court in that case laid down the law of this case. It might perhaps be said that the law laid down in that case was dictum as far as it covers the point involved in the case at bar, which is perhaps true; but, even though it be dictum, an examination of the statute construed leads us to conclude that it is a correct statement of the law. In that case, the court had under consideration the construction of the statute now under consideration here, and used the following language:

"The trial court took the view of this statute that it is not a general statute of descent and distribution, but a special statute, applicable only to the property of enrolled members of the Seminole Tribe of Indians who die subsequent to the 31st day of December, 1899, whose property, if lands, had not been allotted to the Indian, or, if other property, had not been distributed to him at the time of his death. In this construction of the statute by the trial court we concur."

From the syllabus of that case we take this excerpt:

"Section 2 of the Act of Congress approved June 2, 1900, entitled 'An act to ratify an agreement between the Commission to the Five Civilized Tribes and the Seminole Tribe of Indians' (Act June 2, 1900, c. 610, 31 Stat. 250), controls the descent of land to which a duly enrolled member of the Seminole Tribe of Indians who died after the 31st day of December, 1899, before receiving his allotment, is entitled."

This court, in the case of *Bruner v. Sanders*, supra, having correctly decided, we think, that the act of Congress, approved June 2, 1900 (chapter 610, 31 Stat. 250), applies to the facts presented in the case at bar, the question next for determination is whether or not this statute excluded the children of a Seminole citizen by a Creek woman, who were also enrolled as Creeks, from inheriting his allotted lands. The act

under consideration says that such property "shall descend to his heirs who are Seminole citizens." Who are Seminole citizens as here designated? Section 1 of the act set out above provides for the enrollment of the Seminole citizens and says that in making out this roll the names of all of the citizens living on the 31st day of December, 1899, and all the children born to Seminole citizens up to that date, shall constitute the final rolls of Seminole citizens. In section 21 of the Original Curtis Act (Act Cong. June 28, 1898, c. 517, 30 Stat. 502), which provided for the enrollment of the citizens of the Five Civilized Tribes, which included the Seminole Nation, there is a provision which reads as follows:

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

From the reading of these two sections last above set out it plainly appears that neither the widow of decedent, Louis Cox, nor their two children, can be denominated "Seminole citizens." The widow undoubtedly is not so included because she is of the Creek blood and a citizen of that tribe, and the two children are excluded because they were born before December 31, 1899, and were not enrolled as Seminole citizens, and thus do not come within the provisions defining Seminole citizens.

It does not follow, if the children had been born after December 31, 1899, that even then they could have inherited the allotment in controversy. The defendants have presented the additional proposition here that, according to the custom of the Seminole Nation, the blood of the mother determined the tribe to which her offspring belonged, and the fact that the children, plaintiffs here, were not enrolled as Seminole citizens was not due to any neglect of the parents of the said children or of the Commission to have said children enrolled on the Seminole roll, but the law and the custom of the Seminole Tribe were that the children were of the blood of the mother and members of that tribe to which the mother belonged. While we do not find it necessary to pass upon this proposition, and will leave it, as far as this opinion is concerned, an open question, yet we will say that as far as our investigation has lead us, we are of the opinion that this last proposition is a correct statement of the law so far as it applies to facts as presented in the case at bar.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 391)

UNION COAL CO. et al. v. WOOLEY.
(No. 4122.)(Supreme Court of Oklahoma. Nov. 30, 1915.
Rehearing Denied Jan. 11, 1916.)*(Syllabus by the Court.)***1. PLEADING — 367 — MOTION TO MAKE DEFINITE AND CERTAIN — REQUISITES.**

A motion to make a pleading more definite and certain must point out wherein the pleading is indefinite and uncertain, and, if it fails to do so, it is not error to overrule it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. — 367.]

2. APPEAL AND ERROR — 960 — DISCRETIONARY RULING — PLEADING — MOTION TO MAKE CERTAIN.

A motion of this kind is addressed largely to the discretion of the trial court, and a ruling thereon will not be reversed except for an abuse of such discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3832-3834; Dec. Dig. — 960.]

3. CORPORATIONS — 545 — INSOLVENCY — DIRECTORS — RIGHT TO PREFER CREDITOR.

A director of an insolvent corporation is a trustee for the creditors of such corporation, and will not be allowed to prefer an antecedent unsecured debt of other creditors of such corporation who would lose the entire amount due them, if such preference is allowed to stand.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175; Dec. Dig. — 545.]

4. CORPORATIONS — 547 — INSOLVENCY — PREFERENCE OF DEBTS OF DIRECTORS — JURISDICTION IN EQUITY.

Where the directors of an insolvent corporation, upon the sale of its entire property, received a large sum of money, some of which they used to pay debts of the corporation, but paid themselves about \$3,000 for sums they claimed to be due them from the corporation, but paid nothing to the plaintiff, a court of equity has jurisdiction of an action to charge such directors as trustees, and this remedy is not abolished by the statute defining the obligations and liabilities of directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2178-2181; Dec. Dig. — 547.]

5. CORPORATIONS — 547 — INSOLVENCY — PREFERENCE OF DEBT DUE DIRECTORS — PERSONAL JUDGMENT.

Where in such case the directors receive the purchase price of the property of the insolvent corporation in cash, and mingle it with their own funds, it is not error to render a personal judgment against them in favor of a creditor of the corporation who has received nothing on his debt.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2178-2181; Dec. Dig. — 547.]

6. CORPORATIONS — 547 — ACTION FOR TORT — "CREDITOR."

Where a party has an action for a tort pending against a corporation, which is afterwards reduced to judgment, he is a creditor of such corporation before the actual rendition of the judgment. Rev. Laws 1910, § 2893.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2178-2181; Dec. Dig. — 547.]

For other definitions, see Words and Phrases, First and Second Series, Creditor.]

7. CORPORATIONS — 590 — SALE OF PROPERTY — RIGHT OF CREDITORS.

Where there is neither a consolidation nor a merger, and one corporation buys all the prop-

erty of another, for full value, and without fraud, the property will pass to the purchasing corporation free from the claims of creditors of the selling corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354, 2361-2367; Dec. Dig. — 590.]

8. CORPORATIONS — 545, 590 — SALE OF PROPERTY — TRUST FUND — RIGHTS OF CREDITORS — DUTY OF PURCHASING CORPORATION.

In such case the money paid for the property of the selling corporation passes to its directors, and they hold it as a trust fund for the payment of creditors, and the residue, if any, for the stockholders, and the purchasing corporation is not bound to see to the proper application of the purchase money by the directors of the selling corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175, 2354, 2361-2367; Dec. Dig. — 545, 590.]

9. CORPORATIONS — 590 — SALE OF PROPERTY — NOTICE OF INSOLVENCY — EFFECT.

Notice to the purchasing corporation in such case that the selling corporation is insolvent is not notice that the directors intend to misapply the purchase money.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354, 2361-2367; Dec. Dig. — 590.]

Commissioners' Opinion, Division No. 2. Error to District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by Tom Wooley against the Union Coal Company, a corporation, and others. Judgment for plaintiff, and defendants bring error. Affirmed in part and reversed in part.

This was an action by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below, to hold the defendants liable to the payment of a judgment for \$5,697.12 recovered by him against the Adamson Coal & Mining Company. The findings of fact by the trial court clearly state the questions raised, and are as follows:

"That on May 7, 1909, plaintiff filed suit in the district court in and for Pittsburg county, at McAlester, for the sum of \$20,000, against the Adamson Coal & Mining Company; thereafter on or about the 14th day of April, 1910, said plaintiff recovered judgment in said court against the Adamson Coal & Mining Company in the sum of \$5,687.12, and that on or about the 4th day of August, 1909, the Adamson Coal & Mining Company sold all its property and assets to the Union Coal Company, and that said Adamson Coal & Mining Company ceased to do business, having disposed of all its property.

"That the consideration paid by the Union Coal Company for the property of the Adamson Coal & Mining Company was \$28,900. Out of this sum the Union Coal Company retained \$12,783.04, and paid the same to various creditors of the Adamson Coal & Mining Company, and said Union Coal Company turned over and paid to the Adamson Coal & Mining Company the sum of \$16,116.96. Out of this sum the stockholders of said Adamson Coal & Mining Company, Peter Adamson, Jr., Maudie Adamson, and A. Z. Rudd appropriated to their own use and benefit about \$8,000 of said sum.

"The court further finds that at the time said sale was made by the Adamson Coal & Mining Company of its assets and property to the Union Coal Company, and for about three years prior thereto, said Adamson Coal & Mining Company was insolvent and in a failing condition, and the same was known to the Union Coal Company at

the time it bought the assets and property of the Adamson Coal & Mining Company.

"The court further finds that the Union Coal Company knew of the claim of plaintiff against the Adamson Coal & Mining Company at the time it bought the property of said Adamson Coal & Mining Company, and that it knew said suit was pending and knew of the claims and demands of the plaintiff against the Adamson Coal & Mining Company."

There was judgment for the plaintiff below against both defendants, and from this judgment the defendants below bring the case to this court by petition in error and case-made.

Hurley, Mason & Senior, Fred A. Fulghum, W. J. Gregg, and Carl C. Magee, all of Tulsa, for plaintiffs in error Adamson and Rudd. Wright & Boyd, of McAlester, for plaintiff in error Union Coal Co. Geo. W. Sutton, of Muskogee, and W. N. Redwine, of McAlester, for defendant in error.

DEVEREUX, C. (after stating the facts as above). Separate petitions in error and assignments of error are filed on behalf of the Adamsons and Rudd and the Union Coal Company, and, as they present different questions, we will first consider those filed on behalf of the Adamsons and Rudd.

[1, 2] Their first assignment of error is that the court erred in overruling a motion to make the petition more definite and certain. This motion is as follows:

"To require the plaintiff to make his allegations of fact which constitute his cause of action against these defendants more definite and certain."

It was not error to overrule this motion, because it did not point out wherein the petition was indefinite and uncertain (*Grimes v. Cullison*, 3 Okl. 268, 41 Pac. 355, *Cockrell v. Schmitt*, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737, and *Kuchler v. Weaver*, 23 Okl. 420, 100 Pac. 915, 18 Ann. Cas. 462), and also a motion of this character is largely addressed to the discretion of the court, and a ruling thereon will not be reversed, except for an abuse of such discretion (*Ft. Smith & Western R. Co. v. Ketis*, 26 Okl. 696, 110 Pac. 661).

[3-5] These plaintiffs in error also filed a demurrer on the grounds: (1) That the petition does not state facts sufficient to constitute a cause of action; (2) that the joinder of parties defendant is defective; and (3) because several causes of action are improperly joined. The questions raised by the demurrer are disposed of in our decision on the main question presented, which is whether a director of an insolvent corporation can prefer his debts to the prejudice of other creditors, and this depends on whether a director is a trustee for creditors. This question has never been expressly decided in this state, and, looking to other jurisdictions, the authorities are hopelessly in conflict.

In *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705, it is held that the assets of an insolvent corporation are a fund for the payment of its debts, and, if they have gone into the hands of other than bona fide pur-

chasers, leaving corporate debts unpaid, such persons take the property charged with a trust in favor of creditors, which a court of equity will enforce.

In *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40, it appeared that a corporation had conveyed its property so as to protect its directors against liability as indorsers for it, and in condemning the transaction the court says:

"The transaction which this case discloses cannot be sustained by a court of equity. The conduct of the directors of this railroad corporation was very discreditable and without authority of law. It was their duty to administer the important matters committed to their charge, for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust."

In *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. 496, 11 C. C. A. 320, in which the decision was rendered by Circuit Justice Harlan, it is held that, when a private corporation is dissolved or becomes insolvent, and determines to discontinue the prosecution of its business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors, and that the duty in such case of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control or manage its affairs, who, if not technically trustees, hold the corporate assets in a fiduciary relation to creditors.

In 10 Cyc. 803, it is said:

"The assets of an insolvent corporation being a trust fund for creditors, which necessarily means for all creditors, the directors in charge of such assets stand in the position of trustees for the creditors, and cannot so deal with them as to prefer themselves as creditors, for any past indebtedness of the corporation in favor of such directors, unless at the time when such past indebtedness was created it was agreed that they should be so preferred."

On page 805 it is said:

"In two or three American jurisdictions the contrary and regrettable doctrine obtains that the directors may use the knowledge which they possess of its impending insolvency, so as to prefer or secure themselves as its creditors, to the disadvantage and postponement of its general creditors."

In *Olney v. Conanicut Land Co.*, 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. Rep. 767, it is held that the directors of an insolvent corporation are by virtue of their position debarred from preferring debts of the corporation due to themselves, and in the opinion it is said:

"Indeed, no cases that we know of deny a fiduciary relation of directors to stockholders, however they may differ in the use of terms to describe it. This relation has led logically to the conclusion that, in case of insolvency, the assets of the corporation being no longer held for the benefit of stockholders, but for the benefit of creditors, the directors owe to the creditors the duty of a trustee. This duty is clearly stated by Clifford, J., in *Bradley v. Converse*, 4 Cliff. 375: 'Assets of an incorporated company are regarded in equity as held in trust for the payment of the debts of the corporation, and courts of equity will enforce the execution of such trusts in favor

of the creditors even when the matter in controversy may not be cognizable in a court of law. Such assets are usually controlled and managed by directors or trustees; but courts of equity will not permit such managers, in dealing with the trust estate, in the exercise of the powers of their trust, to obtain any undue advantage for themselves, to the injury or prejudice of those for whom they are acting in a fiduciary relation."

The same rule that directors of an insolvent corporation are held as trustees for creditors is announced in *Jones on Insolvent and Failing Corporations*, § 55.

In *Lyons-Thomas Hardware Co. v. Perry Stove Co.*, 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802, the question under consideration is discussed in an elaborate note, in which it is said:

"The most serious conflict between the courts on the question of preferences by insolvent corporations is in reference to the preference of debts of directors. In a few states the doctrine that corporations may prefer creditors is followed to its full extent, and preferences to the directors themselves, although obtained by virtue of their superior knowledge of the condition of the corporation, are upheld."

And in the note it is said:

"But the great weight of authority denies the right of directors of a corporation to take advantage of their position to obtain preferences for themselves or unsecured debts"—citing many cases.

In *Wait on Insolvent Corporations*, § 1621, it is said in part, in speaking on the question of the general right of a corporation to prefer its creditors:

"The practical working of the rule sustaining corporate preferences is monstrous. The unpreferred creditors have only a myth or a shadow left to which resort can be had for payment of their claims; a soulless, fictitious, unsubstantial entity that can be neither seen nor found. The capital and assets of the corporation, the creditors' trust fund, may under this rule of law be carved out and apportioned among a chosen few, usually the family connections or immediate friends of the officers making the preferences."

This language is very applicable to cases where the directors preferred themselves. See *Jones on Insolvent and Failing Corporations*, § 132.

The plaintiff in error relies upon the cases holding that directors are not trustees, and especially on *Corey v. Wadsworth*, 118 Ala. 488, 25 South. 503, 44 L. R. A. 766, in which the doctrine that a director of an insolvent corporation is not a trustee for creditors, and consequently that he can pay his own claim in preference to other creditors, as upheld in the opinion, but this is opposed to the great weight of authority, and, as we think, of reason, and the true rule is that the director of an insolvent corporation is a trustee of the corporate assets for creditors, and that he cannot prefer a prior unsecured debt of his own to the injury of other creditors. But the plaintiff in error contends that their liability is fixed by the provisions of Rev. Laws 1910, § 1254. But this action is not brought under this section, but in equity to reach the trust fund that has come into the hands of these plaintiffs in error,

and for which in equity they should account. *C., R. L. & P. R. Co. v. Howard*, 7 Wall. 392, at 416, 19 L. Ed. 117, cited with approval by this court in *Collins v. Kaw City Mill & Elev. Co.*, 26 Okl. 641, 110 Pac. 734, where it is said:

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that the stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid. Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and, as such, they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation."

The case of *Topeka Paper Co. v. Oklahoma Pub. Co.*, 7 Okl. 220, 54 Pac. 455, is cited by plaintiff in error to sustain their contention, but the facts in that case were that two corporations consolidated, and it was attempted to hold the directors liable for the debts of one of the corporations, and the court held that they were not liable, on the ground that it was not shown that the value of the property of the corporation was by the act of the stockholders destroyed, impaired, or lessened in value.

This case, therefore, is no authority for one like the present, where the directors sell every particle of property the corporation owned, go out of business, and use the money to pay debts due themselves.

[7] Complaint is also made that the court erred in rendering a personal judgment against these plaintiffs in error, but, under the evidence in this case, if a personal judgment cannot be rendered, the defendant in error would be without any remedy, for the plaintiffs in error received the payment in money, not in specific property of the corporation. If the contention of the plaintiffs in error is sound, a trustee can always escape liability by squandering or concealing the trust fund. That a court of equity can render a personal judgment when otherwise the plaintiff would be without remedy is settled. *Murray v. Speed*, 153 Pac. 181, No. 5442, decided November 16, 1915, and not yet officially reported.

[8] That the defendant in error was a creditor before his demand was reduced to judgment is settled by the provisions of Rev. Laws 1910, § 2893, which provides:

"A creditor, within the meaning of this chapter, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money."

And see *Shelby v. Ziegler*, 22 Okl. 799, 93 Pac. 989.

The judgment, therefore, against Peter Adamson, Jr., Maudie Adamson, and A. Z. Rudd should be affirmed.

[9] Coming to the matters presented by the *Union Coal Company*, a different question is

presented. There is no evidence that it did not pay the full value of the property purchased from the Adamson Coal Company, or that they had any fraudulent intent in making the purchase, or that they had any reason to suspect that the directors of the Adamson Coal Company did not intend to pay the just debts of that corporation, and the payment was made in cash. The fact that the Union Coal Company knew that the Adamson Company was in a failing condition and insolvent does not render the purchase by the Union Coal Company fraudulent; for to so hold would render any sale of property by an insolvent fraudulent, even where he got full value for the property sold.

[9] The fact that the Union Coal Company knew that the Adamson Company was insolvent does not carry with it notice that the directors of that company would misapply the purchase money; for no one is bound to assume that the party with whom he deals is a wrongdoer, or that he intends to commit a fraud. *United States v. Detroit, etc., Co.*, 200 U. S. 321, 332, 28 Sup. Ct. 282, 50 L. Ed. 499. That the vendee must participate in the fraudulent intent was decided by this court in *Oklahoma Nat. Bank v. Cobb* (No. 5781) 153 Pac. 134, decided November 16, 1915, not yet officially reported.

In *Vicksburg City Telegraph Co. v. Citizens' Telegraph Co.*, 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656, it was held that, where there has been neither a consolidation nor a merger, but a sale by one corporation of its property to another, if made for a valuable consideration and in good faith, the property will pass to the purchasing corporation, free from the claims of creditors, and the same rule prevails as between individuals; and see *Hawkins v. Central R. R. Co.*, 119 Ga. 159, 46 S. E. 82. And in 1 *Thompson on Corporations*, § 377, it is said:

"The foregoing does not, it is assumed, apply to a bona fide sale, for a good consideration, by one company of all of its properties to another. In such case the consideration of the sale would pass to the directors of the selling company, and they would hold it as a trust fund for their creditors first, and their shareholders next. It would be a mere substitution of trust funds, and the purchasing company would not, on well-settled principles, be bound to see to its proper application by the directors of the selling company."

The question of the power of the Adamson Coal Company to sell its entire assets and property was not raised in the trial court, nor has it been presented to us, and it is therefore not considered; but see *Anderson v. Shawnee Compress Co.*, 17 Okl. 231, 87 Pac. 315, 15 L. R. A. (N. S.) 846.

The only question decided on this part of the case is that, where one corporation purchases all the property of another, and pays its full value in cash, there being no fraudulent intent, it is not liable to creditors of the selling corporation.

We therefore recommend that the case be

remanded, with instructions to affirm the judgment against Peter Adamson, Jr., Maude Adamson, and A. Z. Rudd, and to reverse and set aside the judgment against the Union Coal Company, and to dismiss the action as to it, and, as this judgment is affirmed in part and reversed in part, that the costs of this court be equally divided between the parties. Rev. Laws 1910, § 5261.

PER CURIAM. Adopted in whole.

(49 Okl. 692.)

PARKER et al. v. HAMILTON.
(No. 6275.)

(Supreme Court of Oklahoma. July 13, 1915
Rehearing Denied Jan. 11, 1916.)

(Syllabus by the Court.)

1. JURY \Leftrightarrow 10—RIGHT TO JURY TRIAL—EX-TENT.

The trial by jury secured to the people of the state by section 19, art. 2, of the Constitution is a trial according to the common law as it existed and was in use when the Constitution was adopted, except as specifically modified by the provisions of the Constitution itself.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 15, 16, 27½; Dec. Dig. \Leftrightarrow 10.]

2. JURY \Leftrightarrow 19—RIGHT TO JURY TRIAL—WILL CONTEST.

A proceeding contesting the probate of a will is not a suit wherein the parties are entitled to a trial by jury as a matter of right under section 19, art. 2, of the Constitution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104-133; Dec. Dig. \Leftrightarrow 19.]

3. COURTS \Leftrightarrow 200—JURISDICTION—SUPERIOR COURT—PROBATE PROCEEDINGS.

By reason of section 1966 and section 1974, Comp. Laws 1909 (Rev. Laws 1910, §§ 1798, 1806), the superior court has jurisdiction of matters of probate in a cause appealed from the county court to the district court and transferred upon motion of plaintiffs to the superior court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 441, 442, 454, 469-471; Dec. Dig. \Leftrightarrow 200.]

4. JURY \Leftrightarrow 11—WILLS \Leftrightarrow 318—RIGHT TO JURY TRIAL—DISCRETION—ADVISORY VERDICT—PROBATE PROCEEDINGS.

On an appeal to the district court from a judgment of the county court admitting a will to probate, where the cause is transferred by the district court to the superior court, the latter court may, in its discretion, make an order for a trial by jury of any or all the material questions of fact arising upon the issues between the parties. But in such case the verdict of the jury will be merely advisory to the court, and he may adopt or reject their conclusions, as he sees fit; for the whole matter must eventually be left to him to determine.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 19-24; Dec. Dig. \Leftrightarrow 11; Wills, Cent. Dig. §§ 751-754; Dec. Dig. \Leftrightarrow 318.]

5. COURTS \Leftrightarrow 42—ESTABLISHMENT OF SUPERIOR COURT—VALIDITY OF STATUTE.

Article 7, c. 14, p. 181, Sess. Laws 1909, under which the superior court of Pottawatomie county was organized, is constitutional, and said court is legal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 163-170, 181-183; Dec. Dig. \Leftrightarrow 42.]

6. APPEAL AND ERROR 714—MATTER NOT OF RECORD—BRIEF.

This court will not consider a question raised for the first time in plaintiffs in error's brief, and evidence of which is the clerk's signature to a statement thereof in plaintiffs in error's brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963; Dec. Dig. 714.]

7. TRIAL 370—SUBMISSION OF ISSUES—ADVISORY VERDICT.

In cases where the parties are not entitled to a jury trial as a matter of right, and the finding of the jury being advisory only, it is not error for the court to refuse to submit all the questions of fact to the jury, but he may submit such as are controverted or such as he may desire to be advised upon. *Oklahoma Trust Co. v. Stein*, 39 Okl. 756, 136 Pac. 746.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 881, 885; Dec. Dig. 370.]

8. JUDGMENT 199—MOTION FOR JUDGMENT—ADVISORY VERDICT—CONFLICTING EVIDENCE.

In a case, where the findings of the jury are advisory only, and the same were not adopted by the court, it is immaterial whether such verdict is general or special, or upon what instructions it was reached, or whether on controverted or uncontroverted evidence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. 199.]

9. APPEAL AND ERROR 1047—RULINGS ON EVIDENCE.

In the trial of a case the question of admitting or rejecting testimony is one intrusted largely to the sound discretion of the trial court; and, where the matter submitted by the issues in the case is not one where the parties are entitled to a jury as a matter of right, the ultimate decision of the case is with court, not with the jury, great latitude is allowed in the exercise of discretion by the court in admitting or rejecting testimony, and the case will not be reversed in this court for error in this particular, unless such an abuse of discretion is shown as to deprive the objecting party of some substantial right. *Tobin v. O'Brieter*, 16 Okl. 500, 85 Pac. 1121.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. 1047.]

10. COURTS 488—TRANSFER OF CASE—WAIVER OF IRREGULARITIES.

Irregularities in the transfer of a case from the district to the superior court may be waived by the parties, and, when waived by them, any judgment rendered by the superior court will be regular.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1316-1323; Dec. Dig. 488.]

11. JUDGMENT 211—RENDITION—VALIDITY—ADVISORY VERDICT.

In cases where the court may ignore the findings of the jury and render such judgment as he considers authorized and proper under the evidence in the case, it will be immaterial whether or not it renders judgment in response to a motion therefor by one of the parties, and such judgment will not be void because rendered subsequent to the filing of a motion for a new trial by the party in whose favor the judgment is rendered and before passing on such motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 386; Dec. Dig. 211.]

12. WITNESSES 359—IMPEACHMENT—CONVICTION OF WITNESS.

Where the trial court admits in evidence the judgment of a foreign state convicting a witness who testified upon the trial of a felony, it

is not error to exclude the facts relating to such judgment, but offered to contradict the testimony of such witness as to the facts upon which said conviction was had.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1161, 1162; Dec. Dig. 359.]

13. APPEAL AND ERROR 1014—JUDGMENT CONTRARY TO ADVISORY VERDICT—EVIDENCE.

Where the evidence reasonably tends to support the judgment rendered by the court, ignoring the findings of the jury, in a case where the parties are not entitled to a trial by jury as a matter of right, such judgment will be affirmed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3995½; Dec. Dig. 1014.]

Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Application by B. F. Hamilton to probate the will of Samuel Bailey, deceased, and for letters testamentary. Probate of the will was opposed by Aramella Parker and others. From a judgment admitting the will to probate and granting letters testamentary to proponent, the contestants appealed to the district court, from which court the case was transferred to the superior court, where judgment was rendered for proponent, and contestants bring error. Affirmed.

H. H. Smith, of Shawnee, C. W. Crim, of Estherville, Iowa, J. T. Suggs, of Denison, Tex., B. L. Jones, of Sherman, Tex., and J. D. Lydick, of Shawnee (H. H. Smith, of Shawnee, on the brief), for plaintiffs in error. Samuel W. Hayes, of Oklahoma City, and W. S. Pendleton and F. H. Rely, both of Shawnee, for defendants in error.

BROWN, J. Samuel Bailey died September 28, 1912, in Pottawatomie county, Okl., leaving a will in which he devised to his nephew, Sherman Spencer, his entire estate, consisting of several thousand dollars. The will named Dr. B. F. Hamilton as sole executor without bond. September 27, 1912, B. F. Hamilton, filed with the clerk of the county court his application and petition to probate the will and for letters testamentary. October 21, 1912, Mrs. May Spencer filed her application in the county for probate of the will and to be appointed administratrix with the will annexed, alleging that Sherman Spencer, the legatee named in said will, died September 29, 1912, and that she was his surviving wife and heir, and, as such, entitled to the estate of Samuel Bailey, deceased, and that B. F. Hamilton was not a proper person to act as executor of Bailey's will. October 21, 1912, an answer was filed in the county court by B. F. Hamilton and Sherman Spencer, denying generally the allegations contained in May Spencer's application, and especially denying that Sherman Spencer was dead and the incompetency of B. F. Hamilton to act as executor of Bailey's will, and denying that May Spencer had any right to be appointed administratrix of the will.

After due notice of the application to probate had been given, plaintiffs in error Aramella Parker and Sabrina B. Strong and Parry Kilburn appeared in said county court, the two first mentioned claiming to be sisters of Samuel Bailey, the latter a nephew by a deceased sister, and all claiming to be heirs of said Bailey, and protested against the probate of said will on the ground that Samuel Bailey at the time he made the same was mentally incompetent to make the will, and that the will was not executed according to law, and prayed that the court refuse probate of the will and appoint an administrator of Bailey's estate.

October 21, 1912, B. F. Hamilton and Sherman Spencer filed an answer to the objection and protest of Aramella Parker and others denying the allegations therein contained. November 11, 1912, Aramella Parker, Sabrina B. Strong, Henry F. Bailey, James Chrystler, Hannah Brewer Kipton, Franklin Chrystler, Charles Chrystler, and John M. Chrystler filed in the county court of Pottawatomie county their joint protest and objections to the probate of the will of Samuel Bailey, alleging they were next of kin to said Bailey, and further alleged, in substance, that the purported will of Samuel Bailey was not executed by him according to law, that he was mentally incompetent to make a valid will, and for various reasons therein alleged the purported will was void, and the objectors prayed for the appointment of an administrator of said estate, and that probate of the will be denied. A hearing was had in the county court December 2, 1912, and judgment rendered admitting the will to probate, and granting letters testamentary to B. F. Hamilton, executor. From this judgment the objectors, Aramella Parker, Sabrina B. Strong, and others, appealed to the district court of Pottawatomie county. January 30, 1913, on motion of the objectors, Aramella Parker and others, filed in the district court of Pottawatomie county, the cause was transferred to the superior court of said county. February 1, 1913, Aramella Parker and others filed motion in the superior court of Pottawatomie county asking that said cause be remanded to the district court of said county, alleging that, under the Constitution and statutes of Oklahoma, said superior court was without jurisdiction to hear and determine said cause. The motion was overruled, and plaintiffs excepted.

The case was thereafter set down for trial July 14, 1913, and on July 9th plaintiffs, contestants, filed their motion and application for trial by jury. On the same day the application for trial by jury was sustained on the agreement of plaintiffs to withdraw the application for a rehearing of their application for a writ of prohibition in the Supreme Court of Oklahoma, and upon condition that the plaintiffs deposit with the clerk of the court \$200 in cash to defray the expenses of said jury. July 4, 1913, May Spencer, by her

attorney, filed written objections to a trial by jury for the reason that the jury had been summoned upon the application of plaintiffs, and the expenses thereof paid with money deposited by plaintiffs, and the summoning of the jury was irregular and not authorized by law. July 14, 1913, the case was called for trial, and May Spencer presented her application for a continuance of the case, and defendants Hamilton and Spencer, by their attorneys, moved to quash the panel of the jury summoned for the trial of the case, on the ground the same was irregularly drawn, that there was no money in the court fund to pay the expense of the same, and that the contestants had deposited \$200 with which to pay their expenses, and that fact would have a tendency to bias the jury in favor of the plaintiffs. The court overruled the motion for continuance and the objection to the jury, and the cause proceeded to trial to the jury.

After the conclusion of the evidence, which covers over 300 pages of the case-made, Hamilton and Spencer moved the court to discharge the jury, and for the court to pass upon the questions of law and fact. Contestants, Aramella Parker and others, then moved the court to instruct the jury to return a verdict in effect denying the probate of the will. After refusing numerous instructions requested by the plaintiffs, the court instructed the jury, which retired, and thereafter returned into court their findings and answers to special interrogatories as follows:

"First. Did Samuel Bailey sign the alleged will? Answer: Yes.

"Second. If he signed the alleged will, was the same executed and witnessed in compliance with the law as same has heretofore been stated in these instructions? Answer: Yes.

"Third. If Samuel Bailey signed the will and same was executed as required by law, was Samuel Bailey in the making of said will controlled by an insane delusion as same has been defined for you in these instructions? Answer: Yes.

"Fourth. If Samuel Bailey signed the will, and same was executed as required by law, and if he was not in the making of said will controlled by an insane delusion as same has heretofore been defined in these instructions, did he have the capacity to retain in memory the extent and condition of his property to comprehend to whom he was giving it and to appreciate the deserts and relation to him of others to whom he gave nothing? Answer: No."

Thereafter, July 19, 1913, the defendants moved the court to set aside the special verdict of the jury and enter judgment for defendants, and on July 22d defendants filed motion for new trial. July 26th plaintiffs, the contestants, filed a motion for judgment on the findings of the jury. The court thereupon pronounced its conclusions of fact and of law, and rendered judgment "that the will be admitted to probate notwithstanding the verdict, and that the costs be taxed to the contestants." Contestants excepted to the conclusions of law and fact made by the court and to the judgment rendered, and thereafter in due time filed motion for a new trial, which was overruled, and they prosecute error.

The petition in error contains fifty assignments of error, but in their brief plaintiffs in error present the case to this court upon eight general propositions, viz.:

(1) "The court erred in overruling motion for new trial upon the grounds assigned that defendants or contestants below had the right of trial by jury, and consequently on disputed evidence the court could not sustain a motion for judgment notwithstanding the verdict."

(2) "The superior court was not in existence at the time of the rendition of judgment, October 13, 1918."

(3) "If the court was a legally existing court, it had no jurisdiction to make findings or render judgment at a term subsequent to the term the case was tried, without the court being adjourned to said term."

(4) "The court erred in not submitting to the jury the issue of undue influence, and in not requiring the jury to find generally."

(5) "If the verdict of the jury is special, as contended in defendant in error's brief, a motion for judgment will not lie; and this because a motion for judgment applies only when the evidence is undisputed, and when judgment may be rendered on the pleadings, notwithstanding the verdict, and never applies when a special verdict is relied upon."

(6) "The evidence of Hamilton and Spencer was incompetent, and motion to exclude same should have been sustained."

(7) "The court's view of the law as expressed in its opinion and by its instructions to the jury was erroneous."

(8) "The superior court had no jurisdiction of this case on the record."

[1, 2] It is claimed by plaintiffs in error that, under section 19, art. 2, of the Constitution of Oklahoma, the parties litigant are entitled to a trial by jury as a matter of right in all cases in courts of record in this state when issues of fact are joined by the pleadings. We cannot agree with this contention. The section of the Constitution referred to has been construed to confer the right of trial by jury to be absolute in cases only where the right existed at common law as construed at the time of the erection of the state, except as modified by the Constitution.

In the case of *Baker v. Newton*, 27 Okl. 436, 112 Pac. 1034, 40 L. R. A. (N. S.) 940, it was held, quoting from paragraph 4 of the syllabus:

"Trial by jury secured to the people of the state by section 19, art. 2, of the Constitution, is a trial according to the course of the common law as it existed, and the same, in substance, as that which was in use when the Constitution was adopted, except as specifically modified by the provisions of the Constitution."

In the case of *Baker v. Newton*, supra, Justice Hayes speaking for the court, after copying section 19, art. 2, of the Constitution, and construing the same, says:

"The question therefore arises: What constitutes a trial by jury as guaranteed by the Constitution? This question has been under investigation by many courts of the nation, both state and federal, and there is unanimity in the opinions that the right of trial by jury secured by the Constitutions of the various states is simply the right to a trial by jury constituted substantially and with the same elements and incidents as existed when the Constitution was adopted. *Carroll v. Byers et al.* (Ariz.) 26 Pac. 599; *State ex rel. v. Withrow*, 133 Mo.

500 [34 S. W. 245, 36 S. W. 43]; *Byers v. Commonwealth*, 42 Pa. 89; *Plimpton v. Somerset*, 33 Vt. 283. "The trial by jury secured to the subject by the Constitution is a trial according to the course of common law, and the same, in substance, as that which was in use when the Constitution was formed." *East Kingston v. Towle*, 48 N. H. 64 [97 Am. Dec. 575, 2 Am. Rep. 174]. See, also, *Copp v. Henniker*, 55 N. H. 179 [20 Am. Rep. 194]; *Hagany v. Cohnem et al.*, 29 Ohio St. 82.

"Judge Cooley, discussing these provisions, said: 'All the state Constitutions preserve the right of trial by jury, for civil as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable in inferior courts. The constitutional provisions do not extend the right . . . in the cases in which it was a matter of right before.'"

And again, at page 447 of 27 Okl., on page 1039 of 112 Pac. [40 L. R. A. (N. S.) 940], it is further said:

"The constitutional provisions preserving trial by jury in this state specifically eliminates some of the features thereof as it existed before the admission of the state. Section 19, art. 2, after providing that the right of trial by jury shall be and remain inviolate, specifically provides that in county courts and courts not of record a jury shall consist of six men, and in all civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors shall have power to render a verdict. By these provisions unanimity in the verdict is no longer required in any civil case, and the number constituting the jury, as to county courts, is reduced from 12 to 6; but, except as to these two important changes in the features of the jury trial as it existed at common law, the preceding clause of the section provides that the trial by jury shall be and remain inviolate. It was evidently intended by such declaration of right that those essential features of the jury trial as existed before the admission of the state, not specifically modified by the Constitution, should be preserved."

In the case of *State ex rel. West*, Attorney General, v. *Cobb*, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639, in an opinion by Justice Dunn, it is said, quoting from paragraph 2 of the syllabus:

"The right of trial by jury, declared inviolate by section 19, art. 2, p. 83, Snyder's Const. Oklahoma, except as modified by the Constitution itself, means the right as it existed in the territory at the time of the adoption of the Constitution."

Apache State Bank v. Daniel, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520, was a case in which action was commenced in the county court to compel the administratrix to inventory as part of the estate for which administration was therein pending certain bank stock which it was alleged belonged to the estate. The action was resisted by the administratrix, who claimed that she was the owner of said stock in person. The issue was thus formed by the pleadings, and a trial had in county court, which resulted in an order of that court requiring the administratrix to inventory said property. From this order the administratrix appealed to the district court. A trial was had in the district court before a jury, to which the issues of fact were sub-

mitted and the trial resulted in a verdict and judgment for the administratrix, and appeal prosecuted to this court. One of the grounds relied on for reversal was the submission of the case to a jury. It was held that the submission of the case to a jury for a general verdict was erroneous. But it appearing that the court, having carefully reviewed the evidence, reached a conclusion independent of the jury, the case was not reversed on that ground, although the conclusion reached by the court was the same as found by the jury.

The case of *Cartwright v. Holcomb*, 21 Okl. 548, 97 Pac. 385, 17 Ann. Cas. 277, appears directly in point. The case was one involving the contest of a will the probate of which was resisted in the county court. The court sustained the validity of the will and admitted it to probate. Contestants appealed therefrom to the district court, where a demand for a trial by a jury was refused, and the case was tried by the court without a jury. Judgment was rendered admitting the will to probate. The contestants appealed from the judgment of the district court, and a reversal was sought on the ground plaintiff in error had been denied a trial by jury in the district court. The case involved a question of fact upon which issue had been joined by the pleadings. This court, through the present Chief Justice, citing a number of authorities supporting the opinion, held that in such case a trial by jury as a matter of right did not exist at common law in the territory of Oklahoma.

Such was the condition of the law in Oklahoma at the time of the erection of the state and the adoption of the Constitution. As said by Justice Kane in the *Cartwright Case*, supra, it was within the discretion of the trial court to order a jury to pass upon questions of fact arising in the case. It being discretionary with the court whether it would submit the issues of fact to the jury, we think it was likewise within its discretion whether it would accept and adopt the findings of the jury upon the issues submitted to them. In such cases it is held the findings of the jury are advisory only.

The case of *Barnes et al. v. Lynch et al.*, 9 Okl. 153, 59 Pac. 995, was a suit to set aside deeds to real estate and decree title therein to be in plaintiff and for an injunction restraining defendant from disposing of the land in controversy. The suit being one in which the parties were not entitled to a trial by jury as a matter of right, it was held, quoting from the syllabus:

"In cases of equitable cognizance, while the judge may call in a jury or consent to one, for the purpose of advising him upon the questions of fact, he may adopt or reject their conclusions, as he sees fit, and the whole matter must eventually be left to him to determine, and instructions to the jury furnish no ground of error upon appeal. It was not only the right, but the duty, of the court to have determined all questions of fact as well as of law."

To the same effect is the case of *Richardson-Roberts-Bryne D. G. Co. v. Hockaday et al.*, 12 Okl. 546, 73 Pac. 957, in which the case of *Barnes v. Lynch*, supra, is quoted with approval.

In the case of *Mosler and First National Bank of Walter v. Walter*, 17 Okl. 305, 87 Pac. 877, the territorial court held as follows, quoting from paragraph 3 of the syllabus:

"In an equitable proceeding for the cancellation of a deed, the jury sits merely in an advisory capacity to the court, and a party cannot complain of a refusal of the court to submit special interrogatories, as their submission or rejection by a court of equity lies solely within its sound discretion, and it may adopt or reject such as it deems proper, and no error can be predicated thereon, unless such discretion has been abused."

Section 4993, Rev. Laws 1910, reads as follows:

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."

Our statute was taken bodily from the statutes of Kansas, viz., Gen. Stat. p. 680, § 266.

In the case of *H. H. McCardell et al. v. H. W. McNay*, 17 Kan. 433, plaintiffs sought to set aside a deed to certain property and have the same subjected to his judgment. In the trial of the case the defendant demanded a jury, which was refused, and on appeal the Supreme Court of Kansas, passing upon the right of the litigants to a trial by jury under the statute above referred to, sustained the action of the trial court in the following language:

"The only question in the case in this court is: Did the court below err in refusing the defendants, plaintiffs here, a trial by jury? This question must be answered in the negative. This is not one of the actions in which a party is entitled to demand a jury as a matter of right. In civil actions a jury can be claimed as a matter of right only, for the trial of 'issues of fact arising in actions for the recovery of money, or of specific real or personal property.' Gen. Stat. 680, § 266. Now, this is not an action for the recovery of money. Neither is it an action for the recovery of real property. Nor is it an action for the recovery of personal property."

In the case of *Houston v. Commissioners of Cloud County*, 19 Kan. 396, the action was by Houston against the commissioners and treasurer of Cloud county to restrain the assignment and transfer of certain tax sale certificates, and to set aside the treasurer's sale for taxes upon which such certificates were based. At the trial the plaintiff, Houston, demanded a jury, which was refused, and upon appeal the action of the trial court was sustained. In this case the case of *McCardell v. McNay*, supra, was approved.

We have cited the several authorities above referred to in view of the earnest contention of counsel for plaintiffs in error that in the trial court plaintiffs in error

were entitled to a trial by a jury as a matter of right, and consequently to judgment on the findings and verdict of the jury. We think the authorities above cited settle plaintiffs in error's first proposition against them.

It is further contended by plaintiffs in error that, the trial court having agreed to call and impanel a jury in the trial of the case on the condition that plaintiffs would abandon their motion for rehearing of their application for a writ of prohibition in the Supreme Court and deposit sufficient money to pay the expenses of the jury, the court was bound to afford plaintiffs a trial by jury. It appears the court did all it agreed to do. It did call a jury and submitted to them the facts of the case. The court did not obligate itself to be bound by the action, of the jury, and, if it had so agreed, it would not thereby have estopped itself from exercising the right under the law to reject the verdict of the jury in so far as it did not comport with the court's conclusions after hearing all the evidence in the case.

[3, 5] Plaintiffs in error's second proposition involves the constitutionality of the superior court of Pottawatomie county. It is claimed that article 1, c. 20, § 1797, Rev. Laws 1910, under which the superior court of Pottawatomie county was organized, is unconstitutional. The section complained of is article 7, c. 14, Sess. Laws 1909, p. 181. The act referred to was construed, and the constitutionality thereof sustained, by this court in a well-considered opinion by Justice Hayes in the case of *Burks v. Walker*, 25 Okl. 353, 109 Pac. 544, and the conclusion therein reached has been since recognized as the settled law of the state, and in a late case of *Hatfield v. Garnett*, 146 Pac. 24, this court referred to *Burks v. Walker* with approval. The validity of the act and the decision of *Burks v. Walker* is again recognized by this court in the case of *Leathercock v. Lawter et al.*, decided in March, 1915, and found in 146 Pac. 324. No reason has been shown why the conclusion reached in *Burks v. Walker*, supra, should not be adhered to. We think further consideration of this proposition at this time a consumption of time which the congested condition of the docket of this court will not justify.

Plaintiffs in error's third proposition is as follows:

"If the court was a legally existing court, it had no jurisdiction to make findings and render judgment subsequent to the term the case was tried without the court having been adjourned to that time."

[6] We have already disposed of the question of the legality of the court. And on examination of plaintiffs in error's assignments of error we fail to find any reference to the judgment of the court having been rendered at a term of court subsequent to the trial of the case, and the only evidence of such fact to which our attention is called is the statement in plaintiffs in error's brief,

signed by the clerk of said court; hence we decline to consider this objection.

[4, 7] Plaintiffs in error's fourth proposition is:

"The court erred in not submitting to the jury the issue of undue influence and requiring the jury to find generally."

The case being one in which the parties were not entitled to a trial by jury as a matter of right, and the court not being bound by the findings of the jury, there was no error in failing to instruct upon the issue of undue influence or in failing to require the jury to find a general verdict; the court having refused to adopt the verdict which the jury did return.

In the case of *Oklahoma Trust Company v. Stein*, 39 Okl. 756, 136 Pac. 746, it is held:

"In cases of equitable cognizance the judge may call in a jury or consent to one for the purpose of advising him on questions of fact, and he may adopt or reject their conclusions as he sees fit, inasmuch as the whole matter must be left to him to determine eventually, and it is not error for him to refuse to submit all the questions of fact to the jury, but he may submit such as are controverted or such as he may desire to be advised upon."

To the same effect is the case of *Galer v. Berrian et al.*, 43 Okl. 303, 140 Pac. 155. See, also, *Kentucky Bank & Trust Co. v. Pritchett*, 143 Pac. 338; *Oklahoma Trust Co. v. Stein*, 39 Okl. 756, 136 Pac. 746.

[8] Plaintiffs in error's fifth proposition is as follows:

"If the verdict of the jury was special, as contended in defendants in error's brief, a motion for judgment will not lie; and this because a motion for judgment applies only when the evidence is not disputed, and when judgment may be rendered on the pleadings notwithstanding the verdict, and never applies when a special verdict is relied upon."

The court did not adopt the verdict, and, the findings of the jury being merely advisory, the question of whether it was special or general was of no concern, and it was immaterial upon what instructions it was reached, or whether it was upon controverted or uncontroverted evidence. The record shows the trial court based its judgments upon its own conclusions of what the facts were, as it had a right to do.

In the case of *Barnes v. Lynch*, supra, we find quoted with approval the following cases:

Koons v. Blanton, 129 Ind. 383, 27 N. E. 334, from the Supreme Court of Indiana as follows:

"Since, in a suit in equity to reform a deed, the parties are not entitled to a jury, and since the court, when it calls a jury to its aid in such case, may disregard their findings, the parties cannot complain of the manner in which the questions are submitted, nor to the form of the interrogatories or instructions."

Also *Missouri Valley Lumber Co. v. Reid*, 4 Kan. App. 4, 45 Pac. 722, in a case of foreclosure, as follows:

"The finding of the jury was in any event merely advisory, and not binding upon the court. In the face of it, the court had a right to decide for itself all questions of fact as well as of

law in the case"—citing *Franks v. Jones*, 39 Kan. 238, 17 Pac. 863; *Moors v. Stanford*, 2 Kan. App. 243, 41 Pac. 1064.

Plaintiffs in error's sixth proposition is:

"The evidence of Hamilton and Spencer was incompetent, and motion to exclude the same should have been sustained."

The witness Hamilton was named as executor of the will, and, as such, applied for its probate, and was one of the proponents in the case, insisting upon the validity of the will and its right to probate. Sherman Spencer was the legatee named in the will, and was an adverse party. The contestants were the next of kin and relatives whose rights to Bailey's property depended upon breaking the will. Hamilton and Spencer were called in behalf of proponents, and testified as witnesses in support of the will and its admission to probate. The statute which it is contended by plaintiffs in error rendered the witnesses Hamilton and Spencer incompetent to testify is found in section 5841, Comp. Laws 1909, which, so far as applicable, reads as follows:

"No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where they have acquired title to the cause of action immediately from such * * * person."

It will be observed the statute quoted does not disqualify the administrator or the legatee in a will as a witness in any case. In this case the witnesses Hamilton and Spencer were competent witnesses to prove any material fact in the case of which they had knowledge, unless such fact was in respect to some transaction or communication had personally by such witnesses with the deceased. Dr. Hamilton was introduced by proponent, and, without objection, testified at length as to the deceased's condition of mind and body up to the time of his death, and that he was deceased's physician several years before his death. Some of the answers of the witness were inadmissible, and should have been excluded from the jury, but substantially the same statements which the witness Hamilton says were made by Bailey were also testified to by the witnesses Frank Boggs and Mary Skillington, without objection or contradiction. A lengthy cross-examination by counsel for contestants of the witness Hamilton appears to have covered every matter about which this witness testified in chief, and much more. Hamilton was afterwards recalled by contestants and interrogated as to the property and estate in his hands. Much of what has been said relative to the testimony of the witness Hamilton can be said as to the testimony of the witness Sherman Spencer. He was interrogated and testified without objection as to the relations and feelings of the deceased to the witness and witness' mother, and as to a meeting by the witness and deceased in Shawnee, and friendly con-

versations between them at that place. This witness was also subjected to a rigid cross-examination by contestant's counsel, by which he was interrogated generally as to his relations with the deceased and his conversations with him. Some of his answers, like the witness Hamilton's, were inadmissible. But, if we concede the testimony of the witnesses Hamilton and Spencer was erroneously admitted and influenced the jury in their findings and verdict in the case, still we must not overlook the fact that the court did not adopt the findings of the jury. There was other evidence sufficient to authorize and support the court's judgment, which it had the right to enter notwithstanding the findings of the jury. The fact that incompetent evidence was admitted, will not justify a reversal of the judgment in the absence of a showing plaintiffs in error were prejudiced thereby. What we have said with reference to the testimony of the witnesses Hamilton and Spencer, applies to the evidence of the witnesses Northrup, Frazier, Ong, Crump, and others, which plaintiffs in error claim was erroneously admitted before the jury.

[9] In the case of *Tobin v. O'Brieter*, 16 Okl. 500, 85 Pac. 1121, it is held, quoting from paragraph 3 of the syllabus:

"In the trial of a case the question of admitting or rejecting testimony is one intrusted largely to the sound discretion of the trial court; and, where the matter submitted by the issues in the case is not one where the parties are entitled to a jury as a matter of right, and the ultimate decision of the case is with the court, and not with the jury, great latitude is allowed in the exercise of discretion by the court in admitting or rejecting testimony, and the case will not be reversed in this court for error in this particular, unless such an abuse of discretion is shown as deprives the objecting party of some substantial right."

In *Ray v. Harrison*, 32 Okl. 17, 121 Pac. 633, Ann. Cas. 1914A, 413, it is held, quoting from paragraph 3 of the syllabus:

"When the testimony upon a given point is all harmonious, a cause will not be reversed because some of the evidence thus offered may have been inadmissible."

In the case of *Daniel v. John P. London Co.*, 44 Okl. 297, 144 Pac. 596, it is held, quoting from paragraph 1 of the syllabus:

"The improper admission or exclusion of evidence, if not prejudicial to the party complaining, is not ground for reversal."

As said in *Cartwright v. Holcomb*, supra, the presumption is, in the absence from the record of anything to the contrary, that the court understood the weight to be given to the evidence before it.

Plaintiffs in error's seventh proposition:

"The court's view of the law as expressed in the opinion and by its instructions to the jury was erroneous."

This proposition is answered in our consideration of propositions Nos. 4, 5, and 6.

[10] Eighth proposition:

"The superior court has no jurisdiction of this case on the record."

Under this proposition it is contended by counsel for contestants this case was never

properly transferred from the district to the superior court. The record shows this case was transferred by the district court to the superior court on the motion of the plaintiffs in error, and that thereafter they requested a trial by jury therein, and, without objection, engaged in the trial in said court, and, if there were any irregularity in the transfer of the case, it has been waived by plaintiffs in error.

In *State ex rel. Strong v. Superior Court of Pottawatomie County*, 38 Okl. at p. 868, 132 Pac. 1077, Hayes, C. J., speaking for the court in regard to the transfer of this identical case, says:

"Irregularities in the transfer may be waived by the parties, and, if waived by them, any judgment rendered by the superior court would be regular."

It is also contended by plaintiffs in error under this proposition that the superior court of Pottawatomie county had no jurisdiction to try questions in the contest or probate of a will. Both contentions of plaintiffs in error under this proposition were decided against them by this court in the case of *State ex rel. Strong et al. v. Superior Court of Pottawatomie County*, 38 Okl. 868, 132 Pac. 1077, which was a branch of this case, but, in view of plaintiffs in error's contention that the conclusion reached in that case was erroneous, we have carefully examined and believe the law as announced therein is correct. This renders further consideration of this proposition unnecessary.

[11] One assignment of error is:

"That the court erred in sustaining motion for judgment."

After the case had been submitted to the jury, and after they had returned into court their findings of fact therein, the contestants filed motion for judgment in accordance with the findings of the jury, while the defendants filed a motion for judgment in their favor independent of the findings of the jury, and thereafter the trial judge proceeded to state his conclusions of fact and of law upon the entire case, independent of the findings of the jury, except such findings that the will was executed in all respects as required by law, which was adopted, and the further findings of the jury were ignored by the court, and it was found that Bailey, at the time of making the will, was of sound and disposing mind, and was not influenced by any insane delusion, and that the will should be admitted to probate, and it was so ordered. As we have heretofore held, the court had the right to adopt or reject the findings of the jury and render such judgment as, in his opinion, should be rendered on the whole case; and the fact that he did so after the filing of a motion so requesting is wholly immaterial.

It is also contended by plaintiffs in error that, the defendants below having filed a motion for a new trial, after filing their motion for judgment independent of the verdict of

the jury, it was error for the court to proceed to render judgment without passing on such motion for a new trial; both of said motions being then pending before the court. We think this contention is without merit.

[12] Plaintiffs in error contend that the trial court also committed error in excluding from the jury certain facts recited in the judgment from the Supreme Court of Wisconsin evidencing the conviction of the witness Sherman Spencer, of the offense of wife abandonment. A recital of the facts of such judgment was offered by plaintiffs in error, as they claim to contradict the testimony of the witness Spencer upon the trial in the superior court. The superior court admitted evidence of the conviction of Spencer and the offense for which he was convicted, and directed the jury to consider the fact of his imprisonment only for the purpose of determining the credibility they would give to his testimony, and excluded certain facts which seem to have been recited in the judgment. We think this was correct.

[13] An examination of the voluminous record in this case satisfies us there was sufficient competent evidence before the trial court to support the judgment admitting the will of Samuel Bailey, and the judgment is therefore affirmed.

(12 Okl. Cr. 224)

RICHARDS et al. v. STATE. (No. A-2434.)
(Criminal Court of Appeals of Oklahoma. Jan. 15, 1916.)

(Syllabus by the Court.)

1. WITNESSES — 337 — CROSS-EXAMINATION OF ACCUSED.

A defendant, by availing himself of the statutory privilege of becoming a witness in his own behalf, has voluntarily changed his status from defendant to witness, and consequently may be cross-examined within the usual boundaries, and thus be discredited and impeached.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.]

2. WITNESSES — 337, 342 — IMPEACHMENT OF ACCUSED—REPUTATION.

Where the purpose of testimony is to impeach a witness for want of truth and veracity, the inquiry and the answer must be as to his general character or reputation for truth and veracity in the community in which he resides, and testimony as to the general reputation of a defendant for being a bootlegger is incompetent to impeach the credibility of a defendant as a witness in his own behalf, or for any other purpose.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1113, 1123, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337, 342.]

Appeal from County Court, Harper County; A. H. Walker, Judge.

Clare Richards and another were convicted of having possession of intoxicating liquors with unlawful intent to sell same, and appeal. Reversed and remanded.

El. J. Dick and Malcolm W. McKenzie, both of Buffalo, for plaintiffs in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiffs in error, Clare Richards and Joe Knoble, were convicted in the county court of Harper county on an information which charged that they did have possession of intoxicating liquors, amount unknown, with the unlawful intent to sell the same. On the 8th day of February, 1915, judgment was rendered in accordance with the verdict of the jury. To reverse the judgment an appeal was perfected by filing in this court on April 5, 1915, a petition in error, with case-made.

[1, 2] The Attorney General has filed a confession of error as follows:

"In this case, having read through the record with care, and also having read the elaborate brief of the plaintiffs in error, through their attorneys, we are forced under the recent decisions of this court, to confess error. There was but one witness that testified as to the main facts on the part of the state, and he admitted that he was angry and more than that, offered to leave the jurisdiction of the court and not testify for the sum of \$15. However, the jury found the defendants guilty under this testimony, and there is nothing showing that they were biased or prejudiced, further than they might have been influenced by the evidence. But the error is that the defendants having taken the stand and testified in their own behalf, neither was asked anything about being a bootlegger. But other witnesses were brought in by the state, and two of them were asked if they knew defendants' character on the subject of bootlegging, and answered 'No.' Two others were brought in and to this question they answered 'Yes,' and that their character was bad. Upon the decisions of this court, this is reversible error. *Kirk v. State*, 11 Okl. Cr. 203, 145 Pac. 307; *Sims v. State*, 11 Okl. Cr. 382, 146 Pac. 914."

Upon a careful examination of the record, it is our opinion that the confession of error is well taken.

The judgment herein is therefore reversed, and the cause remanded.

(38 Nev. 553)

RAMELLI v. SORGI. (No. 2056.)

(Supreme Court of Nevada. Dec. 31, 1915.)

1. WATERS AND WATER COURSES ¶179 — FLOWAGE—ACTIONS—NECESSARY PARTIES.

That persons not parties to the action contributed to the damage done to plaintiff's land by permitting waste water to flow thereon, did not render erroneous for want of necessary parties a decree enjoining defendant from suffering waste water to flow from his lands upon plaintiff's land, where it did not appear that defendant and the other alleged necessary parties were acting jointly in causing the damage.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. ¶179.]

2. WATERS AND WATER COURSES ¶124 — WASTE WATER — OVERFLOWING OF LANDS — INJUNCTION.

That waste water from defendant's land flowed without interruption across the land of a third person to reach plaintiff's land, did

not deprive plaintiff of his right to enjoin defendant from flowing such water upon his lands.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 142; Dec. Dig. ¶124.]

Appeal from District Court, Washoe County; John S. Orr, Judge.

On rehearing. Former decision adhered to. For former opinion, see 149 Pac. 71.

Harwood & Springmeyer and Cole L. Harwood, all of Reno, for appellant. Summerfield & Richards, of Reno, for respondent.

NORCROSS, C. J. This case was heretofore determined on the appeal from the judgment. 149 Pac. 71. A rehearing was granted because the court inadvertently overlooked the fact that counsel had stipulated for diminution of the record so as to enable the court to pass on questions raised upon the appeal from the order denying defendant's motion for a new trial. No attack is made upon the correctness of the views expressed in the former opinion.

[1] It is contended by counsel for the appellant that the decree granting an injunction against the appellant "from causing, permitting, and suffering the waste water from said section 15 and the S. ½ of section 10, township 18 N., range 20 E., to flow over, into and upon the plaintiff's land situate in section 3, township 18 N., range 20 E.," should be set aside. It is urged that this portion of the decree should be vacated for the reason that the court found that other persons who were not made parties to the action contributed to the damage done to plaintiff's lands in section 3 by permitting waste water to flow thereon, and that these other persons were necessary parties to the suit. The court found that the lands of plaintiff in section 3 were damaged by waste water from the lands of defendant situate in section 15 and the S. ½ of section 10, but refused to award any judgment for damages against defendant for the reason that it was impossible to determine what portion of the damage was occasioned by waste water from defendant's lands. We are of the opinion that the decree granting the injunction against defendant permitting waste water to flow from his lands above mentioned upon the lands of plaintiff is not invalid for want of other necessary parties. It is not contended that the defendant and the other alleged necessary parties were acting jointly in occasioning the damages in question. Where several parties, acting independently, contribute to an injury, the party injured may proceed against the parties contributing to the injury severally.

[2] It is further contended that the decree should be set aside because it appears from the evidence that one George W. Mapes is the owner of the N. ½ of section 10, and that in order for waste water to reach the lands of

plaintiff it must first pass over the lands of the said Mapes. It is not contended that the evidence discloses that Mapes in any way made use of the waste water from section 15 and the S. $\frac{1}{2}$ of section 10 upon the N. $\frac{1}{2}$ of said section 10 before it passed upon the lands of plaintiff in the S. $\frac{1}{2}$ of section 3. The fact that waste water from defendant's lands flowed without interruption across the lands of a third party would not, we think, affect the right of plaintiff to enjoin defendant from flowing such waste water upon his lands. If it were a fact that the owner of the N. $\frac{1}{2}$ of section 10 appropriated the waste water of defendant to his own use and applied the same in the irrigation of land in the N. $\frac{1}{2}$ of section 10, defendant would not be liable for damages, and the injunction could not be enforced against him for the reason that an intervening party had appropriated such waste water to his own use, and such intervening party alone would be liable in damages to the plaintiff or subject to injunction for such flow.

The judgment heretofore pronounced in the former opinion and decision of this court will stand without modification.

MCCARRAN and COLEMAN, JJ., concur.

(39 Nev. 80)

**WARD v. PITTSBURG SILVER PEAK
GOLD MINING CO. (No. 2120.)**

(Supreme Court of Nevada. Dec. 31, 1915.)
APPEAL AND ERROR \Leftrightarrow 832—SECOND REHEARING.

Where an application for rehearing was granted, and all the matters set up were considered, a second application by the same party for rehearing will not be entertained, except for correction of clerical mistakes or errors apparent on the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. \Leftrightarrow 832.]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

On application to file petition for second rehearing. Denied.

For former opinions, see 148 Pac. 345; 153 Pac. 434.

Samuel Platt, of Carson City, and Geo. H. Martinson, of San Francisco, Cal., for appellant. Dixon & Miller, of Reno, for respondent.

MCCARRAN, J. Since the rendition and filing of the opinion of this court on rehearing in the above-entitled case, an application has been made by appellant to be permitted to file a petition for second rehearing; and we are confronted with the question as to whether appellant is entitled to file such petition as a matter of right. In the case of *Trench v. Strong*, 4 Nev. 87, this court held that it would be a mischievous practice to sanction the filing of a second petition for rehearing, and that the same should not be

permitted except to correct a palpable error and grievous wrong.

Counsel for appellant urges that in view of the fact that its first petition for rehearing was granted and that an opinion was written and filed by this court on that petition for rehearing, that therefore it should be permitted to file a second petition for rehearing based on the opinion of this court. In the case of *Brandon v. West*, 29 Nev. 141, 85 Pac. 449, 88 Pac. 140, this court forcibly asserted the rule that a second application for the rehearing of a cause by the same party, after his petition for rehearing has been denied, will not be entertained. If there is reason for this rule where a petition has been denied, and, in our judgment, the reason is abundant, then, as we view it, there is equal if not more reason for the rule applying where a first petition for rehearing has been granted and all the matters therein set up have been considered by the court.

As asserted by this court in the case of *Brandon v. West*, supra, the court undoubtedly has the right to correct clerical mistakes or some error apparent on the record, such as might occur by inadvertence, oversight, or mistake; but such is not the case here, nor is it within the contention of appellant. The granting of a petition for a second rehearing not based upon clerical mistake or apparent, palpable, injurious error is so liable to open the door to interminable proceedings that the rule asserted by this court in *Brandon v. West*, supra, should not be relaxed or modified. Supporting the rule asserted by this court in the case of *Brandon v. West*, supra, are the more recent cases cited in 1913 Annotations of Cyc. page 294, to wit, *Leathe v. Thomas*, 233 Ill. 430, 84 N. E. 481; *Levert v. Berthelot*, 127 La. 1004, 54 South. 329; *Nelson v. Hunter*, 145 N. C. 334, 59 S. E. 118. In the case of *Marion Light & Heating Co. v. Vermillion*, 51 Ind. App. 677, 99 N. E. 55, 100 N. E. 100, the Appellate Court of Indiana, in a matter quite analogous to that presented here, held that where there was no statute or rule of practice or rule of court authorizing the same party in the same case to file more than one petition for rehearing, the overruling of the first petition for a rehearing exhausted the appellant's remedy in that court.

We are referred to the case of *Roth et al. v. Murray*, 105 Tex. 6, 141 S. W. 515. This case, however, cannot, as we view it, be considered as supporting the contention of appellant herein. The second motion for rehearing in that case was based upon errors in matters decided in the second opinion which were different from those decided in the first opinion. The reason, as well as the matter presented there, was such as differentiate that case from the matter at bar.

The petition will not be entertained.

NORCROSS, C. J., and COLEMAN, J., concur.

(39 Nev. 120)

EARL et al. v. MORRISON et al. (No. 2064.)
(Supreme Court of Nevada. Dec. 31, 1915.)

1. PUBLIC LANDS ⇨106—CHARACTER—DETERMINATION BY LAND OFFICE.

The determination by the federal Land Department of the character of public lands is conclusive, except in certain direct proceedings to set aside a patent for fraud, imposition, mistake, or the like.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. ⇨106.]

2. APPEAL AND ERROR ⇨891—MATTERS OUTSIDE OF RECORD.

The court on appeal from a judgment based on findings that land is mineral may consider a patent since issued conclusive that the land is not mineral.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3625; Dec. Dig. ⇨891.]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Suit by William H. Earl and others against William H. Morrison and others. Judgment for plaintiffs, and defendants appeal. Remanded, with directions.

Cheney, Downer, Price & Hawkins, of Reno, for appellants. Dixon & Miller, of Reno, for respondents.

COLEMAN, J. This is a suit to determine the right of possession to a certain portion of the public domain of the United States. Plaintiffs base their right of possession upon an alleged location of a placer mining claim; while defendants rely upon rights asserted pursuant to filings under scrip, claiming that the land is nonmineral in character. In the trial court evidence was introduced by the respective parties to sustain their contentions. Judgment was rendered in favor of the plaintiffs, and defendants have appealed. The only issue in the case below was as to the character of the land; that is, whether it was mineral or nonmineral.

After the case had been docketed in this court on appeal, defendants made a motion for a stay of proceedings pending the determination by the Land Department of the United States of the character of the land in question. The motion was granted. On November 2, 1915, appellants made a motion in open court that the judgment of the lower court be modified, and that judgment be rendered in favor of appellants, for the reason that since the granting of the stay of proceedings appellants had acquired title to the land under a patent issued by the United States government, which was exhibited in open court. Respondents' position is that such a procedure as that sought by appellants is unheard of and revolutionary, contending that the case must be disposed of here upon the record made in the lower court.

[1] It is invariably held that the determination by the Land Department of the character of land is conclusive, except in certain direct proceedings to set aside a patent for

fraud, imposition, mistake, and the like. In *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 228, it is said:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In *Burfenning v. Chicago*, St. Paul, etc., Ry., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, Mr. Justice Brewer, speaking for the court, used the following language:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions, is conclusive, and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined. *Johnson v. Towsley*, 13 Wall. 72 [20 L. Ed. 485]; *Smelting Company v. Kemp*, 104 U. S. 636 [26 L. Ed. 875]; *Steel v. Smelting Company*, 106 U. S. 447 [1 Sup. Ct. 389, 27 L. Ed. 228]; *Wright v. Roseberry*, 121 U. S. 488 [7 Sup. Ct. 985, 30 L. Ed. 1039]; *Heath v. Wallace*, 138 U. S. 573 [11 Sup. Ct. 380, 34 L. Ed. 1063]; *McCormick v. Hayes*, 159 U. S. 332 [16 Sup. Ct. 37, 40 L. Ed. 171]."

In *Gale v. Best*, 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44, it is said:

"The rule is well settled by unanimous decisions of the Supreme Court of the United States that, when a law of Congress provides for the disposal and patenting of certain public lands upon the ascertainment of certain facts, the proper officers of the Land Department of the general government have jurisdiction to inquire into and determine those facts; that the issuance of a patent is an official declaration that such facts have been found in favor of the patentee; and that in such a case the patent is conclusive in a court of law, and cannot be attacked collaterally. Of course, if the patent be void upon its face, or if looking beyond the patent for a law upon which it is based, it is found that there is no law which authorizes such a patent under any state of facts, or that the particular tract named in the patent has been absolutely reserved from disposal, then the patent would be worthless and assailable from any quarter. For instance, if a certain section or a certain township described by legal subdivisions should be expressly and unconditionally reserved by Congress from disposal under any statute, a patent for any part of such tract would be void.

But, if a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character—such as swamp or mineral—then the Land Department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case the patent could be attacked only by a direct proceeding, and by a person who connects himself directly with the title of the government."

See, also, *Jameson v. James*, 155 Cal. 275, 100 Pac. 700; *Traphagen v. Kirk*, 30 Mont. 562, 77 Pac. 58; *United States v. Mackintosh*, 85 Fed. 333, 29 C. C. A. 176; *Southern Dev. Co. v. Endersen* (D. C.) 200 Fed. 272, 281.

The Supreme Court of Dakota, in *Forbes v. Driscoll*, 4 Dak., at page 359, 31 N. W. at page 645, after reviewing many cases in which it had been held that the findings of the Land Department of the United States as to the character of land is final, says:

"A contrary view of the law would bring the courts and land offices into constant collision. A decision of the courts in advance would take from these officers the jurisdiction the law has given them to hear and determine 'all rights of pre-emption arising between different settlers.' It would bring into the courts for decision all claims and contests before the department, and the absurd result would be reached, as we are informed by briefs of counsel has in fact resulted in this case, to wit: That the plaintiff, *Forbes*, has judgment in the district court of the territory, awarding him the possession of the entire quarter section, while the defendant *Driscoll* has the decision of the Land Department, entered since the trial of this case, awarding him the patent, and consequent right to possession, of the same premises. We have no doubt that the manifest intent of the statutes of the United States, as is so clearly expressed by the decisions of the Supreme Court, was to vest in the Land Department an exclusive jurisdiction of all questions relating to the sale and disposition of the public lands up to the time of the issue of the patent; and this court is therefore of the opinion that the district court erred in entering judgment upon such verdict for the possession of the entire quarter section, ousting the defendant *Driscoll* from his possession and improvements made upon the vacant and unimproved portions of the land. It is not meant to be understood by this decision that an action for possession does not lie under section 650 of the Code of Civil Procedure to protect the actual possession of the pre-emptor against an intruder, or that such action might not lie to recover, beyond the actual possession, the entire quarter section as against a trespasser. This court contents itself with declaring that the judgment ousting the junior pre-emptor from his possession and improvements, obtained and made without trespass, is erroneous, and must be reversed."

[2] Since the issuance of a patent by the government is a conclusive finding that the land is question is not mineral in character, except in certain direct proceedings, the question is: Can this court ignore the findings and judgment of the lower court? In *Ridge v. Manker*, 132 Fed. at page 601, 67 C. C. A., at page 598, Judge Hook uses the following language:

"An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial

court when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuit of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled, or for other reasons has ceased to exist. *Chamberlain v. Cleveland*, 1 Black, 419, 17 L. Ed. 93; *Lord v. Veazle*, 8 How. 251, 12 L. Ed. 1067; *Wood Paper Co. v. Heft*, 8 Wall. 333, 19 L. Ed. 379; *Board of Liquidation v. Railroad Co.*, 109 U. S. 221, 3 Sup. Ct. 144, 27 L. Ed. 916; *Dakota v. Glidden*, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016; *Washington and Idaho Railroad Co. v. Cœur d'Alene R. & N. Co.*, 160 U. S. 101, 16 Sup. Ct. 239, 40 L. Ed. 355; *Bryar v. Campbell*, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. Ed. 926."

The rule laid down in the opinion of Judge Hook appeals to us as being both reasonable and just. While we cannot try de novo the issues involved in the lower court, we think we can take cognizance of the issuance by the federal government of a patent (which is not denied) which is conclusive of the matter. If such were not the case, gross injustice might result in many instances, of which the case at bar is an example. In this controversy one tribunal has decided that the land in question is mineral, and has rendered judgment awarding possession of it to plaintiffs, while the tribunal established by the federal government for the purpose of determining just such questions as to its property has held to the contrary, and its determination is universally recognized as conclusive of the question. Plaintiffs' judgment is but an empty shell, and one which, in our opinion, can and should be set aside.

The sole question is: Shall this court, when confronted with the indisputable and unquestioned proof that the government has determined that the land in question is non-mineral in character, affirm a judgment or even consider the case upon the record as made in the lower court? If we were to affirm the judgment of the lower court, it could be set aside in an independent proceeding. What, then, is the sense in considering this case upon the record made in the lower court? As shown by the cases cited by Judge Hook, appellate courts have, in a variety of situations, disposed of cases otherwise than upon the record brought up. It is no novel procedure. The situation here presented is similar to that which is brought to the attention of the court when, before determination on appeal, the issues involved are settled between the parties and there is no longer an existing controversy. When such a situation is brought to the attention of the court, the case in which it exists is always dismissed. *Haley v. Eureka*, etc., 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; *Wedekind v. Bell*, 26 Nev. 395, 69 Pac. 612, 99 Am. St. Rep. 704; *Pacific Live Stock Co. v. Mason Valley Mines Co.*, 39 Nev. —, 153 Pac. 431, recently decided by this court. If a court can determine that a proceeding is a moot one, why

may it not consider indisputable and undisputed evidence that the government of the United States has made a finding which is conclusive, not only upon the parties, but upon all courts?

In the case of *Goldstein v. Behrends*, 123 Fed. 399, 59 O. C. A. 203, which was an action to determine the right of possession to a portion of the public domain of Alaska, it is said:

"Conceding that the action was for the purpose of determining the right of possession, the controlling question was as to the mineral character of the land. This question was within the jurisdiction of the Land Department to determine, and, upon being submitted to that department in the proceedings for a patent, was determined adversely to the appellant by the Secretary of the Interior; that officer holding that the land was not mineral, and awarding the land to the town-site trustee. This decision is conclusive as to the character of the land, and disposes of the controlling question involved in this case. The appellee in possession of the land has acquired title to it under the town-site patent, and this action in support of his claim to have possession and receive that title has ceased to have a subject upon which a judgment of the court can operate. *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293."

It is the order of the court that the case be remanded, and that the trial court enter an order vacating the judgment and dismissing the action; the parties to pay their own costs in both courts.

(39 Nev. 510)

SKAGGS v. BRIDGMAN et al. (No. 2184.)
(Supreme Court of Nevada. Dec. 31, 1915.)

APPEAL AND ERROR \Leftrightarrow 797—MOTION TO DISMISS—TIME FOR FILING.

That a motion to dismiss an appeal for non-compliance with Supreme Court rules 2 and 3, providing that the transcript of the record must be filed within 30 days after the appeal has been perfected and the statement settled, otherwise the appeal will be dismissed on motion without notice, was not filed until more than three terms had elapsed after the appeal was taken and the record filed in the Supreme Court, did not amount to a waiver of the right to make a motion; Supreme Court rule 8, providing that objections to the record affecting any right "which might be cured on suggestion of diminution of the record," not applying.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3149-3154; Dec. Dig. \Leftrightarrow 797.]

Appeal from District Court, Elko County; Edward A. Ducker, Judge.

Action by Sarah Belle Skaggs, administrator of the estate of Thomas Bryant, deceased, against W. E. Bridgman and another. From judgment for defendants, plaintiff appeals, and defendants move to dismiss the appeal. Motion granted.

Sweeney & Morehouse and W. W. Griffin, all of Carson City, for appellant. Carey Van Fleete, of Elko, and Charles R. Lewers, of San Francisco, Cal., for respondents.

NORCROSS, C. J. This is a motion to dismiss the appeal for noncompliance with the

provisions of rules 2 and 3 of the Supreme Court. Notice of appeal in this cause was filed in the court below on the 7th day of July, 1913. On the 12th day of August, 1913, the clerk of the court below attached his certificate to the record on appeal. The record was filed in this court on the 22d day of July, 1914. On the 27th day of February, 1915, the court, upon application therefor, made an order for substitution of attorneys for appellant. Thereafter, and on the 20th day of September, 1915, counsel for appellant filed a brief upon the merits. Thereafter, and on the 5th day of October, 1915, counsel for respondent Garrecht filed and served a written notice of motion to dismiss the appeal. At the time of filing the motion to dismiss a certificate of the clerk of the court below, as required by subdivision 2 of rule 3, was also filed. The motion to dismiss was heard on the 4th day of November, 1915. The only objection to the motion to dismiss upon the part of counsel for appellant is based upon the provisions of rule 8 and the case of *Kirman v. Johnson*, 30 Nev. 146, 93 Pac. 500, 96 Pac. 1057, is relied upon to sustain their contention that the motion to dismiss comes too late. Rules 2, 3 and 8 provide:

Rule 2. "The transcript of the record on appeal shall be filed within thirty (30) days after the appeal has been perfected and the statement settled, if there be one."

Rule 3. "1. If the transcript of the record be not filed within the time prescribed by rule 2, the appeal may be dismissed on motion without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and, unless so restored, the dismissal shall be final and a bar to any other appeal from the same order or judgment."

Rule 8. "Exceptions or objections to the transcript, statement, * * * or any other technical exception or objection to the record affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken at the first term after the transcript is filed, * * * or they will not be regarded."

We are unable to see how the provisions of rule 8 could have any possible bearing upon the motion here in question. No objection is made to the transcript or record upon appeal "which might be cured on suggestion of diminution of the record." The motion to dismiss deals solely with the question of the applicability of rules 2 and 3 to the fact that more than three terms elapsed after the appeal was taken and the record certified to before the same was filed in this court. Prior to the amendments of rules 2 and 3 by amendment of October 25, 1911, it was provided in rule 3:

"If the transcript of the record be not filed within the time prescribed by rule 2, the appeal may be dismissed upon motion during the first week of the term without notice."

In *Robinson v. Kind*, 25 Nev. 273, 59 Pac. 863, 62 Pac. 705, this court considered, but did not decide, whether a failure to make a

motion to dismiss "during the first week of the term" would amount to a waiver of the right to make such motion. The rule as it now reads places no limitation upon the time within which a motion to dismiss for failure to comply with the provisions of rule 2 may be made. We see no reason for holding, and none has been urged, that the motion to dismiss is not in time. Where there has been a failure to comply with the provisions of rule 2, a motion to dismiss, supported by proper certificate of the clerk, would ordinarily be granted as a matter of course. We need not now consider whether, upon a consideration of a motion to dismiss, notice of which has been given, the appellant making a showing that would warrant a restoration of a dismissed appeal, the order for that reason should be denied, as no such showing has been made.

The motion to dismiss the appeal should be granted, subject to the right of appellant, upon good cause shown (*Lightle v. Ivancovich*, 10 Nev. 41, 43), to move to restore the appeal under the provisions of rule 3 during the next succeeding term.

It is so ordered.

McCARRAN and COLEMAN, JJ., concur.

(38 Nev. 541)

NEVEN v. NEVEN. (No. 2150.)

(Supreme Court of Nevada. Dec. 31, 1915.)

APPEAL AND ERROR ¶189—REVIEW—RECORD—CONTINUANCE.

Where the record fails to show that appellant, when he applied to the trial court for a continuance, brought to the attention of the court, by his affidavit or otherwise, the fact that he had been cited to appear in another court on the day of the trial, the action of the court in denying the continuance will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1153-1154½, 1205-1215; Dec. Dig. ¶189.]

Appeal from District Court, Washoe County; Cole L. Harwood, Judge.

On rehearing.

For former opinion, see 148 Pac. 354. Rehearing denied.

Sweeney & Morehouse, of Reno, for appellant. Dodge & Barry, of Reno, for respondent.

McCARRAN, J. Counsel for appellant, in their petition for rehearing, make the following assertion:

"At the same time the fact exists that Neven was cited into court at Elko county to make an accounting for the guardianship of Le Roy Neven, his nephew."

If the statement of counsel for appellant here quoted was supported by the record before us to any extent whatever, then a rule might apply in favor of appellant different from that asserted in the former opinion of this court. *Neven v. Neven*, 148 Pac. 354.

The fact is, however, that this assertion is unsupported by anything in the record before us. The affidavit of appellant, filed in the court below in furtherance of his motion, makes no such declaration. In the statements made by counsel for appellant before the trial court on the day of the trial in explanation of the absence of appellant and in furtherance of the motion for a continuance, there is nothing indicating that appellant Neven had been "cited into court in Elko," or that appellant had been called there by any process issued out of any court. And it may be not out of place to observe here that had any citation or process issued, calling for the presence of the appellant, Neven, it would have been a simple matter to have produced the same in the trial court either in furtherance of the motion for a continuance or as a part of the affidavit of appellant, and the same would thereby have become a part of the record before this court.

The testimony of the respondent, Mrs. Neven, in detailing a conversation between herself and appellant relative to his going to Elko, sets forth that on Thursday, April 2d, when appellant invited her to go with him to Elko, she inquired of him: "Is it necessary for you to go tonight?" To which he, the appellant, answered: "No; it is not; but I will have to go some time soon."

Petition for rehearing should be denied.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

(39 Nev. 115)

STATE v. BLAHA. (No. 2193.)

(Supreme Court of Nevada. Dec. 31, 1915.)

1. CRIMINAL LAW ¶1086—APPEAL—PRESENTATION—ADMISSION OF CONFESSION.

An assignment of error complaining of the admission of a confession could not be considered where the transcript of the testimony disclosed no objection, though appellant's counsel stated to the court that objections to the admissibility of the confession had been made and apparently omitted from the transcript through inadvertence, in the absence of proof that such was the case and a request made for diminution of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2770, 2772, 2794; Dec. Dig. ¶1086.]

2. CRIMINAL LAW ¶1169—HARMLESS ERROR—EVIDENCE—STATEMENTS BY ACCUSED.

Error, if any, in permitting witnesses to testify to conclusions relative to statements made by accused to officers while he was under arrest, was harmless, where the whole conversation between defendant and the officers was detailed, and it clearly appeared that the statements were freely and voluntarily made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3083, 3130, 3137-3143; Dec. Dig. ¶1169.]

3. CRIMINAL LAW ¶414—SELF-SERVING STATEMENTS—FOUNDATION FOR ADMISSION—NECESSITY.

In a prosecution for burglary, it was not necessary that a foundation be laid for the ad-

mission of defendant's statements that he purchased the stolen jewelry in certain cities.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 862, 936; Dec. Dig. ¶¶ 414.]

4. CRIMINAL LAW ¶824 — INSTRUCTIONS — REQUEST—FALSE TESTIMONY.

Failure to instruct on the maxim, "Falsus in uno, falsus in omnibus," was not error, where accused made no request for such instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. ¶¶ 824.]

5. CRIMINAL LAW ¶786 — INSTRUCTIONS — TESTIMONY OF ACCUSED.

In view of Rev. Laws, § 7160, as amended by St. 1915, c. 157, providing that no special instructions shall be given relating exclusively to the testimony of defendant, the court properly refused to instruct that defendant had testified in his own behalf, and that this was his legal right, and that the jury were not permitted to reject his testimony merely because he was the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1895-1901, 1960, 1984; Dec. Dig. ¶¶ 786.]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Frank Blaha was convicted of burglary of the first degree and appeals. Affirmed.

W. H. Virden, of Reno, for appellant. Geo. B. Thatcher, Atty. Gen., and H. C. Price, Deputy Atty. Gen., for the State.

NORCROSS, C. J. [1-3] Appellant was convicted of the crime of burglary of the first degree, and appeals. Evidence was introduced establishing the fact that a burglary was committed on the night of the 25th day of July, 1915, in the city of Reno, and certain jewelry taken from a trunk stored in a building upon the property of one R. T. Harwell. Upon the afternoon of the day following the burglary appellant was arrested by a police officer of the city of Reno while in the act of attempting to dispose of the stolen jewelry, and was at once taken to the police station. The arresting officer and another member of the city police force, over the objection of counsel for defendant, were permitted to testify to statements made by the defendant to the effect that he purchased a ring, which was part of the stolen jewelry, in the city of Chicago, and a necklace, which was also a part of the stolen jewelry, in the city of Seattle. Shortly subsequent to making these statements the defendant made a confession to the chief of police that he committed the burglary. Error is assigned in the admission of the statements and confession upon the ground that no proper foundation had been laid. The transcript of the testimony discloses no objection whatever to the admission of the confession. Counsel for appellant advises the court that objections to the admissibility of the confession because a proper foundation had not been laid may have been inadvertently omitted in trans-

cribing the record. No proof appears that this is the case, and no request has been made for diminution of the record; hence the suggestion of counsel for appellant cannot be considered. The objection which counsel for appellant asserts was, in fact, made, even if embodied in the record, would not justify this court in holding the same to be substantial error. Assuming that the same objection was made to the testimony of the chief of police as that made to the testimony of the two other officers, the error, if any, amounts simply to the sustaining of an objection to questions propounded to the witnesses whether any inducements, threats or offers of reward were made to procure the statements or confession. Even assuming that the court may have committed technical error in permitting the witnesses to testify to conclusions, it also appears that the whole conversation between the defendant and the officers was detailed, and from all of the facts and circumstances there was no room for serious question that the statements and confession were made otherwise than freely and voluntarily. Besides, it was not necessary to lay any foundation for the admission of the statements made by the defendant as to how he came into possession of the jewelry in question.

"Self-serving statements made by or for the accused out of court, explaining suspicious circumstances, may be proved against him, and their falsity may then be shown. The fact of their falsity admits them as indicating an attempt to explain away incriminating circumstances by falsehoods." 12 Cyc. 429.

Error is assigned in the refusal to give certain instructions requested by defendant. With the exception of one requested instruction, hereafter to be referred to, the instructions requested and refused, so far as they were material, were substantially covered by other instructions given by the court.

[4] Error is assigned in the failure of the court to give an instruction of its own motion upon the maxim, "falsus in uno, falsus in omnibus." If counsel for defendant was of the opinion that an instruction of this kind was material, it was incumbent upon him to request the same.

[5] The following instruction requested by counsel for the defendant was refused:

"The defendant has offered himself as a witness, and has testified in his own behalf. This is his legal right, and you are not permitted under the law to discredit or reject his testimony simply on the ground that he is the accused, and on trial on a criminal charge."

Section 310 of the Criminal Practice Act (Rev. Laws, § 7160), as amended by the Legislature of 1915 (St. 1915, c. 157), provides:

"In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given his testimony being left

solely to the jury, under the instructions of the court: Provided, that no special instruction shall be given relating exclusively to the testimony of the defendant, or particularly directing the attention of the jury to the defendant's testimony."

It clearly appears from the reading of the section as amended that purpose of the statute is to forbid the giving of instructions with direct reference to the testimony of the defendant. The court is permitted to, and did in this case, give general instructions applicable to all witnesses. The purpose of the amended statute was, doubtless, to obviate in the future the giving of an instruction heretofore frequently given in criminal cases and sustained by a number of decisions of this court, and reading as follows:

"The defendant has offered himself as a witness on his own behalf, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, the consequences to him relating from the results of this trial, and all the inducements and temptation which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled; if convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."

The foregoing instruction, while approved by the earlier decisions of the courts of a number of states, has in recent years been severely criticized. The Supreme Court of California, after repeatedly holding this instruction not to be error, later admonished trial courts not to give it, and finally reversed cases where the instruction had been given.

From a reading of the transcript in this case we are unable to see how the jury could have reached any other verdict than the one returned. The defendant was deprived of no substantial right, and no substantial error appears.

Judgment affirmed.

MCCARRAN and COLEMAN, JJ., concur.

(39 Nev. 142)

STATE v. TRANMER. (No. 2141.)

(Supreme Court of Nevada. Dec. 31, 1915.)

1. CONVICTS \S 5 — CRIMES — POWER TO PUNISH.

Where accused was serving a life sentence in the state prison for murder, the district court had jurisdiction to order his production before it for trial on another murder charge.

[Ed. Note.—For other cases, see Convicts, Cent. Dig. \S 4; Dec. Dig. \S 5.]

2. HOMICIDE \S 228 — CORPUS DELICTI — PROOF.

The corpus delicti of a murder may be established by inference from facts as well as from positive testimony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 471-476; Dec. Dig. \S 228.]

3. HOMICIDE \S 228 — SUFFICIENCY OF EVIDENCE.

In a trial for murder, evidence held sufficient to establish the corpus delicti.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 471-476; Dec. Dig. \S 228.]

4. CRIMINAL LAW \S 1170½ — WITNESSES — REFRESHING MEMORY — HARMLESS ERROR.

Where, on a murder trial, a witness was allowed to refresh his memory as to a statement made by accused, by reading his testimony at the coroner's inquest, and his testimony given after such refreshing was substantially the same as before, there was no reversible error, since accused was not prejudiced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3129-3135; Dec. Dig. \S 1170½.]

5. CRIMINAL LAW \S 706 — JOINT PRINCIPAL AS WITNESS — IMPROPER QUESTION — MISCONDUCT.

Where, on a murder trial, a principal with accused in the murder, who had been previously convicted and sentenced to death, was produced as a witness by the state, and during the early part of his examination counsel for accused had asked the state in the jury's presence whether it was admitted that witness was then under conviction of a felony and in the state's prison, it was misconduct for the state's counsel to ask the witness whether he was not then in the penitentiary under sentence of death, where the only object of the state's question was to influence the jury to assess the death penalty against accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1661; Dec. Dig. \S 706.]

6. CRIMINAL LAW \S 1170½ — JOINT PRINCIPAL — CONVICTION — DEATH PENALTY — TESTIMONY.

On a trial for murder, where a joint principal in the crime with accused who had been previously convicted and sentenced to death is called as a witness by the state, it is reversible error to allow the state, for the purpose of influencing the jury to inflict the death penalty on accused, to ask the witness if he is in the state's prison under sentence of death.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3129-3135; Dec. Dig. \S 1170½.]

7. CRIMINAL LAW \S 508 — COMPETENCY — CONVICTIONS — JOINT PRINCIPAL.

One who was jointly indicted with accused for murder and on previous separate trial had been convicted was a competent witness for the state in a murder trial under Rev. Laws, \S 5419, defining witnesses, and Rev. Laws, \S 7451, applying section 5419 to criminal actions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1099-1123; Dec. Dig. \S 508; Witnesses, Cent. Dig. \S 244-248.]

8. CRIMINAL LAW \S 1186 — EXAMINATION OF WITNESS — REMARK OF TRIAL COURT — HARMLESS ERROR.

Where, on a murder trial, the testimony of a witness went solely to the identity of accused, and his participation in the crime had been clearly shown, the remark of the trial judge, made while counsel for defense was reading questions and answers of the witness at a former trial for the purpose of impeaching him, that " * * * there is apparently no inconsistencies or contradictions," there being no substantial conflict between the two testimonies, was harmless error under the statute providing for the disregard of technical errors, where no substantial rights are denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3215-3219, 3221, 3230; Dec. Dig. \S 1186.]

9. WITNESSES — 286 — REDIRECT EXAMINATION—CONVICTED JOINT PRINCIPAL—OFFERS OF CLEMENCY.

On a murder trial, where, on cross-examination of a witness who had been previously convicted as joint principal in the crime on a separate trial, the defense asked him whether he had talked with the county officers including the district attorney, it was a proper exercise of the court's discretion to allow the state on redirect examination to ask the witness whether he had not been informed that no clemency would be extended to him for testifying in the case, since the inference that offers of clemency had been made might have arisen from such previous question by the defense.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 930, 994-999; Dec. Dig. — 286.]

Appeal from District Court, Washoe County; Edward A. Ducker, Judge.

J. Frank Tranmer was convicted of murder in the first degree, and he appeals. Affirmed.

See, also, 35 Nev. 56, 126 Pac. 337, 41 L. R. A. (N. S.) 1095.

J. S. Parker and J. M. Frame, both of Reno, for appellant. George B. Thatcher, Atty. Gen., for the State.

COLEMAN, J. The appellant, J. Frank Tranmer, was indicted in the district court of Humboldt county, together with one Nimrod Urie, for the murder of Maria D. Quilici. Separate trials were ordered, appellant was convicted of murder in the first degree, and the jury fixed the penalty at death. From a denial of a motion for a new trial, and from the judgment of the court imposing the death penalty, an appeal has been taken to this court.

[1] At the time the case at bar was set for trial by the district court, appellant was serving a life sentence for the murder of one Eugene Quilici; and, when application was made to that court for an order that appellant be brought from the state prison for trial, appellant, through his attorneys, objected to the making of the order, for lack of jurisdiction. The overruling of the objection is assigned as error. The identical question here involved was before the court in *Ex parte Tramner*, 35 Nev. 56, 126 Pac. 337, 41 L. R. A. (N. S.) 1095, where the question was decided adversely to appellant's contention. Suffice it to say that we have carefully considered the point urged by appellant, and we think that the holding of the court in *Ex parte Tramner*, supra, is sustained by both reason and authority, and that no good purpose would be served by discussing the question at length in this opinion. An elaborate note to *Ex parte Tramner* may be found in 41 L. R. A. (N. S.) 1095, where it is stated that the great weight of authority sustains the position of the court in that proceeding. The only later case in point which we have been able to find is that of *State v. Rodgers*, 100 S. C. 77, 84 S. E. 304,

which is in line with the views expressed in *Ex parte Tramner*, supra.

[2] It is next urged that the evidence fails to establish the corpus delicti. In the case of *State v. Ah Chuey*, 14 Nev. at page 92, 33 Am. Rep. 530, it was held that the corpus delicti may be established as well by inference from facts as from positive testimony. In *State v. Cardelli*, 19 Nev. 324, 10 Pac. 436, it was said:

"While it is true that a person charged with the commission of a criminal offense is not called upon to answer the charge without satisfactory proof, upon the part of the prosecution, of the corpus delicti, yet it is not essential, in all cases, that there should be any direct evidence upon this point."

Such is the general rule. Wharton's Criminal Law (11th Ed.) § 352, citing many authorities. In 21 Cyc. at p. 1029, it is said:

"The sufficiency of the proof of the corpus delicti is a question for the jury."

[3] The evidence in the present case is quite voluminous, and clearly shows that Eugene Quilici and Maria D. Quilici, his wife, resided at Imlay, Humboldt county, Nev., on and for some time prior to January 6, 1911; that on that night the defendant and one Nimrod Urie, for the purpose of robbery, went to the saloon which was being run by Eugene Quilici, and shortly after entering the place shot both Quilici and his wife, Maria D. Quilici; that Eugene Quilici died instantly; and that one Maria D. Quilici died at Winnemucca, in the same county, about 25 miles from Imlay, on or about the 9th of that month, from a gunshot wound.

It is contended that the evidence fails to show that the Maria D. Quilici who died at Winnemucca was the same Maria D. Quilici who was shot at Imlay. We think the jury had ample evidence before it to justify it in finding that the Maria D. Quilici who died at Winnemucca was the Maria D. Quilici who was shot at Imlay. One Lommori, who was called as a witness on the part of the prosecution, testified as follows:

"Q. Did you know Maria D. Quilici in her lifetime? A. Yes, sir. Q. What relationship, if any, existed between you and Maria D. Quilici? A. She was my sister. Q. Where did she live? A. At Imlay. * * * Q. Mr. Lommori, you realize the fact that the defendant Frank Tranmer or J. Frank Tranmer is being tried for the murder of your sister, do you? A. Yes, sir. * * * Q. Was your sister married? A. Yes, sir. Q. To whom? A. To Eugene Quilici. Q. I will ask you if you were a witness at the coroner's inquest over the body of your sister, Mrs. Quilici? A. Yes sir."

On cross-examination, the witness testified, in part, as follows:

"Mr. Frame (counsel for defendant): Q. You testified in that preliminary, a short time after the occurrence of the killing of your sister, did you not, Mr. Lommori? A. Yes, sir; a short time afterwards. * * * Q. Now, referring to your testimony given at the preliminary hearing between January 12 and January 19, 1911, the same occurring a few days after the occur-

rence in which your sister was killed * * * I will ask you to state whether you testified as a witness at and before the coroner's jury investigation for the death of your sister Maria D. Quilici, the same being held before Justice Dunn in the month of January, 1911, at Winnemucca, Humboldt county, Nev., about January 9th? A. I do not remember. Mr. Frame: I suppose it was admitted that it was given there? Mr. Woodburn (district attorney): Yes, sir, it was there. That is correct. * * * Q. Did you ever hear, just before the happening of the occurrence in which your sister was killed, of Mr. Quilici having an arrangement to buy the Robinson-Kelley saloon which was situated alongside of or near the Quilici saloon? A. Yes, sir. * * * Q. Were you at the depot in Imlay on the day following the killing of your sister by some parties, about noon, when Sheriff Lamb brought the two men to the depot?"

From the foregoing extracts from the evidence it will be seen that witness Lommori testified that he knew that the defendant was on trial for the murder of his sister Maria D. Quilici, which was committed January 8, 1911, and that he attended the coroner's inquest over her body at Winnemucca on January 9th, three days later, and the preliminary examination which was held a few days thereafter. Dr. Giroux testified to holding the autopsy in Winnemucca, and of giving testimony at the coroner's inquest January 9, 1911, which was held over the body of one Maria D. Quilici. We think the evidence is ample to establish the corpus delicti. The questions asked by counsel for defendant, as quoted, show that he considered the Maria D. Quilici over whose body the coroner's inquest was held to be the same person as Maria D. Quilici, the sister of Lommori.

[4] Error is assigned, also, to the ruling of the trial court in permitting the witness Urie to refresh his memory by reference to testimony given by him at the former trial. The witness was asked what the appellant said to him after the crime had been committed and when he (witness) told appellant that he had lost his mask, to which he replied:

"Well, he said that was a bright trick and he ought to kill me. Q. What is that? A. He said that was a bright trick and he ought to kill me. Q. Do you remember the exact words? A. No, I don't know as I can remember the exact words, but something to that effect."

At this point in the proceedings the witness, over the objection and exception of defendant, was permitted to read the testimony given by him at the coroner's inquest:

"Mr. Callahan: After refreshing your memory, can you give the exact language used by the defendant at that time?"

After objection and exception by counsel for defendant, the witness answered:

"I can now, after I read that. Q. Just give the language used by the defendant in reply to your statement that you had lost your mask. A. I told him I had lost my mask, and he say: 'You are a pretty son of a ——. I ought to plug you right here.'"

Prof. Jones, in his work on Evidence, at section 878, says:

"In some jurisdictions, it is held that a witness may refer to a former affidavit or deposition given by him for the purpose of refreshing his memory. While in other states this is not

allowed, as it is held that the practice is in violation of the rule that a memorandum to refresh the memory should have been made at or about the time to which it relates"—citing authorities.

Since the killing was on January 6th, and the coroner's inquest three days later, it would seem that the reason given by Prof. Jones for excluding such testimony does not apply in this case; but we will not undertake to determine what the law on this point is, as the two statements are substantially the same, and we are unable to see that any prejudice could have been done appellant by the ruling of the court.

[5] Appellant also assigns as ground for reversal the action of the district attorney in asking the following question:

"Mr. Callahan: Q. I will ask you to state, Mr. Urie, if you are not now in the penitentiary of the state of Nevada under sentence of death."

Upon objection being made, it was sustained, and the jury was directed by the court to disregard the question entirely. Soon after this witness had begun to give his testimony, counsel for appellant, in the presence of the jury, and before the question quoted was asked, addressing the district attorney, said:

"Mr. Callahan: I suppose it is admitted that this witness is now under conviction of a felony and is in the state's prison?"

There is in our judgment nothing in the preliminary question or suggestion made by counsel for the defendant, "I suppose it is admitted that this witness is now under conviction of a felony and is in the state's prison?" which sustains the position of counsel for the state in urging, or which would justify this court in saying, that defendant's counsel had "opened up the subject, and in all probability brought to the attention of the jury the real status of the witness Urie." For the purpose of raising the objection to the competency of the witness Urie to testify on behalf of the state, it was necessary for counsel for defendant either to request the opposing counsel to admit the fact, or to ask leave to prove as a foundation for the objection that the witness Urie was in the state prison under conviction of a felony, and was a codefendant of the defendant Tranmer. While we will hold that the objection to the competency of the witness Urie is without merit, the objection was anything but one of a frivolous character, as suggested in respondent's brief on appeal. The question has never before been raised in the courts of this state, and there are but few cases directly in point. A consideration of the following cases where the question has been considered will be sufficient answer to the charge that the objection of counsel for defendant was "frivolous": *People v. Labra*, 5 Cal. 183; *People v. Newberry*, 20 Cal. 440; *Ex parte Stice*, 70 Cal. 55, 11 Pac. 459; *McGinness v. State*, 4 Wyo. 115, 31 Pac. 978, 53 Pac. 492.

Independent of the question of the competency of Urie as a witness, defendant had

the statutory right to show that the witness was under conviction for a felony, for the purpose of affecting his credibility as a witness. This right counsel for the state were unquestionably aware of. The record contains the following statement made by assistant counsel for the state:

"Mr. Woodburn: Now, if your honor please, we have no objection to that question being stricken out, and the jury being instructed to disregard it. It was made in good faith, and we thought we would just show the status of this witness, because it goes to his credibility, and it was done under no desire to prejudice the defendant, and it was first suggested through counsel's question as to the status of this man as to where he was living at this time, and, if counsel insists, we are satisfied to have the jury instructed that they may disregard the testimony of the witness on that point."

[6] From a reading of the record we are impressed that the purpose of the question was to get before the jury the fact that Urie was under sentence of death for his participation in the murder of the Quillicis, for the purpose of influencing the jury when they came to consider the question whether they should impose death or life imprisonment as the penalty for defendant's crime. In our opinion the asking of the question was highly reprehensible conduct on the part of counsel asking it, and if it had been answered would have constituted reversible error.

It should be borne in mind, in considering this assignment of error, that the defendant Tranmer was already under conviction of murder in the first degree, with sentence of life imprisonment, for the murder of Eugene Quillicis, and that from the judgment in that case no appeal had been taken. There was no purpose sought to be accomplished, or which could be accomplished, by the trial of the defendant Tranmer for the murder of Maria Quillicis, except to obtain, if possible, a conviction of first degree murder, with the death penalty imposed. There was, however, no duty imposed upon counsel representing the state to bring before the jury facts clearly incompetent for the purpose of influencing the jury in fixing the penalty which the law authorized it to prescribe. Upon the contrary, counsel for the state owed a duty to defendant not to attempt to offer such evidence. At the time the question objected to was asked, counsel for the state undoubtedly knew what the testimony of the witness Urie would be. They knew that such testimony, in a measure at least, was having the indorsement of the representatives of the state as to its verity, and that Urie's testimony made him out to be less blamable than the defendant Tranmer; that, if Urie spoke the truth, Tranmer was the instigator of the robbery which led to the murder; that Urie was a reluctant participant, acting under a certain degree of compulsion, and fired none of the shots which resulted in the death of the Quillicis. In view of this testimony, it is hard to conceive

of a fact that might have a greater influence in persuading the jury to impose the death penalty upon Tranmer than the fact that another jury had imposed the death penalty upon Urie, who might under the evidence have been regarded as morally, if not legally, less guilty than Tranmer.

It is no answer to the seriousness of this assignment that the question was suggested by the prior question and objection of counsel for defendant. It was not so suggested. Counsel for the state, upon this appeal, we think should have presented some more substantial basis for holding this assignment of error to be without merit. In our opinion, the improper question may be regarded as not prejudicing the substantial rights of defendant solely because it was not answered and because the jury was promptly instructed "to entirely disregard the question."

It is only in recent years that a number of states have so changed their Criminal Codes as to permit the jury in first degree murder cases to fix the penalty at death or life imprisonment. In but few cases has the question arisen as to whether evidence, not admissible upon the question of the guilt or innocence of the defendant, may nevertheless be offered for the purpose of influencing the jury as to the penalty in their discretion to be imposed. This question was touched upon by the Supreme Court of California in the recent (1915) case of *People v. Witt*, 148 Pac. 928. In the opinion in that case, Angellotti, C. J., speaking for the court, said:

"It is not claimed that the offered testimony was relevant or material on the issue of either guilt or degree of crime, but simply that, inasmuch as the jury had the right to assess the punishment in the event of conviction at either death or life imprisonment, appellant was entitled to have admitted for their consideration evidence as to matters not otherwise relevant or material. We are of the opinion that our law does not contemplate any such independent inquiry on a trial for murder, and that the determination of the jury, under the provisions of section 190, Penal Code, as to death or life imprisonment, is necessarily to be based solely on such evidence as is admissible on the issues made by the indictment or information and the plea of the defendant."

See, also, *State v. Thorne*, 41 Utah, 414, 126 Pac. 286, Ann. Cas. 1915D, 90.

[7] It is next insisted that the trial court erred in overruling appellant's objection to the competency of witness Urie to testify in behalf of the state. In support of this assignment of error, it is said:

"First, that Urie, being under conviction of a felony, was disqualified as a witness except in cases where called at his own request and in his own behalf. Second, for the further reason that the record discloses that Urie was jointly indicted and jointly charged with the defendant."

It was provided by section 1441 of the Compiled Laws of Nevada (1873) that:

"Persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the Governor, or such judgment has been reversed on appeal, shall not be witnesses."

This court, in an opinion written by Mr. Chief Justice Beatty, in *State v. Foley*, 15 Nev. at page 73, 37 Am. Rep. 458, said:

"It may be that the tendency of enlightened opinion and of recent legislation in other states and countries is against the rule which absolutely excludes the testimony of a convict; it may be that it is an unwise and impolitic rule; but it is unquestionably the law of this state. Not only is the common law unaltered by statute in this particular, but in civil practice it is expressly reaffirmed. Comp. L. 1441. This shows that the Legislature approves the policy of the common-law rule, and we cannot hold that it is less essential in criminal than in civil cases; we feel bound, on the contrary, to maintain it as strictly in one class of cases as in the other."

This opinion was rendered in 1880. It is significant that at the next session of the Legislature, in 1881, the section quoted was repealed.

It is provided by section 5419, Revised Laws, that:

"All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses in any action or proceeding in any court of this state. Facts which, by the common law, would cause the exclusion of witnesses, may still be shown for the purpose of affecting their credibility."

There is no provision in the chapter prohibiting persons charged with, or convicted of, a crime, from being called as witnesses. The section just quoted is made applicable to criminal as well as civil actions by section 7451, Revised Laws. In the case of *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025, Mr. Justice Bonfield, in commenting upon section 5419, Revised Laws, supra, said:

"The evident object the Legislature had in view in enacting the above provisions was to abrogate the general common-law rule which rendered incompetent, as witnesses, in an action or proceeding, the parties thereto or persons having a direct interest in its results, except, as provided in certain subsequent sections, among which is section 379, which declares 'that no person shall be allowed to testify, when the other party to the transaction is dead, or when the opposite party to the action or person for whose immediate benefit the action or proceeding is prosecuted or defended is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased persons.'"

We do not see how the Legislature could have used more significant language. What was the intention of the Legislature in making the section in question applicable to criminal cases? This was the first section in chapter 1 of title 11 (page 405) of Compiled Laws of 1873, and section 1441, supra, was the fifth section of that chapter. When the attention of the Legislature was called to section 1441, supra, by the opinion of Mr. Chief Justice Beatty, it was promptly repealed; and, in view of the action of the Legislature in repealing it, we must conclude that the Legislature meant exactly what it said, that "all persons, without exception," should, be competent witnesses, and that facts which, at common law, would disqualify a witness, might be considered as affect-

ing his credibility. We are of the opinion that the court did not err by its ruling.

[8] Counsel for defendant, during the cross-examination of the witness Lommori, for the purpose of impeaching him by showing that he had testified contrary to the testimony which he gave upon direct examination, read certain questions propounded to him and answers given by him at a former trial, and asked him if he gave such testimony. During the reading of the former testimony, the presiding judge made the remark:

"As far as you have gone and read the testimony into the record, there are apparently no inconsistencies or contradictions."

This remark by the court is assigned as error. The Attorney General concedes that it was error for the court to make the remark, but claims that it was harmless. We have read the testimony of the witness Lommori with great care, and are unable to see that there is any substantial conflict between his testimony given on the trial and the testimony given at the previous hearing. This being true, it would seem that the remark of the court was without prejudice. Furthermore, the point on which it was sought to impeach this witness went solely to the question of the identity of the defendant; that is, of connecting him with the crime. To our mind his participation in the crime is clearly shown; there can be no doubt about it. Consequently, it would seem that in any event the remark was harmless. Mr. Chief Justice Talbot, in *State v. Mircovich*, 35 Nev. at page 490, 130 Pac. at page 766, called attention to our statute, which provides that the court shall disregard technical errors where no substantial rights are denied, and said:

"This court has often applied this statute in murder and other cases, and refused to set aside convictions or remand actions for new trials for errors which did not affect the substantial rights of the accused."

The witness Urie, at the time of the trial in the district court, was under sentence of death for the murder of Mrs. Quilich. On cross-examination, counsel for the defendant inquired of this witness if he had talked with the officers of Humboldt county, including the district attorney, and he said he had. Upon the completion of the cross-examination, the following questions were asked by the district attorney and answers given by the witness:

"Q. I call your attention to last Sunday evening, and ask you to state whether you had a conversation with Mr. Woodburn and myself, here in the county jail. A. Yes, sir; I don't remember what evening it was. Q. Who else was present at that time? A. Mr. Burke. Q. The sheriff? A. The sheriff. Q. Any one else? A. Yes, there was a deputy, I guess; I don't know his name. Q. I will ask you to state whether or not at the time you were distinctly informed that there would be no consideration of any kind extended to you for testifying in this case. Mr. Frame: I object to the question as incompetent, irrelevant, and immaterial, and

for the further reason that it is not proper re-direct examination, and that it calls for a conversation, or conversations, that are in no way related to this case. The Court: The objection may be overruled. A. No, none that I remember. Mr. Frame: Note an exception, if your honor please, upon the grounds stated."

[§] The ruling of the court is assigned as error. It is the contention of the state that the inference from the examination of counsel for defendant was that some promise had been made to the witness Urie, and it was the purpose of this examination to rebut that inference. Counsel for the defendant, during the argument on the objection, stated in the presence of the jury:

"I did not ask him whether he had received any promises. It is true that inference may be drawn."

The court must exercise some discretion in ruling upon such objections. He saw the witness upon the stand and heard him testify, and was in a good position to know just how the cross-examination impressed the jury upon the point in question. We cannot say that the court abused its discretion.

The judgment and order denying the motion for a new trial are affirmed, and the district court is directed to fix a time and make the proper order for having its sentence carried into effect by the warden of the state prison.

NORCROSS, C. J., and McCARRAN, J., concur.

(39 Nev. 123)

GASTON v. AVANSINO et al. (No. 2182.)
(Supreme Court of Nevada. Dec. 31, 1915.)

1. EVIDENCE \Leftrightarrow 586—"NEGATIVE TESTIMONY."

The testimony of one claiming a mechanic's lien for work performed upon a building that he worked on the building, that at that time he looked for a notice signed by the owner that he would not be responsible for the repairs, and that there was no such notice at any time while he was doing the work is not negative testimony such as may be disregarded in the face of positive testimony that the notice was posted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. \Leftrightarrow 586.]

For other definitions, see Words and Phrases, First and Second Series, Negative Testimony.]

2. APPEAL AND ERROR \Leftrightarrow 1011—SCOPE OF REVIEW—CONFLICTING TESTIMONY.

Where the testimony of the plaintiff on the trial of an action to foreclose a mechanic's lien was positive that a notice disclaiming liability for the work done was not posted, and the defendant's testimony was equally positive that it was posted, there was such a conflict in the testimony that the determination of the lower court would not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. \Leftrightarrow 1011.]

3. MECHANICS' LIENS \Leftrightarrow 132—TIME FOR FILING.

Where the original contract for the alteration and repair of a building under which a mechanic's lien was sought to be foreclosed contemplated only certain repairs, but there was no time limit during which they should be done,

and other and additional repairs were made at various times, continuing for a period of several months, a notice of mechanic's lien filed within six months of the completion of the last work of repair was filed in time; the contract being a continuing contract, although during the time there were several times at which the plaintiff was not actively engaged in the repairs.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192-207; Dec. Dig. \Leftrightarrow 182.]

4. MECHANICS' LIENS \Leftrightarrow 281—TIME FOR FILING—FRAUD.

In such case evidence held not to show fraudulent intent in making the final repairs so as to permit filing of lien after it should have expired.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-572; Dec. Dig. \Leftrightarrow 281.]

5. MECHANICS' LIENS \Leftrightarrow 281—TIME FOR FILING—FRAUD.

Evidence held insufficient to show that the contract was performed in a certain month, so as to make invalid a notice filed more than six months thereafter.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-572; Dec. Dig. \Leftrightarrow 281.]

6. MECHANICS' LIENS \Leftrightarrow 281—WAIVER—EVIDENCE—SUFFICIENCY.

Under the rule that one holding a lien will not be held to have waived it by an ambiguous agreement, evidence held insufficient to show a waiver of a mechanic's lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565-572; Dec. Dig. \Leftrightarrow 281.]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by J. B. Gaston against Mary Avansino, as administratrix of the estate of Louis Avansino, deceased, and others. From the judgment and order denying a motion for new trial, defendants appeal. Affirmed.

Mack & Green, of Reno, for appellants.
Dixon & Miller, of Reno, for respondent.

McCARRAN, J. This was an action in foreclosure of a mechanic's lien. In the court below judgment was rendered in favor of the lienholder, respondent herein. From the judgment and from an order denying a motion for a new trial, appeal is taken to this court. The labor was performed and the material furnished by respondent at the instance and request of the lessee of the premises of Louis Avansino, deceased. It is admitted that the work was done and the material furnished in bringing about certain alterations and changes in the premises, and was within the knowledge and with the consent of Louis Avansino. Louis Avansino having died since the judgment was rendered in the lower court, Mary Avansino, administratrix of the estate of Louis Avansino, was substituted as party defendant and appellant herein.

[1, 2] It is the contention of appellant that the court erred in finding the fact that the defendant, appellant herein, did not give no-

tice by posting in writing on the premises in some conspicuous place, stating that he, the defendant, would not be responsible for any material furnished or labor done in the alteration and repair of the building.

Section 2221 of the Revised Laws, 1912, provides:

"Every building or other improvement mentioned in section 1 of this act, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situate thereon."

It was the contention of appellant in the court below that due and sufficient notice was given, by posting in a conspicuous place in the building a certain notice testified to by Louis Avansino, Jr. Louis Avansino, Jr., testified that about the 10th or 11th day of November, 1912, he wrote out a notice, signed it with his father's name, and posted the same in a conspicuous place in the building.

The testimony of the witness Kirby Unsworth is to the effect that on one occasion he saw the witness Louis Avansino, Jr., with a paper in his hand; that on the paper was what he would term a rough notice in handwriting; that he saw Louis Avansino, Jr., go into Kane's Café, the premises in question, carrying this paper. The witness Unsworth, in attempting to fix the time at which his attention was drawn to the notice in the hand of Louis Avansino, Jr., said:

"Q. Can you recall to mind whether or not you accompanied the son from any place to that building for any purpose some time back? A. Last fall, during the noon hour, I met one of the boys, Louis, near Conant's grocery store as I was going out of Conant's, and accompanied him down as far as Kane's Café."

The trial of this case took place in June, 1914; and, if the witness' testimony in this respect was correct, the time at which he saw the notice in the hands of Avansino was nearly a year subsequent to the commencement of the work.

The witness Louis Avansino, defendant in the court below, as well as the witness Maggillo, testified to having seen the notice posted on a swinging door, a conspicuous place in the premises.

It is the contention of appellant that this testimony was not contradicted, except by witnesses who testified that they did not see the notice; in other words, they contend that no positive testimony was given denying the notice. We think the view of appellant in this respect is untenable, inasmuch as the

record discloses the following testimony elicited from the respondent, Gaston, a witness in his own behalf:

"Q. Now, Mr. Gaston, at the time you entered into this oral contract with Kane, Incorporated, for alteration repairs to which you have testified, was there any notice posted upon those premises anywhere to the effect that Mr. Avansino, the owner of the building, would not be responsible for work done thereon? A. No, sir; there was not. Q. Was there any such notice posted upon those premises at the time you commenced work on the 11th of November, 1912? A. No, sir. Q. Was there any such notice posted there at any time during the month of November, 1912? A. No, sir. Q. Was there any such notice posted upon those premises during the month of December, 1912? A. No, sir. Q. Was there any such notice posted upon those premises at any time during the month of January, 1913? A. No, sir. Q. Was there any such notice posted upon those premises anywhere during the month of February, 1913? A. No, sir. Q. Was there any such notice posted anywhere upon those premises during the month of March, 1913? A. No, sir. Q. Was there any such notice posted upon those premises anywhere during the month of April, 1913? A. No, sir."

The witness McDermott testified to having worked in the building as a plumber during the month of March, 1913; that he made some search for notice, and saw none at that time.

The witness Harry Kelly testified that he worked in the building during the month of November, 1912, and also in January, 1913; that he saw no notice.

The witness C. W. Farrington testified that he worked in the building as a carpenter during the month of November, 1912, and as late as May 23, 1913, and that he saw no notice.

The witness E. J. Brennan testified that he worked in the building during the months of November and December, 1912; that his work and employment took him all over the building; and that he saw no notice posted.

The witness Johnson testified that he worked in the building for several days during the month of November, 1912, and saw no notice.

The witness Otto Koehler testified that during the month of December, 1912, he worked in the building as a paper hanger and painter, and saw no notice.

The testimony of several other witnesses was to the same effect.

Whatever might be said as to the negative nature of the testimony of the witnesses called in behalf of respondent in the court below, the testimony of the respondent himself was positive upon the question that no notice was posted. On this question, then, there was a substantial conflict of testimony; and, there being positive and substantial evidence produced by the respondent himself upon which the finding of the court on the question of fact as to the posting of the notice can be supported, the rule universally adopted by this court, and by nearly all other courts of last resort, is applicable here, and the finding will not be disturbed. *Tonopah Lumber Co. v. Nevada Amusement Co.*, 30 Nev. 445, 97

Pac. 636; Turley v. Thomas, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667.

[3] It is the contention of appellant that the trial court erred in finding that the lien was filed within the time required by law. They contend here, as they contended in the court below, that the work was completed in February, 1913, and that services performed thereafter by respondent were no part of the original contract, but were separate contracts for which separate liens should have been filed, and that the lien notice filed by respondent on August 9, 1913, was not filed within the statutory time. Indeed, from a standpoint of the evidence produced, as well as from a standpoint of the law applicable, this is the closest question presented in the case.

It was the contention of respondent in the court below, and testified to, that on the 9th day of November, 1912, he entered into an oral contract with the lessee of the building, to wit, Kane, Incorporated, to furnish labor and material for the alteration, changing, and repair of the building for the convenience of Kane, Incorporated. The terms of the agreement, according to the testimony of respondent, were that respondent was to do the work and furnish the labor and material, and that Kane, Incorporated, was to pay respondent at the rate of \$8 per day for his labor, \$5 a day for carpenters whom he employed, \$2.50 a day for carpenter helpers, \$4 a day for brick mason helpers, and \$7 a day for brick masons. The testimony of respondent, Gaston, in this respect is as follows:

"Q. You say— What was the alteration? Describe that work to be done under that agreement. A. Well, at that time the work that was outlined was rebuilding the dining room, to take out the old kitchen out of the dining room, and take the stairs out of the front and put them in again in the rear, or better than one-third or halfway in the building—they were running the upstairs there—put in a hall from Virginia street to the dining room, and put in the toilets and other conveniences, and put in lunch counters, and put in a front on the building and other alterations, both upstairs and downstairs, and the cellar. Q. And also to supply the materials of that work, were you? A. Yes, sir. Q. And all labor? A. Yes, sir; that is, the carpenters' labor only. Q. The carpenter labor? A. Yes, sir; and the common labor, of course, and the brick masons and brick helpers—those. Q. How was that amount of money to be paid? A. Well, it was to be paid as the work progressed along; to receive payments, and the balance at the completion of the work. Q. When did you begin that work? A. On the 11th day of November, 1912. Q. And you got through, finished it, when? A. On the 21st day of June, 1913. Q. And did you perform all of that contract, all that you agreed? A. Yes, sir. Q. All of the work? A. Yes, sir. Q. Furnished the materials that you agreed to furnish? A. Yes, sir."

On cross-examination the respondent, Gaston, testified that the reason for delay in the completion of the work was to suit the convenience of Kane, Incorporated, who was conducting a saloon and restaurant business in the premises.

It appears from the record that the labor performed by the respondent in and about

the premises and in the alteration and improvement of the building was commenced on or about the 11th day of November, 1912, and that from time to time changes and alterations and improvements other than those contemplated in the original contract were suggested by the lessee of the building. There appear to have been times when no improvements or alterations were being made and when the respondent was not in or about the premises at all; at other times it appears that he was sent for by the lessee and asked to make other changes or alterations or to supply other material; and the last item of service performed or material furnished appears to have been on June 21, 1913, when a screen door was furnished and hung in place by respondent. As we take it from the record before us, all of the work and material went to the common purpose, which common purpose was the object of all parties to the original contract, i. e., the rearrangement and improvement of the premises to suit the business that was to be conducted by the lessee, Kane, Incorporated.

T. J. Kane, the original maker of the contract with respondent, in testifying as to the making of the contract and its general terms and nature, and especially referring to the last item of service performed, said:

"I had a talk when I called him to put in the screen door, and I thought possibly that he would balk at it, but he didn't. Every time I called him he came to me and done the work, knowing the circumstances; that I could not pay in full. Q. You called him to put in the screen doors like you called him to do the other work? A. I did; yes, sir."

It appears that by reason of the several items of service performed and the several items of material furnished in alteration of the building the sum of \$1,176 accrued to the respondent under the contract. It further appears that from time to time small sums of money were paid by Kane, Incorporated, to the respondent in part payment of the services already performed; the total of these sums being approximately \$636, leaving a balance due and unpaid of \$540.

In our judgment, the case presented by the record is one of a continuing contract. While it is true that the materials furnished and the services performed were furnished and performed on several different occasions, yet they all went to the one object, namely, the alteration and improvement of the premises to fit the same for the business being carried on by the lessee. It may be true, as indicated by the record, that on one occasion or even on several occasions, the respondent, lien claimant, was not working in or about the premises, and the work commenced up to that time may have been completed, but it would appear that at all times the lienholder was looked to by the lessee for the further carrying out of changes and alterations and improvements in the premises whenever such changes or alterations or improvements appeared necessary to the fulfillment of the

original purpose; and it further appears that the lien claimant always responded to the request of the lessee for the making of changes or alterations or the furnishing of materials.

The establishment and recognition of mechanic's liens under such conditions has been approved by the courts in more instances than one. In the case of *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 878, the Supreme Court of Indiana, in passing upon a case where under the contract the materials were to be supplied from time to time as needed in the making of repairs and improvements extending over a considerable number of months, said:

"If each order and delivery of materials during the progress of an improvement constituted a separate contract, and required a separate lien, it will be readily seen that, instead of providing a practical, simple, and efficient method of security to the laborer and materialman, as the statute certainly intends, a complication would arise, requiring many liens or the delivery of all materials at one time, or the performance of all labor by continuous and uninterrupted service."

In the case of *Smalley v. Gearing*, 121 Mich. 180, 79 N. W. 1114, 80 N. W. 797, the Supreme Court of Michigan held that, where a contractor entered into an agreement with the materialman whereby the latter was to furnish all materials of a certain kind for a building without any specific quantity being designated, and such material was delivered to the contractor from time to time, the time for filing a lien claim commenced to run on the last delivery. To the same effect is the case of *State Sash & Door Mfg. Co. v. Norwegian Danish E. L. A. Seminary*, 45 Minn. 254, 47 N. W. 796.

In matters of this kind it is not necessarily the contract, but rather the furnishing and use of the materials and the putting of the same into the building, or the performing of the services upon the premises with the knowledge and consent of the owner of the premises, that constitutes the grounds for the lien. Whatever may have been said by other courts, or whatever may be said by other authorities upon the subject, this court has given valuable expression, in the light of which the question under consideration may be solved. The case of *Skyrme v. Occidental Mill & Mining Co.*, 8 Nev. 219, presented facts quite analogous to the case at bar. There the details of the testimony show that a number of contracts were taken by several of the lien claimants, some taking two or more contracts; others but one. These contracts were completed at specified dates. The miners who had taken these contracts, when their contracts were completed, either took a new contract or commenced work by the day in the same mine. The mine closed down without paying its employes, and liens were filed by the miners, which liens included the amounts due to each claimant for his entire labor under the contracts and for his labor

by day's wage. The court, in passing upon the case, commented as follows:

"In the case at bar there was not in reality any new employment. The character of work was the same, viz., labor and work done on the mine. The amount to be paid varied with the peculiar character of the work at different times."

"It would be a harsh and unreasonable rule of construction," says Mr. Justice Hawley, in speaking for this court, "in these cases to hold that the statute required separate liens to be filed for each contract to enable the laborer to secure his wages. The injustice of such a rule would be greater to the mine owner than the laborer. It would destroy the credit necessary at times to have in order to continue operations on the mine, or add unnecessary costs and litigation by filing and foreclosing a multiplicity of liens."

The case of *Skyrme v. Occidental Mill & Mining Co.*, supra, was referred to approvingly in *Capron v. Strout*, 11 Nev. 304, and also in the case of *Ferro v. Bargo Mining & Milling Co.*, 37 Nev. 139, 140 Pac. 527. To the same effect is the reasoning in the following cases: *Salt Lake Hardware Co. v. Chainman Mining & Electric Co. (C. C.)* 137 Fed. 632; *Salt Lake City v. Smith*, 104 Fed. 457, 43 C. C. A. 637.

[4] As we stated at the outset, the question last discussed is perhaps the closest one presented by this case, and is one which demands most careful scrutiny. It may be well to observe here that in the record before us it does not appear that the act of respondent, Gaston, in performing the last service, to wit, the hanging of the screen door on the premises, was done for the purpose or with the intent of extending the time within which he might file his lien for the other service performed or material furnished. There is nothing in the record to indicate, nor is it contended by appellant, that this service was performed for the sole purpose of permitting respondent to file his lien within the statutory time. There is nothing before us indicating fraud on the part of respondent. It may be well to observe here that, had such a condition been presented, the rule which we have asserted here could not operate in favor of respondent.

[5] The witness T. J. Kane, called as a witness for the appellant, testified:

"The real work was done about the 1st of February; something like that."

From this statement the appellant contends that the trial court should have held that services performed or material furnished by respondent after the 1st of February were separate items of services, and hence the notice of lien was void, not having been filed within the time prescribed by statute. However, other statements found in the record made by the witness Kane, as well as the testimony of the respondent, Gaston, warrant us in the conclusion that there was substantial evidence produced upon which to support the finding of the court.

The record here discloses that the object sought to be accomplished was the alteration

and improvement of the premises of appellant; that the services of respondent, as well as the material furnished by him, were devoted to the accomplishment of the primary purpose. The services performed and the material furnished were performed and furnished from time to time to suit the convenience of the lessee of the building. Many of the changes and alterations made in the interior of the building by respondent and many items of material furnished by him were not taken into consideration or contemplated at the original making of the contract. This is not an unusual thing in bringing about alterations and changes in building interiors, where the building has in the past been used for some particular business, and a new business about to be installed therein requires different arrangements, many of which cannot be reasonably foreseen at first. Treating the whole as a continuing contract, the filing of the lien notice within the statutory time after the completion of the last services performed by respondent entitled the respondent to a lien for the whole, less the sum total of the amounts paid thereon. Our conclusion reached as to the second assignment of error discussed in appellant's brief would conclude the third assignment of error also.

[5] It is the contention of appellant that the respondent, by agreement with Louis Avansino, the owner of the premises, specifically waived his right of lien. In this respect the testimony of Louis Avansino, Sr., the owner of the building, is to the effect that about the 11th or 12th of November, and after leasing the premises, he saw some men working in the old dining room, of whom respondent was one, and that on going in there he told them, in effect, that he would not be responsible for any work done by them in the place. He further testified, in effect, that the respondent, Gaston, at that time said to him, in substance, that he had a contract; that he would get his money from Kane; that he would "make no trouble" for Avansino. The witness further stated, in substance, that Gaston at that time said to him that he would hold Kane responsible for the work and services performed. The testimony of the respondent, Gaston, in this respect is to the effect that on the occasion he stated to Avansino that, if Kane was given a chance, he would pay for the labor and material. The witness, however, denied that he at any time stated to Avansino, or to any other person, that he would release Avansino or the premises from responsibility.

It is the contention of appellant that respondent by his acts and utterances made to and in the presence of Louis Avansino, the owner of the building, waived his right of lien as against the premises on which the labor was being performed and the material furnished. As to whether or not the respondent could by parol agreement waive

his right under the statute to a lien for the services performed or the material furnished it will be unnecessary to determine in this case.

The statements of the respondent, Gaston, testified to by the witness Louis Avansino, Sr., upon which it is contended that the former waived his right of lien, are uncertain, even if viewed in the light most favorable to the contention of appellant. We may with propriety observe in passing that, as a general proposition of law, a release of a lien will not be inferred from doubtful expressions (Jones on Liens, vol. 2, p. 747); and, as stated by many authorities, where the terms of the agreement are ambiguous or uncertain on the question of release, the doubt should be resolved against the waiver. (Davis v. La Crosse Hospital Association, 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 950). Between the testimony of the respondent and that of appellant here there is a sharp and distinct conflict. The trial court had opportunity to observe the conduct and demeanor of the several witnesses upon the stand, and, after so observing and listening to the testimony given, found against the contention of appellant here. In this instance, not only is there a substantial conflict in the testimony, but there is substantial evidence upon which the finding of the court in this respect may be supported, for which reason we will not disturb the same. Anderson v. Feutsch, 31 Nev. 501, 103 Pac. 1013, 105 Pac. 99.

We deem it unnecessary, in view of our position here expressed, to touch upon other matters raised in appellant's brief.

The judgment of the lower court and the order appealed from should be affirmed.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

(60 Colo. 466)

SLACK v. ANDERSON. (No. 8452.)

(Supreme Court of Colorado. Jan. 8, 1916.)

1. VENDOR AND PURCHASER \S 44 — EXISTENCE OF AGREEMENT—EVIDENCE.

Evidence in a suit to quiet title in a purchaser from the patentee held to support the finding that there had been no purchase by plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 69-76; Dec. Dig. \S 44.]

2. JUDGMENT \S 344—MOTION TO SET ASIDE—DISCRETION.

In a suit to quiet title, the refusal of a motion to set aside a judgment for defendant, on the ground that the reason contained in the supporting affidavits was immaterial, and that the statute did not contemplate the granting of a new trial on such showing, was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 673; Dec. Dig. \S 344.]

Error to District Court, Phillips County; H. P. Burke, Judge.

Suit by J. L. Slack against Edward Anderson. Judgment for defendant, and plaintiff brings error. Affirmed.

Allen & Webster, of Denver, for plaintiff in error. Munson & Munson, of Sterling, for defendant in error.

TELLER, J. The plaintiff in error brought suit to quiet title to a quarter section of land. The defendant, by answer, claimed title from one Matthew Wasley, who was the patentee from the United States government, and who appeared, according to the records, still to be the owner.

It appears from the abstract that the plaintiff, in the spring of 1912, wrote to Matthew Wasley, in Wisconsin, to the effect that a draft for \$10 had been sent to the Hazel Green Bank to be delivered to him on the execution and delivery of a quitclaim deed for the land in question, which, the letter said, "you remember you used to own."

Wasley testified that the cashier of the above-named bank asked him to sign the deed to fix up the title to the land which his son had sold, he having conveyed to the son in January, 1900; that nothing was said about buying the land; that he signed the deed to clear up the title; and that he received not to exceed \$5 for it. Plaintiff admitted in his testimony that his letter to the bank requested that Wasley be seen and requested to execute a quitclaim deed, "as it was necessary to fix up the title."

The court found that the land was of the value of \$2,000; that there was no bargain and sale between plaintiff and Wasley; that there was no consideration for the deed; that Wasley, in executing the deed, supposed that he was correcting a defect in his former conveyance to his son; and that the plaintiff was not a purchaser of said land for value.

On December 11, 1913, before the entry of judgment, plaintiff was given 15 days in which to move for a new trial. A motion for a new trial not having been filed, judgment for defendant was entered January 9, 1914.

On May 12, 1914, plaintiff filed a motion to vacate the judgment and grant a new trial, supported by an affidavit to the effect that the books of the above-mentioned bank showed a payment to Wasley of \$10, and that the plaintiff could not secure the said affidavit within the 15 days allowed for the motion for a new trial.

The court denied the motion, and held that it was not material whether Wasley received all of the \$10, or only a part of it, that it was wholly inadequate as a consideration, and that the statute did not contemplate the granting of a new trial upon such a showing as the one there made. Counsel urge that the court erred in finding for the defendant, and in refusing to vacate the judgment and grant a new trial.

[1] We are of the opinion that there was evidence to support the finding that there was no purchase by the plaintiff, and the finding, therefore, cannot be disturbed.

[2] The setting aside of the judgment was a matter within the discretion of the court, and we cannot say that the court abused its discretion in the order which it made.

The judgment is affirmed.

Judgment affirmed.

GABBERT, C. J., and HILL, J., concurring.

(60 Colo. 464)

MULLEN et al. v. GRIFFIN. (No. 8449.)
(Supreme Court of Colorado. Jan. 3, 1916.)

1. TRIAL \S 337 — VERDICT — DISREGARD OF INSTRUCTIONS.

In a suit for malicious prosecution, where it appeared that defendant, in causing plaintiff's arrest, acted solely on a report that plaintiff had been seen carrying off two lamps and a sack of coal, and that, without inquiry of plaintiff, and in violation of law, he searched his house in the nighttime, defended in part on the ground that defendant had made to counsel a full statement of all the facts bearing upon the plaintiff's guilt or innocence, in which the court instructed that defendant must have made a full and candid statement of all the facts to constitute the defense, a verdict for plaintiff would not be set aside as in disregard of the instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 790; Dec. Dig. \S 337.]

2. APPEAL AND ERROR \S 581—ASSIGNMENT OF ERRORS—NECESSITY OF OBJECTION.

Where the abstract showed no objection made to the giving and refusing of instructions, alleged errors therein will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2575-2581, 2599, 2601; Dec. Dig. \S 581.]

Error to District Court, Teller County; J. W. Sheafor, Judge.

Suit by D. K. Griffin against R. C. Mullen and the El Oro Mining & Milling Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Edward J. Boughton, of Denver, W. M. Alter, of Cripple Creek, and K. W. Farr, of Victor, for plaintiffs in error. E. G. Vanatta, of Cripple Creek, for defendant in error.

TELLER, J. The defendant in error brought suit against the plaintiffs in error for malicious prosecution, and obtained judgment for damages in the sum of \$1,000.

[1] In the brief for plaintiffs in error counsel say that nine of their assigned errors are summed up in one, which is that the court erred in receiving and entering the verdict, because the jury failed and refused to be governed by instructions numbered 6 and 7. In argument counsel contend that the verdict is in conflict with instruction 6, but say nothing more of instruction 7. Instruction 6 informs the jury what facts are necessary to be established to constitute the defense of

having acted in the prosecution on advice of counsel. It is urged that there was uncontradicted evidence to prove every fact declared by the instruction to be necessary to such defense. Hence, it is said, the verdict should have been set aside. One of the elements of the defense outlined by the instruction was that defendant had made "a full, true and candid statement of all the facts bearing on the guilt or innocence of the plaintiff of which knowledge might have been obtained by the exercise of reasonable diligence."

The jurors may well have considered that defendant Mullen did not make proper effort to ascertain the facts bearing on plaintiff's guilt before he sought advice of counsel. From defendant Mullen's own statement it appears that, in causing plaintiff's arrest, he acted solely on a report made to him that plaintiff had been seen carrying off two lamps and a sack of coal. He made no inquiry of plaintiff as to the matter, and proceeded, in violation of law, to search the plaintiff's house in the nighttime. Had he asked the plaintiff about the property taken, and received an explanation, he would not have made a fair and full statement to counsel unless he had included plaintiff's explanation. Upon this matter of a full and fair statement it cannot be said that a finding against defendants is without support in the evidence.

The jurors, who heard and saw the witnesses, might have found against the defendant on this or one of the other matters which he had to prove to make out that defense; and we cannot say that the trial court, with its full knowledge of the case presented, erred in regarding, as it must have done, the jury as justified in its findings.

[2] Errors are assigned also on the rulings of the court in refusing and in giving instructions: but, as the abstract shows no objections made in either case, the alleged errors will not be considered.

There being no error in the record as presented, the judgment is affirmed.

Judgment affirmed.

GABBERT, C. J., and HILL, J., concur.

(60 Colo. 462)

McGREW v. LAMB, Sheriff, et al. (No. 8405.) (Supreme Court of Colorado. Jan. 3, 1915.)

1. APPEAL AND ERROR ⇨866—SCOPE OF REVIEW—NONSUIT—EFFECT.

On appeal from an order sustaining motion for nonsuit in an action for mandatory injunction to compel defendant sheriff to issue a certificate of redemption from the sale of lots under special execution, unless plaintiff had an interest in the lots which would entitle him to redeem, the order must be affirmed and no other questions need be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. ⇨866.]

2. DEEDS ⇨32—REQUISITES—PARTIES.

A deed delivered in blank as to the grantee conveyed no title, and a subsequent delivery to another party without inserting the grantee's name and deed by him to the plaintiff creates no title in the plaintiff, since no deed is valid absent competent grantor and grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 64; Dec. Dig. ⇨32.]

3. APPEAL AND ERROR ⇨854—SCOPE OF REVIEW—REVERSAL—GROUNDS OF DECISION BELOW.

Although the decision of the court below was based upon improper grounds, if it was correct, it will be affirmed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. ⇨854.]

Error to District Court, Morgan County; H. P. Burke, Judge.

Action by O. H. McGrew against Silas S. Lamb, Sheriff of Morgan County, and another. From an order sustaining a motion for nonsuit, plaintiff brings error. Affirmed.

James E. Jewel, of Ft. Morgan, for plaintiff in error. Johnson & Robison and Walter S. Coen, all of Ft. Morgan, for defendants in error.

GABBERT, C. J. [1, 2] Plaintiff in error commenced an action against defendants in error for a mandatory injunction to compel the defendant sheriff to issue him a certificate of redemption from sale of lots under a special execution, and to cancel a quitclaim deed purporting to convey the lots in question to defendant Goodman. At the conclusion of the testimony on the part of plaintiff a motion by defendants for a nonsuit was sustained.

The only question necessary to determine is whether the testimony established that plaintiff had any interest whatever in the lots; for, unless he had some interest, which under the statute relating to redemptions from execution sales would entitle him to redeem, the judgment should be affirmed. If he had any such interest, it is by virtue of a deed executed by one Cook, in whom the title was vested, and delivered to a George T. Bennett with the name of the grantee blank. Bennett afterwards delivered this deed to S. W. Beggs in the same condition, and in which the name of the grantee never was inserted. Beggs was the grantor of plaintiff, and, unless the above facts vested title in him, the title, according to the record, is in defendant Goodman. It is axiomatic that to every deed there must be at least two parties, one capable of conveying, and the other of receiving, and that a deed without a grantee is practically no deed at all. Warvelle on Vendors, § 481. Whether a deed which does not contain the name of a grantee is void as held in some jurisdictions need not be determined, for clearly it is invalid for any purpose, and does not pass any interest until the name of the grantee is inserted therein. Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed.

90; *Lund v. Thackery*, 18 S. D. 113, 99 N. W. 856; 13 Cyc. 540. See, also, *Herr v. Denver M. & M. Co.*, 13 Colo. 406, 22 Pac. 770, 6 L. R. A. 641, where the question is discussed to some extent.

The deed from Cook delivered to Bennett did not name a grantee. In this condition Bennett delivered it to Beggs, and the name of a grantee never was inserted, so that in the circumstances of this case Beggs never acquired any title, and his deed to plaintiff conveyed nothing.

Other questions are argued by plaintiff in error which, in our opinion, are without merit and need not be considered.

[3] The learned trial judge appears to have decided the cause upon a question other than the one we have based our conclusion upon. Whether his theory was right or wrong is immaterial when his conclusion was unquestionably correct.

The judgment of the district court is affirmed.

Judgment affirmed.

WHITE and BAILEY, JJ., concur.

(60 Colo. 456)

McRORY v. INDEPENDENT ORDER OF PURITANS. (No. 8367.)

(Supreme Court of Colorado. Jan. 8, 1916.)

INSURANCE — 755 — FRATERNAL INSURANCE — ESTOPPEL.

Where the secretary of the defendant insurance order knew of the falsity of statements as to physical health contained in a member's application, and the medical examiner must have discovered their falsity, yet the insurer, for over two years having continued the membership and accepted the premiums, is estopped in an action on the certificate to set up the falsity of the statements in the application.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1907-1916; Dec. Dig. ¶ 755.]

Error to District Court, City and County of Denver; John H. Denison, Judge.

Action by W. W. McRory, guardian of John Paul Johns, a minor, against the Independent Order of Puritans. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded with directions.

Clark Varnum, of Chicago, Ill., H. F. Johns and William L. Varnum, both of Denver, and T. M. Morrow, of Scottsbluff, Neb., for plaintiff in error. Edward J. Boughton, of Denver, and Karl W. Farr, of Victor, for defendant in error.

GARRIGUES, J. This action was brought by the guardian of John Paul Johns, a minor, against the Independent Order of Puritans, a fraternal association organized and existing under the laws of Pennsylvania, to recover judgment on a limited annuity certificate issued to Anderson B. Johns. The sub-

stantial defense interposed by defendant is that the insured in his medical examination for membership in the order falsely stated and represented that he had never had inflammatory rheumatism; that he had not recently had any severe illness; that he was last attended by a physician ten years prior to making the application for insurance, and that he was not subject to kidney disease; that by reason of such false statements, the policy is void. The reply denied the allegations of new matter set up in the answer. At the conclusion of the testimony at the trial each side moved for a directed verdict, and it was stipulated between the parties that the jury should be excused, and that upon a determination by the court of the motions a verdict should be directed accordingly. The jury was excused, and thereafter the court sustained the motion of defendant and entered judgment of dismissal, to review which action the case is brought here on error.

Defendant is a fraternal organization operating under the lodge system. July 1, 1908, a benefit certificate was issued to Anderson B. Johns in which John Paul Johns, his son, was eventually named as the beneficiary. The certificate was issued upon the usual written application and medical examination of the insured, wherein he warranted his answers to be true. September 17, 1910, he died, from what cause or disease the record is silent.

To arrive at an intelligent understanding of the questions involved and clearly present the situation and circumstances surrounding the transaction, we are of necessity forced to go somewhat into the evidence. One W. C. Danks was the chief witness for the defense as to the falsity of the statements in the application of the insured. According to his testimony, he was intimately acquainted with the deceased during, prior to, and after the time of his application for membership; was fully conversant with his physical condition; knew that he was suffering from rheumatism and kidney disease, and that he had come to Colorado for the benefit of his health. He says:

"I first became acquainted with Mr. Johns about the latter part of the year 1907; met him in Denver. We formed a partnership to practice law, commencing the 1st day of March, 1908, and continuing until March, 1909."

It will be observed that it was during this period the benefit certificate was applied for and issued. The witness was first called to identify the application made by the insured, and said:

"I don't believe I was present when this application was signed by Mr. Johns. I was present when the application was forwarded to the home office. I was local secretary of the company at the time. He (Johns) stated to me ten minutes after he signed it that he had actually signed the application and hoped to be a member within a few days. At that time, I was the secretary, and all policies came to me, and I delivered them to the persons."

On cross-examination the witness gave the following testimony:

"Q. You had seen some application in Dr. East's office? A. Yes, sir. Q. Then when he said, 'I signed an application,' you assumed merely that the one you saw in Dr. East's office is the one that he referred to, did you? A. He accompanied me there the next morning, and we saw that the letter was sent out immediately. Q. But he did not call your attention to any particular application there? A. I looked it over before it was sent. Q. In Dr. East's office? A. Yes, sir. Q. And he showed it to you—Dr. East? A. Well, I don't remember; it was lying on his table, he might have; Mr. Johns and I examined it. Q. You were district officer of the association? A. I was."

Thereafter the witness was recalled for the purpose of establishing the falsity of the statements made in the application and testified regarding the physical condition of the applicant. On cross-examination he said:

"The examination of the application was just a casual looking it over before it was put in the envelope. I didn't read it. I rather think I was local secretary at the time; was recognized as secretary at the home office, and performed the duties of secretary with the knowledge and consent of the head officers; carried on the correspondence, if there was any. I don't remember anything only in remitting money. I remitted money as secretary, collected by me as secretary. Q. From July, 1908, to some time in 1909 you collected assessments on this certificate, did you, or received them? A. Yes, sir. Q. And you remitted them to the home office? A. I certainly did. Q. The secretary is one of the officials of the local lodge, is he not? A. I presume he would be. We had no local lodge; I was just secretary. Q. Is the medical examiner known as one of the officers of the order? A. The by-laws say what the officers of the local council shall be, and they include the secretary and medical examiner."

Mr. Danks also testified that he was an attorney at law and represented the defendant locally in legal matters in which it was interested, and that he was also a member of the organization.

The medical examiner of the company testified that he had made a careful examination of the applicant; that he had examined and tested his urine; that, in his judgment, the applicant had fully and truthfully answered each question; that the risk was first-class; and that he recommended the applicant for membership.

It seems to us that the following deductions are warranted by the evidence: First, that Danks was the local secretary and agent of the organization; second, that he was fully conversant with the physical condition of Johns immediately before, at the time, and after he applied for membership in the defendant company, and when he collected and remitted the assessments on the policy; third, that he was sufficiently familiar with the application and with its contents to swear that it was the identical one upon which the membership certificate had been issued, and that he examined it before it was sent to the home office; fourth, that the medical examiner must have discovered and known that Johns was suffering from kidney disease and was not an insurable risk.

It is conceded that the statements made by Johns in his application were false; but plaintiff seeks to avoid the defense interposed on this account upon the ground that the company, through its authorized officers and agents, was fully cognizant of Johns' physical condition at the time, and knew that his statements were false, notwithstanding which it issued to him its certificate and continued to collect assessments from him thereon for more than two years after it had this knowledge and up to the time of his death; that by so doing it waived the false representations, and is now estopped from avoiding liability on the policy. Defendant, while recognizing this general rule, contends that it had no knowledge of the facts; that, while its local representative Danks was personally fully acquainted with the entire situation, still his relations with the company were not of such a character that his knowledge could be legally presumed to be the knowledge of the company; that whatever information he received was in a personal capacity only, and not as an official of the company; that he had no knowledge of the contents of the application, and did not know that the statements therein made were not in conformity with the true physical condition of the applicant, and therefore it is not bound by his personal knowledge or precluded from asserting the defense now presented.

The question is not without difficulty. A great many authorities are cited by defendant's counsel in support of its contention, and there seems to be little controversy over the principles of law involved; but counsel are far apart on the proposition of whether the principles are applicable to the situation here presented. This is one of those peculiar cases in which the law is well settled, the evidence practically without conflict, and yet a correct solution with absolute certainty of being right is difficult. We have reached the conclusion that the examining physician and Danks were both agents of the organization, and that their knowledge was the knowledge of the company. It is to be presumed that the medical examiner was competent, possessed the proper qualifications, and made a thorough examination of the insured, which, if properly conducted, would necessarily have brought to his attention the physical ailments of the applicant. Danks knew his physical condition, and was one of the principal witnesses who furnished the evidence for the company to establish the falsity of the statements in the application, which he says he examined before it was sent to the home office. The company must be presumed to have known the facts with which their agents were acquainted when it accepted the risk. For over two years it permitted the insured to remain a member of the association and to pay assessments, which it received, up to the time of his death. Under these circumstances we conclude the company is

estopped from setting up the defense interposed. The following authorities tend to support this conclusion: *Supreme Lodge v. Davis*, 26 Colo. 252, 58 Pac. 595; *Supreme Tent v. Volkert*, 25 Ind. App. 627-643, 57 N. E. 208; *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; *Order of Foresters v. Schweitzer*, 171 Ill. 325, 49 N. E. 506; *Kidder v. Supreme Assembly*, 154 Ill. App. 489-491; *Trotter v. Grand Lodge*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533; *Alexander v. Grand Lodge*, 119 Iowa, 519-522, 93 N. W. 508; *Whigham v. Independent Foresters*, 44 Or. 543-553, 75 Pac. 1067; *Pringle v. Modern Woodmen*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Morrison v. Wisconsin Odd Fellows*, 59 Wis. 162, 18 N. W. 13; *Wiberg v. Minnesota Ass'n*, 73 Minn. 297-304, 76 N. W. 37; *Bail v. Aid Association*, 64 N. H. 291-293, 9 Atl. 103.

The judgment is reversed, and the cause remanded, with directions to the lower court to enter judgment for the plaintiff.

Reversed and remanded, with directions.

GABBERT, C. J., and SCOTT, J., concur.

(60 Colo. 498, 499)

STATE ex rel. STATE BOARD OF AGRICULTURE v. LEDDY, State Auditor, et al. (and six other cases). (Nos. 7886, 7917, 7918, 7780, 7781, 8058, and 7885.)

(Supreme Court of Colorado. Jan. 3, 1916.)

APPEAL AND ERROR ⇐19—DETERMINATION—MOOT CASE.

Where the subject-matter of the controversy has long since ceased to exist, the case is moot and the appellate court will not entertain writs of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-90; Dec. Dig. ⇐19.]

In Nos. 7780 and 7781:

En Banc. Error to District Court, Prowers County; Henry Hunter, Judge.

In Nos. 7885, 7886, 7917, and 7918:

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

In No. 8058:

Error to District Court, City and County of Denver; John H. Denison, Judge.

Proceedings by the People of the State of Colorado on the relation of Charles Maxwell and others against A. E. Downer, Clerk and Recorder of the town of Lamar, also against C. M. Lee, as Mayor, and others, together with proceedings by the State, on the relation of the State Board of Horticulture, and by the State, on the relation of the State Board of Agriculture, against Michael A. Leddy, State Auditor, and others. In the first two cases there were judgments for re-

lators, and defendants brought error, while in the latter judgment went for relators, and defendants brought error. Actions between Henry J. Arnold, as Mayor, etc., and Frederick J. Chamberlin, and also Daniel B. Carey. There being judgments for the latter, the former bring error. In actions between Frank P. Read and others and Ellis Meredith and others, the former bring error, judgment going against the latter. Cases dismissed.

In No. 7886:

Thos. R. Hoffmire, of Pueblo, for plaintiff in error.

In Nos. 7917 and 7918:

W. H. Bryant, J. A. Marsh, and W. R. Kennedy, all of Denver, for plaintiff in error. Henry A. Lindsley and Walter E. Schwed, both of Denver, for defendant in error.

In Nos. 7780 and 7781:

I. B. Melville, of Denver, and C. C. Goodale and Alfred Todd, both of Lamar, for plaintiffs in error. Granby Hillyer, of Lamar, for defendants in error.

In No. 8058:

McKnight & Henry, Carlisle A. Ferguson, and M. H. Farrington, all of Denver, for plaintiffs in error. W. H. Bryant, J. A. Marsh, and W. H. Malone, all of Denver, for defendants in error.

In No. 7885:

Thos. R. Hoffmire, of Pueblo, for plaintiff in error. Benjamin Griffith, Atty. Gen., and Philip Mothersill, Asst. Atty. Gen., for defendants in error.

PER CURIAM. The judgment of this court determining the respective questions presented in each of the above causes could not affect the rights of either of the parties thereto at this time, for the reason that the subject-matter of controversy in each has long since ceased to exist. An actual controversy is an essential requisite to appellate jurisdiction. It is not within the province of an appellate court to decide abstract or hypothetical questions, disconnected from the granting of actual relief, or from the determination of which no practical result can follow. *City and County of Denver v. Brown*, 47 Colo. 513, 108 Pac. 971; *Agricultural Ditch Co. v. Rollins*, 42 Colo. 267, 93 Pac. 1125; *Northern Colorado Co. v. Poupplrt*, 47 Colo. 490, 108 Pac. 23; *People v. Hall*, 45 Colo. 303, 100 Pac. 1129. Each of the cases fall within this rule, and they are therefore dismissed.

In causes Nos. 7780 and 7781, the costs in this court and the district court are taxed to defendants in error.

(60 Colo. 382)

CITY OF GOLDEN v. WESTERN LUMBER & POLE CO. (No. 8243.)

(Supreme Court of Colorado. Jan. 3, 1916.)

1. MUNICIPAL CORPORATIONS — 373 — CLAIMS — STATUTE.

Under Rev. St. 1908, § 5408, providing that any person to whom a contractor for work with a city may be indebted may file his claim with the clerk of the city, and if the claim tally with the statement of the contractor, the amount shall be paid directly to claimant and deducted out of the sum to be paid the contractor, where a contractor to build waterworks for defendant city made a written order for the payment of money in favor of a materialman, which was served on the city, there being no fraud, the city was bound by such order as to the amount of the claim.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. — 373.]

2. MUNICIPAL CORPORATIONS — 373 — CLAIMS — INTEREST — STATUTE — "CITY."

Rev. St. 1908, § 3162, provides that creditors may receive interest, in the absence of agreement as to rate, at 8 per cent. for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing, or on money due on mutual settlement of accounts from the date of such settlement, on money due on account from the due date, etc. Section 3163 provides that county orders and warrants and other like evidences or certificates of municipal indebtedness shall bear interest at 6 per cent. from the date of presentation for payment, etc. A city, by statute, upon presentation to it by a materialman on a waterworks job of the contractor's order for the payment of money, became liable in the amount thereof directly to the materialman, but neglected to pay, and the materialman sued, claiming interest. *Held*, that the "city," a voluntary organization created for local convenience, advantage, and interest, and acting in a private as well as a public capacity, was liable for interest under section 3162, since its building of a waterworks was a purely private activity, while towns and cities in business transactions are liable for interest in the absence of statute or decisions putting them on a different footing, the only purpose of section 3164 being to make it impossible for a municipality to agree to pay a higher rate of interest on certain securities than 6 per cent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 913; Dec. Dig. — 373.]

For other definitions, see *Words and Phrases*, First and Second Series, City.]

Gabbert, C. J., and Garrigues, J., dissenting.

En Banc. Error to District Court, Jefferson County; H. S. Class, Judge.

Action by the Western Lumber & Pole Company against the City of Golden. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Barner and William A. Dier, both of Golden, for plaintiff in error. Van Cise, Grant & Van Cise, of Denver, for defendant in error.

BAILEY, J. This action was commenced May 27th, 1904, in the District Court of Jefferson County, by the Western Lumber and Pole Company, defendant in error, against

Ronald P. McDonald and the City of Golden, the latter being plaintiff in error here, to recover the sum of \$3,477.11, with interest at eight per cent. a year from November 5th, 1903, alleged to be due for fir pipe staves, sold and delivered to McDonald as principal contractor, for use in the construction of a water works system for the city. The cause was tried to the court in April, 1908, upon the issues formed by the amended complaint, the answer of the city and replication thereto. Upon these issues, after a full hearing on the merits, the court found that the city was not liable for the claim, and as to it entered a judgment of dismissal. Subsequently such proceedings were had that this judgment was reversed by the Court of Appeals and the cause remanded. See *Western Lumber & Pole Co. v. City of Golden*, 23 Colo. App. 461, 130 Pac. 1027.

At a second hearing, on November 29th, 1913, upon motion, on the authority of the decision of the Court of Appeals, judgment was entered in favor of the company for the sum of \$6,277.00, the aggregate of the original claim, \$3,477.11, and interest, \$2,799.89, to date of judgment. The case is now here for review on writ of error sued out by the city to that judgment.

There are but two questions for consideration. First. Should the case have been retried on its merits upon the theory that it was remanded for that purpose? and, Second. Is the company entitled in any event to interest on its claim?

The amount of the original claim is evidenced by an order in writing duly served upon the clerk of the city on November 5th, 1903, which reads as follows:

"Golden, Colo., Nov. 5th, 1903.

"To the City of Golden, W. H. Carter, Esq., City Clerk, Golden, Colo.

"Dear Sir—You will please retain out of any estimate due me, on contract between the City of Golden and myself, the sum of thirty-four hundred seventy-seven dollars and eleven cents (\$3,477.11), and pay the same to the Western Lumber & Pole Company of Denver, Colorado. Interest to be added at rate of 8 per cent. per annum from date until paid.

"[Signed] R. P. McDonald."

The pleadings of the city admit that it failed to comply with and observe the provisions of the law, upon which the company relied for recovery, and under which the city's liability was declared.

[1] Section 5408, Revised Statutes 1908, provides:

"Any person, to whom a contractor * * * may be indebted, may file with the clerk of such city * * * his claim. * * * If such claims tally with statement of contractor * * * the amount claimed shall be paid directly to claimant, and shall be deducted out of sum to be paid contractor. * * *"

The facts essential to recovery under the law on the merits were conclusively shown by testimony at the original trial, and no testimony was introduced to overcome, disprove

or challenge the same. But the trial court misapplied the law and determined, regardless of the proofs, that under the statute and as matter of law there was no liability against the city under the circumstances shown. On the contrary, however, the Court of Appeals in its opinion determined that the right of the company to recover from the city had been fully established, and remanded the case, in this language:

"Entertaining no doubt as to the validity of the statute and the right of the Lumber Company to invoke its provisions, the judgment of the trial court must be reversed and the case remanded for further proceedings in harmony with the views herein expressed."

Just what the Court of Appeals did determine as to plaintiff's right of recovery is shown in the following extracts from the opinion rendered. At page 463 of 23 Colo. App., at page 1027 of 130 Pac., this was said:

"The contractor became indebted to the Lumber Company for material which it had furnished him, and which he and another firm of contractors, who completed the waterworks after the termination of the McDonald contract, used in the construction of the plant. For this indebtedness, amounting to over \$3,000, after all proper credits were allowed, the contractor gave an order to the plaintiff in error on the city. In fact he gave two such orders, one signed by himself, and one signed by himself and his manager. These orders appear to have been delivered to the city clerk. * * * There was other evidence, such as correspondence, clearly indicating knowledge on the part of the city officials that the contractor was not making satisfactory settlements with the Lumber Company for material which the latter was furnishing the former."

On pages 469, 470 of 23 Colo. App., on page 1029 of 130 Pac., it is further said:

"It is conceded that the city made no attempt whatever to comply with the provisions of this statute or any thereof. * * * Section 5408 of the act, in unequivocal terms, commands the city to pay the money due the claimant directly to him, when by agreement or judgment that amount shall have been ascertained."

After saying that equity considers that as done which ought to have been done, the opinion proceeds as follows, at page 475 of 23 Colo. App., at page 1031 of 130 Pac.:

"This wholesome rule of equity requires us to hold that neither the city's duty nor the Lumber Company's right have been in any manner altered by the unauthorized payment by the city of McDonald's claim, and that the Lumber Company may yet look to the city for its pay for the material furnished the contractor, precisely as it might have done had no such payment been made by the city to him."

It is clearly evident that when the contractor, McDonald, gave the order to the company, that was an admission by him of the amount due the latter. In other words, the written order by the contractor, when served on the city on November 5th, 1903, was in every way equivalent to a compliance by the creditor with the requirements of Section 5408. The city had notice of the claim and the amount thereof, and in the absence of fraud, and there is no suggestion of that, was bound thereby, as to the amount of the claim. The opinion of the Court of Appeals

plainly determines that the plaintiff was entitled to recover under the statute, upon the merits of the case. Nothing therefore was left to be done but to remand the cause to the trial court for entry of the judgment which it should have entered originally, and as we construe the remanding order, considered in connection with the context of its opinion, the Court of Appeals intended that the trial court should do precisely what it did do.

[2] Having determined that the city is liable, shall it pay interest on the claim from the time of the presentation of the order and demand for payment, November 5th, 1903, or at all? The sections of the statute involved in this consideration are 3162, 3163 and 3164, Revised Statutes 1908, which read as follows:

3162. "Creditors shall be allowed to receive interest when there is no agreement as to the rate thereof, at the rate of eight per centum per annum, for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing, or on any judgment recovered before any court or magistrate authorized to enter up the same within this state, from the day of entering up said judgment until the satisfaction thereof be made; also, on money due on mutual settlement of accounts from the date of such settlement, on money due on account from the date when the same became due, and on money received to the use of another and retained without the owner's knowledge."

3163. "The parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein for the payment of a greater or higher rate of interest than eight per centum per annum, and any such stipulation may be enforced in any court of competent jurisdiction in the state."

3164. "County orders and warrants, town and city and school orders and warrants, and other like evidences or certificates of municipal indebtedness, shall bear interest at the rate of six per centum per annum from the date of the presentation thereof for payment at the treasury where the same may be payable, until there is money in the treasury for the payment thereof, except when otherwise specially provided by law, and every county treasurer, town treasurer and city treasurer to whom any such county, town, city or school order or warrant is presented for payment, and who shall not have on hand the funds to pay the same, shall indorse thereon the rate of interest said order or warrant will draw, and the date of such presentation, and subscribe such endorsement with his official signature; provided, that, all such orders and warrants may be made to bear a lower rate of interest than above specified, by special agreement between such counties, towns and cities issuing the same, and the person to whom such orders or warrants are issued."

It has long been recognized that a distinctively municipal corporation acts in a two-fold manner, namely, in a governmental or political capacity, and in a ministerial or private or business capacity. In this case the city was acting in a purely ministerial or business capacity. This court has repeatedly recognized this doctrine. In *Denver v. Maurer*, 47 Colo. 209, at page 212, 106 Pac. 875, at page 876, it is said:

"The authorities agree that two classes of general duties are imposed upon a municipal corporation. One is governmental, and the municipality is not liable for negligence of em-

ployés occurring in the performance thereof. The other is private and corporate, and the municipality is liable for negligence of employes occurring in the performance thereof. *City of Denver v. Davis*, 37 Colo. 370 [86 Pac. 1027, 6 L. R. A. (N. S.) 1013, 119 Am. St. Rep. 293, 10 Ann. Cas. 187]."

In *City of Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729, it was declared that a municipality undertaking a public improvement, such as the construction of a sewer, is liable like an individual for damages resulting from negligence or omission of duty.

Explaining fully the distinction, based upon authorities quoted therein, in *Esberg Cigar Co. v. City of Portland*, 34 Or. 282, 55 Pac. 961, 48 L. R. A. 435, 75 Am. St. Rep. 651, it was held, in substance, that water works belong to a city in its private, rather than its public capacity, so as to make it liable for injury for the negligent construction or maintenance thereof, even though the legislature determines upon the necessity for such works and selects certain persons as agents of the city by whom the work shall be undertaken.

In *Shipley v. Hacheney*, 34 Or. 303, at page 307, 55 Pac. 971, at page 972, this is said:

"So it is said, in manifest harmony with this distinction, that the rule in respect to the corporate indebtedness of the municipality does not ordinarily differ from that which applies to individuals. *Dillon, Mun. Corp.* § 506. The doctrine is also sustained and promulgated by judicial utterances. In *Murphy v. City of Omaha*, 33 Neb. 402, 408, 50 N. W. 267, it is said: 'In the absence of any contract that payment shall be delayed, the city will be liable for interest like any other debtor. * * * In its business transactions a city should be required to conform to the ordinary rules, and all exemptions claimed which would work injustice should be denied.' Upon the same principle, interest was allowed against the town in *Langdon v. Town of Castleton*, 30 Vt. 285. See, also, *Pruyn v. City of Milwaukee*, 18 Wis. 367; *City of Grand Rapids v. Blakely*, 40 Mich. 367, 29 Am. Rep. 539; *State ex rel. v. Trustees of Town of Pacific*, 61 Mo. 155; *City of Scranton v. Hyde Park Gas Co.*, 102 Pa. 382."

Even in Illinois, where the decisions in this particular seem to be favorable to the city, they do not go so far as to hold that cities are not chargeable with interest. In *Conway v. City of Chicago*, 237 Ill. 128, at page 137, 86 N. E. 619, at page 623, the court said:

"The general rule as to the liability of municipalities is, that they are not liable on their contracts for interest in the absence of an express agreement to pay it, yet where money is wrongfully obtained, or where it is lawfully obtained and unlawfully and wrongfully withheld, the municipality is liable for interest to the same extent as a private person." *City of Shawnee v. Freauff*, 36 Okl. 280, 128 Pac. 255; 28 Cyc. page 1754.

We have no hesitancy, therefore, in holding, upon the weight of authority, that towns and cities in business transactions are liable for interest, in the absence of statute or decisions of our courts putting them on a different basis, the same as private corporations or individuals. In this connection it is contended by counsel for the city that this court,

in the case of *Montezuma County v. Wheeler*, 39 Colo. 207, 89 Pac. 50, has laid down a rule based upon the construction of our statutes, which puts towns and cities in a different position respecting interest than obtains generally.

The opinion in question ought not to be given such construction. There it was attempted to collect interest from a county upon a bill of a water commissioner, which the county refused to pay. It was sought to recover interest on the amount from the date the bill was presented and payment demanded. The liability of the county for interest, under such circumstances, was denied, upon the theory that counties are involuntary organizations, civil divisions of the state, created by general law to aid in the administration of state government, and therefore not liable for interest, except by agreement, or unless specifically made so by statute.

A city is a voluntary organization created for local convenience, advantage and interests, and acts in a private as well as a public capacity, and an entirely different rule applies to it with respect to liability to pay interest in business transactions. This distinction is clearly recognized and pointed out in the decision under consideration. Besides, that portion of the opinion which it is sought to apply in this case, was in no sense necessary for a decision of that case, the matter in question being purely argumentative and expressly used, as stated in the opinion itself, to strengthen the conclusion, based on an entirely different line of argument, which had been reached. After the court had determined the case upon the theory that the county was an involuntary corporate body, a division of the state, created purely as an agency or instrumentality of the state for general governmental purposes, and subject to like rules and restrictions governing its liability for interest as the state, and therefore not bound by statute to pay interest unless expressly designated therein, the court made use of this language:

"The foregoing we believe to be the correct doctrine as to the allowance of interest upon claims against a county. We are strengthened in the belief that it was not the intention of the legislature to allow interest upon claims against counties by virtue of sec. 2252 *Mills' Ann. Stats.* (sec. 3162, R. S. 1908), because sec. 2254 provides that: 'County orders and warrants and other like evidences or certificates of indebtedness shall bear interest at the rate of eight per cent.' If it was intended that obligations of the county other than those mentioned in sec. 2254 should draw interest, as provided in sec. 2252, the enactment of the latter section would have been idle, because the earlier section provides for the allowance of interest 'on any bond, bill, promissory note or other instrument of writing,' which expressions are broad enough to include county orders and warrants and other like evidences of municipal indebtedness. The rule being that counties may not have liabilities imposed upon them in the absence of a statute, and the fact that the legislature provided that county orders, warrants and other like evidences of municipal indebtedness shall bear interest, it must have intended to exclude all ob-

ligations other than those mentioned. *Expressio unius est exclusio alterius.*"

In argument counsel for the city say, having reference to that part of the decision above quoted, "The reasoning of that opinion would seem to apply as well to cities and towns." Undoubtedly this would be true if the reasoning thus put forth had been essential to the conclusion there reached, or if that particular portion of the opinion could fairly be said to be other than argument or dicta.

The evident intent of Section 3164 was, first, to place a uniform rate of interest upon a specific class of obligations; and second, to make it impossible for county, town, city or school district officials to agree, as otherwise under Section 3163, *supra*, they might do, to pay a higher rate of interest upon such securities than that fixed by statute. We are unwilling to accept the suggestion that it was the intention of the legislature by the enactment of section 3164 to preclude the recovery of interest, except by express agreement, on all other county, city, town or school district indebtedness. Section 3164 in no manner limits, qualifies or changes the effect and purpose of section 3162, except as to a particular class of securities. By section 3162 creditors are entitled to interest on claims therein mentioned at the rate of eight per cent. per annum from all debtors. The conclusion reached in *Montezuma County v. Wheeler*, *supra*, therefore, has no bearing upon the question of the liability of towns and cities for interest. Any other holding would have the effect to exempt cities and towns from the payment of interest on judgments against them. Section 3162 plainly applies to cities and towns, and gives a creditor the right to recover interest, upon claims growing out of business transactions with them, whenever, under like circumstances, he might lawfully do so from a private corporation or individual.

There appearing to be no error in the judgment, it is affirmed.

GABBERT, C. J., and GARRIGUES, J., dissent.

GARRIGUES, J. (dissenting). 1. It appears from the complaint that the defendant in error, a lumber company, in 1903 furnished the contractor, McDonald, with a quantity of fir pipe staves used by him in constructing a pipe line for a system of waterworks built by the city, for which, without interest, it is alleged an unpaid balance remains of \$3,451.92, not \$3,477.11, as stated in the majority opinion. The city paid the contractor, who, it is alleged, neglected to pay the lumber company such balance, and in 1904 it brought suit against the city based upon chapter 124, Session Laws of 1899. At the first trial in 1908, the lower court dismissed the action as to the city, upon the ground

that in no event could it be liable under this statute for such material furnished to the contractor. Thereafter such proceedings were had on review that this judgment was reversed by our Court of Appeals, which held this interpretation placed upon the statute by the lower court was erroneous, and that the lumber company might yet, notwithstanding the city had paid the contractor in full, look to it for its pay for such material in an action based upon the city's failure to comply with the statute. The case was reversed by the Court of Appeals and remanded for further proceedings in the lower court in harmony with the views expressed in its opinion, but without specific directions as to the judgment, or any judgment that should be entered. In November, 1913, after remittitur from the Court of Appeals, the lower court, upon motion of the lumber company and against the protest and over the objection of the city, summarily entered judgment against it in the sum of \$6,277, without a trial or the presentation of any evidence whatever, based solely upon the remittitur, judgment, and opinion of the Court of Appeals. Upon the question of interest the complaint alleges that after deducting all payments, there remained a balance November 5, 1903, of \$3,451.92; that the interest on this up to November 5, 1903, was \$25.19, which was added to the balance, and on this date McDonald gave the lumber company an order on the city for \$3,477.11 bearing interest at 8 per cent. from November 5, 1903, until paid, and it is upon this order that the lower court entered judgment for \$6,277, being the face of the order, plus \$2,799.89 interest thereon, computed at 8 per cent. from November 5, 1903, and it is the judgment of the lower court pronounced upon this order which the majority opinion affirms. The allegations of the complaint regarding the purchase of the staves by McDonald from the lumber company, their use by the contractor in the construction of the pipe line, and that there was a balance due from McDonald to the lumber company were all denied and put in issue by the answer.

2. The Court of Appeals gave no direction to the lower court to enter any specific judgment. It simply ordered that it proceed in harmony with the views expressed in the opinion of the court. The question which it had under consideration and decided was the liability of the city, as an abstract proposition under the statute, not the amount of the liability. The lower court held it could not be made liable under the statute in any event. The Court of Appeals held this was erroneous; that a municipality letting a contract for public works may be made liable under the statute to one supplying material to the contractor; that merely because the statute contained no provision for its enforcement was no defense, where the city had paid the contractor in full in violation

thereof and made no attempt to comply with its terms. It is evident to me, and I think very clear from reading the opinion of the Court of Appeals, that it only intended to place a construction upon the statute for the guidance of the lower court in another trial de novo, and reversed and remanded the case generally. If it had intended the lower court should, upon receipt of the remittitur, enter a final judgment for a definite amount based simply upon the opinion, judgment, and remittitur of the Court of Appeals, it seems inexcusable that it did not give such specific directions to the lower court. It gave no such directions. I think the majority opinion arbitrarily reads such intent into the opinion of the Court of Appeals. The city has a right, on a trial de novo, to contest the matters at issue in the pleadings, governed by the law of the case announced by the decision of the Court of Appeals. The contractor could not forestall this right and obligate the city to pay a liquidated amount with interest thereon by giving an order on the city. I think it erroneous to measure the city's liability by an order given by McDonald to the lumber company against the city drawing 8 per cent. interest, in the face of a denial by the city of the allegations of the complaint. According to the decision of the Court of Appeals, the lumber company's right of action against the city, if any, is based purely upon a statutory liability, and not upon an order given by the contractor. When the case was reversed and remanded without further directions except to proceed in harmony with the opinion, I think it stood for trial de novo upon the issues presented by the pleadings, as originally. Where it is intended the trial court should enter a final judgment disposing of the case upon the record as it stands, the practice in all well-regulated courts of review is for the appellate court to direct specifically the kind of judgment to be entered. *Johnson v. Bailey*, 17 Colo. 59, 28 Pac. 81; *Dickson v. Bank*, 11 Colo. App. 154, 52 Pac. 745; *Talcott v. Delta Co.*, 19 Colo. App. 11, 73 Pac. 256; *Cahn v. Tootle*, 58 Kan. 280, 48 Pac. 919.

3. According to the law of the case as announced by the Court of Appeals, the suit is based upon a specific statute, and the measure of the city's liability is the unpaid balance, if any, which the contractor owes the lumber company for material, not the order given by McDonald. The complaint alleges that the balance is \$3,451.92, which, plus \$25.19 interest that was added, amounted on November 5, 1903, to \$3,477.11, for which amount McDonald on that date gave an order, drawing 8 per cent. interest. The lower court allowed the face of this order and interest from date at 8 per cent., making an aggregate judgment of \$6,277; and the question is presented: In the event there is a balance due the lumber company from McDonald for which the city is liable, must it pay interest thereon under the statute? not must it pay

interest on the McDonald order. Every lawyer knows that, in the absence of an express agreement, interest is purely a creature of statute, and one claiming interest must place his finger on some specific law authorizing it. There is no provision for interest in the statute creating the liability of the city in this case, and its liability to pay interest, in the absence of an express agreement, on any balance due from the contractor to the materialman is based upon chapter 71, R. S. 1908. Section 3162 thereof, upon the allowance of interest generally to creditors, provides that creditors, where there is no agreement as to the rate, in certain specific instances shall be allowed 8 per cent. per annum. Section 3164 provides that county orders and warrants, town and city orders and warrants, and school orders and warrants shall bear interest at 6 per cent. per annum from the date of presentation until there is money in the treasury to pay them. In the *Montezuma Case*, 39 Colo. 207, 89 Pac. 50, we held that section 3162, regarding the general liability of creditors to pay interest, did not apply at all to counties; that the liability of counties to pay interest is governed exclusively by section 3164. The provisions of this section 3164 concerning towns and cities, counties and school districts, are identical. It makes no distinction. It says that city orders and warrants, like county orders and warrants, shall draw 6 per cent. interest from date of presentation until there is money in the treasury for their payment. Therefore the reason given in the *Montezuma Case* for holding that it was not intended by the statute that obligations of the county other than those mentioned in section 3164 should draw interest under section 3162 applies with equal force to towns and cities and school districts. The statutory liability of the city for the balance due the materialman from the contractor is an obligation of the city other than that mentioned in section 3164, and if section 3162, regarding interest generally, is not applicable to counties, then from the reasoning in the *Montezuma case*, it does not apply to cities. The McDonald order, calling for 8 per cent. interest, was not a contract or agreement made by the city. The city had nothing to do with it. It in no way bound the city to pay either the principal or interest mentioned therein. Its liability is not upon the order, but for the unpaid balance, if any, for material, and whether it was liable or not for interest on such balance depends upon the provisions of section 3164, under the authority of the *Montezuma Case*, and not upon section 3162. It surely cannot be successfully contended that section 3164 does not place counties, cities, towns, and school districts upon exactly the same basis and apply to them alike with regard to the payment of interest; and, if counties are not liable for interest under section 3162, then towns, cities, and school districts are not. I

understand the majority opinion to hold that in their governmental capacity cities are controlled by section 3164 in regard to payment of interest, but in their ministerial capacity they are governed in this regard by section 3162. The statute makes no such distinction, and the Montezuma Case expressly holds that obligations of the county other than those mentioned in section 3164 do not draw interest under section 3162. I cannot consistently say that counties are governed wholly by section 3164 in the payment of interest, but that cities in their ministerial capacity are governed by section 3162 when the statute places each upon exactly the same footing with regard to the payment of interest, without making such distinction or any distinction whatever. I think, if we were right when we said that the obligations of counties other than those mentioned in section 3164 do not draw interest under section 3162, that we are wrong now when we draw a distinction in the section as to cities and say they are controlled by section 3164 in their governmental capacity, but by section 3162 in their ministerial capacity as to the payment of interest, without overruling the doctrine announced in the Montezuma Case.

(60 Colo. 452)

EAST DENVER MUNICIPAL IRR. DIST.
et al. v. **ALTURA FARMS CO.** et al.
(No. 8199.)

(Supreme Court of Colorado. Jan. 3, 1916.)

1. JURY \hookrightarrow 70—**OPEN VENIRE—STATUTE.**

Rev. St. 1908, § 3685, authorizing the court to order the issue of an open venire when the county commissioners fail to return a list, etc., is not exclusive of the right to secure a jury through the issue of an open venire, instead of drawing from the regular list.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. \hookrightarrow 70.]

2. APPEAL AND ERROR \hookrightarrow 922—**PRESUMPTION—BURDEN OF PROVING ERROR—JURY.**

Even if an order for the issue of an open venire could issue only when the commissioners fail to return a list, etc., as prescribed in Rev. St. 1908, § 3685, a party objecting to the issue of an open venire would be bound to show affirmatively that the necessary conditions did not exist, in order to overcome the presumption in favor of the regularity of the proceedings below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3723; Dec. Dig. \hookrightarrow 922.]

3. APPEAL AND ERROR \hookrightarrow 200—**REVIEW—OBJECTION.**

The objection to the court's order for the summoning of a jury of freeholders, not made below, will not be considered when first made on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \hookrightarrow 200.]

4. EMINENT DOMAIN \hookrightarrow 262—**REVIEW—FAILURE TO STATE OBJECTION.**

An order in a condemnation proceeding for the jury's view of the premises, without requiring respondent to advance the expense, to which the petitioner saved an exception, but did not state any ground of objection, so as to advise the trial court thereof and give it an opportunity to

pass on the question, prevented its review on appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. \hookrightarrow 262.]

5. APPEAL AND ERROR \hookrightarrow 706—**REVIEW—AFFIDAVITS ON MOTION FOR NEW TRIAL.**

Where the affidavits in support of a motion for a new trial were not preserved in the bill of exceptions, the Supreme Court could not consider them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2944-2947; Dec. Dig. \hookrightarrow 706.]

6. APPEAL AND ERROR \hookrightarrow 662—**RECORD—MOTION FOR NEW TRIAL.**

While the motion for a new trial is, by statute, a part of the record, the allegations of fact therein are no more to be accepted as true, without proof, than are the averments of a pleading.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2850-2852; Dec. Dig. \hookrightarrow 662.]

7. APPEAL AND ERROR \hookrightarrow 671—**DISCRETION OF TRIAL COURT—APPLICATION TO BRING IN WITNESSES.**

An application for process to bring in witnesses for examination as to the alleged misconduct of the opposing party during the trial is a matter within the discretion of the trial judge, and, without any statement in the application as to what the proposed witnesses would testify to, the Supreme Court cannot say that its refusal of the application was an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. \hookrightarrow 671.]

8. APPEAL AND ERROR \hookrightarrow 581—**RECORD—ADMISSION OF EVIDENCE.**

Where the abstract of record does not show either objection or exception to rulings on the admission and exclusion of evidence, the Supreme Court will not look beyond the abstract, and hence cannot consider the alleged errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2575-2581, 2599, 2601; Dec. Dig. \hookrightarrow 581.]

9. APPEAL AND ERROR \hookrightarrow 1004—**REVIEW—AMOUNT OF VERDICT.**

Where the Supreme Court can find nothing in the record indicating that the jury acted from passion or prejudice, it is not justified in disturbing the verdict on the ground that it is excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. \hookrightarrow 1004.]

Error to District Court, Arapahoe County; H. S. Class, Judge.

Condemnation proceeding by the East Denver Municipal Irrigation District and others against the Altura Farms Company and others. Judgment awarding compensation to defendants, and plaintiffs bring error. Affirmed.

Rodney J. Bardwell, Roy O. Hecox, Edgar McComb, and Paul M. Clark, all of Denver, for plaintiffs in error. Doud & Fowler, of Denver, Daniel Prescott, of Littleton, and E. B. Fowler, of Denver, for defendants in error.

TELLER, J. The plaintiff in error instituted a proceeding to condemn a right of way

across the land of the defendants in error, and the question as to the compensation to be allowed for the right of way was tried to a jury.

[1, 2] It is first alleged that there was error in the summoning of a jury, in that the jury was secured through the issue of an open venire, instead of being drawn from the regular list, as jurors were drawn for service at the beginning of a term.

Counsel urge that there was no showing made of facts which would authorize the court to order the issue of an open venire, the conditions under which it may issue being prescribed by section 3685, R. S. 1908. If counsel were correct in their assumption that the order could issue only in the cases mentioned in the statute, they would still be obliged to show affirmatively that the necessary conditions did not exist in order to overcome the presumption in favor of the regularity of the proceedings below. *Giano v. People*, 30 Colo. 20, 69 Pac. 504. But the method prescribed by the statute is not in fact exclusive, as this court has distinctly held. *Id.*, 30 Colo. 28, 69 Pac. 504.

[3] It is next objected that the court should not have ordered a jury of freeholders to be summoned; but, as this objection does not appear to have been made below, we are not called upon to consider it.

We are unable to appreciate counsels' contention that there was error in the sustaining of challenges to jurors on the ground that they were not freeholders. The statute gives to parties the right to demand a jury of freeholders and the court, in sustaining the challenges, merely enforced the right given by law.

[4] It is also urged that the court erred in making an order permitting the jury to view the premises sought to be condemned without requiring the respondent to advance the expenses of the examination. From the record it appears that when the order was made, the attorney for the petitioner saved an exception to it. No ground of objection was stated. It is clear that if the ground now urged had been stated at that time, the order for an advance of the jury's expenses might, and probably would, have been made. Failure, in such a case to advise the trial court of the ground of the objection, and so afford it an opportunity to pass upon the question, prevents its review here. *Cone v. Montgomery*, 25 Colo. 280, 53 Pac. 1052; *Colo. City v. Smith*, 17 Colo. App. 172, 67 Pac. 909; *Empire Co. v. Lanning*, 49 Colo. 458, 113 Pac. 491.

[5, 6] It is most earnestly contended that the court erred in overruling the motion for a new trial on the ground alleged therein, viz., that in the matter of inspecting the premises defendants in error were guilty of misconduct. Several affidavits were filed in support of the motion for a new trial, but, as

they are not preserved in the bill of exceptions, we cannot consider them. There is therefore nothing in the record which establishes that the things were done which are alleged to have constituted misconduct on the part of respondents. While the motion for a new trial is, by statute, a part of the record, the allegations of facts therein are no more to be accepted as true without proof thereof than are the averments of a pleading. For these reasons we cannot consider the alleged error in refusing to grant a new trial.

[7] It is also urged that the court erred in not granting the petitioners' application for process to bring in witnesses for examination as to the alleged misconduct of respondents. That was a matter within the discretion of the trial judge, whose knowledge of the entire case would qualify him to determine as to the necessity for such process. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424. In the absence of any statement in the application as to what the proposed witnesses would testify, we cannot say that the court abused its discretion in denying the application.

[8] A large number of errors are assigned upon the admission and the rejection of testimony, but in only three instances does the abstract of record show either objection or exception to the rulings sought to be reviewed. We have many times held that in such cases we will not look beyond the abstract, and hence cannot consider the alleged errors.

As to the three cases covered by the abstract, we are of the opinion that the rulings were correct.

[9] It is lastly urged that the verdict is excessive, but we find nothing in the record which indicates that the jury acted from passion or prejudice; hence we are not justified in disturbing the verdict.

Finding no error in the record, the judgment is affirmed.

Judgment affirmed.

GABBERT, C. J., and HILL, J., concurring.

(78 Or. 641)

PETERSON et al. v. LEWIS, State Engineer.
(Supreme Court of Oregon. Dec. 28, 1915.
On Petition for Rehearing, Jan. 18, 1916.)

1. AMICUS CURIAE § 3—PROCEEDINGS—EFFECT OF APPEARANCE.

Where counsel appear in an action as amici curiae, file briefs, and make oral argument in behalf of the state highway commission, whose action in regulating the duties of the state engineer is involved in the action, but who are not parties to it, the interest of the commission must be considered to the same extent as if it were a party.

[Ed. Note.—For other cases, see *Amicus Curiae*, Cent. Dig. §§ 3-5; Dec. Dig. § 3.]

2. MANDAMUS § 10, 84—SUBJECTS OF RELIEF—OFFICIAL DUTIES—CONSTRUCTION OF HIGHWAYS—CONTRACTS.

Although duties of the state highway engineer are not specifically stated in the law, but

are merely imposed by fair implication, their performance may be compelled by mandamus, and the remedy extends to enforcement of contracts involving official duties, though not to wholly private contracts.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 37, 180-183; Dec. Dig. ☞ 10, 84.]

3. HIGHWAYS ☞ 96—CONSTRUCTION—DUTIES OF STATE ENGINEER—"PERSONS INTERESTED."

Under Laws 1913, p. 664, § 6, requiring the state highway engineer to collect data and furnish the same to all persons interested in road building, the contractor building a county road is an "interested person," and entitled to the information.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 313, 314, 316, 317, 319-322, 356; Dec. Dig. ☞ 96.

For other definitions, see *Words and Phrases*, First and Second Series, Interest.]

4. HIGHWAYS ☞ 96—CONSTRUCTION—DUTIES OF STATE ENGINEER.

Laws 1913, p. 664, § 6, requiring the state highway engineer to collect data on road building and advise county officers in charge of roads relative to road construction, requires active co-operation, and not casual advice and aid to be given by the engineer.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 313, 314, 316, 317, 319-322, 356; Dec. Dig. ☞ 96.]

5. MANDAMUS ☞ 93—SUBJECTS OF RELIEF—OFFICIAL DUTIES.

The duties imposed by Laws 1913, p. 663, requiring the state highway engineer to provide information for the contractor and render assistance to the county authorities by furnishing a final estimate of the amount of the work done under road contracts, may be enforced by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 195; Dec. Dig. ☞ 93.]

6. STATUTES ☞ 125—VALIDITY—TITLE AND SUBJECT-MATTER.

Laws 1913, p. 663, created and prescribed the duties of the office of state highway engineer. Petitioners contracted with a county to build certain roads, and did build them, the contract providing that the state highway engineer should make a final estimate of all work done thereunder, and the value of the work, and that the county should then, after approving his estimate, pay the contractor. After making the contract, but before completion of the work, Laws 1915, p. 537, was enacted, being entitled "An act abolishing the office of state highway engineer," etc., and transferring his duties to the state engineer, and providing for the appointment of a deputy state engineer, and providing that the office of state highway engineer should be abolished and the duties thereof be placed under the state engineer, and that a chief deputy state engineer should be appointed, who should perform all the duties of the former state highway engineer. *Held*, that the last provision, operating only to change the title of the state highway engineer, was void under Const. art. 4, § 20, as being repugnant to the title of the act.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 187-191; Dec. Dig. ☞ 125.]

7. MANDAMUS ☞ 151—PARTIES—PROPER OFFICER—"DEPUTY."

Under Laws 1913, p. 663, creating and prescribing the duties of the office of the state highway engineer, as amended by Laws 1915, p. 537, transferring those duties to the state engineer and requiring the duties to be performed by his deputy, a performance of the duties could be enforced by mandamus against the state engineer, since his deputy was not an independent

officer, but acted only in his behalf (citing *Words and Phrases*, "Deputy").

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 291, 292; Dec. Dig. ☞ 151.]

8. STATUTES ☞ 64, 181—CONSTRUCTION—REPUGNANCY—PARTIAL INVALIDITY.

Statutes must be so construed as to effectuate the intention of the Legislature, and where part of a statute is valid and conforms to the obvious intent, but a later section is repugnant and void, the statute is void only as to that section.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58-66, 195, 259, 263; Dec. Dig. ☞ 64, 181.]

9. CONSTITUTIONAL LAW ☞ 62—LEGISLATIVE POWER—DELEGATION.

An order of the state highway commission attempting to vary the duties imposed by statute on the state engineer is void, since under Const. art. 4, § 1, legislative power cannot be delegated to such a commission, being reposed in the Legislature.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 94-102; Dec. Dig. ☞ 62.]

10. HIGHWAYS ☞ 112—CONSTRUCTION—STATUTES—EXECUTION.

Under statutes providing for highway construction, the determination of completion and the amount due for the work, is a part of the construction.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 346, 347, 351-355; Dec. Dig. ☞ 112.]

In Banc. Mandamus by Andrew Peterson and another against John H. Lewis, State Engineer of the State of Oregon. Heard on demurrer to the alternative writ. Demurrer overruled.

This is an original proceeding in mandamus brought by the plaintiffs Peterson and Johnson against John H. Lewis, state engineer, to require defendant as such officer to make and deliver to the petitioners and to the county court of Clatsop county, Or., a final estimate of the work done by them, and the value thereof, under their contract with the county of December 18, 1914, for the construction of a certain county road therein extending from the city of Astoria to the west line of Columbia county. The alternative writ asserts the following facts: The contract provided that the work should be done according to the plans, specifications, and schedule of rates, prices, and maps of the road which were prepared by the state highway engineer, and that all the work thereunder should be done under the supervision of the field engineer selected by the state highway engineer; the work, however, to be approved and accepted by the latter. The contract further provided that payment for the work done by the contractors should be by warrants of Clatsop county issued upon vouchers of the state highway engineer approved by the county court, out of any money on hand from the sale of its permanent road bonds, or after January 1, 1915, by warrants drawn on the general fund of that county. Further provision was made for the making of partial payments during the progress of the work upon estimates of

the engineer in immediate charge thereof, and the contract contained the following:

"The state highway engineer shall, as soon as practicable after the completion of this contract, make a final estimate of the amount of work done thereunder, and the value of such work, and Clatsop county shall, at the expiration of 35 days from and after such estimate is so made, and is approved by the county court of Clatsop county, pay the entire sum so found to be due hereunder after deducting therefrom all previous payments and all amounts to be retained under the provisions of this contract. All prior partial estimates and payments shall be subject to correction in the final estimate and payment."

The road referred to is one which was constructed by the county mentioned with funds derived from the issue and sale of its bonds under chapter 103, General Laws of Oregon for 1913, pursuant to the vote of the taxpayers of the county. The county court requested the assistance of the state highway engineer in the matter of the construction of the road under the terms of chapter 339, General Laws of 1913, p. 663, providing for the appointment and prescribing the duties of the state highway engineer. The contract was executed pursuant to such arrangement. The contractors began the work thereunder soon after its execution, and, except for temporary suspensions, prosecuted the same until September 4, 1914, when it was finished. According to the terms of the contract, the field engineer in charge of the work furnished the contractors with preliminary estimates from time to time during the progress of the work. Based upon these estimates, the contractors were paid installments from time to time; the theory of the contract being that, after the completion of the work, the state highway engineer himself should give to the contractors a final estimate showing the amount of work done and the value thereof, correcting all errors in the preliminary computations in order to determine the balance due the contractors. The state highway engineer performed the duties of the engineer under the terms of the contract, which were requested by the county court, until May 22, 1915. Thereafter they were performed by a chief deputy state engineer until August 27, 1915, when the highway commission passed an order purporting to relieve the defendant of all duties and responsibilities in connection with the highway work of the state of Oregon. Thereupon the appointment of the chief deputy state engineer was revoked by the state engineer.

The petition for the writ alleges that chapter 337 of the General Laws of 1915 imposed upon the state engineer, an elective officer, the duties previously performed under the contract and law by the state highway engineer by virtue of chapter 339, General Laws of 1913, and that the former is the only officer or person authorized by law or the contract to make such final estimate; further, that although more than 80 days have elapsed since the date of the completion of the

work, the state engineer has failed and refused to make or deliver to the contractors, or to the county court of Clatsop county, the final estimate made necessary by the contract before the contractors can enforce any claim for final settlement against the county. The defendant demurred to the writ upon the ground that it does not state facts sufficient to constitute a cause of action.

Harrison Allen and Griffith, Leiter & Allen, all of Portland, for plaintiffs. G. W. Allen, of Portland, for defendant. C. L. McNary and John H. McNary, both of Salem, amici curiæ.

BEAN, J. (after stating the facts as above). [1] It is claimed by defendant that the highway commission by an order relieved the state engineer of all duties and responsibilities in connection with the highway work, and provided that it should be done by I. E. Cantine, chief deputy state engineer. On account of the action taken by the commission, the state engineer endeavors to assume a neutral attitude in the premises. Counsel have appeared as amici curiæ, made oral argument in the interest of the highway commission, and also filed a brief. The interest of the commission should be considered to the same extent as though it were a party to this cause. It is contended by the petitioners that under chapter 339, Laws of 1913, the duties to be performed by the state engineer are separate and distinct from those which that act requires him to perform in connection with the state highway commission; that he is authorized and required by law to act for the various counties of the state in the capacity of an engineer in the matter of road construction; that he, having been substituted for the state highway engineer, is the only officer recognized by the law or the contract to perform these functions. It is suggested on behalf of the defense that the plaintiffs are not entitled to the benefit of the writ for the reason that the duty, if it exists, is a contractual one and not imposed by law.

[2] The writ lies to compel the performance of an act which the law imposes as a duty resulting from an office, trust, or station. Whenever the law gives power to or imposes an obligation on a particular person to do some particular act or duty, and provides no other specific remedy for the performance thereof, the writ will issue. Duties of this kind need not be specifically stated in the law. If they are imposed by implication from a fair, reasonable construction of the law, it is sufficient. It is not necessary that they be imposed by law on the individual in question, provided he has put himself in the position from which by law the duties accrue. Merrill, *Mandamus*, § 13. By the same authority (section 16), since the object of the writ is to enforce duties created by law, it will not lie to enforce private contracts, unless it is extended to such cases

by statutory enactment. Where, however, a contract involves an official duty, the rule is otherwise, since that is one of the grounds for the issuance of the writ.

[3-5] It is maintained by counsel in behalf of the highway commission that the chief deputy state engineer is an independent officer, upon whom, if any one, the alleged duty rests. These questions require a construction of the statutes of 1913 and 1915. First. What were the duties of the highway engineer in the premises, under the provisions of the act of 1913? As we go along it will be well, in the same connection, to note to some extent the general purpose and scope of the act in order to keep in mind the legislative object and intent. The title indicates that its objects and purposes are: (1) To create a state highway commission, defining the duties thereof, and making provision for the payment of expenses while engaged in the performance of such duties; (2) to create the office of state highway engineer, provide for the appointment of such officer, prescribe his duties, fix his salary, provide for the conduct of subordinates in, and payment of expenses of, his office; (3) to prescribe the duties of the county courts and other county officials in relation to the purposes of the act; (4) to provide for the creation of a state highway fund, the levying of a tax to create the same, and the use and disbursements thereof; (5) to provide for the employment of convicts on roads; and (6) to make an appropriation for carrying out the purposes of the act. By this chapter the state highway commission is created, and provision is made for the appointment of a state highway engineer who shall be versed in scientific road construction. Viewing this statute from a general standpoint, it appears that a scheme was inaugurated for the construction of roads by the state and its counties working in unison, in order that state and county roads may eventually connect and form a continuous highway. In order to accomplish this, the act provides that the state highway engineer shall render assistance to the several county courts and highway officers in promoting highways and in the improvement and construction of roads. As a matter of reciprocity, it enjoins upon the latter and other county highway officers the duty of furnishing the former, upon his written request, with all available information in connection with the building and maintenance of public highways and bridges in their respective localities. See section 7. Section 4 of the act directs that the engineer shall act in an advisory capacity to the county courts of the different counties in the matter of road construction and maintenance whenever requested so to do. This section further specifically provides:

"Upon request of the county court of any county said engineer shall furnish specifications for any piece of proposed road construction in such county upon being furnished the necessary information and data to enable him to prepare

such specifications; and such specifications shall be so furnished free of all costs to such county."

The latter part of section 6 is as follows:

"Said engineer may be consulted at all reasonable times by the county officers having care and authority over highways, culverts and bridges, and shall advise such officers relative to the construction, repair, alteration or maintenance of the same, and shall furnish such other information and advice as may be requested by persons interested in the construction or maintenance of public highways, and he shall at all times lend his aid in encouraging and promoting highway improvements throughout the state. Said engineer shall co-operate with all highway officers, and shall assist county authorities in all matters pertaining to the construction of roads when called upon to do so by the county court."

Separate and apart from the duties of the engineer relating to the construction of state roads, and the like, as prescribed by the state highway commission, it is plain that the Legislature imposed upon that officer the duty of furnishing plans and specifications for proposed road construction, upon the request of the proper county court, and necessary information and data therefor. Such plans, etc., are to be kept on file in his office. By the terms of the statute this assistance is to be rendered "free of all costs to such county." The engineer is directed by law to advise such officers relative to the construction or maintenance of highways and bridges and to furnish such other information and advice as may be requested by "persons interested" in such work. It would seem that persons constructing a highway pursuant to a contract with a county would certainly be interested in such undertaking within the meaning of the statute. Evidently the law-makers believed that the information and advice provided for would avail nothing unless in case of road contracts it were extended to the contractor and carried out in the construction of the thoroughfare. Not only is the engineer to advise, but section 6 immediately specifies that he shall co-operate with and assist, county authorities in such matters when called upon to do so, following the policy initiated by the federal government in superintending the construction of certain county roads as samples. The law does not contemplate mere casual advice by the engineer, but rather that he shall on appropriate occasions act in an advisory capacity in building public county roads to an extent sufficient to carry into execution the plan which he has made. It provides for rendering valuable aid to counties in the improvement of public roads with the apparent object of attaining a symmetrical system of highways. An annual tax is ordained to be levied and an appropriation made to effect the purpose of the law. In consonance with the spirit and letter of the statute, the highway engineer made plans, specifications, and estimates for the work which were embraced in and made part of the contract with the plaintiffs, by the terms of which under the law that official was made the arbiter of the

work in the first instance. In short, pursuant to the statute, he assumed the duties of engineer in the construction of the highway.

In the furtherance of the contract and the carrying out of the purpose of the act, that law imposes the duty upon the engineer to provide information for the contractor and render assistance to the county authorities by furnishing a final estimate of the amount of the work done by the petitioners under the contract; therefore the writ is an appropriate remedy to require the proper officer to perform such function. *Wren v. Indianapolis*, 96 Ind. 206; *Conn. v. Bd. County Com'rs*, 151 Ind. 517, 51 N. E. 1062; *People ex rel. Peck v. Buffalo State Asylum*, 8 N. Y. Supp. 396; *State v. Holliday*, 8 N. J. Law, 205.

[8, 7] This brings us to the difficult problem of ascertaining upon whom the duty mentioned rests. In 1915, the Legislature, adopting a policy of consolidation of commissions and offices, enacted chapter 337 of the General Laws of Oregon, p. 537. The title of the act is as follows:

"An act abolishing the office of state highway engineer as defined by section 3 of chapter 339 of the Session Laws for 1913, and transferring and conferring the powers, duties and work of the state highway engineer upon the state engineer, and providing for the appointment of a deputy in the office of the state engineer who shall be versed in scientific road construction, and fixing his compensation."

Section 1 provides that the office known as the state highway engineer, as defined by section 3 of chapter 339 of the Session Laws of 1913 is hereby abolished, and the powers, duties, and work now performed by the state highway engineer shall be vested in and placed under the charge and direction of the state engineer, and, wherever in any law now in force in the state of Oregon the name "state highway engineer" appears, it shall be considered that the name "state engineer" is substituted in lieu thereof. Section 2 directs that all records, maps, drafts, and furniture relating to the work and business of the office of state highway engineer shall be transferred and lodged with the state engineer. Section 3 ordains that the chairman of the state highway commission may appoint one chief deputy in the office of the state engineer, who shall be versed in scientific road construction and duly qualified to act as such, and who shall serve at the pleasure of the chairman of the state highway commission, and whose duties shall be such as prescribed by the state highway commission. That section also fixes his salary and provides for expenses.

Thus far there is little difficulty or contention as to the meaning of the statutes in question. Apparently after the drafting of the original bill, by an amendment there was added to section 3 of the act the following:

"All work in the department which has heretofore been in the charge of the state highway

engineer shall be under the direct supervision of said chief deputy state engineer; and such additional deputies and assistants as the state highway commission shall deem necessary in said road department, shall be appointed by said chief deputy state engineer subject to the approval of the chairman of the state highway commission."

It is the contention of the plaintiffs: (1) That the state engineer is the only officer recognized by the law or the contract to perform the duties mentioned; (2) that all that portion of the act of 1915 which attempts to impose upon the chief deputy state engineer the work in the department formerly done by the state highway engineer is void under section 20 of article 4 of the Constitution, in that the act embraces a subject which is not included in the title, namely, that having reference to the performance of the work in question by the chief deputy, who was designed as a deputy for the state engineer to be answerable to him in the true sense of that term. On behalf of the commission it is contended that:

"Those duties defined by the earlier law remain unimpaired, but the duties which were originally cast upon the state highway engineer by prescription from the state highway commission are no longer to be exercised by the state engineer, but are transferred, by the power of chapter 337 of the Laws of 1915, upon the deputy engineer because the law requires him to be versed in scientific road construction."

In its final analysis the position taken in opposition to plaintiffs is that the chief deputy state engineer is an officer entirely independent of the state engineer. The latter part of section 3 quoted above is in direct conflict with the title of the act, and if given literal force, instead of merging the office of highway engineer with that of state engineer, according to the clearly expressed legislative intent, the effect of chapter 337 would be merely to change the title of the state highway engineer. Such provision is not within the scope of the title of the act. The title of an act defines its scope. It can contain no valid provisions beyond the range of the subject there stated. *Sutherland on Stat. Const.* § 145. See, also, *State v. Levy*, 147 Pac. 919; *State v. Perry*, 151 Pac. 655.

[8] We understand it to be a governing rule of construction to give a statute such a meaning, if possible, as will render it valid and effectuate the will of the lawmakers as expressed. *Schaedler v. Col. Contract Co.*, 67 Or. 412, 135 Pac. 536; *K. P. Ry. Co. v. Com'rs*, 16 Kan. 594. It is a rule of statutory construction that, where the first section of a statute conforms to the obvious policy and intent of the Legislature, it is not rendered inoperative by unconstitutional provisions in a later section which do not conform to this policy and intent. In such case the later provision is nugatory and will be disregarded. Article 4, § 20, of the Constitution; *Endlich on Interpretation of Stat.* § 183; *State v. Bates*, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612; *McCormick v. West Duluth*, 47 Minn. 272, 50 N. W. 128.

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 55 Hun, 603.

The latter part of section 3 of chapter 337, above quoted, is repugnant to article 4, § 20, of the Constitution, which provides that:

"Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be embraced in the title. And if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." *Clemmenssen v. Peterson*, 35 Or. 48, 49, 56 Pac. 1015; *Spaulding Log. Co. v. Independence I. Co.*, 42 Or. 397, 71 Pac. 132; *Simon v. Northup*, 27 Or. 505, 40 Pac. 660, 80 L. R. A. 171.

Therefore the latter part of section 3 does not relieve the state engineer of the duty thrust upon him by the two acts, nor make the chief deputy an independent official. On the other hand, it would seem that, after two years' experience, it was deemed wise by the legislative branch of the state government to so change the *modus operandi* relating to the highway engineer as to provide that the work of that officer should be subject to the supervision of another skilled civil engineer; the object being the centralizing of the responsibilities as recommended in the message of the governor appertaining to that subject, in order to secure a higher state of efficiency and promote economy. That the chief deputy is subordinate to the state engineer is indicated by the words "chief deputy state engineer," as well as by the provisions of sections 1 and 2 of the later act. A "deputy" is defined in 13 Cyc. 1043, as follows:

"One appointed as the substitute of another, and empowered to act for him in his behalf or on his behalf; one who is appointed, designated or deputed to act for another; one who occupies in right of another, and for him regularly his superior will answer; one authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter; one who by appointment exercises an office in another's right; one who exercises an office, etc., in another's right having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable."

To the same effect is 3 Words and Phrases, p. 2008.

[9] The statute referred to imposes upon the state engineer the duties enumerated in chapter 339, Laws of 1913. That official is responsible to the state and parties coming within the terms of the act. The chief deputy state engineer is answerable to his superior. "No man can serve two masters." Any other arrangement in the premises would naturally lead to chaos and produce confusion. The state engineer cannot be relieved of the trust reposed in him by the statute, except by the expressed will of the lawmakers, and the order of the highway commission of August 27, 1915, did not have that effect. Legislative power cannot be delegated to a commission. Const. art. 4, § 1; *Sutherland on Stat. Const.* (2d Ed.) § 93; *State v. Orange*, 60 N. J. Law, 111, 36 Atl. 707.

[10] The determination of whether or not a road is completed, and the amount due for

the construction thereof, is as much the carrying into execution of the statute as the enforcement of any of its other provisions. Roads cannot be constructed without compensation.

It being the statutory duty of the state engineer to furnish the required certificate and information, the plaintiffs are entitled to the relief prayed for; otherwise they might be remediless and justice be defeated.

It follows that the demurrer to the writ must be overruled, and it is so ordered.

EAKIN, J., did not sit.

On Petition for Rehearing.

BEAN, J. The petition for rehearing suggests a further ruling as to the working force of chapter 339, Laws of 1913, as amended by chapter 337, Laws of 1915. The "state engineer" being substituted for the "state highway engineer" by the later act, there can be no question but that all the duties coming within the purview of the statute would devolve upon the state engineer, and for this reason the enactment of 1915 provides the assistance of a deputy for that official. It also subjects the state engineer to the duty of responding to the requisitions of the highway commission in the matter of the construction of state roads. These additional explanations cover all the interrogatories submitted by the petition, in so far as they pertain to the issues raised in this proceeding.

Other points are ably argued, but are not involved in the litigation, so as to authorize this court to adjudicate the same. With this explanation, a rehearing will be denied.

EAKIN, J., took no part in the consideration of this case.

(78 Or. 503)

EVANHOFF v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

(Supreme Court of Oregon. Dec. 28, 1915.)

1. INJUNCTION \Leftrightarrow 28—WORKMEN'S COMPENSATION ACT—TRIAL BY JURY.

The enforcement of the Workmen's Compensation Act (Laws 1913, p. 188), will not be enjoined at the suit of an injured servant on the ground that the State Industrial Accident Commission and the state treasurer threatened to deprive him of the right to a trial by jury, and wrongfully claimed power to determine the amount he might recover, since, even if his allegations as to the unconstitutionality of the act were well taken, he could test their authority by bringing his action either at common law, or under the Employers' Liability Act.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 62-65; Dec. Dig. \Leftrightarrow 28.]

2. STATES \Leftrightarrow 168½ — PARTIES — SUIT BY TAXPAYER—PAYMENT OF SALARIES—INDUSTRIAL ACCIDENT COMMISSION.

The only ground permitting the suit was that plaintiff was a taxpayer of the state, and that, by the unlawful expenditure of moneys appropriated for salaries and claims under the pro-

visions of the act, his financial burdens might be increased.

[Ed. Note.—For other cases, see *States*, Dec. Dig. \S 168½.]

3. STATUTES \S 114—TITLE OF ACT—CONSTITUTIONAL PROVISIONS — WORKMEN'S COMPENSATION ACT.

The Workmen's Compensation Act, entitled "An act creating the State Industrial Accident Commission and providing an industrial accident fund," an appropriation for such fund, providing for the administration of the terms of the act, for the collection and disbursement of funds for the compensation of workmen, prescribing the duty of employers and workmen subject to the act, providing penalties for a violation of its terms, and abolishing, in certain cases, the defenses of assumption of risk, contributory negligence, and negligence of fellow servants in actions for personal injury and death, does not violate the constitutional requirement that every act embrace but one subject, which shall be expressed in its title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 145, 147-149; Dec. Dig. \S 114.]

4. CONSTITUTIONAL LAW \S 80—MASTER AND SERVANT \S 16½, New, vol. 16 Key-No. Series—JUDICIAL POWER — ENCROACHMENT BY LEGISLATURE.

Such act, creating a State Industrial Accident Commission, composed of three commissioners charged with the administration of the act, does not contravene Const. art. 3, \S 1, declaring that the powers of government shall be divided into three separate departments, the legislative, the executive, including the administrative, and the judicial, and that no officer of any department shall exercise the functions of another.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. \S 140, 143-147; Dec. Dig. \S 80.]

5. CONSTITUTIONAL LAW \S 80—MASTER AND SERVANT \S 16½, New, vol. 16 Key-No. Series—JUDICIAL POWERS — CONSTITUTIONAL PROVISIONS—INDUSTRIAL ACCIDENT BOARD.

Under Const. art. 7, \S 1, as amended in 1911, the Legislature was authorized to confer judicial powers upon the State Industrial Accident Commission created by Workmen's Compensation Law, since under the amendment the Legislature or the people may confer judicial powers upon any tribunal selected, so long as the different departments of government are not made to encroach on each other.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. \S 140, 143-147; Dec. Dig. \S 80.]

6. CONSTITUTIONAL LAW \S 313, 328—RIGHT TO JUSTICE—DUE PROCESS OF LAW—WORKMEN'S COMPENSATION ACT—TRIAL BY JURY.

Workmen's Compensation Act, providing a system of actual voluntary insurance for injured workmen and creating a State Industrial Accident Commission to administer its provisions, does not violate Const. art. 1, \S 10, declaring that no court shall be in secret, but justice shall be administered openly, and that every man shall have remedy by due course of law for injury to his person, etc., nor Const. U. S. Amend. 14, \S 1, declaring that no one shall be deprived of property without due process of law, on the theory that the act attempts to establish a court for the trial of causes without a jury, and to compel employers and employees to adjust their grievances without their consent, since the act leaves both the employer and the employee free to accept or reject its provisions.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. \S 933, 950-963; Dec. Dig. \S 313, 328.]

7. MASTER AND SERVANT \S 87½, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—CONSTITUTIONALITY.

Such act is not unconstitutional because requiring the employé to elect, at the time of his employment and in advance of any injury, whether he will come under its terms, and providing that if he voluntarily chooses to come under its terms, he waives any other remedy, since the act merely proposes to employers and employes an accident and life insurance scheme in lieu of litigation, which noncompulsory feature eliminates the objection of its unconstitutionality.

8. STATUTES \S 119—SALARY OF PUBLIC OFFICERS—FORM AND CONTENTS OF ACT.

Workmen's Compensation Act, creating a State Industrial Accident Commission composed of three commissioners, appointed for terms of four years at an annual salary of \$3,600, payable from the accident fund provided by the act, does not violate Const. art. 9, \S 7, declaring that laws making appropriations for the salaries of public officers and current expenses of the state shall contain provisions upon no other subject, since it is not an appropriation bill in the sense that bills providing for general current expenses or salaries of constitutional officers are such, especially in view of the construction followed and acquiesced in by the Legislature, and of the disorganization of public business and destruction of private pecuniary rights which would follow a declaration of its unconstitutionality.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 164-167; Dec. Dig. \S 119.]

9. CONSTITUTIONAL LAW \S 48—CONSTITUTIONALITY OF STATUTE—CONSTRUCTION.

A statute will not be held unconstitutional where a reasonable doubt exists as to its invalidity.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. \S 46; Dec. Dig. \S 48; *Statutes*, Cent. Dig. \S 56.]

10. STATUTES \S 15—AMENDMENT — READING — CONSTITUTIONAL PROVISIONS.

Const. art. 4, \S 19, requiring bills to be read by sections on three several days in each house does not require the whole of a bill, as amended during its progress through the Legislature, to be so read.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 12, 13; Dec. Dig. \S 15.]

Burnett, J., dissenting in part.

In Banc. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit in equity by George Evanhoff against the State Industrial Accident Commission and others, to enjoin the enforcement of the Workmen's Compensation Act. Decree for defendants, and plaintiff appeals. Affirmed.

This is a suit in equity to enjoin the enforcement of chapter 112, Laws of 1913, generally known as the Workmen's Compensation Act. In the complaint it is alleged that plaintiff is a subject of the king of Bulgaria, but is a resident freeholder and taxpayer of the state of Oregon. The complaint then alleges that he has a good cause of action against the Bridal Veil Lumber Company for damages for personal injuries sustained by him while in its employ, and sets forth in detail the facts constituting such cause of action with all the particularity which could be required in an action for damages against

said corporation, averring that he has thereby been damaged in the sum of \$15,000. It is further alleged:

"The State Industrial Accident Commission wrongfully professes to have power and authority to deprive plaintiff of his right of action or to a civil trial in the said cause, and wrongfully professes to have power and authority, and is threatening to and will, unless restrained by this court, deprive this plaintiff of his right of trial of said cause of action before a jury or before any of the established circuit courts of the state of Oregon, more especially before the circuit court of the state of Oregon otherwise having jurisdiction thereof, and wrongfully professes to have power and authority to determine the amount which plaintiff shall receive in payment by reason of said injuries, and to cause plaintiff to accept from said State Industrial Accident Commission a sum which it may see fit to award plaintiff in full and complete discharge and satisfaction of all of his claims arising from the matters herein alleged, and that the said State Industrial Accident Commission bases its claim upon and in virtue of an act, to wit, House Bill No. 27, entitled, 'An act creating the State Industrial Accident Commission and providing an industrial accident fund, making an appropriation for such fund and providing for the administration of the terms of this act, providing for the collection and disbursement of funds for the benefit, compensation and care of workmen, prescribing the duties of employers and workmen subject to this act, and providing penalties for a violation of the terms of this act, and abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow servant in actions for personal injury and death,' filed in the office of the secretary of state of the state of Oregon, February 25, 1913, and acts amendatory thereto and thereof. * * * Thos. B. Kay, as state treasurer of the state of Oregon, wrongfully and without right professes and claims to be empowered by the said act to pay, and unless restrained by an order of this court will pay, to each of the said commissioners constituting the State Industrial Accident Commission the sum of \$3,600 a year each as salary for their acts as such, and will make such payments out of a fund purported to be created by and referred to in said act; and, further, the said state treasurer claims and asserts power and authority to pay, and unless restrained by order of this court will pay, out of such funds divers sums of money for all and every of the various purposes set forth in said act, and wrongfully and without right asserts power and authority to pay, and unless restrained by order of this court, will pay, out of said fund such sums of money as the commission above named may see fit to allow to various and numerous injured workmen, and by such payment the said state treasurer will divert large sums of money collected as taxes to the payment of the various sums designated in said act. * * *

"The acts of the defendants State Industrial Accident Commission and Thos. B. Kay, state treasurer of the state of Oregon, in enforcing the said legislative enactment known as and called the Workmen's Compensation Act of Oregon, are, and each of them is, wrongful and unlawful in this: That the said act (Session Laws of Oregon 1913, page 188), filed in the office of the Secretary of State, February 25, 1913, commonly known as and called the Oregon Workmen's Compensation Act, is unconstitutional and void and conflicts with the provisions of the Constitution of the state of Oregon, as well as the Constitution of the United States in the following particulars, to wit: (1) It vests judicial powers and functions in an administrative and executive board, to wit, the Oregon Industrial Accident Commission, and thereby attempts to combine judicial and executive

functions in violation of section 1, article 3, of the Constitution of Oregon. (2) It arbitrarily fixes a limit on sums to be allowed for personal injuries, and thereby passes judgment by legislative enactment on the amount which any injured person falling within its purview may recover, and is violative of section 1, art. 3, of the Constitution of Oregon in that the Legislature, by fixing such judgments, attempts to and did exercise judicial powers. (3) It is not within the police powers of the state. (4) It provides a system of awards based upon sociological reasons, and disregards the individual and personal right of an injured employé to recover such injuries, and thereby violates section 10, art. 1, and section 17, art. 1, of the Oregon Constitution. (5) It imposes taxes which are general throughout the state. Such act has not been ratified by the voters of the state at a general election, as provided in section 1a, art. 9, of the Constitution of Oregon as amended by laws of 1911, at page 9, and therefore is not in force. (6) It violates subdivision 3, § 23, art. 4, in this: Section 32 of the said act attempts to provide and regulate a special practice in courts of justice. It further violates subdivision 10 of section 23, art. 4, of the Constitution of the state of Oregon, in that it purports to and provides for the assessment and collection of taxes for state purposes, and is a special act on both the subjects herein specified. (7) It violates the Constitution of Oregon at section 7 of article 9, in this: It creates public offices and makes appropriations for the salaries of the officers therein designated and other current expenses of the state, and embraces subjects other than those relating to the salaries of such officers and the current expenses of the state. In addition to such subjects, it purports to and does embrace acts on the following subjects: (a) Creating the State Industrial Accident Commission; (b) providing an industrial accident fund; (c) making an appropriation for such fund; (d) providing for the administration of the terms of the act; (e) providing for the collection and disbursement of funds for the benefit, compensation, and care of workmen; (f) prescribes the duties of employers and workmen subject to the act; (g) provides penalties for violations of the terms of the act; (h) abolishes certain defenses in certain cases; (i) attempts to regulate rights where injuries to a laboring man are caused by third persons; (j) provides a system of appeals and regulates practice thereon. (8) It vests judicial power in the State Industrial Accident Commission without providing for a jury trial before it, and attempts to make its decisions binding unless appealed from, and thereby deprives injured laborers of their right of jury trial in civil cases, and is violative of section 17, art. 1, section 1a, art. 1, and section 10, art. 3, of the Constitution of Oregon. (9) It provides for the determination of questions involving the extent of injuries and the amount to be recovered by injured workmen, and vests the determination of such questions in the said Oregon Industrial Accident Commission, and does not require notice to be given to the injured workmen of the time or place of hearing, nor require process to procure the attendance of witnesses, nor does it require that a time and opportunity be given to such injured workmen to be heard in respect to their rights, and therein it does not provide due process of law to persons falling within its purview, and is violative of section 10, art. 1, of the Constitution of the state of Oregon. (10) It attempts to compel workmen to make an election in advance of injuries received between the awards under the act and the constitutional right to proceed in a civil jury case guaranteed by section 10, art. 1, and section 17, art. 1, of the Constitution of Oregon. (11) At sections 2 and 8 of the Workmen's Compensation Act, it provides for the appointment and removal of commissioners. It does not

provide for their election and recall, and the said act vests judicial power in said commissioners and is violative of section 18, art. 2, of the Constitution of Oregon. (12) At section 20 of said act, it attempts to make annual appropriations out of any moneys in the state treasury not otherwise appropriated, and makes such appropriations for a period of time extending beyond the life of the Legislative Assembly which passed the act, and thereby violates sections 1, 2, and 3, article 9, of the Constitution of Oregon. (13) It violates sections 7, 8 and 9, article 11, of the Constitution of Oregon in this: That at section 20 of the said act an appropriation is made out of any moneys in the general fund in the state treasury not otherwise appropriated, and there is also appropriated annually out of any moneys in the state treasury not otherwise appropriated a sum equal to one-seventh of the total sum, which shall be received by the state treasurer under provisions of section 19 of said act, and by such enactments the state of Oregon undertakes to and does assume to pay obligations and losses occasioned in the private business of persons, corporations, and associations, and the state attempts to and does lend its credit to such private enterprises and corporations. (14) That the said act is violative of section 20, art. 4, of the Constitution of Oregon in this: It embraces subjects not expressed in the title and not germane thereto. At section 12 it attempts to regulate rights of an injured workman injured by a third person, and at the same section it purports to provide an exclusive remedy in lieu of all claims against an employer, and thereby prohibits one spouse from recovering for loss of consortium by injury to the other caused through the fault of the master. (15) That the said act is discriminatory as between laborers affected by its provisions in this: That it does not relate to laborers for the state, any counties, or any municipalities within the state, who may be engaged in similar employments, as laborers working for private corporations, and it thereby denies to laborers for private persons, corporations, associations, and enterprises the equal protection of the law, which laborers for the state, or any of the counties within the state, or any municipalities within the state, are guaranteed and retained.

"The said act is violative of the Constitution of the United States and of the state of Oregon in the following particulars: (1) It violates section 4, art. 4, of the Constitution of the United States in this: That it deprives injured workmen within its purview of a republican form of government by vesting judicial and executive powers in the same officers. (2) It is violative of amendment 7 and amendment 14, § 1, of the Constitution of the United States, and of section 10, art. 1, and section 17, art. 1, of the Constitution of Oregon, in that it deprives a workman, injured through the fault of his master, of the right to trial by jury, and also denies such workman of the right to recover individually for the individual wrongs committed against him, and denies the right to recover a sum commensurate with the injuries sustained. (3) It deprives injured workmen of property without process of law in violation of Amendment 14, § 1, of the Constitution of the United States in this: It does not require a trial before the Oregon Industrial Accident Commission, nor does it require notice of the time or place of hearing to be given to such workmen, nor afford him an opportunity to appear before such board in person or by counsel, nor does it require the protection of witnesses before such board for or against the claim of such injured workmen, but it provides for a summary procedure in determining the extent and character of injuries suffered by such workmen, as well as determining the amount to be recovered within the limits prescribed, and limits the amount of recovery to sums not purporting to be commensurate with the injuries sustained. (4) It denies to injured workmen the equal protection of the law, and violates Amendment 14, § 1, of the Constitution of the United States in this: That within the class of workmen affected by its provisions, it awards equal sums for similar injuries to different workmen, regardless of the question of fault, and thereby takes from a workman injured through the fault of his master the sum which he should recover, and gives to a workman suffering like injuries an equal sum, although he is hurt through his own fault; also it denies the equal protection of the laws to workmen of the same class, grade, and kind who are working for private persons, corporations, firms, or enterprises, and takes from them the privileges of jury trial and immunity from the operation of said law which are accorded to laborers for the state of Oregon, or any of the several counties within the state of Oregon, or any municipalities within the state of Oregon, in this: That laborers engaged in like work for the state of Oregon, or any municipality or county therein, as that in which laborers for private corporations, associations, individuals, or enterprises are engaged, are not embraced within its terms; that in each particular specified herein wherein the said act violates the Constitution of the United States, it infringes upon the right of this plaintiff to recover for the injuries hereinafore set forth."

The plaintiff declares that the act under which defendants claim authority was not properly passed, and several pages of the journals of the two houses of the Legislature are pleaded, but are here omitted, the substance of the alleged informalities being that the original bill as introduced was amended in both houses in several particulars, and that the complete bill as finally amended was not read three times, as required by section 19, art. 4, of the Constitution. There was a general demurrer to the complaint, which being sustained, the plaintiff appeals.

Isham N. Smith, of Portland (Logan & Smith, of Portland, on the brief), for appellant. Geo. M. Brown, Atty. Gen., and J. O. Bailey, Asst. Atty. Gen., for respondents.

McBRIDE, J. (after stating the facts as above). [1, 2] The complaint and the able and ingenious brief of counsel for plaintiff point out 19 alleged specific violations of the Constitution of this state, all committed within the compass of a single act, and then, piling Pelion on Ossa, specifies four alleged violations of the Constitution of the United States, perpetrated by means of the same statute.

It would be, indeed, a reflection upon republican government if a bill which is so permeated with the rottenness of unconstitutionality could pass both houses of the Legislature with only three dissenting votes, and thereafter be indorsed by the people upon a referendum by a majority of more than two to one. It may be premised that, assuming every allegation as to the unconstitutionality of the act is well taken, plaintiff has shown but one reason why he should be permitted to bring this suit, and that is because he is a taxpayer of the state, and that by the unlawful expenditure of the moneys appropriated by the state under the provisions of the act in question his financial burdens as such will

be increased. *State ex rel. v. Metschan*, 32 Or. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692.

The allegations that the defendants threaten to deprive plaintiff of the right of trial by jury and wrongfully claim to have power to determine the amount that plaintiff shall recover, etc., have no force whatever. If plaintiff has a right to sue in the courts, there is manifestly no method whereby the defendants can prevent him so doing. If they have no right to determine his case for any reason, there is no law which compels him to present his claim to them or to abide their award if made against his remonstrance. He can test their authority by ignoring them and bringing his action either at common law or under the Employers' Liability Act as the fact may warrant. The sufficiency of the facts in relation to the injury to permit a recovery under either aspect, not being relevant to the matter in controversy, will not here be discussed.

[3] Under the first point made in the brief are included several objections to the title of the act, which is as follows:

"An act creating the State Industrial Accident Commission and providing an Industrial Accident Fund, making an appropriation for such fund and providing for the administration of the terms of this act, providing for the collection and disbursement of funds for the benefit, compensation and care of workmen, prescribing the duties of employers and workmen subject to this act, and providing penalties for a violation of the terms of this act, and abolishing in certain cases the defenses of assumption of risk, contributory negligence and the negligence of a fellow servant in actions for personal injury and death."

Concerning this objection counsel in their brief observe:

"It is plain that the act provides a system of jurisprudence for the administration of all questions relative to injuries received by workmen in the course of their employment, save those specified in the act itself. It also creates a board; a fund, and makes appropriations therefrom; provides: (a) For its administration; (b) the collection and disbursement of its funds; (c) the duties of employers and employees; (d) penalties for its violation; and (e) abolishes certain defenses in such cases."

In our view every matter referred to in the title is germane to the purpose of the act. Its object is to provide a system of actual voluntary insurance for injured workmen. As a necessary part of the system, a fund is to be raised whereof the employer shall contribute the larger part, the employé a small part, and the state a small portion. It would be absurd and wholly outside the intent of the Constitution to require that there should be one act to create the Commission and define its duties, another to prescribe the amount the employé should contribute, a third to fix the amount that the state should contribute, and a fourth to appropriate the money thus defined to be the state's contribution. Such red-tape methods of accomplishing an object justified by the highest considerations of pub-

lic policy and humanity were never contemplated by the framers of the Constitution.

"It is sufficient if the general subject of the act is contained in the title and is a fair index to the legislation proposed, and if all the provisions of the act are germane to such subject and do not relate to matters wholly foreign thereto." In *re Willow Creek*, 74 Or. 592, 615, 144 Pac. 505.

[4] It is also urged in the objection now being considered, and elsewhere in the able brief of plaintiff, that the act in question attempts to confer judicial and legislative functions upon the Industrial Accident Commission, and is therefore in contravention of section 1, art. 3, of the Constitution, which is as follows:

"The powers of the government shall be divided into three separate departments—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

This identical question is passed upon adversely to plaintiff's contention in *Re Willow Creek*, supra, at pages 610, 611, and that opinion and the authorities there cited are so conclusive as to render further discussion of the subject unnecessary.

[5] Neither is it necessary to discuss the question as to whether the Legislature had power to confer judicial functions upon the Commission. Section 9, art. 7, of the Constitution before amendment provided:

"All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers, and tribunals."

As originally adopted section 1, art. 7, of the Constitution read as follows:

"The judicial power of the state shall be vested in a supreme court, circuit courts, and county courts, which shall be courts of record, having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this Constitution. Justices of the peace may also be invested with limited judicial powers, and municipal courts may be created to administer the regulations of incorporated towns and cities."

In 1911 this section was amended so as to read:

"The judicial power of the state shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. The judges of the Supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected." Laws 1911, p. 7.

It would appear that the power of the Legislature or of the people to confer judicial powers upon any tribunal which it or they may select is, by the force of this amendment, practically an unlimited one so long as the different functions of government, executive, legislative, and judicial, are not so blended as to contravene section 1, art. 3, of the Consti-

tution, which, as shown in the case last cited, is not the case here.

[6] It is next contended that the act is void in that it violates section 10, art. 1, of the Constitution of this state, which is as follows:

"No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

And that also it is in violation of section 1 of the Fourteenth Amendment to the federal Constitution, as it deprives a person of property without due process of law. Neither of these positions is well taken. Plaintiff's argument proceeds upon the theory that the act establishing the Industrial Accident Commission attempts to establish a court for the trial of causes without a jury, which it does not, and to compel workmen and employers to adjust their grievances without their consent, which is contrary to the whole spirit and intent of the act. As before noted, the act leaves the employer free to accept the provisions of the act or to reject them as he may see fit. If he gives notice that he rejects them, he is left to protect himself from actions for personal injury by litigation in the courts. It is true that the act has swept away certain defenses heretofore available; but, as this could have been done in any case, he has no legal reason to complain. If he sees fit not to avail himself of the provisions of the act, he may still protect himself by giving notice that he rejects its provisions. It is not compulsory, and the arguments that apply with greater or less force to compulsory acts are here inapplicable. The state says to the employer and employé alike:

"We present to you a plan of accident insurance which you may accept or reject at your own pleasure. If you accept, you must be bound by its terms and limitations; if you reject it, the courts are open to you with every constitutional remedy intact. Take your choice between our plan and such remedies as the statute gives you."

Discussing certain features of the Iowa Compensation Act, limiting the amount to be allowed for certain injuries, Mr. Justice McPherson, in the case of *Hawkins v. Bleakley* (D. C.) 220 Fed. 378, 381, says:

"The first twenty-two sections of this lengthy statute fix the liability of the employer and the rights of the employé. A scale of compensation is fixed and made certain. Each party can come within the statute or remain outside of the statute. Each party has his election. Many of the states for many years have had statutes fixing the liability with precision in cases of death, and in no instance has any court held such statute invalid. And why a statute cannot fix with certainty the damages to be allowed in case of the loss of an arm, leg, eye, or other injury is not perceived, and counsel fail to state any legal or constitutional objection thereto."

[7] It is further contended that the act is unconstitutional because it requires the employé to elect, at the time of his employment and in advance of all injuries, whether or not he will come under the terms of the act.

Just what provision of the Constitution is violated we are not informed. It is a general principle that a person may, at any time, waive his right to bring an action upon a money demand unless there is a constitutional or statutory provision prohibiting it, or it is clearly against public policy to permit him to do so. So it has been often held that a contract whereby an employer attempts to stipulate against the consequences of his own negligence is void because contrary to public policy; but what is or is not public policy is, in its last analysis, a legislative question, and we have yet to find an instance where a statute has been declared void because in the opinion of the court it would have been better policy to have left it unenacted. This view of the act disposes of many of the constitutional questions raised by counsel. The state proposes to employers and employés an accident and life insurance scheme, and offers it to them in lieu of litigation. It does not compel them to become participants in it or to contribute to it, but if they voluntarily choose to do so, they waive any other remedy, because the statute provides as a part of the scheme that they must do so; and, as before observed, by permission of the statute a party may waive or limit the quantum of his compensation for any possible prospective injury. The noncompulsory feature of the act may be said to eliminate most of the objections urged upon constitutional grounds.

[8] One objection, however, which is urged with much plausibility is that the act violates section 7, art. 9, of the Constitution, which is as follows:

"Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions upon no other subject."

The evident purpose of this provision was to prevent matters foreign to the general purpose of appropriation bills being attached to them as riders, thereby taking advantage of the necessity of the state for money to defray its current expenses and to pay its officers to pass measures that perhaps would otherwise have been defeated. The instant act is not primarily an act to appropriate money to pay salaries or other current expenses. It is not an appropriation bill in the sense that bills providing for general current expenses or salaries of the constitutional officers of the state are such. We have been cited to no case, in this state or elsewhere, where a provision similar to the one at bar has been construed in accordance with counsel's contention, and in this state contemporary legislative construction has been the other way. Thus, at the first regular session of the Legislature held after the adoption of the Constitution, we find an act, entitled "An act for the appointment of a librarian and defining his duties" (Laws 1860, p. 64), was passed, creating the office of state librarian, defining his duties, prescribing the hours dur-

ing which he should keep the library open, and appropriating \$400 annually for the purchase of books and \$150 annually for his salary. The president of the Senate, the Speaker of the House, and many members of both houses had been members of the constitutional convention. From that time to the present it is safe to say that there has not been a session of the Legislature where similar acts have not been passed. Some of them are: The Food and Dairy Commission Act; the Immigration Commission Act, passed in 1885; the Fish Commission Act, in 1887; the State Board of Horticulture Act, in 1895; the Bureau of Labor Statistics Act, in 1903; the act creating the office of state engineer, and providing a water code, in 1905; the Bank Examiner Act, the Railroad Commission Act, and the Sheep Inspector Act, in 1907; the act creating the office of insurance commissioner and a fund known as the "insurance fund," and the act creating our present water board, in 1909; the act creating the state forestry board, and the act providing for the construction of a branch insane asylum in Eastern Oregon, in 1911; the act providing for a state industrial school for girls; an act creating an Industrial Welfare Commission; an act creating the state highway commission; and an act creating the state live stock sanitary board, in 1913. Most of these acts fixed the salary or compensation of the officers designated to carry out their purposes and appropriated the money necessary to pay such salaries and to accomplish the general objects for which the law was enacted. An examination of the late session laws of other states having identical or similar provisions in their Constitutions shows that the same legislative practice has been pursued in these jurisdictions, so that it may be said practically the uniform contemporaneous construction of this section of the Constitution is that it does not prohibit the Legislature from passing an act designed to effect a particular purpose and in the same act to provide the funds necessary to accomplish that purpose. While such a construction will not be permitted to overturn and render nugatory a clear provision of the Constitution, in cases where the meaning of a clause in the instrument is capable of two interpretations, it is entitled to great weight. It was remarked by Judge Cooley:

"But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by a

decision that the construction was erroneous, the argument ab inconvenienti is sometimes allowed to have very great weight." Cooley, *Const. Lim.* (7th Ed.) p. 102.

[9] All the considerations suggested by the learned jurist exist here. We sum up the situation: (1) The construction to be placed upon the clause in question is not clear; (2) the construction above indicated has been followed and acquiesced in by the Legislature and the people from the adoption of the Constitution until the present time; (3) that construction was adopted by legislators who had participated in the framing of the Constitution and who may fairly be presumed to have known the intent with which it was adopted; (4) to now hold that the acts so passed are void would be attended with such disorganization of public business and destruction of private and pecuniary rights which have grown up with faith in the validity of the acts which would be affected by a decision favorable to the contention of plaintiff as would create widespread confusion and disaster. Our Irrigation Code, Minimum Wage Act, Public Utilities Act, and much of the legislation heretofore alluded to would be thrown into hopeless disarray. Under the act now being considered widows, orphans, and helpless cripples who have taken advantage of its provisions would be deprived, in many instances, of their means of subsistence, and be thrown upon the cold charities of the world. These consequences are too momentous to be invoked by a new construction of a doubtful provision of the Constitution. The rule is well settled that a statute will not be held unconstitutional where a reasonable doubt exists as to its invalidity. *Cline v. Greenwood*, 10 Or. 230; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; *State v. Cochran*, 55 Or. 157, 180, 104 Pac. 419, 105 Pac. 884; *Libby v. Olcott*, 66 Or. 124, 134 Pac. 13; *In re Willow Creek*, *supra*.

[10] It is further urged that the act is unconstitutional because the original bill was amended in many particulars during its progress through the Legislature, and the whole bill as amended was not read by sections on three several days, as required by section 19, art. 4, of the Constitution. Such has never been the practice in this state, and what little authority can be found on the subject is contrary to plaintiff's contention. *People ex rel. v. Wallace*, 70 Ill. 680. In that case the court says:

"It is also objected that the tenth section of the act was not constitutionally adopted, because it was engrafted as an amendment whilst the bill was being considered, and was not read on three several days in the house adopting it as an amendment. We are clearly of opinion that the requirement does not apply to an amendment, and the objection cannot prevail."

Other objections are urged, but they are simply variations of those already considered. Upon the whole case we are of the opinion that the act violates no prescription of the Constitution of this state or of the Unit-

ed States, and that it was properly passed and is in every respect a valid law. While experience may suggest from time to time changes and amendments, they are in line with twentieth century progress. Before its enactment one workman out of three received a large compensation for his injuries by an action at law, while the remaining two were defeated and got nothing. Now every workman accepting its provisions receives some compensation if injured; and, taken as a whole, it will be found that more money in the way of compensation is received by the whole body of injured workmen than by the inadequate remedies afforded in the courts. It has been a boon to the employers, the employed, and the community, which latter could formerly only offer to the injured laborer the charity of the almshouse instead of that just compensation which he may now receive without the humiliation of pauperism or the loss of self-respect.

The decree of the circuit court is affirmed.

EAKIN, J., took no part in the consideration of this case.

BURNETT, J. (concurring specially). I cannot agree that continued violations shall be dignified into contemporaneous construction of so plain a mandate as section 7, art. 9, of the state Constitution that:

"Laws making appropriations for the salaries of public officers and other current expenses of the state shall contain provisions on no other subject."

I concur in the result of the opinion of Mr. Justice McBRIDE, however, for the reason that, with the whole question before them on the referendum of the act in question, the people approved it at the election of November, 1913, by a vote of 67,814 to 28,608.

(78 Or. 525)

UPTON v. STATE INDUSTRIAL ACCIDENT COMMISSION OF OREGON.

(Supreme Court of Oregon. Jan. 11, 1916.)

In Banc. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Action by Mark R. Upton against the State Industrial Accident Commission of Oregon. From an adverse order, plaintiff appeals. Affirmed.

The complaint in this case is similar in all respects to that in the case of *Evanhoff v. State Industrial Accident Commission*, 154 Pac. 106, recently decided by this court and not yet officially reported. A demurrer to the complaint having been sustained, plaintiff appeals.

Isham N. Smith, of Portland, for appellant. Geo. M. Brown, Atty. Gen., and J. O. Bailey, Asst. Atty. Gen., for respondent.

McBRIDE, J. The reasoning of the opinion in *Evanhoff v. State Industrial Accident Commission*, 154 Pac. 106, applies to this case in every particular, and upon the authority of that case the judgment of the circuit court is affirmed.

EAKIN, J., took no part in the consideration of this case.

REED et al. v. MILLS.

(78 Or. 558)

(Supreme Court of Oregon. Jan. 11, 1916.)

1. REPLEVIN \Leftrightarrow 1—"CLAIM AND DELIVERY"—NATURE OF ACTION.

An action for the recovery of possession of personal property provided for by L. O. L. § 283 et seq., is strictly possessory, and its gist is the defendant's wrongful detention of the demanded property and plaintiff's right to immediate possession thereof at the time the action was commenced.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 1.]

For other definitions, see *Words and Phrases*, First and Second Series, *Claim and Delivery*.]

2. REPLEVIN \Leftrightarrow 10—BOND—FRAUDULENT ASSIGNMENT—CONSTRUCTIVE POSSESSION—NONSUIT.

Where, in an action to recover possession of a bond under L. O. L. § 283 et seq., regulating actions of claim and delivery, plaintiff's reply showed that the bond had been delivered by defendant to a third person without consideration, who held it in trust for defendant subject to his control, and with knowledge of his intent to defraud plaintiff, defendant's motion for nonsuit made at the close of plaintiff's evidence, which evidence did not allude to the pretended assignment and delivery of the bond, was properly overruled, since an action to recover possession of personal property lies where defendant has constructive possession as well as in cases of actual possession.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 69-82; Dec. Dig. \Leftrightarrow 10.]

3. REPLEVIN \Leftrightarrow 8—CLAIM AND DELIVERY—SET-OFF—ISSUE.

In an action to recover possession of personal property, plaintiff, if entitled thereto, may recover possession regardless of any indebtedness owing by him to defendant, since the right to possession is the only issue that can be determined in such action, leaving defendant to pursue his proper remedy as a creditor.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 45-68; Dec. Dig. \Leftrightarrow 8.]

4. REPLEVIN \Leftrightarrow 12—CLAIM AND DELIVERY—MONEY JUDGMENT—SET-OFF.

For the same reason, defendant was not entitled to have such debts due him deducted from a money judgment in plaintiff's favor in such action, where possession of the property could not be delivered.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 98-110; Dec. Dig. \Leftrightarrow 12.]

5. APPEAL AND ERROR \Leftrightarrow 238—REVIEW—ERROR IN JUDGMENT—MOTION IN LOWER COURT.

Where it appeared in such action that the bond demanded had been sold, and a new one issued in lieu, and, the canceled bond having been received in evidence, its number and series were entered in the judgment for plaintiff, and defendant did not move the court below to correct the particularity of the judgment in this respect, any error committed therein is unavailing on appeal, though a motion to set aside the verdict and judgment and to grant a new trial was interposed, since the proper way to correct an error in a judgment in replevin is by motion therefor in the court below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1343, 1345, 1357, 1358, 1360, 1364, 1366, 1382, 1386-1410; Dec. Dig. \Leftrightarrow 238.]

Department 1. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Action by W. P. Reed and J. M. Reed

against W. E. Mills. Judgment for plaintiffs, and defendant appeals. Affirmed.

This action was commenced June 11, 1914, to recover the possession of a bond for \$1,000 issued by the Realty Associates of Portland, Or., and alleged to be unlawfully held by the defendant in Wasco county, Or. The complaint is in the usual form. All of its material averments are denied in the answer, except that of the demand and the refusal to deliver the bond. For a further defense it is alleged, in effect, that between February 1, 1914, and May 1st of that year the plaintiffs were the owners of real property in Oregon, and at their solicitation the defendant, as a real estate broker, negotiated the sale of a part of their lands, whereby it became necessary for him to advance on their account \$62.50 interest due on a mortgage upon the premises so sold, which sum they promised to repay; that, in connection with that sale, the defendant, at the plaintiffs' request, procured for them a loan of \$2,000, for which they promised to pay him \$40; that between the dates last mentioned the defendant, at the plaintiffs' solicitation, negotiated the sale of other lands for them to L. W. Curtiss for \$12,000, for which service they promised to pay him \$600; that, in order to discharge these obligations, the plaintiffs delivered to the defendant the demanded bond, requesting him to sell it for not less than 80 per cent. of its face value, promising to pay him, if sale were made, \$100; that, pursuant to the latter agreement, the defendant, on April 28, 1914, sold and delivered the bond to C. L. Gavin for 85 per cent. thereof; and that, after deducting from the proceeds of such sale the sums of money so due the defendant, there remained \$47.50, which, prior to the commencement of this action, he tendered to the plaintiffs, and upon their refusal to accept such money left it with the clerk of the court for them.

The reply denies the material averments of new matter in the answer, and for a further defense alleges, in substance, that the defendant voluntarily paid \$62.50, when only \$43.50 was due, which latter sum the plaintiffs tender in full payment of the demand; that the defendant, acting for himself and L. W. Curtiss, negotiated an exchange of a part of the plaintiffs' land, for which they received a transfer of all the capital stock of The Dalles and Rockland Ferry at \$3,000, a part of which stock was owned by the defendant; that, as further consideration, the plaintiffs received a conveyance of about four acres of land at The Dalles, Or., estimated to be worth \$3,000, and also bonds of the Realty Associates of Portland, Or., of the face value of \$6,000; that one of these bonds for \$1,000 was never delivered to the plaintiffs, who consented that it might be sold by the defendant, but on April 2, 1914, no sale thereof having been made, they requested him to return the bond, with which demand he re-

fused to comply, and delivered it to C. L. Gavin, who paid no consideration therefor, and held it in trust for the defendant and subject to the latter's control, and with knowledge of his intent to hinder, delay, and defraud the plaintiffs.

Predicated on these issues, a trial was had resulting in a judgment for the return of bond No. 232, series No. 1, of the Realty Associates of Portland, Or., but, if return thereof could not be had, then for the recovery of \$850, the value thereof, and the defendant appeals.

John Gavin, of The Dalles (R. R. Butler, of The Dalles, on the brief), for appellant. M. R. Klepper, of Portland (W. H. Wilson, of The Dalles, on the brief), for respondents.

MOORE, C. J. (after stating the facts as above). [1, 2] The plaintiffs having introduced their evidence in chief and rested, the defendant's counsel moved for a judgment of nonsuit on the ground of a failure to establish a cause sufficient to be submitted to the jury. This motion was denied, and it is contended that an error was thereby committed. It is argued by defendant's counsel that the pleadings conclusively show the defendant had sold and delivered the bond to C. L. Gavin April 28, 1914, or 44 days before this action was commenced, and, since their client did not have possession of the demanded property at that time, this cause should have been dismissed. It is maintained by plaintiffs' counsel, however, that, though the reply admits the defendant had delivered the bond to C. L. Gavin, the transfer was a pretense only, and that the defendant was at all times after it was so delivered in the constructive possession thereof.

The recovery of the possession of personal property, which, under section 283, L. O. L., is denominated an action of claim and delivery, is substantially the ancient remedy of replevin, and is governed by the same rules which controlled the means originally employed to enforce that right. The action is strictly possessory, and its gist is the defendant's wrongful detention of the demanded property and the plaintiffs' right to the immediate possession thereof at the time the action is commenced.

"Replevin," says an author, "will not lie against one who at the time the action was instituted was neither in the actual nor constructive possession or control of the property, unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ." Cobbey, *Replevin* (2d Ed.) § 64.

In *De Lore v. Smith*, 67 Or. 304, 309, 136 Pac. 13, 14 (49 L. R. A. [N. S.] 555), Mr. Justice McNary, discussing this subject, observes:

"As an abstract proposition of law, this court has become wedded to the rule that, in order to maintain replevin, defendant should have either the actual or constructive possession of the property sought to be recovered at the time of the

commencement of the action, so that defendant, if judgment be rendered against him, might make delivery thereof to plaintiff."

In the case at bar, if the assignment and delivery of the bond were made by the defendant before the action was commenced, ostensibly to remove it from his possession, though, in fact, he retained control thereof, the action was properly maintainable against him. This was the theory on which the cause was tried. When the motion for a judgment of nonsuit was interposed, the only testimony that had been offered was that given by the plaintiff W. P. Reed. The fact that he did not allude to what his counsel assert was a pretended assignment and delivery of the bond would not have authorized a summary dismissal of the action. In *Andrews v. Hoeslich*, 47 Wash. 220, 222, 91 Pac. 772 (18 L. R. A. [N. S.] 1265, 125 Am. St. Rep. 896, 14 Ann. Cas. 1118) it is said:

"Where, as in this case, property has actually been in appellant's possession, and has been wrongfully transferred by him without respondent's knowledge before the commencement of an action for the recovery of its possession, the rule that replevin will not lie against one not in possession at the time of the commencement of the action will not obtain."

To the same effect, see *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259, 262. No error was committed in denying the motion.

[3, 4] An exception having been taken to a part of the court's charge, it is insisted by defendant's counsel that an error was committed in instructing the jury as follows:

"If you should find from the evidence that the plaintiffs are entitled to the bond, and should return a verdict in favor of the plaintiffs, your verdict would not prevent the defendant from recovering off the plaintiffs any amount that the plaintiffs may be owing to the defendant; in other words, you are not establishing the question as to whether plaintiffs owe the defendant or not. The question you are to try and determine is whether the plaintiffs delivered the bond to the defendant for the purpose of paying the items which the defendant says the plaintiffs owe him. If the bond was not delivered to the defendant for such purpose, then the plaintiffs would be entitled to recover the same, even if they owe the defendant each and all of the items which the defendant claims the plaintiffs owe him."

An exception having been taken by defendant's counsel to the court's refusal to give a requested instruction, it is maintained that an error was committed in declining to direct as follows:

"I charge you, gentlemen of the jury, that if you should find for the plaintiffs in this case, and find that the bond cannot be delivered, and should find that the plaintiffs have been damaged, you are to deduct from any amount which you may find due the plaintiffs from the defendant as damages the amounts which are due to the defendant, if any, for real estate commissions, negotiation of loan, commission on sale of bond, and for money advanced, and it is admitted and conceded in this case that the sum of \$43.50 is due from the plaintiffs to the defendant, but whether or not the plaintiffs are entitled to recover in this case is a matter for you to determine, and the burden is upon the plaintiffs to prove their case, and, if they fail to do so, your verdict must be for the defendant."

The court permitted the defendant freely to offer testimony tending to prove the plaintiffs were indebted to him as alleged in the answer. This was done to substantiate the defendant's theory by showing a consideration for delivering the bond to him in payment of the plaintiffs' obligations. The plaintiffs' hypothesis was that the bond had been so delivered in order that a sale thereof might be made and the proceeds arising therefrom returned to them. If the latter theory was correct, the defendant had no right to appropriate the bond merely because the plaintiffs might have been indebted to him. In an action of claim and delivery the only issue that can be determined is the plaintiff's right to the immediate possession of the demanded personal property. The fact that a sum of money is due and owing does not authorize a creditor, without pursuing the remedy prescribed by law, to take possession of the debtor's personal property and apply it, or the proceeds arising therefrom, to the payment of his claim. No error was committed in giving the instruction first hereinbefore quoted.

It will be remembered that the reply admitted \$43.50 was due the defendant on account of interest which, it was averred, he had voluntarily paid, and also alleged that the plaintiffs tendered that sum in full payment thereof. The plaintiffs' final pleading did not allege that this amount of money had been offered to the defendant, or that upon his refusal to accept it that sum had been left with the clerk of the court for him. The averment referred to is nothing more than a mere proposal to allow the defendant to take a judgment for the sum of \$43.50. Such offer in an action of this kind is not good pleading, and might upon motion have been stricken from the reply. The tender was probably set forth in the reply to show to the jury a willingness on the plaintiffs' part to deal justly with the defendant.

To sanction the giving of the requested instruction would permit a creditor, without pursuing the provisional remedy of attachment, to take possession of a debtor's personal property unlawfully, and, if it could be sold before an action of replevin were instituted, the creditor might from the proceeds pay his own demand and turn over to the debtor the surplus of the money, if any remained. While a creditor has an adequate remedy for the recovery of debts due him, the law will not countenance the scheme of obtaining payment of his demands as outlined in the requested instruction, in refusing to give which no error was committed.

[5] The complaint did not particularly describe the bond undertaken to be recovered, probably because it had never been in the plaintiffs' possession, but at their request had been delivered to the defendant. It appeared at the trial that, though the bond had been sold, and a new one issued in lieu thereof,

the canceled bond was received in evidence disclosing the number and series as hereinbefore set forth.

"The proper way to correct an error in entering a judgment in replevin," says a text-writer, "is by motion in the court in which it was rendered, not by appeal." Cobbey, Replevin (2d Ed.) § 1092.

To the same effect is the case of *Ingersoll v. Bostwick*, 22 N. Y. 425.

It is difficult to understand how the defendant can be prejudiced by the judgment in the respect mentioned, since he cannot return the bond demanded. But, however this may be, the particularity of the judgment does not appear to have been called to the attention of the trial court, so as to afford it an opportunity to correct the final determination, though a motion to set aside the verdict and judgment and to grant a new trial was interposed. The defendant's counsel not having specified the number and series of the bond as given in the judgment now complained of, any error committed in such final determination of the cause is unavailing on appeal.

It follows that the judgment should be affirmed, and it is so ordered.

BENSON, BURNETT, and McBRIDE, JJ., concur.

(79 Or. 249)

LUEDDEMANN et al. v. RUDOLF.

(Supreme Court of Oregon. Jan. 11, 1916.)

1. BROKERS ⇐7—ACCEPTANCE—NECESSITY.

Where a firm of real estate brokers, replying to a response to their advertisement in which the owner of land offered to sell or exchange the same for a price named at a fixed commission, stated that the owner of the places they advertised could not consider the property of the person who answered the advertisement and then made a counter offer, no contract of employment of the brokers by the party resulted.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 5-8; Dec. Dig. ⇐7.]

2. BROKERS ⇐43 — EMPLOYMENT — WRITTEN CONTRACT.

By direct provision of L. O. L., § 808, an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission must be in writing.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. ⇐43.]

Department No. 1. Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Action by Max Lueddemann, Ernest L. Lueddemann, and J. B. Ruley, as copartners under the firm name of Lueddemann, Ruley & Co., against William Rudolf to recover \$1,000 as broker's commissions claimed to have been earned by the plaintiffs in effecting a sale of the land of the defendant. The complaint was denied, and other issues raised, which are not deemed material for the consideration of the case. From a verdict and judgment in favor of the plaintiffs, the defendant appeals. Reversed.

H. E. Slattery, of Eugene, for appellant. Jesse Stearns, of Portland (F. E. Smith, of Eugene, on the brief), for respondents.

BURNETT, J. [1, 2] According to the bill of exceptions the plaintiff Lueddemann testified that on March 16, 1914, he received through the United States mail a letter from the defendant, "Exhibit A" which is here set out:

"Yamhill, Oregon, Mar. 16—14.

"Lueddemann Ruley Company.

"Sir I seen your Ade in the Sunday Oregonian that you had land to trade for a wheat ranch that I would trade for a good dairy ranch. My farm is 5 miles north of Kahlotus, Franklin Co. Wash. consists of 1440 achers, 1300 in cultivation, 650 in fall wheat and 650 to bee summer followed free to buyer. Place rented to Nov. 1st, this fall. My price is \$27.00 acher; there is a mortgage of \$9025, against it, \$1725 due this fall; \$1300 next fall; \$6000 in 1916. Buildings only fair; small house, barn room for 25 head of horses, well and windmill. SW 1-4 of sec. 12; all sec. 13; all of sec. 14 Town. 14 R. 34. I will give \$1000 Com. on a trade or I will give you \$1500 on cash sale. In case of cash sale I will cut my price a little. Will give long time with fair cash payment down. Hope to hear from you soon.

"Your truly,

Wm. Rudolf."

The same witness testified that in answer to the foregoing letter he wrote, signed, and mailed to the defendant at his postoffice, Yamhill, Or., the following communication:

"Portland, Oregon, March 21, 1914.

"Mr. William Rudolf, R. 1, Yamhill, Oregon —Dear Sir: Replying to your favor of March 16th, the owner of the three places we advertised could not consider your property, as it amounts to more than he would care to undertake. He would assume up to say \$4,000 or \$5,000, but your property amounts to over \$38,000, and he would have to assume over \$20,000, so it is out of the question. We are glad, however, to know about your property, as we believe that we can get you a trade. Please let me know whether all of this years crop goes with the place, or is it rented, and if rented, when can you give possession? Are they to plow the Summer fallow even if you trade the place off? How far are you from the nearest station? Is there any running water on your place, or any alfalfa land? Is there any stock and implements included? Would you cut the place in two, that is, would you trade part of it? How high would you go, if you could get a good stocked and equipped dairy farm? Please let me know about these matters, and I will try to put up a good proposition to you as we have a number of things to offer for a good wheat farm.

"Yours truly,

"Lueddemann, Ruley & Co.,

"By Max Lueddemann."

The plaintiffs stated to the court that these two letters constituted the contract of employment, and that they relied upon them as constituting the agreement between the parties whereby the defendant employed the plaintiffs to effect a trade of his land. In order to establish a contract upon offer and acceptance the acceptance must be in the precise terms of the offer. In other words, the acceptance must precisely meet the terms of the offer, or there is no meeting of minds so essential to the validity of a contract. The

following excerpt from the letter of the plaintiff conclusively shows that the offer of the defendant was not accepted:

"Replying to your favor of March 16th, the owner of the three places we advertised could not consider your property, as it amounts to more than he would care to undertake. He would assume up to say \$4,000 or \$5,000, but your property amounts to over \$38,000, and he would have to assume over \$20,000 so it is out of the question."

The remainder of the plaintiff's letter at best is nothing more than a counter proposition. There was no acceptance of this counter proposition according to the statements of the plaintiff that the two letters mentioned constituted the whole contract. Section 808, L. O. L., says:

"In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * * 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

As stated, the only writings offered in evidence are not sufficient in point of law to constitute a contract. The case is controlled by *Henry v. Harker*, 61 Or. 276, 118 Pac. 205, 122 Pac. 298, where it was decided that the writings appearing in evidence did not constitute a contract by offer and acceptance.

The judgment of the circuit court is reversed.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(30 Or. 378)

MUIR v. MORRIS et al.

(Supreme Court of Oregon. Jan. 11, 1916.)

1. ATTORNEY AND CLIENT — 143—ADDITIONAL COMPENSATION—CONSIDERATION.

Where plaintiff was employed by defendants as an attorney at a monthly salary, which had been fixed in advance, their statement to him that they realized he was underpaid, but that if he would do his best to promote their ventures, and such ventures should prove successful, he would receive a substantial reward, did not create a legal obligation on defendants; since such offer was based on no consideration.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328-331; Dec. Dig. — 143.]

2. EVIDENCE — 165—BEST AND SECONDARY—MEMORANDUM.

In an action for such reward, the contents of a memorandum made by defendants in fixing the reward could not be orally proved by plaintiff from memory, refreshed by a memorandum made by him while the matter was clear in his mind, where no showing was made to account for not producing the original memorandum.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 548-555; Dec. Dig. — 165.]

3. EVIDENCE — 441—PAROL EVIDENCE—CONTRACTS.

Where plaintiff in such action alleged that defendants fixed the reward in their agreement of dissolution of their firm, at 1,000 shares of stock in a power company controlled by them, but the dissolution contracts contained no provision relating thereto, plaintiff could not prove the inclusion of such provision in oral negotiations preceding the contracts, since such negotiations being merged in the written contracts, evidence thereof was inadmissible, under L. O. L. § 713, prohibiting parol variance of written instruments.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. — 441.]

4. EVIDENCE — 424—PAROL EVIDENCE—PERSONS BOUND BY CONTRACT.

Plaintiff could not, on the ground that he was not a party to such dissolution contract, rely on conditions or considerations de hors, to support his claim to such reward, since, there being no binding obligation on defendants therefor unless embodied in the written contracts, plaintiff must recover as a privy to such contracts or not at all.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1966-1968; Dec. Dig. — 424.]

5. EVIDENCE — 419—PAROL EVIDENCE—CONSIDERATION.

Where, in such dissolution contracts, the consideration provisions were contractual in their nature and not merely monetary, and the contracts were otherwise complete, leaving nothing more to be said, plaintiff could not as a privy show that the real consideration was different from that expressed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. — 419.]

Bean, J., dissenting.

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Jane W. Muir, as executrix of the estate of William T. Muir, deceased, against James H. Morris and Fred S. Morris, individually and as partners doing business under the firm name and style of Morris Bros. From a judgment for defendants, plaintiff appeals. Affirmed.

William T. Muir, plaintiff's deceased husband, whom for brevity we style "Muir," began this action to recover \$85,000 as money had and received by the defendants to his use, which he claimed was the proceeds of a sale by the defendants of 1,000 shares of stock in the Oregon Water Power & Railway Company held by them in trust for him. Muir died November 4, 1911, and the present plaintiff was substituted in his stead. Other personages figuring in the transactions culminating in this litigation may be thus described: Morris & Whitehead was a Colorado banking corporation which we designate as "the bank," the stock of which was owned by the defendants Morris. It engaged in promoting and operating various railway and water enterprises, and dealt in corporate and municipal bonds and other securities. Morris Bros. & Christensen was a partnership composed of James H. Morris, Fred S. Morris, and Julius Christensen, which we

call "the firm," and which took over all the assets and business of the bank, continuing its existing enterprises and engaging in new ones. Among the concerns promoted by the bank and the firm was the Oregon Water Power & Railway Company, an Oregon corporation called herein the "Power Company" with 20,000 shares of stock, each of the par value of \$100, all of which, except 4 shares issued to that number of individuals, including Muir, to enable them to qualify as directors, was originally issued to Fred S. Morris as a representative of the bank. The latter concern and its successor, the firm, always owned a very large majority of the stock of the Power Company until it and its property were sold to the Portland Railway, Light & Power Company, another corporation in this state.

In substance, the complaint states that Muir served the bank and the firm as an attorney until the dissolution of the latter, and afterwards performed the same duty to the defendants at an agreed monthly salary in money which all his employers frequently said was inadequate compensation for the services he rendered, and that if he would continue in their employment he should receive additional compensation in the form of an interest in the property shares of stock, profits, and business of the Power Company and other corporations owned and operated by them, provided the enterprises were successful, the amount of which reward was to be afterwards determined. It is charged that this stipulation was made both by the bank and its successor, the firm, that Muir continued to work for the small salary, and that he fully performed all the conditions of his employment on his part until the Power Company was finally sold as stated. Substantially, the plaintiff avers that about November 7, 1904, the members of the firm agreed among themselves that Muir's additional compensation should consist in the issuance to him of 1,000 shares of the Power Company stock, but that although stock was issued to other employes of the firm, none was issued to him. The foregoing is a condensation of a very extended recitation of matter of inducement leading up to the crux of the complaint found in the thirteenth paragraph which we adapt to the limits of an opinion thus: That thereafter about June 26, 1905, the firm was dissolved; that before and at the time of such dissolution, as an inducement thereto and as part of the contract of dissolution, it was then agreed between Christensen on the one hand and the defendants herein, on the other, that the 1,000 shares of Power Company stock which the firm had determined to deliver to Muir should be and was his property, to which he was entitled in payment of the extra compensation mentioned; that defendants here should issue the same to him, and that in consideration thereof Christensen agreed to

satisfy certain eastern creditors of the firm, and did then and there assign to these defendants all his stock and interest in the Power Company. It is further averred that about that time the defendants formed the partnership of Morris Bros. through which they acquired and assumed control of the Power Company and all its stock and so continued until about April 27, 1906, when they sold all the stock to the Portland Railway Light & Power Company at \$65 per share, which was paid to them, and that they retained the sum of \$65,000 received for the 1,000 shares they had agreed to issue to Muir. For this amount, with interest, judgment is demanded.

The answer admits that Muir was in the employment of the bank, the firm, and Morris Bros. successively; that the firm succeeded to all the interests of the bank; that Morris Bros. took over from the firm part of the Power Company stock being all the firm's interest therein agreeing to pay part of the firm's liabilities, and that afterwards Morris Bros. sold all the Power Company stock owned by them, and did not pay Muir the \$65,000 claimed by him. Otherwise the complaint is traversed, in all material particulars.

Affirmatively the defendants allege that about December 18, 1908, they had an accounting with Muir covering all the transactions described in the complaint, as a result of which they paid and discharged all demands which he had against them. A second defense is in substance as follows: That about February 15, 1901, Muir entered the employment of the bank at an agreed monthly salary, later serving the firm in the same capacity until its dissolution, and afterwards the defendants, composing a firm of Morris Bros. until May 1, 1906, all at a stipulated compensation per month; that during all this time he was working under contract for an agreed salary and for no other compensation, and that long prior to the beginning of this action Muir had been paid in full for all the services rendered as set out in the complaint.

It is further stated that these defendants and Muir were personal friends, and that on account of a desire to help him and not because of any legal obligation resting upon them, Fred S. Morris, representing in Oregon the bank and the firm, told Muir that if the Oregon ventures proved profitable he would not be forgotten, but would be enabled, out of the various enterprises mentioned, to reap benefit above and beyond the agreed salary which he was paid; that when the firm was dissolved, the defendants were owners of all the stock of the Power Company, except 1387 shares; that 5,000 shares had been deposited with Eugene Ivins as collateral for \$100,000 loaned by him to the firm; that Ivins had an option also to purchase the stock while still unredeemed for \$50 per share; that on account of the friendship to

Muir and in pursuance of the statement they had made to him, Fred S. Morris indorsed his note for \$25,000, with which Muir took up 1,000 shares of stock pledged to Ivins, applying the money in payment of the Ivins loan, and that afterwards the defendants sold the stock with their own, paid Muir's note and gave him \$15,000 of money realized from the sale, being the \$15 per share in excess of the option price extended to Ivins. The reply traversed the new matter of the answer in important particulars. In his testimony, however, Muir admitted receiving the \$15,000 as profit on the sale of the 1,000 shares of Power Company stock redeemed from Ivins, but contended it was a transaction distinct from the one on which this action is founded. At a trial before a jury, the circuit court at the close of the testimony for the plaintiff entered a judgment of nonsuit on the motion of the counsel for the defendants, and the plaintiff appeals.

Ralph E. Moody and Kenneth L. Fenton, both of Portland (Wm. D. Fenton and Ben C. Dey, both of Portland, on the brief), for appellant. Wirt Minor, John M. Gearin, and C. W. Fulton, all of Portland (Teal, Minor & Winfree and W. A. Johnson, all of Portland, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). [1] The precise question to be determined is whether there was any competent evidence to take the case to the jury. Besides the writings hereinafter mentioned, the evidence is found in the deposition of the decedent and the testimony of Julius Christensen and W. H. Hurlburt, the former a member of the firm, and the latter president and general manager of the Power Company while under control of the bank and the firm. Muir admitted as a witness that he entered the employment of the bank in February, 1901, at a salary of \$200 per month, which was agreed upon in advance. He continued under that arrangement until April, 1902, from which date to December 31st of that year he drew a salary of \$275 per month. During the year 1903 he received a monthly compensation agreed upon in advance of \$400, and afterwards until the Power Company was sold, he received \$275 per month. He says:

"During this entire time it was frequently stated by Mr. Fred S. Morris, who had charge of the business here and the operations of Morris & Whitehead, bankers, Morris Bros. & Christensen, and Morris Bros., in this territory, that I was inadequately compensated, the statement being commonly that Mr. Brown, Mr. Hurlburt, and myself were all working for inadequate salaries; that this was recognized by our employers, and the purpose was to see that we received additional compensation. There was never anything definite said to me, just how this compensation would be paid; there was no promise of any definite amount, or any particular thing, but there was a continual statement and promise that there was recognition of the fact that I and the other two men spoken of were very much underpaid; that this was ap-

preciated, that they desired me and them to continue and do the very best we could to co-operate with him, making things a success, and upon the successful issue that we would receive substantial reward, putting it in the light that upon the failure, as I looked upon it, we would not be expected to be additionally compensated, but upon the issue of success we would be, and we were urged in that way, at least I was, to do the very best we could to see that things were made a success."

Giving this testimony its utmost weight it is plain there was nothing in the contemplation of the parties except a possible honorarium unsupported by any legal obligation. Under the contract of employment his services were met by the consideration of his monthly salary settled upon in advance. Having already agreed to render these services, he was bound to perform them, and they could not, as a consideration, support any additional or different contract.

It should be observed that in the thirteenth allegation of the complaint, to which reference has been made, the plaintiff founds her cause of action upon the contract for the dissolution of the firm, and it is stated as an inducement thereto and as part of the agreement of dissolution the defendants promised to issue 1,000 shares of Power Company stock to Muir. The record discloses four written agreements affecting the liquidation of the firm. The first was dated January 31, 1905, and provides in general terms that the partnership should terminate by July 1, 1905, unless continued by mutual written consent; that the indebtedness and liabilities of the firm should be reduced and paid off as rapidly as possible without sacrificing the interests or assets of the concern; and that no more business should be undertaken, the general purpose being to enter upon a course of liquidation and settlement of the affairs of the firm. The original agreement of partnership provided that Christensen should be owner of one-fifth of the firm's property, and each of the two Morris brothers should own two-fifths of the same, and that the partners should be liable for the firm's indebtedness in like proportion. The next agreement affecting the winding up of the firm's affairs was dated June 28, 1905. By its terms Morris Bros., the defendants here, assumed the payment of the Ivins note of \$100,000, turned over to Christensen 647 shares of Catawba Power Company, 6½ shares of Warren & Jamestown Street Railway Company, and 2,383 shares of York Haven Water & Power Company, for which Christensen transferred to them 49 shares of Land Company of Oregon, 2,096 shares of Power Company stock, and all his interest in the 5,000 shares of the latter stock pledged to Ivins, subject to the terms of the pledge and his option to purchase the same at \$50 per share. This agreement does not purport to affect the remaining interests of Christensen or Morris Bros. in the Power Company stock or the other assets of the firm still on hand. The next agreement was dated June 27, 1905, and

provided that the defendants here, on or before August 1, 1905, should personally discharge without using any of the partnership assets, all the firm's obligations represented by several of its promissory notes, required Christensen to discharge certain other of its obligations, and generally provided for the disposal of the remainder of the firm's assets. The fifth paragraph states that:

"None of the funds or assets of the partnership shall be in any way used by any of the liquidating partners, except as provided herein. The said funds shall be kept separate and apart from and be in no wise commingled with any other funds or assets. All moneys of the partnership shall be deposited in the name of and to the credit of Morris Bros. & Christensen."

Finally, on November 1, 1905, the members of the firm made their last written stipulation, so far as the record discloses, winding up its affairs in detail according to schedules annexed to the document, and apportioned among themselves the liabilities assumed by each. In all these written contracts affecting liquidation of the firm, no mention whatever is made of any obligation to Muir or of his ownership of or right to any of the stock of the Power Company. On the contrary, as quoted above, they expressly interdicted any use of the assets except as prescribed in the language of their stipulations. There is no attempt whatever to prove the averment of the complaint that as early as November 7, 1904, the partners of the firm had determined to issue any stock to Muir.

[2] Plaintiff offered oral testimony to show that in the negotiations culminating in the agreement of June 26, 1905, the partners set aside 1,000 shares each for Muir, Brown, and Hurlburt, and one share each for J. Frank Watson and A. B. Croasman. Such proffered evidence is found in the deposition of Muir, wherein he speaks of having seen a certain yellow paper memorandum shown him in Philadelphia in April or May, 1908, by James H. Morris, wherein were set down in the latter's handwriting 1,000 shares each for Muir and Hurlbut, and he thinks 2,000 for Brown, which Morris told him were made when the agreement of June 26, 1905, was framed so as to determine what would be left of the Power Company stock to be disposed of between the partners. The witness Christensen also testified about the same memorandum all over the objections of the defendants. The plaintiff relies upon this paper to prove the fixing of the then yet undetermined amount of extra remuneration to be awarded to her decedent. If it was of any value as proof, the paper itself was the best evidence; but curiously enough, no effort appears to have been made to produce it or to account for its absence. Not only so, but Muir, avowing his complete forgetfulness of it, offered as evidence of its contents part of a written statement made by himself May 30, 1908, when, as he says, the matter was fresh in his memory, covering his recollection of the conversation with Morris and the terms of

the paper which the latter exhibited to him.

In the light of such cases as *Wiseman v. N. P. R. Co.*, 20 Or. 425, 26 Pac. 272, 23 Am. St. Rep. 135, *Jones v. Teller*, 65 Or. 328, 133 Pac. 354, and *Parker v. Smith Lumber Co.*, 70 Or. 41, 138 Pac. 1061, the witness, though clearly remembering the same, could not be permitted to state the contents of the paper, unless some showing was made to account for not producing it. Much less, in the absence of such explanation, could he substitute his own memorandum of his remembrance of its terms.

[3] All this, however, as stated in the complaint, was part of, and hence, as a matter of law, was merged in, the written agreement and cannot affect the conditions thereof as thus finally settled.

We here recite the oft-quoted section 713, L. O. L.:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

"2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 717, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. The term 'agreement' includes deeds and wills as well as contracts between parties."

[4] The plaintiff argues that she was entitled to show the actual consideration of the contract in question; that she is not bound by its terms, and may show other conditions supporting her claim. It must be admitted that the talk about other possible additional compensation was not definite enough to constitute a legal obligation. As a corollary to this, it is plain that the amount and manner of additional pay rested solely in the discretion of the employers, and without some definite stipulation supported by sufficient consideration, no liability would accrue against them. It is indispensable, therefore, for the plaintiff to show some such contract. Indeed, this is the avowed theory of the complaint, as stated in the thirteenth paragraph. The plaintiff must therefore claim under the contract of dissolution or not at all. Her demand cannot rise above its source. If the theory of the complaint is sound, Muir was in every sense of the word a privy to the contract of dissolution, both by the allegations of that pleading and the operation of the law. Under the provisions of section 713, L. O. L., no other evidence is admissible to declare the terms of the contract, except the writing itself. The partners had a right to contract as they chose concerning the assets of their own firm. It is true enough, as argued by the plaintiff, they could have disposed of the

personality of the concern by oral agreement, and have fastened upon it a trust in favor of any one they chose to mention. But although it is competent to create a trust in chattels by parol, yet it is equally true that when parties have reduced their contract to writing, even about a matter that might have been left to recollection, that instrument is the exclusive standard to which their obligation must be referred. Taken altogether, the contracts already mentioned constitute a complete disposition of all the assets of the firm in detail. They are binding not only upon the parties themselves, but also upon those who claim under them. The writings left nothing to determine respecting the stock in question. All the shares were finally and effectively disposed of, nothing remaining to be done. In other words, the contract was complete within itself about all such matters. Therefore it cannot be varied by parol testimony. The case is essentially controlled by Oregon Mill Co. v. Kirkpatrick, 66 Or. 21, 133 Pac. 69, where a similar question was involved. In brief, unless Muir was privy to the contracts involving disposition of the shares in question he cannot claim the benefit of them. On the other hand if he was privy to them, he must take them as he found them. In them, however, as before stated, there is no provision for his benefit.

The principle is stated thus by Mr. Chief Justice Moore in Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523:

"The rule that an instrument in writing cannot be contradicted or varied by parol evidence applies only between the parties and their privies, and cannot be invoked in controversies between third parties and any of the parties to the contract."

In that case a son had executed to his mother a bill of sale of a stock of goods in his possession absolute on its face, but in reality as a mortgage to secure her for moneys which she had advanced to him. The plaintiff, claiming that the son in control of the business was her agent, sued her for the price of certain goods delivered to him and which he had included in the bill of sale. The paper was offered to prove her absolute ownership of the stock of goods. This document was thus drawn in question collaterally between parties, one of whom was a stranger to it, and it was held that she might show the real object of the contract as against the stranger. In such cases as the American Contract Co. v. Bullen Bridge Co., 29 Or. 549, 46 Pac. 138, only the rate of payment and quality of the property to be delivered was specified in the offer and acceptance of the parties, nothing being said about the quantity to be furnished. It is plain in such a case that not all the contract is included in the writing, and that the remainder of the terms may be proven by parol. In the instant case, however, the contracts are com-

plete in themselves, leaving nothing more to be said.

[5] The plaintiff cannot import into them any additional stipulation inuring to her benefit on the pretense that she is merely inquiring into the consideration. The provisions of the agreements constituting the consideration are contractual in their nature, and not merely monetary. Within the meaning of Sutherland v. Bloomer, 50 Or. 398, 93 Pac. 185:

"The consideration specified in the written contract consists of certain acts to be performed, and the authorities are practically unanimous in holding that, where the statement in the written instrument as to the consideration is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to perform certain acts, it cannot be changed or modified by parol or extrinsic evidence."

All the assignments of error upon which the plaintiff relies are bottomed upon an effort to go behind the written contract of dissolution and prove by oral testimony an agreement for the benefit of the plaintiff's decedent. They must all yield to the rule declared by section 713, L. O. L., and cannot avail the plaintiff at this juncture. The judgment of the circuit court was right, and must be affirmed.

MOORE, C. J., and HARRIS, J., concur.
BEAN, J., dissents.

(79 Or. 38)

CITY OF PORTLAND et al. v. AMERICAN SURETY CO. OF NEW YORK et al.

(Supreme Court of Oregon. Jan. 18, 1916.)

1. COSTS \S 13 — EQUITY PROCEEDING — DISCRETION.

In an equitable proceeding the allowance of costs and disbursements rests in the discretion of the court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 21, 25; Dec. Dig. \S 13.]

2. APPEAL AND ERROR \S 323 — MATERIALMEN — ENFORCING CLAIMS — APPEAL — NECESSARY PARTY.

Where, in a suit by a materialman against a contractor and his surety other subcontractors were made parties so as to determine their participation in the unpaid portion of the contract price, one subcontractor was denied participation and appealed, the other subcontractor defendants were necessary and proper parties to the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1796, 1798-1806; Dec. Dig. \S 323.]

3. COSTS \S 230 — PREVAILING PARTY — SEVERAL CLAIMANTS — APPEAL.

Where in such appeal appellant obtained a reversal, with costs against the contractor's surety, the other defendant subcontractors will not be awarded costs against appellant on motion therefor, since, in being allowed participation, he was a prevailing party against them to that extent.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 869-876; Dec. Dig. \S 230.]

4. COSTS \Leftrightarrow 240—SEVERAL CLAIMANTS—ADVERSE POSITION—APPEAL.

Neither will they be awarded costs against the contractor's surety, since as between them and such surety there was no dispute.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 922-926; Dec. Dig. \Leftrightarrow 240.]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by the City of Portland, on the relation of the Van Emon Elevator Company, and the Van Emon Elevator Company, against the American Surety Company of New York and others, Title Guaranty & Surety Company and others, and the contractor for whom they were surety, to recover for materials furnished in the erection of a building. The Western Electric Company and others were joined as materialmen and subcontractors for the purpose of determining and adjusting their rights of participation in the unpaid balance of the contract price. From a decree of the circuit court denying it participation until the claims of the other materialmen were satisfied, the Western Electric Company appealed, securing a reversal on that point. On motion by defendant Westinghouse Pacific Coast Brake Company to modify the decree, so as to allow it costs against appellant, Western Electric Company, and respondent Title Guaranty & Surety Company. Motion overruled.

See, also, 153 Pac. 788.

Moser & McCue and Wm. A. Williams, all of Portland, for appellant. W. P. La Roche, City Atty., for respondent city of Portland. Reed & Bell, of Portland, for respondent Van Emon Elevator Co. Kollock & Zollinger, of Portland, for respondent Title Guaranty & Surety Co. Chas. J. Schnabel and J. B. Ofner, both of Portland, for Westinghouse Pacific Coast Brake Co. J. A. Beckwith, of Portland, for A. G. Electric & Manufacturing Co.

BURNETT, J. Under a clause of the charter of the city of Portland the relator instituted a suit against a contractor for the erection of a city building and his surety to recover for materials furnished by it and incorporated in the structure. Other materialmen and subcontractors were made defendants, so that, among other things, their rights to participate in the balance of the contract price remaining unpaid and in possession of the city might be determined and adjusted. The circuit court denied relief to the Western Electric Company, a defendant materialman, as against the contractor's surety, the Title Guaranty & Surety Company, and postponed its participation in the city fund until all

other claimants were satisfied therefrom. The Western Electric Company appealed, serving notice on all other parties to the suit, secured a reversal of the decree of the circuit court and established its right to participate in the balance unpaid of the contract price and to recover from the contractor's surety. The decree of this court awarded costs and disbursements in favor of the Western Electric Company against the Title Guaranty & Surety Company, but denied such indemnity to all other parties. The defendant Westinghouse Pacific Coast Brake Company now moves for a modification of the decree so as to allow it costs and disbursements against the appellant, Western Electric Company, and the Title Guaranty & Surety Company.

[1] Let it first be set down that in equitable proceedings the allowance of costs and disbursements rests in the discretion of the court.

[2-4] As influencing the exercise of this prerogative in this instance, it will be observed that the decree of the circuit court in favor of all the claimants except the appellant Western Electric Company excluded the latter from participation in the city fund until the claims of the former were satisfied. In this court this preference was overturned, and the appellant was admitted to share in the fund like all other claimants. They were proper and necessary parties to the appeal, and the appellant prevailed against them in that respect. This is a sufficient reason for denying any of them costs or disbursements against the appellant. It might properly have been ground for awarding costs against them. There was no dispute in this court between them and the Title Guaranty & Surety Company; hence no equitable ground exists here for giving any of them costs or disbursements against it.

The principal dispute before us was between the Title Company and the Western Company wherein the latter contended for the allowance of its claim against the former which had been wholly denied by the circuit court. Having succeeded in establishing its entire demand against the Title Company, it would ill accord with equitable considerations, in the absence of any unusually different conditions, to deny costs in favor of the appellant and against the Title Company. In the adjustment of costs in this court the other claimants fared quite as well as they had any reason to expect and must be content.

The motion is overruled.

MOORE, C. J., and McBRIDE and BENSON, JJ., concur.

(89 Wash. 104)

CARKONEN v. COLUMBIA & P. S. R. CO.
(No. 12325.)

(Supreme Court of Washington. Jan. 7, 1916.)

Department 1. Appeal from Superior Court, King County; John E. Humphries, Judge.

On motion for rehearing. Rehearing denied.

For former opinion, see 150 Pac. 1162.

Brady & Rummens, of Seattle, for appellant. Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, for respondent.

PER CURIAM. Respondent has applied for rehearing en banc, and urges, among other things, that the motion for judgment notwithstanding the verdict was granted before the decision of this court in *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490, which was decided August 14, 1914, while the notice of appeal herein was filed June 15, 1914. We make this additional statement in justice to counsel for respondent, that it may not appear that the making of the motion at such time was a careless oversight of a question of practice on the part of counsel.

It is also urged that we should have followed the precedents set in *Pierce v. Seattle Electric Co.*, 83 Wash. 141, 145 Pac. 228, and *Boyce v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 82 Wash. 204, 144 Pac. 27, decided after the *Forsyth* Case, in which cases we for the time being suspended the operation of the rule established in the *Forsyth* Case, because of the fact that the practice condemned by the *Forsyth* decision had not always been understood, and the cases cited were pending when the *Forsyth* Case was decided. Such was true in this case also. But the great number of such cases coming here has impelled us to adhere to the rule established by the *Forsyth* Case; otherwise the continual exceptions would require endless distinguishing decisions, or result only in additional confusion. Hence we have decided to hereafter in all cases hold to the rule adopted in the *Forsyth* Case.

(89 Wash. 141)

PETERSON et al. v. DENNY-RENTON CLAY & COAL CO. (No. 12518.)

(Supreme Court of Washington. Jan. 8, 1916.)

1. **EVIDENCE** \Leftarrow 442—**PAROL EVIDENCE—CONTRACT OF SALE.**

Where a shipping order for brick was upon its face a complete contract between the parties, covering all the terms of the order, the buyer's offer of parol evidence to prove a different contract, not tending to establish fraud in the procurement of the shipping order but only to modify it, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. \Leftarrow 442.]2. **SALES** \Leftarrow 181—**ACTION FOR PRICE—EVIDENCE.**

In an action for the price of brick sold under a shipping order constituting on its face a

complete contract between the parties and specifying highway paving brick at \$17.85 per thousand net, evidence for the buyer that the brick actually delivered to him was No. 2 brick at \$13.75 per thousand was admissible, as the buyer in a suit for the purchase price of goods may show that they were not what he contracted for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473-491; Dec. Dig. \Leftarrow 181.]3. **SALES** \Leftarrow 285—**BREACH OF WARRANTY—ACCEPTANCE—RIGHT TO DAMAGES.**

In a seller's action for the price of brick sold and delivered as provided by a shipping order constituting a complete contract between the parties warranting that the brick would be highway paving brick, the buyer, who had accepted and used the brick delivered without notifying the seller, before the action, that they were of a quality inferior to that contracted for, and who was not himself seeking to rescind the contract, was entitled to set off the difference in price between the quality warranted and the quality actually received.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 806-808, 810; Dec. Dig. \Leftarrow 285.]4. **SALES** \Leftarrow 179—**RIGHT TO INSPECTION—DAMAGES FOR INFERIOR QUALITY.**

Where goods are sold, by contract providing for an inspection, but containing no warranty, the buyer's right to recover damages for defects, etc., does not survive his acceptance after opportunity to discover such defects, unless notice is given to the seller, or the buyer returns or offers to return the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 456-468; Dec. Dig. \Leftarrow 179.]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by the National Surety Company against Andrew Peterson, the Denny-Renton Clay & Coal Company, and others, with cross-action by the Denny-Renton Clay & Coal Company. Judgment for the Denny-Renton Clay & Coal Company against Peterson and the National Surety Company, and they appeal. Reversed and remanded.

John W. Roberts and George L. Spirk, both of Seattle, for appellants. Ballinger, Battle, Hulbert & Shorts, of Seattle, for respondent.

MORRIS, C. J. This is an appeal from a judgment in favor of the Denny-Renton Clay & Coal Company, respondent herein, against Andrew Peterson for the price of a quantity of paving brick, bought by Peterson from the company and used by him in building a portion of state highway No. 4, north of the city of Seattle, for the construction of which he held a contract with King county.

After the contract was completed a number of liens were filed against the work, and the National Surety Company, surety on Peterson's bond to the county, instituted this action to have determined the rights of the various lien claimants to the funds in the hands of the county commissioners due to Peterson. The respondent was, among others, named as defendant, and appeared by answer and cross-complaint, seeking to

recover a balance of \$40,836.35 claimed to be due on the brick purchased from it by Peterson. Peterson admitted a balance of \$27,152.58 due the respondent, and made tender of that amount, but denied the balance claimed by the company. To prove the contract of sale the company introduced over objection a shipping order which reads as follows:

fused, whereupon Peterson sought to show the circumstances under which the shipping order was signed, to establish that it was not a complete contract, but only an order to ship brick previously contracted for. This offer was likewise refused. The ruling of the trial court in excluding this evidence is assigned as error. The shipping order was upon its face a complete contract be-

DENNY-RENTON CLAY & COAL CO.

Shipping Order No. Renton 1004

Date Sept. 20, 1913.

Ship to Andrew Peterson at as instructed

Route as instructed

Ship when Hold for shipping instructions

Charge to Andrew Peterson

Address

Railway Exchange Building,
L. I. D. No. Seattle, Wash.

Location of Work

North Trunk Road

Permanent Highway No. 4

Owner's Name

Address

Sold F. O. B. cars Renton factory

Freight allowed to

Purchaser's Order No.

Req. No.

Frt. Rate

Minimum Weight 60,000 Lbs.

Pieces

Articles

Approx.

4,000,000 Highway Paving Brick

Note by G. W. P. (Will want brick in about 3 weeks from date and then fully 40,000 per day steady shipment. Will advise several days in advance.)

Original Credit O. K. T. W. L.

Notice to Factory: If any portion of this order cannot be filled as specified, advise this office in writing immediately on receipt of order.

Price Seventeen dollars & twenty-five cents per thousand Net.

(\$17.25)

Terms. Net cash on or before the tenth of the month following date of shipment.

Purchaser Please Note: We hand you herewith duplicate copies of your valued order as same has been entered for delivery by us. If same is correct, please sign and return original to us and keep duplicate for your records. If not correct, please advise stating wherein an error appears.

Note: All contracts, sales and deliveries are contingent upon delays caused by fire, strikes, accidents, floods, carriers and other conditions beyond our control.

Date Sept. 22, 1913.

Denny-Renton Clay & Coal Co.
[Sign here.] Andrew Peterson.

Peterson sought to show that this shipping order was not his contract with the brick company, but that he had contracted with it for a quality of brick known as No. 2, at a price of \$13.75 per M., and had actually received and used that kind of brick in the construction of the road. All his offers of such testimony were refused by the trial court, on the ground that the shipping order was a written agreement constituting the contract of purchase between the parties, and oral testimony could not be received to vary or contradict the terms thereof. At the conclusion of the testimony and offers to prove each party challenged the sufficiency of the evidence to sustain a judgment for the adverse party, and moved for judgment. The trial court thereupon took the case from the jury and entered judgment for the respondent and against both National Surety Company and Peterson.

[1] By his offers of testimony Peterson sought to show that prior to the signing of the shipping order he had entered into a written contract with the respondent for the purchase of No. 2 brick. This contract was not produced at the trial; counsel stating that it had been lost. This offer was re-

tween the parties covering all the terms of the order, and, as the offer of testimony to prove a different contract did not tend to establish fraud in the procurement of the shipping order, but only to modify it by parol testimony, the trial court held correctly that the evidence was inadmissible.

[2] A price list of the respondent was introduced in evidence showing the price of No. 2 brick as \$13.75 per thousand, and the amount tendered in court by Peterson would be the correct amount due the respondent for the brick delivered if it was No. 2 brick. Peterson made offers to prove by numerous witnesses that the brick actually delivered to him by respondent was No. 2 brick, and not highway paving brick, as provided for in the shipping order. The trial court refused this offer, and this, we think, was error. It would seem a travesty on justice to hold that a party could not show in a suit to recover the purchase price that the article delivered was not the article contracted for, but one of inferior quality and less value. It would be taking away a defense of litigants that has never been questioned by the courts. The authorities are united in holding that a vendee, when

sued for the purchase price of goods, may show that the goods were not what he contracted for.

In *Smith v. Pickands*, 148 Mich. 558, 112 N. W. 122, the court held that the burden of proof was on the vendee to show that the goods delivered were not as specified in the contract after an acceptance by the purchaser.

In *Home Ice Factory v. Howells Mining Co.*, 157 Ala. 603, 48 South. 117, there was a contract by the terms of which the vendor contracted to ship the vendee the best quality of coal, and the vendee sought to escape liability on the purchase price on the ground that the coal received was of an inferior grade, and the court there held that the quality of the coal was an issue in the case, and evidence was taken on that question.

In *Neck v. Marquette Cement Mfg. Co.*, 153 Wis. 298, 148 N. W. 869, a quantity of cement was sold under a written contract which provided that the cement should conform to standard specifications for Portland cement adopted by the American Society for testing materials with methods of testing recommended by the American Society of Engineers. Evidence was admitted showing that the cement was inferior by the use of another test, and, in answer to the vendor's contention that the only way the cement could be shown inferior in quality was by the test provided for in the contract, the court said:

"In the absence of a provision * * * making the test the sole evidence of the inferiority of the cement, the fact might be established by other evidence."

Mette & Kanne Distilling Co. v. Lowrey, 39 Mont. 124, 101 Pac. 966, holds that, in an action by a vendor to recover the purchase price of chattels sold under a contract, the burden of proof is on the vendor to show a delivery of the goods described in the contract, thus recognizing the rule that the vendee can show that the goods delivered were not the goods described in the contract.

[3] Respondent next contends that, because Peterson accepted and used the brick without notifying it, until this action was instituted, that they were of a quality inferior to that contracted for, he cannot now be heard to say that the bricks were inferior to those described in the contract. In discussing the rules applicable to this contention, it will be well to keep in mind that respondent is attempting to recover the purchase price of highway paving brick as provided for in the contract of purchase; there thus being an express warranty that the brick to be delivered would be highway paving brick. Peterson is not seeking to rescind the contract nor to avoid liability for the value of the brick, but is attempting to set off the difference in price between the brick described in the contract and the brick he claimed to have received.

In *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. Rep. 890, this court said:

"It is undoubtedly true that, if the brick were defective, and appellant was silent, and did not give notice or offer to return them within a reasonable time after discovering defects, the right to rescind the sale was thereby waived. But the right to recover damages on account of defective quality was in no wise affected."

Again, in *Dickinson Fire, etc., Co. v. Crowe & Co.*, 63 Wash. 550, 115 Pac. 1087, we said:

"If we should concede that there was a breach of warranty, the rule is that a failure to give notice or to offer to return the property within a reasonable time after discovering the defects operates as a waiver of the right to rescind, and leaves the purchaser only the right to recover or offset damages to the extent of the diminished value of the article."

In *Dayton v. Hooglund*, 39 Ohio St. 671, the court held that:

"In a suit for the price of a lot of iron manufactured by the plaintiff for the defendant, the defendant, in case there is a breach of warranty as to the quality of the iron, may recoup for such damages as he has sustained, although he has used the iron without offering to return it."

Other cases adhering to this rule are *Stark Bros. Nurseries & Orchards Co. v. Mayhew*, 160 Mo. App. 60, 141 S. W. 433; *Grisinger v. Hubbard*, 21 Idaho, 469, 122 Pac. 853, Ann. Cas. 1913E, 87; *J. Rosenbaum Grain Co. v. Pond Creek Mill & Elevator Co.*, 22 Okl. 555, 98 Pac. 331; *Graff v. Osborne*, 56 Kan. 162, 42 Pac. 704.

The case of *Williams & Co. v. Miller & Co.*, 1 Wash. T. 88, cited by respondent, does seem to support its contention that the acceptance and use of goods estops the vendee from showing that they were not what he contracted for. But from the facts in that case it does not appear whether or not there was any warranty of the goods sold, or whether there was any provision in the contract for inspection, either of which conditions would change the rule; and, if that case could be construed as supporting respondent's contention, it has been impliedly overruled by the *Tacoma Coal Co.* and *Dickinson Cases*, supra, in so far as it attempts to hold that a vendee is liable for the contract price of goods when he has accepted goods inferior to those described in the contract.

The case of *Childs Lumber Co. v. Page*, 28 Wash. 128, 68 Pac. 373, holds that, where a party does not object to materials furnished for the construction of a building, but allows them to be used in the building, he cannot thereafter refuse to pay for them on the ground that they were inferior. But the contract in that case provided for an inspection on the part of the vendee.

[4] There is a well-defined distinction in the rule where an inspection or test is provided for in the contract, which was noticed by us in *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 140 Pac. 381, L. R. A. 1915B, 1131. In that case we said in part:

"The authorities cited by the respondent are clearly distinguishable from the case here. In *Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27

Pac. 454, 26 Am. St. Rep. 890, there was involved the sale of bricks by the manufacturer for the construction of coke ovens. The sale was not expressly subject to inspection or test, and the order for the bricks negated any implication to that effect. * * * While recognizing the rule, as sustained by the New York and Wisconsin authorities, that, in the absence of a warranty and a breach, the vendee's right to recover damages does not survive the acceptance of the property after an opportunity to discover defects, unless notice has been given to the vendor or the vendee returns or offers to return the property, the court points out the fact, which we have also noted, that this rule does not apply in cases of express warranty of quality."

Schopp v. Taft, 106 Iowa, 612, 76 N. W. 843, cited by respondent, sustains this doctrine, and holds that, in the absence of a warranty, when goods are tendered by the seller in performance of an executory contract of sale, and accepted by the buyer after an opportunity of inspection, without objection, the purchaser is liable for the price agreed upon.

In Yelser v. Russell & Co. (Ky.) 83 S. W. 574, relied upon by respondent, the court said:

"There is no better settled principle of law than that, if a vendee accepts goods delivered under a warranty of quality, or retains them after the discovery that they are not the articles purchased, and fails to give notice within a reasonable time that he declines to receive them, because not in conformity with the contract, or exercises ownership over them, he cannot thereafter refuse to pay for them."

While this case holds that the vendee will have to pay for the goods, it does not hold that he has to pay the contract price, or that he cannot recoup damages for the difference between the contract price and the price of the goods actually delivered. In fact, in this very case the vendee did file a counterclaim for damages accruing from the failure of the vendor to deliver the goods he contracted to deliver, and a judgment for \$40 was entered in favor of the vendee, and the vendor took nothing. The right of a vendee when sued for the purchase price of goods to show that the goods received were not as contracted for is well established. Tacoma Coal Co. v. Bradley, supra, and Dickinson Fire, etc., Co. v. Crowe & Co., supra.

We conclude, therefore, that it was error to exclude evidence of the kind of brick actually delivered by the respondent, and for this reason the judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion.

FULLERTON, MAIN, and ELLIS, JJ., concur.

(89 Wash. 92)

SKOUG v. DOWNS et al. (No. 12806.)
(Supreme Court of Washington. Jan. 6, 1916.)
APPEAL AND ERROR ⇐997, 1003—REVIEW—
VERDICT—DIRECTION OF VERDICT.

Where there is testimony to sustain the verdict, the appellate court will not inquire into the preponderance of the evidence or interfere

with the judgment of the trial court in denying motions for directed verdict, etc.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8938-3943, 4023, 4024; Dec. Dig. ⇐997, 1003.]

Department 1. Appeal from Superior Court, Spokane County; H. L. Kennan, Judge.

Action by E. M. Skoug against John M. Downs and another. From a judgment for plaintiff, defendants appeal. Affirmed.

D. R. Glasgow, of Spokane, for appellants. Zent, Powell & Redfield, of Spokane, for respondent.

PER CURIAM. No question of law is involved in this case. It was tried by a jury. There is testimony to sustain the verdict. In such cases this court will not inquire into the preponderance of the evidence, interfere with the verdict, or with the judgment of the trial court in denying motions for directed verdict, judgment non obstante veredicto, and for a new trial. We interfere in jury cases only when it can be said that there are no facts which will support the legal conclusion that a judgment should be rendered.

A part of a real estate commission which respondent claims and which is the foundation of his suit was taken in the form of a promissory note which was discounted by appellants. It is contended that in any event respondent's judgment must be diminished to the extent of the discount. Whether respondent was bound to lose the discount or any part of it was for the jury.

The judgment is affirmed.

(89 Wash. 55)

SUMNER v. GRAYS HARBOR RY. &
LIGHT CO. (No. 12913.)

(Supreme Court of Washington. Jan. 4, 1916.)

1. CARRIERS ⇐318—SETTING DOWN PASSENGERS—NEGLIGENCE.

Evidence, in a passenger's action for personal injury while alighting from defendant's street car, apart from any negligence of the conductor in failing to warn her that the car was still in motion, held not to show any negligence on the part of the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. ⇐318.]

2. CARRIERS ⇐303—SETTING DOWN PASSENGERS—ANNOUNCEMENT OF STREET.

A street car conductor's announcement of a stopping place, is not of itself an invitation to a passenger to alight before the car comes to a full stop and does not show that the conductor intended or had any reason to believe that the passenger would alight before the car stopped.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. ⇐303.]

3. CARRIERS ⇐303—SETTING DOWN PASSENGERS—WARNING OF CAR'S MOTION.

Where a passenger, after the announcement of her stopping place, went to the platform, stood in the doorway, and, after directing the conductor's attention to her suit case, which he

picked up, stepped from the car while it was in motion, slowly coming to a stop, there was no negligence on the part of the conductor in failing to warn her that the car was in motion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226-1232, 1234-1240, 1243; Dec. Dig. § 308.]

Department 2. Appeal from Superior Court, Grays Harbor County; Mason Irwin, Judge.

Action by Ethyl Sumner against Grays Harbor Railway & Light Company. Judgment for plaintiff, and defendant appeals. Reversed, and case dismissed.

Bridges & Bruener, of Aberdeen, for appellant. F. W. Loomis, of Aberdeen, for respondent.

PARKER, J. The plaintiff seeks recovery of damages which she claims as the result of personal injuries caused by the negligence of the defendant's servant while she was alighting from one of its street cars. Trial before the court, and a jury resulted in verdict and judgment in favor of the plaintiff in the sum of \$208.36, from which the defendant has appealed. The principal contention of counsel for appellant is that the trial court erred in denying their motion for directed verdict in appellant's favor, made at the close of the evidence for the plaintiff and also at the close of all the evidence.

At about 9 o'clock on the evening of November 11, 1914, the respondent was a passenger on one of appellant's street cars in Aberdeen. She was on her way home, expecting to leave the car at Washington street, at which point she usually left the car when returning to her home from the business portion of the city. It will be conducive to accuracy to tell the story of the incidents immediately preceding the accident in respondent's own language. She was asked and answered in her testimony as follows:

"Q. When you got on the Heron street car did you tell the conductor where you wanted to go? A. Not when I got on. Q. Did you later? A. I think when he called Washington street I just nodded my head at him. Q. Always got off at Washington street? A. While I was living in that part of town I always got off at Washington street. Q. How did you know it was your destination? A. He called Washington street. Q. Where was he when he called the street? A. If I remember right, I think he was about in the middle of the car. Q. When did you get up? A. When I thought the car was about where I would get off; slacking up about enough. Q. Did the conductor go out ahead of you or behind you? A. He went out, and then I got up and went out after him. Q. Where was the conductor when you went out? A. He was in the vestibule. Q. What direction was he facing? Toward you or facing some other? A. He had turned around to pick up my suit case, and he would really be facing—I can't tell the directions in Aberdeen; facing towards the brewery out that door of the car. Q. Was he picking up your suit case as you came out of the car? A. As I stood in the door. Q. As you came up to the door, what direction was he facing? A. Facing me. Q. Did you say anything to him? A. I told him that was my

suit case. Q. Where was the suit case? A. Setting in the vestibule. Q. Where with reference to his position? A. Sitting right at the back up as close to the rear of the car as could be. Q. Sitting behind him or beside him or in front of him? A. I think it would be at the side of him. Q. And then what did you do? A. The last I can remember I went and took hold of the handle on the door to step out, and that is the last I can remember then. Q. Did he say anything to you about the car not having stopped? A. I didn't hear him. Q. Why did you get off the car when you did? A. Well, I thought the car had stopped, and I was supposed to get off when the car stopped. Q. Could you see that it had not stopped? A. No; it had stopped apparently to me. The fog was so thick—I didn't feel any motion of the car. Q. Was the fog any thicker than usual on that night? A. Yes, sir; very thick. Q. You could see just as well as if you had been outdoors all the while? A. Well, I wasn't outside of the car when I last remember. That is, I wasn't out onto the pavement. The last I can remember is taking hold—just as I reached for the handle of the car and stepped down onto the first step. Q. Did you see anything that night? Could you see the objects on the street, or anything, that night? A. Not plain. Q. Did you wait at the vestibule for any length of time, for a moment? A. I hesitated there. I thought he would get the suit case picked up. Q. The car was still in motion at that time? A. It must have been. Q. You knew it was still going? A. Yes, while I was standing in the door. Q. You say that you stepped out and took hold of the handle of the door, was it, or of the steps? A. Just right there as you step out. Q. When did you ask the conductor for your suit case? A. Just as I stood in the vestibule door. As I went out I looked where it was left, and it was gone. Just then I said to him: 'That is my suit case.' Q. As the conductor turned around in a southerly direction over towards the brewery to get your grip, you, thinking the car had stopped, stepped off the car? A. I don't know whether I stepped off or fell off. The last I can remember is when I took hold of the handle. Q. And the conductor at that time was just turning around getting the suit case in the back of the vestibule? A. Yes, sir. Q. You say you don't remember after you stepped off, fell off, or whatever happened that night. You say it was still in motion? A. I must have been, but I thought it was not. I didn't remember anything until I got in my house."

[1] Other evidence shows that respondent stepped or fell to the ground while the car was moving slowly, and that it thereafter moved some 10 or 12 feet before coming to a full stop. It also appears that the car was possibly a few feet beyond the usual stopping place when it came to rest. It does not appear, however, that there was any difference in the surface of the street at any point alongside of the track at or between the usual stopping place of the car and the place where it actually did stop, assuming that it really passed the usual stopping place. So, so far as the surface of the street is concerned one place was as safe to alight as another within these limits. There were no gates or doors at the sides of the vestibules of the car for the conductor to open or close, as in some cars. There was no jerk or sudden acceleration of speed of the car which might throw one off their balance or furnish the least cause for their falling. The car was gently

coming to a stop. There is nothing in the evidence indicating that respondent was not in full possession of all her faculties, both mental and physical. She was of mature years. This version of the facts we think is as favorable to respondent as the evidence will admit of.

[2, 3] It seems clear to us that there is no possible ground of negligence on the part of appellant upon which the respondent can recover, except it might be said that the conductor was negligent in failing to warn her of the fact that the car had not stopped when she stepped off. Manifestly, there was no affirmative act of negligence whatever committed by appellant, or any of its servants, contributing to respondent's injuries. Counsel for respondent call our attention to a number of decisions holding that it is not contributory negligence, as a matter of law, on the part of a passenger, when a station or stopping place is announced, for him to get up and proceed to the platform with a view of alighting. These decisions are of no aid here. Other decisions render it plain that such an announcement is not of itself an invitation to a passenger to alight before the train or car comes to a full stop. So the fact that the conductor announced Washington street as the stopping place, then being approached, and that respondent in response thereto got up and proceeded to the platform, argues little or nothing here. Such facts do not show an invitation to respondent to alight before the car came to rest, nor do they show that the conductor had any such intent, nor do they argue that the conductor had any reason to believe that the respondent would attempt to alight before the car came to rest. According to the respondent's own testimony, she was standing in the doorway, and directed the conductor's attention away from her to her suit case, and saw him partly turn to pick it up immediately preceding her stepping off the car. The real question is, conceding all these facts in the light most favorable to respondent's contention, Was the conductor negligent in failing to warn respondent that the car was in motion? We think it must be decided as a matter of law that he was not negligent in that respect.

Of the decisions of this court relied upon by counsel for respondent, our attention is called to *Brown v. Seattle City Ry. Co.*, 18 Wash. 465, 47 Pac. 890, and *Ranous v. Seattle Electric Co.*, 47 Wash. 544, 92 Pac. 382. In the *Brown Case* the car was standing still when the plaintiff arose to go out, and suddenly, when she was stepping to the ground, the car started, throwing her to the ground and injuring her. In the *Ranous Case* while the plaintiff was getting ready to step off the car, it apparently being about to come to a stop, its speed was suddenly accelerated, and the lurch caused by such acceleration threw plaintiff onto the street. In these cases, therefore, there was manifestly a positive af-

firmative negligent act on the part of the company contributing to the injuries for which damages were claimed. We have no such condition here.

In *Morris v. I. C. R. R. Co.*, 127 La. 445, 53 South. 698, 31 L. R. A. (N. S.) 629, there were involved conditions similar to those before us. In answering contentions of substantially the same nature as here made, Chief Justice Breaux, speaking for the court, observed:

"The train was still in motion. Plaintiff testified that it was in motion, but that he was not aware of it at the time. The question arises: Did it not devolve upon him to satisfy himself before alighting that the train was standing ready to permit passengers to alight? If a passenger, who has every reasonable opportunity to assure himself that the train is at full stop, fails to make inquiry, he cannot hold others liable for damages in case he alights while it is in motion and is hurt. There were lights at the depot. Near the depot there were visible objects, although it was in the night, whereby it was possible to satisfy himself that the train was still moving. Besides, the motion of the car is of itself a warning that the train is still moving and has not come to a full stop. Plaintiff's position is that there was negligence on the part of the flagman, who should have warned him of the danger and should have notified him not to attempt to alight. Unquestionably that would have been a very proper act on the part of the flagman. The question is whether the company is liable for the failure of its flagman to thus notify and warn the plaintiff. That is not the trend of the decisions. * * * The flagman had seen plaintiff pass him. He was standing behind him on the steps. He, the testimony states, had no reason to infer that plaintiff would seek to alight at that particular time. It happens (it is within common knowledge) that passengers frequently step down to that step, while on their way to alight, without attempting to step off before the car has stopped. We are not led to infer from the testimony that the flagman had invited the passenger to step off. It is true, as before stated, that at about the time the whistle sounded for Kentwood, he announced that the next stop was that place. There is not in this announcement an invitation to alight before the train has stopped. The following is from the text of *Thompson on Negligence*, vol. 3 (2d Ed.) § 2345: 'Ordinarily a railway carrier of passengers is under no duty to assist adult passengers who are in apparent good health and possession of their faculties to get on and off its vehicles or to find seats for them; but its duty is limited to giving them a reasonable time and opportunity to do so without assistance, and this is especially true where there are no special sources of danger.'

In *Armstrong v. Portland Ry. Co.*, 52 Or. 437, 97 Pac. 715, a situation quite similar to this was involved. The plaintiff, arising from her seat and going to the platform upon an announcement of the street she expected to alight at, stepped off the car before it came to rest, there being no invitation for her to do so. Holding that there was no negligence upon the part of the conductor, Chief Justice Bean, speaking for the court, observed:

"It clearly and undisputably shows that there was no negligence on the part of defendant, and that plaintiff was injured because she attempted to alight from a moving car, without any necessity, or seeming necessity, for so doing, and that she was not advised or requested to do so

by defendant's servants. This was negligence of such an obvious character that the court was justified in directing a verdict against her. 3 Thompson on Negligence, § 3013.

"It is argued, however, that defendant is liable because the conductor did not notify plaintiff that the car was still in motion and warn her against the danger of her contemplated act; but the evidence does not show that the conductor knew, or had any reason to believe, that she was intending to get off the car until it had stopped. Plaintiff was of mature years and in possession of all her faculties, and we are not advised of any rule of law making it negligence for the conductor of a street car, under such circumstances, not to warn such a person of the danger to be apprehended in alighting from a moving car. The facts do not bring the case within the rule announced in *Smitson v. S. P. Ry. Co.*, 37 Or. 74, 60 Pac. 907. There the injured party was a passenger on a steam railway. As the train approached her destination it stopped, and she was invited by one of the company's servants to alight but, as she was in the act of doing so, the train suddenly started, injuring her. The facts, therefore, are entirely different from those shown in the present case. Here there was no invitation or request to plaintiff, from any employé or agent of defendant, to alight from the car, and they had no reason for supposing or believing that she would attempt to do so while the car was in motion. There is therefore no ground upon which the defendant can be charged with negligence by reason of the failure of the conductor to notify plaintiff that the car was still in motion, or that she was liable to be injured if she attempted to alight before it stopped."

These views find support in *Illinois Central R. R. Co. v. Massey*, 97 Miss. 794, 53 South. 385, and *Burton v. Wichita B. & Light Co.*, 89 Kan. 611, 132 Pac. 183.

The decision principally relied upon by counsel for respondent, and which probably lends as much support thereto as any in the books, is that of *Blue Grass Traction Co. v. Skillman* (Ky.) 102 S. W. 809. That case is possibly distinguishable from the one before us, in that the conductor could plainly see that the plaintiff was going to get off while the car was in motion. If not so distinguishable, we are inclined to view that decision as not being in harmony with the weight of authority. However, the Kentucky court in the later case of *Louisville Ry. Co. v. Furnas*, 155 Ky. 470, 159 S. W. 994, expressed views apparently quite in harmony with the decisions we have above noticed.

In *Elwood v. Connecticut Ry. & Lighting Co.*, 77 Conn. 145, 58 Atl. 751, 1 Ann. Cas. 779, we have a decision which it may be said is not in harmony with our conclusion here reached. That decision, however, seems to proceed upon the theory that the facts showed an invitation on the part of the conductor to the plaintiff to alight while the car was in motion.

In *Cooper v. Georgia C. & N. Ry. Co.*, 61 S. C. 345, 39 S. E. 543, we have a condition where there was an acceleration of the speed of the train, instead of its coming to a stop, as it was apparently doing at the time the plaintiff stepped off. The facts of that case may also be well construed as an invitation

on the part of the railway company's servant to the plaintiff to step off.

In *Long v. Red River T. & S. Ry. Co.* (Tex. Civ. App.) 85 S. W. 1048, there were also involved facts which might well be construed as an invitation to the plaintiff to get off the moving train.

We are of the opinion that it must be held as a matter of law that appellant's conductor was not guilty of negligence in failing to notify respondent that the car was still in motion when she stepped off.

The judgment is reversed, and the case dismissed.

HOLCOMB, MOUNT, and MAIN, JJ., concur.

(89 Wash. 172)

In re BUCHANAN'S ESTATE. (No. 12925.) (Supreme Court of Washington. Jan. 10, 1916.)

HUSBAND AND WIFE — 257 — COMMUNITY PROPERTY—CORPORATE STOCK.

Deceased, in contemplation of their marriage, and her husband contributed in the proportion of five-ninths and four-ninths, respectively, to the amount required for the purchase of stock in a lumber company in the name of the husband. Thereafter for several years, and until the death of deceased, the husband gave his time to developing the business of the corporation, drawing a salary therefor, and mainly as the result of his efforts the value of the stock increased manifold. At the time of the death of deceased one-half of the corporate stock of the corporation stood in the name of the husband, and the dividends paid on the stock had been so intermingled that no part thereof could be said to be the separate property of either the husband or the wife. It appeared that the growth of the business and increase in value of the original investment resulted, not as a natural increase apart from the efforts of the husband while a member of the community, but resulted from his personal efforts during his married life in the performance of which he was the servant of the community. Held, that the gains and profits produced by the personal efforts of the husband, though added to in a measure by the original investment, became community property, and that, though the funds used in purchasing the stock were separate property, yet, since they had lost their identity and become intermingled with community property, the entire interest in the corporation which stood in the name of the husband was community property, and should be administered as such.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 904-908, 910; Dec. Dig. — 257.]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Proceeding in the administration of the estate of Sarah A. Buchanan, deceased, wherein Earl McCoy seeks to have brought into the estate and administered as part thereof property claimed by James Buchanan as his separate property. From judgment for Earl McCoy, James Buchanan, personally and as administrator, appeals. Affirmed.

F. D. Oakley, of Tacoma, for appellant. Burkey, O'Brien & Burkey, of Tacoma, for respondent.

PARKER, J. This is a proceeding in the administration of the estate of Sarah A. Buchanan, deceased, wherein Earl McCoy, a son and heir of deceased, seeks to have brought into the estate and administered as part thereof certain property which he claims was the community property of his deceased mother and her husband, James Buchanan, at the time of her death, which property James Buchanan claims as his separate property, and that it is therefore not subject to administration as part of the estate of the community. The relief prayed for by Earl McCoy is, in substance, that James Buchanan, who is the administrator of the estate of deceased, be required by the court to inventory this property and administer the same as the property of the community which was dissolved by the death of Sarah A. Buchanan. Issues were joined and trial had upon the merits, before the superior court without a jury, resulting in findings and judgment as prayed for by Earl McCoy, from which James Buchanan, both personally and as administrator, has appealed. The principle question, and the only one which we deem it necessary to here notice, is: Was the property the community property of deceased and James Buchanan at the time of her death?

The trial court made findings covering the facts in considerable detail. Contention is made in behalf of appellant that these findings are not in accordance with the evidence in a number of particulars. Because of the nature of the case, we have deemed it wise to look to the evidence as found in full in the statement of facts as certified by the court, rather than to the abstracts thereof prepared by respective counsel, in which they seem to be at variance. We have therefore read all of the evidence as found in the statement of facts, and are convinced therefrom that we should now take the same view of the facts as the trial court did, especially since the court's conclusions rest largely upon the oral testimony of witnesses whose credibility is involved; in other words, we cannot say that the evidence does not preponderate in favor of the court's findings. We shall not analyze the evidence here, but state the facts, in substance, as found by the trial court, and some additional facts which we think the record shows and are worthy of note. The quotations in our statement following are from the findings:

Sarah A. Buchanan was married to James Buchanan on April 15, 1901. She was then a widow, and had five children living, one of whom was Earl McCoy, the petitioner in this proceeding. "Shortly prior to her marriage to James Buchanan and in January, 1901, the deceased sold a timber claim then owned by her as her sole and separate property, and received therefor the sum of approximately \$885 over and above all sums necessary to pay incumbrances upon said property, and prior to her marriage she was the owner of the furniture in the hotel known as the Brunswick Hotel, located on East Twenty-Fifth and D streets, in the city of Tacoma. Said hotel had from 30 to 36 rooms furnished, and the furniture was worth from \$500 to \$800, and just prior to her

marriage the deceased sold the furniture; the exact amount which she received therefor being unknown to the court. Prior to his marriage to deceased James Buchanan had been a laborer working in various sawmills in the state of Washington and British Columbia for a period of about four years, and had saved but little, if any, money. James Buchanan and one Clinton McDaniel in April, 1901, executed articles of incorporation of the Puget Sound Lumber Company, being filed on April 11, 1901. On April 13, 1901, James Buchanan paid into the treasury of the said company \$600 in payment for six shares of its capital stock, and deceased and James Buchanan then went to Victoria, British Columbia, and were married on April 15, 1901, and continued to live together as husband and wife until her death. Three hundred dollars additional was paid in by James Buchanan in payment of three additional shares of stock in said company in August, 1901, and in July, 1902. James Buchanan at all times after the mill was put into operation, and until the death of his wife, Sarah A. Buchanan, devoted his entire time and attention to work in connection with the operation of said mill. Of the sum of \$900 in money paid for said stock \$500 or more of the same was paid with money furnished by the deceased, and not more than \$400 of said money was furnished by the said James Buchanan. The money furnished by the deceased and paid in payment for stock on April 13, 1901, was furnished by the deceased in contemplation of an immediate marriage with the said James Buchanan and for the purpose of helping finance the said lumber company as a community enterprise, and the remaining money was paid for the same purpose. The said lumber company was financed to a large extent by borrowed money raised from notes signed by the corporation and by the members thereof, including James Buchanan, and largely by the use of money so borrowed the original mill was practically rebuilt or changed several times, greatly increasing its value and capacity, and one time after it had been destroyed by fire it was entirely rebuilt, partly from money collected from insurance, and partly from money so borrowed. The capital stock of said company was divided into 50 shares of par value of \$100 each, and about the year 1909 16 2/3 shares had been issued and stood in the name of James Buchanan, 16 2/3 shares had been issued to and stood in the name of Wade Hampton, and 16 2/3 shares had been issued and stood in the name of E. V. Wintemote, who had purchased the stock formerly owned by Mr. Daniel, and about said time James Buchanan and Mr. Wintemote purchased the stock of Mr. Hampton for \$17,000, paying him therefor in cash out of the corporate funds, but said time Mr. Hampton delivered his certificates of stock to the officers of the company, and since said time no transfer has been made of said certificates, and at the time of the death of said deceased, and continuing to the present time, all of the outstanding stock was owned by the community composed of Mr. Buchanan and the deceased, owning one-half thereof, and Mr. Wintemote, owning the remaining one-half. Through the money borrowed on the credit of James Buchanan and the other members of the said lumber company while the deceased and James Buchanan were husband and wife, and through the work, energy, and skill and management of the said mill by the said James Buchanan and his associates during the time that Mr. Buchanan and said deceased were married, the said mill plant and equipment increased many times in value. A dividend of 30 per cent. upon the capital stock was declared in 1905, and the same, amounting to \$500, was credited to the account of James Buchanan upon the books of the company in the same account in which the salary account of Mr. Buchanan was credited,

and out of this fund the community expenses of the deceased and Mr. Buchanan were paid. Deceased and James Buchanan did not in their lifetime treat said property as the separate property of either of them, but as their community property, and, when compared to the value of said mill plant at the time of the death of deceased, the original investment in said stock was so small, and its part in creating the final result was so uncertain and insignificant, that, taken in connection with the impossibility of ascertaining its proportion in the value of the capital stock or of said mill at the time of her death, and the fact that the salary of the said James Buchanan in conducting said mill and the dividends derived from said stock were intermingled, whatever of separate funds entered into said property was so intermingled with the community property as to have lost its identity and separate character, and all of said stock and all interest in the said mill plant constituting a one-half interest therein was the community property of the said deceased and Mr. Buchanan at the time of her death."

We do not overlook the fact that the conclusions of the court as to the property being community property, in the above-quoted portions of the findings, can hardly be regarded as findings of fact, but rather as conclusions of law. We therefore do not adopt them as findings of fact. Sarah A. Buchanan died April 12, 1911, within three days of ten years after her marriage to James Buchanan. Thereafter James Buchanan was duly appointed administrator of her estate and that of the community which was dissolved by her death.

The facts above summarized are gathered from the findings of the court. There are other facts shown by the record which we deem also worthy of note here, as follows: The Puget Sound Lumber Company was during the lifetime of Sarah A. Buchanan what might be designated a close corporation; its stock being owned by those very few persons who were actively engaged in promoting its business. Indeed, when the manner of its operation and financing is considered, it might be said to have been operated much as a partnership, though it can hardly be said that it was not technically a corporation. James Buchanan was at all times its active manager and one of its principal officers; and, while he received a salary, as appears from the books of the company, the growth of its business and the accumulation of its property were manifestly the result of his personal efforts apparently more than that of any one else, and in any event much more than the result of the small amount of capital invested at the beginning by himself and wife. He was manifestly more than a mere employé for wages or salary. His whole attitude and demeanor towards the business of the company points to his efforts in its management as being more for the purpose of making money as a part owner thereof than as being interested only in receiving wages or salary for his work as an employé. The property here involved is a one-half interest in this corporation, its business and

property, in so far as such interest is evidenced by one-half of the capital stock thereof standing in the name of James Buchanan. Of course, this stock is personal property, and it may also be noted that the property of the corporation is now, and at all times has been, substantially all personal property. Some of these facts may seem irrelevant, but we think none of them are wholly so, in view of the involved nature of our problem.

Counsel for appellant rely upon that line of decisions holding that the status of property as to its being community or separate is determinable from its status at the time of its acquisition by either member of the community, and that its "rents, issues, and profits" go to its owner. Counsel proceed upon the theory that this stock was the separate property of appellant in the beginning because of his claimed ownership of the money which then purchased it, and that its increased value because of the growth of the business and property of the Puget Sound Lumber Company also became his separate property. In this behalf our attention is called to the decisions of this court in *Webster v. Thorndyke*, 11 Wash. 390, 39 Pac. 677, *Harris v. Van De Vanter*, 17 Wash. 489, 50 Pac. 50, *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594, *Guye v. Guye*, 63 Wash. 340, 115 Pac. 781, 37 L. R. A. (N. S.) 186, *Teynor v. Heible*, 74 Wash. 222, 133 Pac. 1, 46 L. R. A. (N. S.) 1033, and *In re Deschamp's Estate*, 77 Wash. 514, 137 Pac. 1009, which decisions have to do with real property, the increased value thereof during coverture, and crops raised thereon, and also with live stock and their natural increase. The theory and nature of counsel's argument is evidenced by their quotations from our decision in *Guye v. Guye*, supra, at page 348 of 63 Wash., at page 734 of 115 Pac., as follows:

"Counsel argue, however, that the natural enhancement in the value accruing while the marital relation existed should be treated as community property. They point out that the tracts adjudged to be separate property by the trial court have enhanced in value practically \$350,000 since the marriage of the appellant and Francis M. Guye, and contend that it is property acquired during marriage within the spirit and intent of the statute. But we think this contention untenable also. Since by the statute the spouse owning separate property is entitled to the rents, issues, and profits thereof, so such owner must be entitled to the natural increase in value, as such increase is as much the issue of such property as would be the rents derived therefrom. So also, under such a rule, the ownership of a specific tract might be constantly changing. As long as its value remained stationary or decreased it would be separate property. But the moment it increased in value it would become mixed property; that is, in part separate and in part community. And so, again, property that is separate property to-day might be mixed property to-morrow, and on the next day again be separate property, owing to its fluctuation in value. We cannot think this meaning of the statute. We think the statute meant to declare that a specific article of personal property, or a specific tract of real property, once the separate property of one of the spouses, no matter how it may fluctuate in val-

ne, remains so, unless, by the voluntary act of the spouse owning it, its nature is changed."

We are unable to gather from these observations of the court any rule more favorable to counsel's contention than that specific real or personal property, once becoming separate property, remains so, unless by voluntary act of the spouse owning it its nature is changed. But this, it seems to us, does not solve the question of when profits or gains resulting largely from personal efforts of one of the spouses becomes separate or community property. It is by no means always clear that such profits and gains are or are not rents, issues, and profits of separate property, though separate property may have, in a measure, contributed to such gains.

The property here involved is not real property; nor do we think that the original investment from which in a measure it comes was in any event at the beginning more than four-ninths the separate property of appellant; five-ninths at least being the then separate property of deceased. Nor can we concur in the view that the some twentyfold increase in value of this original investment resulted as a natural increase apart from the personal efforts of appellant while a member of the community. We are constrained rather to the view that such change, increase, and growth in the business and its property was very much more the result of the personal efforts of appellant during the ten years of his married life, in the performance of which he was the servant of the community. As we view it, we are then confronted with the question: What was the principal producing cause of these profits and gains? This may not be a very exact or satisfactory rule of determining whether property is community or separate. But, where a small original investment of separate funds is united with the personal efforts of a member of the community, and therefrom profits and gains to the extent of some twentyfold are returned, the property being personal and undergoing many changes, we know of no other rule by which the question of such gains being community or separate property can be determined, other than by taking into account the relative contributing force of the original investment and the personal efforts of a member of the community. The authorities do not furnish us much light upon this question in so far as decisions directly in point are concerned. However, in *Yessler v. Hochstettler*, 4 Wash. 349, 366, 30 Pac. 398, 403, observations were made by Judge Stiles, speaking for the court, quite in harmony with this view as follows:

"In this case the land purchased with the borrowed money paid for itself, and a large profit in land and money besides. It was a speculation purely personal in which the energy, skill, and business prudence of Mrs. Yessler certainly were greater factors than the credit given by the mortgage of her land. But these mental forces, whether of husband or wife, are servants of the community, and their products are

its property, to be shared in equally by the members of the community, and to follow the channels of devise and descent provided by the statute."

In *Lake v. Lake*, 18 Nev. 361, 392, 4 Pac. 711, 723, the question was presented somewhat as it is here, and was reviewed at some length. Justice Leonard, speaking for the court, observed:

"And in this or any other case, if profits come mainly from the property, rather than the joint efforts of the husband and wife, or either of them, they belong to the owner of the property, although the labor and skill of one or both may have been given to the business. On the contrary, if profits come mainly from the efforts or skill of one or both, they belong to the community. It may be difficult in a given case to determine the controlling question, owing to the equality of the two elements mentioned, but we know of no other method of determining to whom the profits belong. In the use of separate property for the purpose of gain, more or less labor or skill of one or both must always be given, no matter what the use may be; and yet the profits of property belong to the owner, and in ascertaining the party in whom the title rests the statute provides no means of separating that which is the product of labor and skill from that which comes from the property alone."

The following decisions, while not directly in point, we think, lend support to this view: *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. Rep. 176; *Sherlock v. Denny*, 28 Wash. 170, 68 Pac. 452; *Beggess v. Richards' Admr.*, 39 W. Va. 567, 20 S. E. 599, 26 L. R. A. 537, 45 Am. St. Rep. 938; *Penn v. Whitehead*, 17 Grat. (Va.) 503; 94 Am. Dec. 478; *Glidden, Murphree & Co. v. Taylor*, 16 Ohio St. 509, 91 Am. Dec. 98.

It may also be said that our decision in *Katterhagen v. Melster*, 75 Wash. 112, 134 Pac. 673, and decisions therein noticed are in harmony with our conclusions here reached touching the question of investments of funds borrowed during coverture becoming community property, though borrowed upon the credit of one spouse; the theory being that such gains are the product of community individual efforts.

These observations, we think, in any event lead to the conclusion that the gains and profits produced by the personal efforts of appellant, though added to, in a measure, by the original investment, become community property. We agree, however, with the trial court that the funds, though at the beginning separate property of appellant and Sarah A. Buchanan, in the proportion of four-ninths and five-ninths, which purchased the stock in the first instance, have during the ten years of coverture become so intermingled with community property and lost their identity as separate property that all of the stock and interest in the Puget Sound Lumber Company standing in appellant's name became the community property of appellant and his deceased wife, Sarah A. Buchanan.

The proper disposition of the case is fraught with great difficulty, but upon the whole record we cannot escape the conclusion that the trial court properly disposed of the rights of

the parties, and that its order and judgment must be affirmed.

It is so ordered.

MORRIS, C. J., and MAIN, HOLCOMB, and MOUNT, JJ., concur.

(89 Wash. 161)

DONALDSON v. GREAT NORTHERN RY. CO. (No. 12500.)

(Supreme Court of Washington. Jan. 10, 1916.
On Rehearing, March 4, 1916.)

1. APPEAL AND ERROR §1002—REVIEW.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3335-3337; Dec. Dig. §1002.]

2. JUDGMENT §199 — NOTWITHSTANDING VERDICT.

In an action for the death of an engineer killed by an exploding boiler, the refusal of defendant's motion for judgment non obstante veredicto, based on the testimony of experts that the water was too low in the boiler, was not an abuse of discretion, where the fireman stated that the water gauge showed sufficient water.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 337-375; Dec. Dig. §199.]

3. TRIAL §139, 140—PROVINCE OF JURY — CREDIBILITY OF WITNESSES.

The credibility of witnesses and the weight of their testimony is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-335, 338-341, 365; Dec. Dig. §139, 140.]

4. APPEAL AND ERROR §882—REVIEW — INVITED ERROR.

Where, in an action for the death of a locomotive engineer, defendant's counsel in his opening statement referred to the report made to the federal inspectors and stated that plaintiff could produce the report if they desired, plaintiff's offer of the report in evidence cannot be complained of, the error being invited, though by Act Feb. 17, 1911, c. 103, § 8, 36 Stat. 916 (U. S. Comp. St. 1913, § 8637), such report is made inadmissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. §882.]

5. DEATH §99—DAMAGES—MEASURE.

An award of \$8,500 damages in favor of a mother for the death of her son, who though earning \$175 a month was unmarried and stated that he did not intend to marry as long as she lived, and contributed \$75 a month to her support, cannot be held excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. §99.]

6. JURY §82—EMPLOYERS' LIABILITY ACT.

Though an action under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665), is brought in the state courts, the state law warranting verdict by ten jurors applies; Const. U. S. Amend. 7, preserving inviolate the common-law jury trial, not extending to the states.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 221-225; Dec. Dig. §82.]

Department 2. Appeal from Superior Court, Snohomish County; R. C. Bell, Judge.

Action by Adaline Donaldson, as administratrix of the estate of Vance H. Thomas, deceased, against the Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. V. Brown and F. G. Dorety, both of Seattle, for appellant. Jas. McCabe and Higgins

& Hughes, all of Seattle (Hyman Zettler, of Seattle, on rehearing), for respondent.

PER CURIAM. This is an appeal from a judgment for the plaintiff entered after denial of motions for judgment non obstante and new trial, upon the verdict of a jury in an action brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), to recover damages for the death of her son Vance H. Thomas, which she alleged was due to the negligence of the appellant.

On November 5, 1913, Thomas was an engineer in the employ of the appellant, and was on that date operating engine No. 1902, which was one of three engaged in hauling a freight train between Skykomish and Scenic. When near the station at Tonga, the boiler exploded, and Thomas was killed. It is admitted that engine No. 1902 was originally a coal burner and several years prior to the accident had been changed into an oil burner. When equipped as a coal burner, the stay belts which extend from the main shell through the water space and support the crown sheet were secured to the latter by button heads, as is customary in coal burners. When the change was made from coal to oil, these bolt heads were not changed. Whether the explosion was due to this fact is a principal ground of controversy.

[1] The appellant and the respondent each have an explanation of the cause of the explosion. The respondent asserts that it was due to the use of button head instead of taper head bolts on an oil burner; that it was due to the lack of fusible plugs, and to an accumulation of scale on the crown sheet; all of which it is alleged was due to negligence of the appellant. Appellant contends that the explosion was due entirely to low water in the boiler which was solely the negligence of the deceased. Testimony was introduced in support of each theory, and there is thus presented a direct conflict in evidence on which the verdict of the jury, if the question was properly submitted, is conclusive, regardless of our own opinion as to weight of the evidence. *Parker v. Wash. Tug & Barge Co.*, 85 Wash. 575, 148 Pac. 896; *Lombardi v. Bates & Rogers Constr. Co.*, 152 Pac. 1025.

[2, 3] Ordinarily we will not under such circumstances review the record further than to discover whether there is evidence to support the verdict, and, having found such evidence, we will accept the verdict as conclusive. However, the appellant urges that the evidence presented by the respondent is so meager, unreliable, and lacking in probative value, and the evidence opposing it in such preponderance, that the denial of the motion for judgment non obstante veredicto or for new trial was an abuse of discretion on the part of the trial court. The amount of the verdict and the seriousness with which appellant argues the point, coupled with the somewhat novel character of the grounds

urged and their evident importance to appellant, have impelled us to give as briefly as possible the reasons why we are unable to accede to the arguments advanced.

The essence of appellant's contention is that the condition of the crown sheet, bolts, and flues after the explosion shows conclusively as a scientific fact that the explosion could not have been due to any other cause than low water. Appellant introduced the testimony of over a dozen boiler makers, master mechanics, boiler inspectors, and others, all of whom stated positively that the conditions after the explosion conclusively showed low water as the cause. We do not agree, however, that this testimony established undisputed scientific facts. The evidence at best was of a negative character, and the statements of the witnesses were their opinions drawn from their previous experiences. Because they had never known the conditions shown here to occur except from a low-water explosion, they concluded that they could not result otherwise. On behalf of the respondent, one Hanson, fireman on the engine when the explosion occurred, testified positively that the water glass showed sufficient water on the crown sheet to prevent an explosion. An effort was made to impeach this testimony by introducing a statement prepared by the attorneys for appellant and acknowledged as correct by Hanson while he was in the hospital after the explosion. Hanson denied any knowledge of this statement, claiming that he was unconscious for days after the explosion, and had made no such statements at any time. The credibility of his testimony was clearly for the jury. We have, then, the evidence of the only witness who was in a position to know positively whether there was water in the boiler, to the effect that the water glass indicated sufficient to prevent a low-water explosion. Opposed to this is the testimony of a large number of capable experts that the explosion could have been due only to low water. Under such conditions, it was clearly competent for the jury to determine that the testimony of Hanson was entitled to greater weight than that of appellant's witnesses. We conclude that on this ground appellant was not entitled to judgment, and that the denial of a new trial was not an abuse of discretion.

Appellant contends that, even if it be found that the evidence of low water was a question for the jury, nevertheless the evidence did not show any negligence on the part of the appellant. Coupled with this contention is an attack on the character of respondent's expert testimony. The contention is not made that there was a total lack of evidence of negligence, and there being some evidence that the button head bolts have a tendency to become overheated by an oil flame and allow the crown sheet to give, which would result in an explosion, it was for the jury to say, whether their use under such circumstances was negligence. Likewise, as to the

use of fusible plugs as a means of preventing explosions and as to the presence or absence of scale on the crown sheet. The reliability of respondent's witnesses and the sufficiency and consistency of their testimony are all questions which the verdict precludes us from reviewing.

[4] The most serious contention aside from the questions of evidence just discussed, is a claim that a new trial should be allowed because of misconduct of respondent's counsel in questioning appellant's witness Dowling, superintendent of safety for the Great Northern, concerning the report of the federal inspector on this accident. The use of these reports or any part thereof "for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation" is, by statute (Act Feb. 17, 1911, c. 103, § 8, 36 Stat. 916 [U. S. Comp. St. 1913, § 8637]) made unlawful. During the cross-examination of the witness, counsel for respondent asked him whether he considered the government inspectors were wrong in their conclusions, if their report on the accident stated that certain conditions found after the explosion could not have resulted from a low-water explosion. After the examination had proceeded for some time and the witness had had several features of the report stated to him and had been asked his opinion as to the worth of the conclusions, appellant's counsel objected to the line of cross-examination, but did not base the objection on the inadmissibility of the report. Respondent's counsel was stopped, whereupon he attempted to put the report in evidence. The offer was refused. Under the federal law the report was absolutely inadmissible, but we do not believe that appellant is in a position to complain of the conduct of respondent's counsel in asking the witness about the report. In his opening statement appellant's counsel stated to the jury:

"We will show that whenever an accident of this kind happens it is reported to the United States government and an inspection is made and reports printed and published, and the data is available so that the plaintiffs can have access to it and produce it if they so desire, as correct."

Respondent was justified in construing this as a challenge to produce the report. The fact that the error, if any, was thus invited by appellant, and his failure to object on the ground of the inadmissibility of the report until the harm, if any, had been done, force us to the conclusion that appellant cannot now complain that he was prejudiced by the action of respondent.

[5] The verdict awarded respondent \$8,500. Appellant now contends that this amount is excessive and conclusive proof that it was influenced by passion and prejudice. At the time of his death the deceased was earning about \$175 per month. He was living with his mother and furnishing \$75 per month or more to maintain the home kept for him by her. He had expressed his intention of not

marrying as long as his mother lived. The income from this verdict well invested would not enable the respondent to live in better circumstances than those to which she was accustomed during her son's life, and, in view of her possible greater needs during her declining years, we do not find the verdict excessive. As one of the grounds for a new trial, appellant introduced affidavits to the effect that respondent had previously supported herself and had other means of support. We do not find, however, that there was an abuse of discretion in denying a new trial on these grounds.

[8] Appellant contends that the instruction that an agreement by ten jurors would be sufficient is in violation of the seventh amendment to the Constitution of the United States, which has been generally construed to contemplate a trial by twelve jurors. It is, however, well settled that this amendment does not apply to the states, and that the verdict in an action in the state court under the federal Employers' Liability Act is controlled, not by the provision of the national Constitution, but by the laws of the state where the suit is pending. The authorities are collated and the rule well stated in *Roberts, Injuries to Interstate Employees*, p. 312, § 176.

Several other grounds of error are urged in the request for a new trial. These have all been considered without convincing us that there is error warranting a new trial of this case.

The judgment is therefore affirmed.

On Rehearing.

PER CURIAM. Appellant has filed a petition for a rehearing, which, after due consideration, is denied. Our attention, however, is called to a stipulation entered into in connection with a motion to strike respondent's brief because of failure to file in time, and because of which the case was not heard here until the May, 1915, term. The stipulation provides that, if the judgment be affirmed, the interest accruing during the period of continuance might be eliminated from the judgment in case the court should determine such a condition a proper one in denying the motion to strike the brief. This stipulation was overlooked in writing the opinion, although we had it in mind in reaching our conclusion, and intended to give effect to it. Not having done so in the opinion, we do so now. The opinion is modified to this extent: The judgment will not bear interest from March 1, 1915, to June 17, 1915. In all other respects the judgment will stand.

(89 Wash. 83)

ANDERSON v. PUGET SOUND TRACTION,
LIGHT & POWER CO. (No. 12778.)

(Supreme Court of Washington. Jan. 5, 1916.)
STREET RAILROADS § 114—INJURIES TO PERSONS ON TRACK—ACTIONS—EVIDENCE.

Evidence held to warrant finding that the motorman could have avoided collision with an automobile truck which plaintiff was driving, had he used ordinary care.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 239-250; Dec. Dig. § 114.]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Thomas Anderson against the Puget Sound Traction, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jas. B. Howe and A. J. Falknor, both of Seattle, for appellant. E. L. Skeel and W. M. Whitney, both of Seattle, for respondent.

MORRIS, C. J. Action for personal injuries growing out of a collision between one of appellant's cars and an auto truck driven by respondent. The cause was tried to the court without a jury, resulting in a judgment for plaintiff, from which this appeal is taken.

The place of the accident was at the intersection of Terry avenue and Howell street, in the city of Seattle. It is clear from the testimony that, when respondent first attempted to cross the street car tracks, there was ample room and time for him to do so before the car would reach the crossing. This fact was assumed by both the motorman and respondent, and each acted accordingly. Just as respondent drove upon the track he was confronted with a new situation caused by another auto truck going west turning in front of him in an attempt to pass a slow-going milk wagon going in the same direction. Respondent would have passed in front of this milk wagon had it not been for the approach of the other truck, or had the truck remained behind the milk wagon in the relative position it was when first observed by respondent. The sudden change, of course, of this auto truck prevented respondent from continuing his passage across the tracks, and in order to avoid a collision with it he stopped his auto with its front wheels resting on the south rail of the inbound car track, in which position the car hit him.

The evidence supports the theory of the lower court that, had the motorman been alive to this changed situation, necessitating a change in action, he could have prevented the collision, and, not having done so, negligence was established. We find nothing in the case to establish appellant's theory of contributory negligence.

The judgment is affirmed.

HOLCOMB, MAIN, PARKER, and ELLIS,
JJ., concur.

(89 Wash. 87)

REMSNIDER v. UNION SAVINGS &
TRUST CO.

(Supreme Court of Washington. Jan. 5, 1916.)

1. MASTER AND SERVANT § 87½, New, vol. 16
Key-No. Series — INJURIES TO SERVANT —
WORKMEN'S COMPENSATION ACT—"WORK-
SHOP."

A janitor in an office building was injured while scrubbing down the walls and floors of the elevator shaft beneath the cage. The elevator was operated by electricity. The Workmen's Compensation Act (3 Rem. & Bal. Code, § 6604—1 et seq.) provides, in section 2, that the act shall apply to all inherently hazardous

employments, including factories, mills, and workshops where machinery is used. Section 3 defines a workshop as a room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise. Held that, though the elevator was operated by electricity, the shaft could not be considered a workshop, and the janitor's rights were not governed by the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Workshop.]

2. MASTER AND SERVANT \S 87½, New, vol. 16 Key-No. Series—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT.

Where neither the work of a janitor in an office building nor employment about an elevator shaft had been classified as extrahazardous by the Industrial Insurance Department as authorized by Workmen's Compensation Act, § 2, an injury to a person engaged in such employment is not governed by the statute.

3. DAMAGES \S 132—PERSONAL INJURIES—ACTIONS—EVIDENCE.

In view of the conflict in medical testimony as to the permanency of the injuries of a servant 54 years of age, whose injuries consisted of paralysis of one leg and internal injuries, held, that an award of \$5,000 could not be determined excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. \S 132.]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by A. Remsnider against the Union Savings & Trust Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Farrell, Kane & Stratton, of Seattle, for appellant. Clem J. Whittemore and Peters & Powell, all of Seattle, for respondent.

ELLIS, J. Action to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant as its janitor. The defendant is the owner of an office building known as the Hoge Building in the city of Seattle. In the building are maintained and operated three elevators or lifts. The plaintiff, as janitor, was directed by the superintendent or head janitor to go into the elevator shaft beneath the elevator cage and scrub down the walls and doors. While he was so employed the elevator was run down into the shaft, crushing him between the board across the shaft on which he was reclining and the bottom of the cage. At the trial defendant's negligence was conceded. The only contested issue of fact was as to the extent and character of the injuries sustained by the plaintiff. The jury returned a verdict in favor of the plaintiff for \$5,000. From the judgment thereon the defendant appeals.

The record sufficiently presents two questions which we shall consider in their logical order.

[1, 2] The appellant's first claim is that the respondent, while engaged in cleaning the elevator shaft, was a "workman" engaged in "extrahazardous work" within the meaning of the Workmen's Compensation Act (chapter 74, Laws of 1911, p. 345; 3 Rem. & Bal. Code, § 6604—1 et seq.), and that the court there-

fore had no jurisdiction of the action. It is argued that the elevator shaft wherein was operated an elevator driven by electricity, and wherein the respondent was working when injured, was such a place as to make the respondent's work extrahazardous within the meaning of sections 2 and 3 of the act, in that it was a "room or place wherein power-driven machinery was employed." The appellant relies upon our decision in *Wendt v. Industrial Insurance Commission*, 80 Wash. 111, 141 Pac. 811, as decisive of this point. In that case the deceased was a carpenter regularly employed as such by a corporation operating a large department store. His duties comprised making shelving, display standards, repairs, additions, alterations, and the like about the store. The company maintained a repair shop primarily for the repairing of its delivery wagons and automobiles. In this shop, besides a carpenter bench and carpenter's tools, there were a power lathe, an emery wheel, a grindstone, drills, etc., operated by electricity. The deceased met his death through receiving an electric current while turning on a switch to put in motion the grindstone for the purpose of sharpening a chisel. After a careful analysis of the statute, we held, in substance, that the company conducted, as a department of its business, this shop which was extrahazardous within the enumeration of section 2 of the act, being a "workshop" as defined in section 3:

A " * * * room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control."

Our decision was based upon the plain fact that the shop there in question met the definition of a workshop, and that the deceased met his death in attempting to operate the power-driven machinery in connection with his regular employment, that of "carpenter work," which is in section 4 of the act specifically classified as among the extrahazardous works contemplated by the act. The distinction between the *Wendt* Case and the case before us seems clear. If an elevator shaft in an office building is, as appellant argues, a "room or place wherein power-driven machinery is employed," so as to fall within the meaning of the workman's compensation act, then it is such because the elevator shaft is a workshop, since the language quoted is employed in section 3 of the act as defining the word "workshop" as used in the enumeration of extrahazardous works found in section 2. The act does not say, nor does it imply, that every place in which power-driven machinery is employed impresses an extrahazardous character on work performed in such place. It merely employs the circumstance of the presence of power-driven

machinery in connection with a number of other things in defining a workshop. If the presence of power-driven machinery is the sole determining factor, then every shaft in which is operated a power-driven elevator or lift is a workshop. Then, also, the operator of the elevator and every employé of the appellant who in the course of his duties had occasion to enter the elevator to pass from one floor to another would be employed, for the time being, in a room or place wherein power-driven machinery is employed, hence in a workshop, and in an extrahazardous work.

Though the respondent was injured in a place where power-driven machinery was employed, it cannot by the widest stretch of the meaning of the statute be termed a workshop. Though his regular employment was at times fraught with hazard, as are all employments, it was not one, which, to use the language of section 2 of the act, has "come to be, and to be recognized as being inherently and constantly dangerous." Neither was it connected with any of the occupations enumerated as extrahazardous in section 2, nor is it mentioned in any of the schedules in section 3 or in any of the classifications in section 4. Section 2 of the act closes with the provision that:

"If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4."

But neither the work of a janitor in an office building nor working in or about an elevator shaft has yet been classified by the department as extrahazardous, nor has any rate of contribution been fixed as provided in the clause quoted.

In the recent case of *Guerrieri v. Industrial Insurance Commission*, 84 Wash. 266, 146 Pac. 608, after another careful analysis of the statute, we held that one who was employed in operating a passenger or freight elevator or lift in a mercantile establishment was not engaged in an extrahazardous employment within the meaning of the statute. That decision by plain inference is contrary to the appellant's contention here. Respondent was not engaged in an extrahazardous work within the meaning of the act. Though section 2 points out that "there is a hazard in all employments," it provides statutory compensation only for injuries received in employments recognized as "inherently and constantly dangerous" and which it enumerates as extrahazardous. As we said in the *Guerrieri* Case:

"The manifest intent of the law is not to cover and compensate for accidents generally, but to cover accidents occurring in those employments or occupations which are specifically classed as, or which may be found by the commission to be, extrahazardous."

On a careful reconsideration of the whole question, we are satisfied that the *Guerrieri* Case was correctly decided and is controlling on the facts here.

[3] The other contention is that the verdict is excessive. The injury was mainly to the sciatic nerve, resulting in a partial paralysis of the right leg and foot. There was also a small hernia and an injury to the kidneys, causing a passage of blood. All of these conditions persisted at the time of the trial nine months after the injury, the last, however, only to a slight extent. The leg was still swollen and of a bluish color. The respondent was still on crutches. He is nervous and suffers from insomnia. He is 54 years old, but had always been strong and well prior to the injury. As to the man's condition at the time of the trial, the testimony presents a sharp conflict. Of five physicians who had examined him a short time prior to the trial, two intimated a belief that he was malingering and were of the opinion that the injury to the leg was not permanent. Three were strong in the opinion that his suffering was real, and two were of the positive opinion that the injury to the leg was permanent. The third expressed doubt as to whether the full use of the leg would ever be restored. Upon this conflict of evidence the question of the permanency of the injury was one for the jury, as was also the amount of the damages. The award is large, but the evidence gives us no warrant to interfere with the verdict. To do so would be a wanton invasion of the province of the jury.

The judgment is affirmed.

MORRIS, C. J., and CHADWICK, MOUNT, and FULLERTON, JJ., concur.

(89 Wash. 93)

STUHT et ux. v. UNITED STATES FIDELITY & GUARANTY CO. (No. 12852.)

(Supreme Court of Washington. Jan. 6, 1916.)

INSURANCE — 665 — LIABILITY INSURANCE — AUTOMOBILE INSURANCE.

In an action on a policy of automobile insurance which excepted damages caused by striking any portion of the roadbed and all loss or damage caused by upset of the injured machine, unless such upset is a direct result of a collision, evidence held to show that the machine upset at the edge of a bank, when the driver was attempting to make a quick turn, and that the damages were the result of its falling over the bank, and not by any collision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by H. C. Stuht and wife against the United States Fidelity & Guaranty Company. From a judgment for plaintiffs, defendant appeals. Reversed, and cause ordered dismissed.

Shepard, Burkheimer & Burkheimer, of Seattle, for appellant. Vince H. Faben, of Seattle, for respondents.

MOUNT, J. This is an action upon a policy of automobile insurance. The complaint, after setting out the terms of the policy, alleged that on August 9, 1913, the insured automobile was wrecked and destroyed through a collision between the automobile and the wooden planking constituting a portion of the sluice box at the side of the roadway and projecting into the highway, and by striking and colliding with a tree near the roadway, and striking violently the ground near the roadway then being traveled by the machine, to the damage of the plaintiff in the sum of \$1,000. The amended answer of the defendant admitted the issuance of the policy, but denied all the other allegations of the complaint, and alleged two affirmative defenses, which it will not be necessary to notice. The case was tried to the court and a jury. At the conclusion of the plaintiff's evidence, the defendant moved the court for a directed verdict, and again made the same motion at the close of all the evidence. Finally, after a verdict was returned by the jury, a motion was made for judgment notwithstanding the verdict. These motions were all denied, and a judgment was entered upon the verdict. The defendant has appealed.

We are satisfied that these motions should have been granted. The policy sued upon insures the plaintiffs against damage to his automobile—

"if caused solely by collision with another object, either moving or stationary (excluding, however, all loss or damage by fire from any cause whatsoever; all loss or damage caused by striking any portion of the roadbed, or by striking street or steam railway rails or ties; and all loss or damage caused by the upset of the injured automobile unless such upset is a direct result of such a collision as is covered hereby)."

The evidence for the plaintiff shows that the automobile in question had been taken to a repair shop to have some repairs made thereon. After the repairs had been made, the mechanic took the automobile and started to deliver it to the owner. He testified that he did not go directly to the garage of the owner, but went in a roundabout way, intending first to go to his home, and from thence to take the car to the owner. He was the only witness who testified for the plaintiff as to the manner of the damage to the car. He testified upon that question as follows:

"In the month of August. It was between 7 and 8 o'clock some time; it was after the sun, I think, was down. Well, anyhow, it must have been along about that time; I don't remember exactly. * * * Well I was going west, or east, I should say, on Norman street; this was between—I passed Thirteenth avenue; from Thirteenth it is quite a little steep grade down to Fourteenth. Fourteenth is the end of Norman street; it ends there. I think about the middle of the block some one crossed the street

in front of me, and I turned in close to the curb on the right-hand side. When I came to Fourteenth, it is very narrow. Fourteenth avenue is very narrow at that point, and in making the turn—I couldn't make the turn in the street, and I went out where the sidewalk strip should be. Of course, I knew I was getting dangerously close to the edge of the bank, but I felt I was safe, and was getting back into the road, when all at once I went down the bank. * * * Of course, I knew I was headed back. I got the wheels back, and I headed up Fourteenth avenue, or should have been. I was out in the sidewalk strip all right, but at this point the machine came up, and the next thing I knew a man was leaning over me down the hill, down 10 or 15 feet below, and he asked me if I was hurt. I was stunned; I didn't know just exactly how long it was. I didn't lose consciousness, but I was stunned, and the machine was a few feet farther down the hill than I was, against a tree."

The witness testified that the bank at that point was steeper than 45 degrees; that these streets were asphalt paved streets; that he did not see any water drain or sluice box; that on the next day he returned to the scene of the accident and examined the place. He testified that the front end of the automobile evidently rolled down the sluice box, and that was what kept the automobile from crushing him. He then testified:

"It is a wooden box, and at one time or another—it looks like it was used for a sluice box or sewer, and that runs down the hill quite a little ways and sticks above the level of Fourteenth avenue just a little ways. * * * I should judge it would be a foot. * * * Just about 20 feet before I started to make the turn. I realized I was so close to the right-hand curb; it would be hard to make the turn after I got over there. I didn't realize the narrowness of Fourteenth avenue until after I got so close—I could see it would be awful hard to make the turn into Fourteenth avenue, and then I set the brakes, trying to slow down. I thought I was headed safely back into the street. I knew I was dangerously close to the bank, and I had the wheels turned as far as they would go to the right. I thought I was safely back on the level. It didn't go over or shoot over; it came to a sudden jar, and it turned sideways."

He then goes on to explain the damage to the car.

It is not claimed by the respondent that this sluice box was in the street, or even in the sidewalk strip. The testimony shows that it was to the side of the sidewalk strip lying on the side of the hill, and projecting above the level of the street about a foot. It seems too plain for discussion that this car was being driven down the hill at a rapid rate of speed, when the driver attempted to make the short turn to the right onto Fourteenth street, and on the brink of the hill the car upset and went over the hill. It was plainly a case where the car upset before it struck anything outside of the road. If the evidence of this witness is not clear upon this point, the evidence of the defendant's witnesses shows very clearly and beyond dispute that the sluice box in question was lying on the side of the hill, and not in the roadway. The marks upon the sluice box to which the plaintiff's witness referred were some distance down the hill, and showed

where the car first struck the sluice box after the upset. The plaintiff's witness himself says this sluice box saved his life. We have no doubt, from the plaintiff's own evidence, that this was a clear case of the car upsetting upon the brink of a precipice without any other cause. It was the duty of the trial court, therefore, to have directed a verdict upon the first motion made by the defendant, because the policy provides that if the damage is caused by an upset of the injured automobile, unless such upset is the direct result of a collision such as is covered thereby, such damage is not insured against. There was no collision with any object shown. The only claim of the respondent is that there was a sudden jar. It is argued from this that the jar was caused by a collision. But aside from the mere fact of a jar, there is nothing to show that there was anything in the roadway, either movable or stationary, that the automobile could have collided with. It simply went over the bank. The jar that the witness spoke of was no doubt caused by the automobile letting loose from the roadway and starting to turn over as it went down the precipice. It is plain, we think, that the court should have directed a verdict in favor of the defendant.

The judgment appealed from is therefore reversed, and the cause ordered dismissed.

MORRIS, C. J., and CHADWICK and ELLIS, JJ., concur.

(89 Wash. 77)

WINTER v. EBERHARDT et al.
(No. 12908.)

(Supreme Court of Washington. Jan. 5, 1916.)
APPEAL AND ERROR — 1010 — FINDINGS — EVIDENCE.

A finding for defendants, in an action for damages from false representations, whereby plaintiff was induced to purchase certain mining claims, could not be disturbed on appeal, where it was supported by evidence, which was almost entirely oral, and no material question was presented to the Supreme Court other than questions of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. — 1010.]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by A. H. Winter against George Eberhardt and others. From judgment for defendants, plaintiff appeals. Affirmed.

S. S. Langland, of Seattle, for appellant. Maurice D. Leehey and Robert M. Jones, both of Seattle, for respondent.

PER CURIAM. The plaintiff seeks recovery of damages from the defendants, which he claims resulted from false representations made to him by the defendants, inducing him to purchase from them certain mining claims. Trial before the superior court without a jury

resulted in findings and judgment in favor of the defendants, from which the plaintiff has appealed.

No question worthy of serious consideration is here presented other than questions of fact. We have carefully read all of the evidence as presented to us by the abstract thereof made by counsel, and conclude that we would not be warranted in interfering with the conclusions reached by the trial court. The controlling evidence consists almost wholly of oral testimony of witnesses given in the presence of the trial court. Viewing it even in cold typewriting, we incline to the view that it preponderates against appellant's contentions. We think it would be unprofitable to discuss the evidence in detail here.

The judgment is affirmed.

(89 Wash. 85)

FERCOT v. CITY OF SPOKANE.
(No. 12801.)

(Supreme Court of Washington. Jan. 5, 1916.)

1. INTOXICATING LIQUORS — 97 — LICENSES — FORFEITURE.

The forfeiture of a saloon license for misconduct is a matter so entirely within the discretion of the city authorities that the courts will not review their judgment, consequently the propriety of such action cannot be questioned in a proceeding by the former licensee to recover a proportionate part of his license fee from the city.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. — 97.]

2. INTOXICATING LIQUORS — 97 — LICENSES — RECOVERY OF FEE.

In the absence of a statute or ordinance compelling it to do so, a city is not liable, at the suit of a former licensee, where the license to sell intoxicants has been forfeited for cause, for return of a proportionate part of the amount paid for the license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. — 97.]

Department 1. Appeal from Superior Court, Spokane County; B. K. Pendergast, Judge.

Action by Armand Fercot against the City of Spokane, a municipal corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

F. W. Girand, of Spokane, for appellant. H. M. Stephens, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for respondent.

CHADWICK, J. Appellant brought this action to recover a proportionate part of a saloon license after a forfeiture by the city commission for misconduct in the use of his license and upon his plea of guilty to a charge that he had sold liquor on Sunday.

[1] It is enough to say that this court has held that the forfeiture of a saloon license for misconduct is a matter so entirely within the discretion of the city authorities that the courts will not review their judgment. State ex rel. Aberdeen v. Superior Court, 44 Wash.

526, 87 Pac. 818; *State ex rel. Puyallup v. Superior Court*, 50 Wash. 650, 97 Pac. 778. Having held that a review may not be had directly, it will follow as of course that neither the discretion of the council nor the guilt or innocence of the appellant can be tried out in a collateral proceeding.

[2] This court has also held, and its holding seems to be in line with the decisions of other courts, that, in the absence of a statute or ordinance compelling it to do so, a city is not liable, at the suit of the licensee, for the return of the money paid for a liquor license where it has been revoked or forfeited for any cause which, to the council, seems sufficient. *Krueger v. Colville*, 49 Wash. 295, 95 Pac. 81.

The law is such that appellant cannot now be heard to claim, as he attempts to in this case, that the crime, if any, was induced by the agents of the city; that he was not guilty; that he pleaded guilty on the advice of counsel that the police justice would probably hold with the city, and it would be cheaper for him to do so than to stand upon his plea of not guilty; and that he has, at all times, obeyed the laws of the state and the ordinances of the city.

There was a time for appellant to try these questions. If convicted before the justice, he might have appealed to the superior court. He has made his own record and is bound by it.

Affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(89 Wash. 106)

DOMRESE et al. v. CITY OF ROSLYN.
(No. 12846.)

(Supreme Court of Washington. Jan. 7, 1916.)

ESTOPPEL ¶93—PERMITTING IMPROVEMENTS
—DIVERSION OF WATER—INJUNCTION.

Where a landowner objected when a city having the power of eminent domain, but not exercising same, began the construction of a system of waterworks necessitating the appropriation of water from a stream which flowed over her land and the conducting of a pipe line across her land, but after some negotiations gave a deed for the right of way of the pipe line, after which the city completed its work, she and her lessee were estopped from thereafter enjoining the city from a further diversion of the water; the wrong, if any, being not in the taking of the water, but in the manner of taking.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 264-275; Dec. Dig. ¶93.]

Department 1. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by Minna Domrese and another against the City of Roslyn, a municipal corporation. From judgment for defendant, plaintiffs appeal. Affirmed.

O. O. Felkner, of Ellensburg, for appellants. E. E. Wager, of Ellensburg, and Harry L. Brown, of Roslyn, for respondent.

CHADWICK, J. Appellant Minna Domrese is the owner of a tract of land situate in a mountain cañon near the city of Roslyn. Appellant Hamer is her lessee. In 1909 respondent put in a system of waterworks. It took its supply of water from Cedar creek, which flows in the cañon and over the lands of appellant Domrese. The water was taken at a point above and conducted through a pipe line over and across her land. At the time the work was in progress she objected to the trespass of the city. After some negotiations she executed a deed for a right of way for the pipe line, and the city completed its work.

In 1914 this action was begun. Appellant sets up her title, alleging that the city has appropriated the waters of the creek, which is riparian to her land, and asks that respondent be enjoined from a further diversion of the water. The court below denied this relief upon the ground that the waters of the stream had not for a period of ten years been put to any beneficial use and upon the ground of equitable estoppel. We think it unnecessary to inquire whether the judgment of the trial judge can be sustained upon either one of these theories.

Granting, but without deciding, that appellant has a cause of action, the only question with which we are concerned is whether she has a remedy in equity. Respondent might at the time of its trespass, if it was a trespass, have maintained an eminent domain proceeding. It might have condemned all of the interest of the appellants in the waters of Cedar creek. It did not do so, but did complete its water system, and put the waters of the stream to a public use.

This court, since the case of *Kakeldy v. Columbia & Puget Sound R. R. Co.*, 37 Wash. 675, 80 Pac. 205, was decided, has consistently held that injunction will not lie in such cases. The reasoning of that case is that a party who acquiesces in the construction and operation of a public utility is estopped to maintain ejectment or a suit for injunction, but will be left to his action for damages.

In *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820, the deeper principle is adverted to; that is, that the wrong lies, not in the taking, but in the manner of the taking; for the taking, whether done directly or indirectly, is an exercise of a sovereign power. We held squarely that:

Where one having a right to condemn property " * * * is about to take possession without condemnation, injunction is a proper remedy; where there has been a taking and the public function is being exercised, the only remedy is to take compensation. Whether we call the taking a tort, or say that the claimant can waive the tort and sue on an implied contract, it makes no difference; the law is the

same. The constitutional right to compensation cannot be taken away; for the right to redress the wrong does not and cannot be made to depend upon statute law. The remedy is in the courts having jurisdiction to redress wrongs under the forms of the common law."

In *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304, an injunction was sought upon a similar state of facts. We said:

"Plaintiffs' only remedy in this case is to recover damages. They cannot enjoin the work. They permitted the city to begin and prosecute the work until near completion, and must now seek their remedy at law."

In *Stewart v. Fitzimmons*, 149 Pac. 659, we likened the right to claim a homestead to the act of a city taking property for a public use without first resorting to an eminent domain proceeding. We said:

"The right of Peter A. Peterson to claim a homestead being referable to the sovereign power of the state, the case falls within the principle announced by this court in holding that the state or any of its instrumentalities having power to exercise the right of eminent domain would not be ousted as for trespass after taking property and before ascertaining the damages to be paid; this upon the theory that a right to take is a sovereign right, and that the remedy in damages was open to the aggrieved party under the forms, modes, and usages of the common law. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080."

The wrong to appellants, if any, being not in the taking, but in the manner of taking, and the work being done, it follows that equity will afford no remedy.

Judgment of the lower court is affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(89 Wash. 124)

GODLEY v. GOWEN. (No. 12899.)

(Supreme Court of Washington. Jan. 7, 1916.)

1. MASTER AND SERVANT §236—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY—EVIDENCE.

Where, in an employe's action for damages from his arm being broken while he was attempting to crank defendant's automobile, there was evidence that plaintiff was unfamiliar with the management of an automobile and the method of safely starting the engine, and that defendant knew advancement of the spark lever when the machine was being cranked would cause the engine to back-fire, and yet advanced the lever so as to cause the engine to kick back when he knew plaintiff was turning the crank, and in danger, the question of defendant's negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010, 1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. §236.]

2. APPEAL AND ERROR §1036—REVIEW—INSTRUCTIONS—HARMLESS ERROR.

In an employe's action for damages from his arm being broken while attempting to crank defendant's automobile, an instruction that, if an employe is ordered or permitted to do dangerous work, the employer should sufficiently instruct him, if he is disqualified, that he may understand the dangers, if erroneous in the use of the word "permitted," was harmless, where

the issue presented by the parties was whether defendant ordered plaintiff to crank the automobile, and there was no contention that he permitted plaintiff as a mere volunteer to crank the machine.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. §1036.]

3. DAMAGES §26—PERSONAL INJURIES—FUTURE PAIN AND SUFFERING—EVIDENCE.

While there can be no recovery for future pain and suffering which will "probably" occur in the future, the recovery in a personal injury case may include damages for future pain and suffering which the evidence shows plaintiff will be subjected to.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 69, 236; Dec. Dig. §26.]

4. TRIAL §252—INSTRUCTIONS—EVIDENCE.

Where, in an employe's action for damages from his arm being broken while he was attempting to crank defendant's automobile, there was no evidence that there was a safe and also unsafe way in which to take hold of the crank handle, and, though there was evidence that one way of taking hold of the handle was safer than another, plaintiff testified that he was not aware of this fact, and it appeared that he had not been instructed thereon, the court properly refused to instruct that an employe cannot recover for his injuries where he had chosen an unsafe way to perform an act, where there is a safe way which a reasonably prudent person would take.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. §252.]

5. APPEAL AND ERROR §1070—EXCESSIVE VERDICT—CURE OF ERROR.

Error in returning a verdict for \$100 for an item as to which the instructions limited the recovery to \$40 was cured where the verdict was reduced more than \$100.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4231-4233; Dec. Dig. §1070.]

6. TRIAL §133—OPENING STATEMENT OF COUNSEL—CURE OF ERROR—INSTRUCTIONS.

A statement in the opening statement of counsel for plaintiff that shortly after the accident defendant discharged plaintiff from his employ and refused to pay his doctor's bill was not prejudicial, where, on objection made, the court told the jury that they should not consider such statements unless they were supported by evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. §133.]

7. DAMAGES §131—PERSONAL INJURIES—EXCESSIVE RECOVERY.

Where an employe suffered a broken arm, and his expenses connected therewith were about \$40, a recovery of \$400 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. §131.]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Walter A. Godley against Elwin T. Gowen. From judgment for plaintiff, defendant appeals. Affirmed.

Jas. A. Dougan, of Seattle, for appellant. Walter S. Fulton, of Seattle, for respondent.

MOUNT, J. The plaintiff had his arm broken while attempting to crank an automobile. He sued the defendant for damages, alleging negligence in two respects: First, that the plaintiff was employed by the de-

defendant as a clerk in a grocery store, that he was not familiar with automobiles, that on the day of his injury the defendant ordered him to crank the automobile without informing him of the danger thereof, and that, while the plaintiff was turning the crank to start the engine, the defendant, without notifying the plaintiff, advanced the spark lever, which caused the engine to kick back and break the plaintiff's arm; second, that the plaintiff did not know that there was any danger of the engine back-firing, or kicking back, and that the defendant failed to warn the plaintiff of the danger, and failed to instruct him how to take hold of the handle of the crank. These allegations of negligence were denied by the defendant; and he alleged that the injury was caused by the plaintiff's own neglect, that the defendant ordered the plaintiff not to go about the automobile, but that the plaintiff voluntarily, in violation of orders, and without the knowledge of the defendant, attempted to crank the automobile, and was injured.

Upon these issues the case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for the sum of \$500 damages to his person and \$100 expenses. The trial court granted a new trial unless the plaintiff would remit from the verdict the sum of \$200. This was done, and a judgment for \$400 was entered. This appeal followed. Numerous assignments of error are made in the appellant's brief; but the assignments are discussed under six points, which we shall briefly notice.

[1] It is argued first that the court erred in denying motions for a directed verdict and for judgment non obstante. This is based upon the contention that no negligence on the part of the defendant was shown. It is claimed that the evidence shows that the plaintiff knew as much about cranking the automobile as the defendant did, and that therefore it was not negligence for the defendant to request the plaintiff to crank the automobile. The plaintiff testified that he was unfamiliar with the management of the automobile, and was unfamiliar with the method of safely starting the engine. All the evidence tended to show that, when a person is turning the engine, or cranking an automobile, the advancement of the spark lever at that time will cause the engine to back-fire, or kick back. We think the evidence fairly shows that the defendant knew or should have known this fact. It was clearly negligence, therefore, for the defendant to advance the spark so as to cause the engine to kick back when he knew the plaintiff was turning the engine by the crank, because it was clearly shown that when an engine kicks back, or back-fires, the person holding the crank is placed in imminent danger. We are satisfied that upon this fact alone the question of negligence was for the jury, and the court therefore did not err in sending the case to the jury.

[2] In the instructions to the jury the court, in substance, told the jury that, when an employé is ordered or permitted by one having authority over him to do a temporary work beyond the work which he had engaged to do, and the one in authority knows, or ought to know from all the circumstances in the case, that such work is dangerous, it is the duty of the employer to caution and instruct a disqualified employé sufficiently to enable him to understand the dangers he will encounter. Another instruction was also given along the same lines. It is argued by the appellant that the court erred in using the words if the "defendant ordered or permitted the plaintiff to attempt to set the engine of the automobile of defendant in motion," because the use of the word "permitted" was confusing to the jury. It may be that the use of the word "permitted," taken from its connection with the facts of the case, was not apt; but it is plain from a reading of the instructions in connection with the facts that the court meant to tell the jury that, if the defendant ordered the plaintiff to set the engine in motion, then it was the duty of the plaintiff to instruct an ignorant servant if dangers were attendant thereon. The plaintiff's case was based upon the allegation that he was ignorant of the dangers of cranking an automobile; that he was ordered by his master to do the work. The defense was based upon the statement that the defendant had forbidden the plaintiff to use the automobile, and that he was injured by disobeying the orders of the defendant; that he voluntarily, without the knowledge of the defendant, attempted to crank the automobile, and was thereby injured. There was no idea of permission, except as it may be inferred from an order by the defendant to the plaintiff to crank the automobile; and we think this is what the court meant, and what the jury understood by the instruction. If the use of the word "permitted" was error, it was error without prejudice, because there was no contention on the part of the defendant that he permitted the plaintiff, as a volunteer, to crank the automobile. The defendant either ordered the plaintiff to crank it, or the plaintiff cranked it without the knowledge of the defendant and against his desires. We are satisfied, therefore, that these instructions were not erroneous under the circumstances.

[3] It is next contended that the court erred in instructing the jury to the effect that in estimating the amount of damages to be allowed to the plaintiff they had a right to take into consideration the pain and suffering which the jury found the plaintiff to have sustained as the result of his injuries, "and any future pain and suffering, if any, that the evidence shows that the plaintiff will be subjected to." It is argued by the appellant that the complaint did not ask for damages for future pain and suffering, and that the plaintiff waived such suffering.

This court has held in a number of cases that an instruction is erroneous where the jury are directed that they may find damages for future pain and suffering which would probably occur in the future. *Bennett v. O. W. R. & N. Co.*, 83 Wash. 64, 145 Pac. 62. The court in this case did not so instruct the jury, but instructed that they might find for future pain and suffering which the evidence showed that the plaintiff would be subjected to. We think this is a correct instruction, and therefore not erroneous. In the *Bennett Case*, supra, we held that, where there is evidence that the plaintiff will be subjected to future pain and suffering, he is entitled to recover therefor. It is where there is a mere probability that the plaintiff will suffer that the instruction is erroneous. We find no waiver upon this question.

[4] It is next urged as error that the court refused to give certain instructions to the effect that, if the jury found that the servant chose an unsafe way in which to perform the act, where there was a safe method which a reasonably prudent person would take, then the servant could not recover. This, no doubt, is the rule in a proper case; but the only application this rule could have here is as to the manner in which the respondent says he took hold of the crank handle. There is nothing in the record to show that there was a safe way, and also an unsafe way, in which to take hold of the crank handle. There was evidence to show that taking hold of the crank in a certain way was safer than taking hold of it in some other way. But the plaintiff also testified that he was not aware that there was a safe way to take hold of the crank and an unsafe way. He was not instructed upon that point, and did not know. We think an instruction with reference to the choice of ways does not apply to such facts.

[5] It is next argued that the verdict is excessive, and that the jury were influenced by passion, shown by the fact that in the instructions the jury were told that they could not return a verdict in excess of \$40 for expenses to which the plaintiff had been put for doctor's bills, etc., and because the jury returned a verdict for \$100 on account of this item. This, no doubt, was the reason that the trial court ordered a reduction of the verdict from \$600 to \$400. Conceding that the jury returned an erroneous verdict in the sum of \$100, when the instructions permitted them to return a verdict for only \$40 upon that question, that error was completely cured when the total amount of the excessive verdict was stricken or reduced.

[6, 7] It is finally claimed that in the opening statement of counsel for the plaintiff a statement was made to the effect that shortly after the accident the defendant discharged the plaintiff from his employ, and refused to pay his doctor's bill, and that this was mis-

conduct which would warrant the granting of a new trial. When counsel made this statement it was objected to, and the court told the jury, in substance, that they should not consider statements of counsel unless the same were supported by the evidence. We think this was not such misconduct of counsel as would warrant the granting of a new trial. We are also satisfied that the judgment as finally rendered is not excessive.

The judgment is therefore affirmed.

MORRIS, C. J., and FULLERTON, ELLIS, and OHADWICK, JJ., concur.

(39 Wash. 130)

CHAFFEE v. HAWKINS et al. (LYNCH, Intervener). (No. 12904.)

(Supreme Court of Washington. Jan. 7, 1916.)

1. ACKNOWLEDGMENT §62 — VALIDITY — PLACE.

A deed fair on its face, signed by the grantors and duly acknowledged, imports verity, and will not be held invalid merely because of uncertainty in the proof of the place of acknowledgment.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 345-347; Dec. Dig. §62.]

2. ACKNOWLEDGMENT §56, 62—CERTIFICATE OF NOTARY—IMPEACHMENT—PROOF.

A grantor may impeach the notary's certificate for fraud or other reasons recognized in equity, but the proof thereof must be clear and convincing.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 301, 302, 315, 345-347; Dec. Dig. §56, 62.]

3. ACKNOWLEDGMENT §62 — IMPEACHMENT OF NOTARY'S CERTIFICATE—PROOF.

Where the testimony of mortgagors in a mortgage foreclosure suit, denying that they acknowledged the mortgage, was contradicted by the testimony of all others who were present, and was in conflict with the attendant circumstances, and it appeared that, in consideration of the giving of the mortgage and the notes secured by it, a pending action had been dismissed and a judgment satisfied, thereby releasing a judgment lien, and that the mortgage had been duly recorded, there was a want of that clear and convincing proof essential to an impeachment of the notary's certificate to the acknowledgment.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 345-347; Dec. Dig. §62.]

4. MORTGAGES §558 — DEFICIENCY JUDGMENT—LIABILITY OF GRANTEEES.

A recital of a warranty deed that it was "subject * * * to all liens" did not make the grantees liable to a deficiency judgment on foreclosure of a mortgage not specifically mentioned in such recital.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592-1595, 1597; Dec. Dig. §556.]

5. MORTGAGES §558 — DEFICIENCY JUDGMENT—LIABILITY OF GRANTEE.

The grantee in a deed made subject to liens generally is liable for a deficiency judgment rendered on foreclosure of mortgage against the property only when it clearly appears that it was his intention to assume and pay the mortgage debt; any doubt as to his intention being resolved in his favor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1596; Dec. Dig. §558.]

Department 1. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

Suit by Stephen E. Chaffee, trustee for O. A. Jones and others, against Luther Hawkins and others, wherein John H. Lynch intervenes. From decree for defendants, plaintiff appeals. Reversed and remanded, with directions.

Stephen E. Chaffee, of Sunnyside, for appellant. Lynch & Chesterley and John H. Lynch, all of North Yakima, for respondents.

CHADWICK, J. Prior to October 22, 1913, defendants Luther Hawkins and Jennie Hawkins, his wife, were indebted to several persons upon certain promissory notes in the sum of \$80.10 each, and to another in the sum of \$274 upon a judgment theretofore rendered, in all aggregating the sum of \$755.60. Appellant is an attorney at law and had, prior to that time, begun a suit against the defendants Hawkins to recover the sums due upon the promissory notes. In consideration of a dismissal of the suit and the satisfaction of the judgment that had theretofore been entered against them, the defendants Hawkins made a new note, and a mortgage upon a 40-acre tract of land, the legal title to which was then in them. On February 1, 1913, the defendants Hawkins had employed the intervener Lynch to defend an action involving their land, and had given a mortgage—in form a quitclaim deed—in the sum of \$2,000 to secure his attorney's fees and the expenses of the suit. In January, 1914, defendants Hawkins made, executed, and delivered their deed of warranty conveying the mortgaged premises to defendants Chesterley—

"subject, however, to all liens, incumbrances and taxes which are a valid and subsisting charge upon said premises, and subject to a quitclaim deed intended as a mortgage executed by Luther Hawkins in favor of John H. Lynch recorded in volume 133 of deeds at page 634, deed records in the office of the auditor of Yakima county, Washington, which said grantee hereby assumes and agrees to pay as a part of the purchase price above mentioned."

Thereafter appellant, acting as trustee for his clients, began this action to foreclose the lien of his mortgage. Mr. Lynch intervened, and from the complaint, the petition and answer in intervention, and the answer of the defendants, the issue whether appellant's mortgage was in fact executed is drawn. The court below found that the claims represented by appellant were valid claims at the time they were executed; that at no time, either before or at the time the mortgage purports to be executed did the defendants Hawkins, or either of them, promise or agree to execute any mortgage or expect or intend to do so, and that:

"As soon as the notes and said mortgage were prepared, they were placed before the defendants Hawkins for signature and the said Hawkins and wife, relying upon Mr. Chaffee to prepare notes for their signature in accordance with the understanding and agreement thereto-

fore had by them with him, did not read over the said notes, and did not observe that there was with the same any document purporting to be a mortgage, or any document other than a note, and appended their signature to the various papers as they were presented to them for that purpose; that after so doing they immediately left the office without either acknowledging, or intending to acknowledge, the execution of any mortgage, and never knew that they had signed a mortgage until the commencement of this action;" "that the defendants are illiterate colored people and, although able to write and read to some extent, yet they are slow of intellect, thought, and speech, and it is difficult for them to comprehend business affairs of the nature involved in this suit."

The court further found that defendants Chesterley took their deed without actual knowledge of the existence of the appellant's mortgage; that they were not bound thereby, and had taken title to the land subject only to the lien of intervener's mortgage. The court accordingly held that appellant have judgment against defendant Hawkins for the full amount claimed and \$125 attorney's fees; that the mortgage given to secure him as trustee was null and void; that the Lynch mortgage was a prior lien for \$2,000, less the sum of \$294, which had been paid thereon; and that title to the land was in the defendants Chesterley.

Appellant's mortgage is in proper form, and was seasonably recorded. It purports to be acknowledged before H. L. Miller who was the cashier of the bank at Sunnyside, and is attested with his seal. The instrument and its acknowledgment is sustained by the testimony of the appellant and by the notary.

The testimony of the defendants Hawkins is to the effect that they did not agree to and did not intend to sign a mortgage; that if they did so, the mortgage was given in ignorance of the fact that it was a mortgage.

We have not overlooked the answer of the husband defendant that the signature was not his signature, but the whole of his testimony makes it plain—and it is not seriously contended that it is not so—that he intended to say no more than that it was not a binding signature.

[1] A collateral issue was developed on the trial. It became uncertain whether the instrument was acknowledged in the office of the appellant or at the bank. Much is made of this uncertainty by counsel, but in the light of the whole record and the established principle that a deed fair upon its face, signed by the grantors and duly acknowledged, imports verity which courts will not lightly disregard constrains us to hold that the place the deed was acknowledged is not very material.

[2] Appellant contends that one who has signed a deed will not be heard to question it or to challenge the certificate of the notary who has taken and certified to his acknowledgment. There is abundant authority to sustain this premise but we think the better doctrine is that a grantor may impeach such certificate for fraud or other reasons, finding sustenance in any of the recognized princi-

ples of equity. We think the true rule is as stated in *Western Loan & Savings Co. v. Waisman*, 32 Wash. 644, 73 Pac. 703, where the court said:

"That the evidence required to overcome a certificate of acknowledgment must be clear and convincing is generally held, and it may well be said that where fraud or duress is not shown as a circumstance attending an acknowledgment, the unsupported testimony of parties directly interested in the impeachment is not of that clear and convincing character that is necessary to overcome a record and an official act."

The doctrine is sustained in *Drew v. Bouffleur*, 69 Wash. 610, 125 Pac. 947, and *State v. Hatfield*, 65 Wash. 550, 118 Pac. 735, Ann. Cas. 1913B, 895. See, also, 1 R. C. L. p. 294, as follows:

"Impeachability for Fraud, Accident, or Mistake.—It is a maxim of the law that fraud vitiates all things, and certificates of acknowledgment are no exception to the rule. The other grounds upon which written instruments generally are open to attack may also be made the basis for the impeachment of certificates by the introduction of parol evidence. Many courts, reasoning that the officer taking an acknowledgment acts judicially, have asserted that if a certificate is regular on its face, parol evidence may not be received to contradict it in the absence of an allegation of fraud, mistake, collusion, imposition, or the like. According to this view, certificates are not entitled to the precise degree of credit that is given to judgments of courts of record; but they are held to be entitled to much of the weight and authority of records, and to be subject with some modifications to the same general principles of construction and intent which apply to other matters of the same class."

All the books agree, however, that the evidence offered to impeach an acknowledgment regular in form must be clear, cogent, and convincing. 1 Cyc. at page 623, lays down the rule:

"Where a certificate of acknowledgment is regular on its face, a strong presumption exists in favor of its truth. * * * The proof to overthrow a certificate regular on its face must be so clear, strong, and convincing as to exclude every reasonable doubt as to the falsity of the certificate."

[3] In the case at bar, while it is true that the defendants Hawkins deny the mortgage, their testimony is not supported by any other witness, nor do there seem to be any equities which can be said to sustain their contention. On the other hand, their testimony is denied by all who were present, and is challenged by all the concomitant facts and circumstances. A pending action was dismissed; a judgment was satisfied which operated to release the property from the judgment lien. The mortgage was recorded and became a matter of constructive notice to the purported makers, and it may be fairly inferred from the record, a matter of notice to their attorney, the present intervenor, and the defendants Chesterley.

We conclude that the defendants and the intervenor have not sustained the issue tendered by them by evidence that is strong, convincing, and cogent.

[4, 5] The only question now necessary for us to decide is whether appellant is entitled to a deficiency judgment against defendants Chesterley. The law is that a deed taken subject to prior liens does not bind the grantee to pay, unless it is stated in the instrument or is shown by independent evidence that it was taken in fact subject to the payment of the existing incumbrance, or that the existing incumbrance was a part of the purchase price. It seems clear to us that the assumption clause in the Chesterley deed did not bind the vendees to pay or make them personally liable for any lien or incumbrance other than the mortgage owned by the intervenor. The deed was made subject to liens generally, and subject to a particular lien which is described and which the grantee assumed to pay. Or if the language be doubtful, appellant is in no better position. A vendee is bound under such covenants only when it is clear that it was his intention to assume and pay a lien or incumbrance. *Jones on Mortgages*, § 748, and citations. 27 Cyc. p. 1343. From this it follows that if it be doubtful, the doubt will be resolved in favor of the vendee, and a recovery against him will be denied.

The court below held jurisdiction of the case until the case of *Union Central Life Insurance Co. v. Hawkins*, 84 Wash. 605, 147 Pac. 199, should be finally decided in this court in order to determine whether the intervenor was entitled to the full amount of his mortgage, less the sum paid. That case being disposed of favorably to the intervenor's clients, he is entitled to a foreclosure of his lien.

The case is reversed and remanded, with directions to enter a decree that will protect the lien of appellant and the lien of the intervenor in the order of their priority.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(39 Wash. 254)

WELCH et ux. v. PETLEY et al. (No. 12889.) (Supreme Court of Washington. Jan. 11, 1916.)

1. MUNICIPAL CORPORATIONS §821—STREET IMPROVEMENT—PERSONAL INJURY—NEGLIGENCE—SUBMISSION TO JURY.

Where, in an action against a contractor and a city for personal injuries from a defective sidewalk, it appeared that the contractor was grading the street under a contract therefor with the city and occupied a portion of the street for that purpose near the point of injury with machinery and a coal pile; that he had barricaded the street but not the sidewalk, which was left open for the public, and on the night of the accident he had hung red lanterns on the machinery and coal pile, but had placed no lights or warning signals at a point where he had that day torn up the sidewalk, which was part of his work, and plaintiff, knowing that the grading was being done, but not knowing that the sidewalk was torn up at that point, was caused to fall by such condition of the sidewalk, the place being dimly lighted by distant street

lights. The case was properly submitted to the jury on the question of the sufficiency of the barriers and warnings with regard to persons using the sidewalk and on the question of plaintiff's negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.]

2. APPEAL AND ERROR § 977 — MOTION FOR NEW TRIAL—OVERRULING—DISCRETION.

Where, in an action for personal injuries, the court below overruled defendant's motion for new trial for developments in plaintiff's condition subsequent to the rendition of a judgment in her favor, such ruling will not be interfered with on appeal, in the absence of a clear abuse of discretion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Albert Welch and Ruby Welch, his wife, against B. H. Petley and others, to recover for personal injuries. Judgment for plaintiffs, and defendants appeal. Affirmed.

E. P. Whiting, Jas. E. Bradford, and F. M. Egan, all of Seattle, for appellants. Green & Chester, of Seattle, for respondents.

HOLCOMB, J. Eighteen errors are assigned by the appellants, but they are argued under three general propositions: (1) Whether or not appellants were guilty of negligence; (2) whether or not respondent Ruby Welch was guilty of contributory negligence; and (3) whether the court erred in giving and in refusing certain instructions.

[1] On and prior to June 20, 1914, Thirty-Seventh avenue south in Seattle was a public street, with a plank sidewalk along the easterly side thereof for some distance south of Hudson street, consisting of two rows of wide planks laid parallel side by side, and which had been used by respondents and pedestrians generally for a long time. At a point about 90 feet south of the south line of Hudson street the plank sidewalk was elevated about 20 inches from the ground. The city had let a contract to Petley for the grading of Thirty-Seventh avenue south, and on June 17, 1914, the contractor had taken possession of the street under his contract and, at the intersection of the street with Hudson street just south of the south line thereof, he had placed a platform on skids, 9 feet 9 inches wide and 35 or 40 feet long, on which was mounted a donkey engine and boilers. Just north of the south line of Hudson street and its intersection with Thirty-Seventh avenue south, a car of coal was placed on a track, and a large pile of coal was unloaded therefrom on the ground close to the platform and extending across the center of the street, leaving space sufficient at each end of the pile for the sidewalk and for teams to pass between the sidewalks and the coal pile up and down Thirty-Seventh avenue south. There were cables extended,

but left lying flat on the ground at the time mentioned, from the donkey engine south for some distance. The contractor removed one of the planks from the narrow sidewalk on the easterly side of Thirty-Seventh avenue south, at the point about 90 feet south from Hudson street where it was about 20 inches from the ground, and left no barrier or light or other warning to guard that place, and at that place, after night or on the night in question, it was very dark.

At about 10:30 in the night of June 20th, Mrs. Welch left the southwest corner of the intersection of Hudson street and Thirty-Seventh avenue south, walking very rapidly, or almost running, diagonally across Thirty-Seventh avenue south, to the easterly side of the street, reaching the line of the sidewalk on that side a little distance north of the place where the plank had been removed, walked to that place, and not knowing previously and not being able to see at the time that the plank had been removed, stepped down, fell, and sustained severe injuries. A part of the contractor's work was to remove the plank sidewalk and grade and improve the street its entire width. Mrs. Welch had been familiar with the street and the sidewalk in this locality about three years, but had not been along there that day, and was unaware of the removal of a part of the walk. There was an arc light at the southeast corner of the street intersection mentioned, extending on an arm from a wire pole. There were incandescent lights further south on Thirty-Seventh avenue, but none very near the place where the accident occurred. There was a conflict in the testimony as to what red lights were put up at the street intersection. It seems well established that there was one red light on the coal pile and one on the donkey engine. Respondents and other witnesses in their behalf testified that there was no warning red light at the entrance to the walk going south from Hudson street on Thirty-Seventh avenue, no board nailed up, nor any sign, signal, or warning to indicate that the walk was not to be used by the public. There was no barrier or sign of any kind at the south end of the block to indicate that the street was closed to travel.

1. Appellants rely upon the decisions in *Hunter v. Montesano*, 60 Wash. 439, 111 Pac. 571, Ann. Cas. 1912B, 955, *Jones v. Collins*, 177 Mass. 444, 59 N. E. 64, and *Compton v. Town of Revere*, 179 Mass. 413, 60 N. E. 931, to the points that obstructions so placed, and of such nature as to be calculated to give ample notice to the public that the street was in process of construction and not open for travel, thereby suspended the legal liability for not keeping the street in a safe condition for travel; and that a person so traveling such street assumes the hazard incident thereto.

These contentions are sound, but do the facts here come within them? In the Hunter Case the street had been in process of construction for two or three months, of which plaintiff was well aware, being employed in the daytime in a livery stable situate thereon; the accident occurred upon a dark, windy, rainy night; he knew that the street was all torn up at the place where he attempted to travel; he knew that there was a barrier extending from curbing to curbing at each end of the block on Main street which was being paved; he saw the barriers and knew the condition of the street. Assuredly, as was said by the court, per Gose, J., "he was guilty of the grossest negligence." In the case it was further pointed out that "Main street outside the sidewalk area was properly barricaded." Plaintiff in that case was not traveling upon the sidewalk area, but in the main portion of the street.

In *Jones v. Collins*, supra, it was stated by the court there were barriers across each end of the street that was being improved, and across the ends of each street leading into it, and had been up for many days previous to the accident, and "were so placed, and so numerous, and of such a nature as to be well calculated to give ample notice to the public that the street was in process of construction, and was not open for travel."

In the Compton Case it was pointed out that:

"This is not the case of a person entering upon a street in the nighttime, which he has no reason to suppose defective, but of a person entering a street in the daytime, the grade of which he knows is being changed, and which he also knows is not graded or fit for public travel."

Again:

"It is obvious that the plaintiff knew all that there was to know about the condition of things, and, in attempting to use the street, did it at his peril."

These cases, therefore, all differ from the facts in the case now under consideration. From them and many others in this and other states, as was said in the Hunter Case:

"The principle which may be deduced * * * is that a city is not required to so barricade a street as to preclude injury. It discharges the full measure of its duty when it gives a plain warning that there is danger in traveling a street."

But a street is often closed to travel as to its main body, or to teams and vehicles, and not as to its sidewalks or to pedestrians. The case of *Lautenschlager v. Seattle*, 77 Wash. 12, 137 Pac. 323 (also written by Judge Gose), is more controlling here. Plaintiff recovered against both the city and the contractor. On motion of the city, judgment n. o. v. was granted in its favor. It was said:

"We think the court erred in entering a judgment non obstante in favor of the city. Whether the appellant was guilty of contributory negligence is a question of mixed law and fact. There is abundant evidence in the record which justified the jury in finding that the public were traveling the two-plank way, where the appel-

lant fell, with the knowledge and approval of the city. * * * Was the appellant exercising reasonable care in view of all the attending circumstances? The jury, upon competent testimony, resolved this question in her favor. Where the public use a street upon the invitation of the city, either express or clearly implied, the duty devolves upon the city to use reasonable care to keep it in a reasonably safe condition for travel. * * * A traveler is not required to avoid a particular street because there is another and safer one that he may take. He has a right to travel upon any street which the city leaves open for travel. * * * Where a city undertakes to improve a street, it is required to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close the street to public travel. * * * It was incumbent upon the city to provide signals or warnings if the walk was in common use and dangerous, and it knew, or in the exercise of reasonable care ought to have known, its condition."

Judgment in favor of plaintiff on the verdict was ordered. The case does not depart from the Hunter Case, but is clearly distinguishable therefrom and from the other cases cited and relied upon.

In the present case the evidence showed that other persons were using the street, and that a man and his wife traversed the same sidewalk area immediately after Mrs. Welch, and in fact discovered her in the depression into which she fell. It was a proper case to go to the jury upon the questions of the sufficiency of the barriers and other warnings to notify the public of the suspension of travel upon the sidewalk area, and also upon the question of the negligence of Mrs. Welch.

2. It was upon the foregoing theory that the court instructed the jury, and of which appellants complain. There was no error, therefore, in the giving and refusing of instructions by the court.

[2] 3. As to alleged subsequent developments as to the condition of Mrs. Welch, shown on motion for new trial, the court passed upon them as matters of fact, exercised his judicial discretion, and denied the motion. It has so frequently been held in this state that in such case, unless there is a clear and manifest abuse of discretion by the trial court, this court cannot and will not interfere, that no citation of cases is necessary.

Judgment affirmed.

MORRIS, C. J., and MAIN, PARKER, and BAUSMAN, JJ., concur.

(89 Wash. 109)

COOK v. STORY. (No. 12849.)

(Supreme Court of Washington. Jan. 7, 1916.)

1. SALES \Rightarrow 23—EXPRESS CONTRACT—RIGHT OF ACTION.

Where a tentative contract to buy accessories and act as the seller's agent in a certain territory was rejected by the seller and a new contract sent to the buyer, which he rejected, the seller could not sue on the original tentative contract, as an express contract, for the

price of accessories shipped to the buyer but not accepted by him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. ¶23.]

2. SALES ¶23—ORDER ON FAITH OF TENTATIVE CONTRACT—OBLIGATION OF BUYER.

Where the buyer ordered accessories on faith of a tentative contract made by him with the seller's agent and repudiated by the seller, and a new contract sent, which the buyer rejected, he was under no obligation to accept the accessories ordered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 44-48; Dec. Dig. ¶23.]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by M. H. Cook against E. H. Story. From judgment for plaintiff, defendant appeals. Reversed and remanded, with direction to dismiss.

G. C. Israel, of Seattle, and H. B. Noland, of Tacoma, for appellant. Hayden, Langhorne & Metzger, of Tacoma, and McClure & McClure, of Seattle, for respondent.

ELLIS, J. Action for the purchase price of certain automobile tires and tubes, which it is alleged were sold and delivered to the defendant by plaintiff's assignor under a written contract. The plaintiff's assignor, W. D. Newerf, doing business as W. D. Newerf Rubber Company, in San Francisco and Los Angeles, was the Pacific coast agent for the Miller Rubber Company, a corporation operating a tire factory at Akron, Ohio. One C. W. Sahland, a traveling salesman for the Newerf Company, met the defendant, Story, in Seattle on May 28, 1913, and with him arranged the details of a contract appointing Story as general agent and distributor for the Newerf Company in the sale of Miller tires, tubes, and accessories, the agency to cover the states of Washington, Idaho, and Montana. Shortly after this conference the parties went to Tacoma and at the office of Hugo Metzler, an attorney and secretary of the Auto Equipment Company, through which the defendant expected to supply the demand for Miller tires in that city, the defendant for himself, and Sahland for the Newerf Company, signed a tentative contract covering the three states for one year, subject to termination by either party on 90 days' notice. By this tentative contract the defendant was to maintain at his own expense an office and showroom in Seattle, carry a stock sufficient to meet the requirements of customers, and advertise the goods. The Newerf Company was to extend certain credit, furnish goods to the defendant at certain scheduled prices, allow certain trade and cash discounts, and make replacements of guaranteed tires on given terms. This agreement was signed in duplicate with the understanding that it was to be submitted to the Newerf Company for approval. Sahland throughout represented that he had no authority to finally approve the contract. This was testified to by the

defendant and was admitted by Sahland himself. A blank for such approval appears at the foot of the contract. Sahland retained both copies of the contract for the purpose of submission to the Newerf Company for approval, stating that if approved one copy would be returned by the company to the defendant. He testified that he did in fact turn both copies over to the company for approval. It is admitted that the contract was never formally approved by the Newerf Company, and neither copy was ever returned to the defendant. On the contrary a new contract, materially differing from the one submitted, and omitting from its operation the state of Montana, was prepared in duplicate by the Newerf Company and sent to the defendant with a request that he sign and return it for execution by the company. On July 2, 1913, the defendant wrote the Newerf Company, declining to sign the new contract on the ground that it was not in accordance with his agreement with Sahland, and declining to proceed further in the matter. He testified that he then canceled all orders, amounting to \$4,000 or \$5,000, which he had given, and the fact is not contradicted. Apparently all orders on which goods had not been delivered save one were treated as canceled. That order, which is the one here involved, arose as follows: On June 1, 1913, the Auto Equipment Company, through its president, Lindquist, had ordered through Sahland tires and tubes to the amount of \$1,500 in anticipation of the races which were to take place at Tacoma in the first week of July. No word having been received from the order, the defendant on June 10th telegraphed the Newerf Company, among other things: "Wire Akron to ship me at Tacoma order prepared by Lindquist." The goods reached Tacoma about July 17th, billed to Miller Tire Company and Auto Equipment Company. Meanwhile, the Auto Equipment Company having been advised that Story had closed his place of business in Seattle and severed his relations with the Newerf Company sent one De Land to San Francisco to make some arrangement with the Newerf Company. On July 9, 1913, he received from that company the following, which is termed in the record a letter of credit:

"San Francisco, Cal., July 9, 1913.

"Auto Equipment Co., Tacoma, Wash.—Gentlemen: In accordance with verbal understanding with Mr. John De Land, we herewith grant you the privilege of selling Miller quality tires and tubes, also other accessories carried by us, in the state of Washington until such time as we may close this territory with E. H. Story, yourselves, or other parties. We will furnish you, during this time, a stock of Miller tires and tubes not to exceed the amount of \$2,500. Such stock to be delivered either from San Francisco, Los Angeles, or Akron, Ohio, in order to give the best service in supplying said stock. Your prices on Miller tires, during this time, to be 7½ and 5 per cent. from the two attached lists, you to pay us on the tenth of each month for all sales made from stock of Miller tires fur-

nished by us, when a further 5 per cent. for cash will be allowed. Yours very truly, [Signed] W. D. Newerf Rubber Co., per J. E. Newerf.

He testified:

"On the 9th of July they gave me this letter of credit. I returned to Sacramento, then came here and went into the Auto Equipment. Mr. Lindquist and Mr. Metzler told me there was a shipment down there for Auto Equipment. It was about the 17th or 18th of July that the goods were delivered to us. Newerf had told me it was on the road and would be delivered to us on the letter of credit which I had at the time. They told me that when I was in San Francisco, and said the Story deal was off."

He also testified that before returning to Tacoma he went to Akron, Ohio, to arrange an agency for the Miller tires, and there met W. D. Newerf, who told him the same thing. Sahland, who was present at that interview, denied this, but admitted that De Land was then told that "the deal with Story was entirely canceled" and the Newerf and Miller Companies were at liberty to give the Washington agency to the Auto Equipment Company.

When the goods arrived in Tacoma the railroad company, for some reason not explained, notified Story of that fact, but he refused to accept them and refused to authorize their delivery to the Auto Equipment Company, stating in effect that he would have nothing to do with the matter. The chief clerk of the freight agent of the railroad company at Tacoma testified that on Story's refusal to accept the goods he sent a telegram to the agent of the B. & O. Railroad at Akron, Ohio, but was not permitted to state the contents of that telegram or what reply he received. At any rate the goods were delivered to the Auto Equipment Company on July 17th. That company, as it now appears, was then in failing circumstances and went into the hands of a receiver soon afterwards.

The court found, in substance, that the goods were sold and delivered to the defendant under the terms of the written contract, and that there was a balance of \$1,399.02 due thereon, for which amount, with interest at 6 per cent. from August 30, 1913, judgment was entered. The defendant appeals.

[1] The appellant contends that no express contract was ever consummated, and hence the action being on an express contract cannot be maintained. Under the evidence we are clear that the execution of the written contract sued upon was never consummated. The tentative agreement was signed with the understanding that it would have to be submitted to the Newerf Company for approval. It was never approved, but was expressly repudiated by Newerf. A new

and different contract was sent to him. He rejected it and canceled all outstanding orders. The respondent seeks to meet this fact with the argument that no formal approval was necessary in that the Newerf Company ratified the contract by accepting and filling orders under its terms. There would be force in this argument were it not for the undisputed fact that the Newerf Company expressly repudiated the first contract and sought to impose a new one. There was never thereafter an offer on the part of the Newerf Company to approve or deliver to appellant the old contract, or to continue operations under it. The fact that under the first contract as a working basis some goods were ordered, delivered, and paid for, does not alter the fact that, even granting this sufficient to constitute a ratification, the Newerf Company itself refused to so regard it, or if so regarding it, rescinded the contract. Having itself repudiated or, what comes to the same thing, rescinded the contract, the Newerf Company cannot complain when the appellant meets it on the ground which it has elected to occupy. *Gibson v. Rouse*, 81 Wash. 102, 110, 142 Pac. 464.

[2] The Newerf Company, before the arrival of the goods, having repudiated the contract upon the faith of which they were ordered, the appellant was under no obligation to accept them. He was under no obligation to thus lay himself open to the claim now advanced as to the old contract, that he had ratified the new one by continuing to receive goods.

The respondent asserts that the contract forwarded to the appellant for execution was a "consignment contract" and not a selling contract, the inference being that it was not intended to take the place of the original agreement. This seems to be based upon a misconception of the record. It is true there had been some negotiations looking to a contract for taking goods on consignment, but the contract sent was by its terms a selling contract and bore a memorandum that it was "intended to take the place of the one signed and handed to Sahland May 28th." That such was its purpose Sahland himself testified. A letter in evidence from Newerf to Story so indicates.

The respondent did not sue on a quantum valebat, nor was there any evidence directed to that issue. He sued upon an express contract, which he failed to prove.

The judgment is reversed and the cause is remanded, with direction to dismiss.

MORRIS, C. J., and CHADWICK, FULLERTON, and MOUNT, JJ., concur.

(39 Wash. 43)

SMITH SAND & GRAVEL CO. v. CORBIN.
(No. 12773.)

(Supreme Court of Washington. Jan. 4, 1916.)

1. APPEAL AND ERROR ¶1097—DETERMINATION—LAW OF CASE.

A decision by the court on a former appeal constitutes the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. ¶1097.]

2. APPEAL AND ERROR ¶840 — QUESTIONS PRESENTED FOR REVIEW — DETERMINATION.

Rem. & Bal. Code, § 399, subd. 8, declares that a new trial may be granted for error in law occurring at the trial and excepted to. At a former trial defendant excepted to evidence addressed to a count of the complaint which did not state a cause of action. Held that, on appeal from an order granting defendant a new trial, the appellate court was bound to determine whether the complaint stated a cause of action in order to correctly decide the question of the admissibility of the evidence; hence that its determination on that matter became the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3301, 3303, 3314; Dec. Dig. ¶840.]

3. APPEAL AND ERROR ¶171—THEORY OF ACTION—CHANGE.

Counsel cannot assert on appeal inconsistent theories concerning a cause of action set out in his complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. ¶171.]

4. EVIDENCE ¶445 — PAROL EVIDENCE — WRITTEN CONTRACT—TIME OF PERFORMANCE.

Where a written contract for the excavation of rock fixed no time for the completion of the work, and therefore impliedly required completion within a reasonable time, the contract could not be varied by a contemporaneous or subsequent parol agreement that plaintiff should only be required to excavate the rock as it could crush and sell it at a profit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. ¶445.]

5. APPEAL AND ERROR ¶768—DETERMINATION.

The Supreme Court is not bound to consider only the questions presented in the briefs of the parties, but may make an independent investigation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3103; Dec. Dig. ¶768.]

6. PLEADING ¶248—AMENDMENT—SCOPE.

In an action for breach of a contract for the excavation of rock, where the original complaint averred that plaintiff was not bound to remove the rock faster than it could crush and sell the same with profit, an amendment setting up defendant's breach of the contract requiring payment of 90 per cent. of the monthly estimates of rocks removed states an entirely new cause of action, and, after the first complaint was held insufficient, should not be allowed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. ¶248.]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the Smith Sand & Gravel Company against D. C. Corbin. From a judgment for defendant, plaintiff appeals. Affirmed.

O. C. Moore, of Spokane, for appellant. Allen, Winston & Allen, of Spokane, for respondent.

MOUNT, J. This case has been before this court on two former occasions. The first appeal was by the plaintiff from an order granting a new trial. The appeal was first heard by department 1 of this court, and the order affirmed. 75 Wash. 635, 135 Pac. 472. A rehearing was granted and the cause was presented to the court en banc. The order granting a new trial was again affirmed, the entire court concurring. 81 Wash. 494, 142 Pac. 1163. In the en banc opinion, speaking of the trial court's ruling on the motion for a new trial, we said:

"The court, in ruling orally upon the motion, gave three reasons for granting a new trial: (1) That he had committed error in his instructions to the jury touching the burden of proof; (2) that he had erred in permitting any testimony to be introduced on the second cause of action; (3) that, in any event, the verdict was against the evidence. The formal order, however, did not state the grounds. Even under our decision antedating this appeal, which was taken prior to the adoption of the rule to that effect, in *Rochester v. Seattle, Renton & Southern R. Co.*, 75 Wash. 559, 135 Pac. 209, we are at liberty to examine the whole record, and, if it discloses any ground warranting the granting of a new trial, the order appealed from must be affirmed. Such an examination convinces us that the so-called second cause of action failed to state a cause of action. It pleaded an oral agreement contemporaneous with the written agreement, and sought to put upon this oral agreement a construction which would vary the terms and legal effect of the writing. It is a rule of universal application that a written contract complete in itself, or in so far as it is complete in itself, cannot be contradicted, explained, enlarged, varied, or controlled by extrinsic evidence of a different contemporaneous parol agreement." *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163.

We then held that, because the court at the first trial had committed error in admitting any evidence under the second cause of action, a new trial was properly granted. For a synopsis of the pleadings and of the facts we refer to the two former opinions.

On the transmission of the remittitur the defendant moved the trial court to strike from the amended complaint upon which the first trial was had the second and third causes of action. The motion was granted, and a judgment was entered dismissing the second and third causes of action. The plaintiff again appeals. There is grave doubt as to whether the order appealed from is appealable, but, inasmuch as it must be affirmed on the merits, we prefer so to dispose of it.

[1, 2] The first claim of error is directed to the striking by the trial court of the second and third causes of action. The third cause of action was abandoned at the former trial. There was obviously no error in striking it. Counsel makes the surprising claim that the sufficiency of the second cause of action was not before the court on the hearing en banc, and that therefore everything

said in the opinion save the final sentence affirming the order granting a new trial is obiter dictum. Several pages of his brief are devoted to the elementary rule that dictum is not decision. It is then argued that the sufficiency of the complaint was not before us because insufficiency of a complaint to state a cause of action is not made by statute a specific ground for the granting of a new trial. The statute (Rem. & Bal. Code, § 899, subd. 8) however, does provide that a new trial may be granted for "error in law occurring at the trial and excepted to at the time by the party making the application." It is self-evident that the admission of evidence addressed to a pleading which does not state a cause of action, over objection and exception taken, is error in law. We were therefore compelled to pass upon the sufficiency of the second count of the complaint in order to determine whether the trial court had committed error in law by admitting evidence under it. Demonstrably the determination of the insufficiency of the second cause of action was necessary to the conclusion that the new trial was properly granted. Our decision that it did not state a cause of action, therefore, became thenceforth the law of the case and a sufficient warrant to the trial court to strike it from the complaint.

[3, 4] Appellant now urges us to reconsider the question of the sufficiency of the second cause of action, insisting that all that was said in the opinion en banc was an inadvertence, and in conflict with the holding of this court in *Interstate Engineering Co. v. Archer*, 64 Wash. 629, 117 Pac. 470. We find no such conflict. In that case there was no formal written contract. The writing consisted of an order for structural iron and the letter acknowledging receipt of the order, stating the price, kind of material, manner of shipment, and terms of payment, but failing to state the *quantity* of material or the *time* when it was to be delivered. The defendant pleaded and was permitted to prove that the plaintiff agreed to ship the iron *within a reasonable time, and not to exceed 30 days after the date of the contract*. We said:

"The letter upon its face does not purport to state the whole agreement. * * * Where it appears that only a part of the contract is in writing, the part not in writing may be proved by parol, *in so far as it is not inconsistent with the written portion*. 17 Cyc. 748; Wigmore, Evidence, § 2430. It was proper, therefore, for the court to receive oral evidence as to the time when the materials were agreed to be delivered."

The phrase which we have italicized in the above quotation states an essential qualification in every such case. It marks a plain and elementary distinction between the *Interstate Engineering Case* and the case before us. In the case here there was neither allegation nor offer of proof that any definite time was agreed upon as a reasonable time for the removal of the rock. The written contract definitely provided *what work was to*

be done, and at what price, but did not provide when it was to be completed. *There being no allegation that any definite time was agreed upon, either orally or otherwise, it became an implied term of the contract that it must be done within a reasonable time*. It follows that the only competent evidence as to time was evidence of what was a reasonable time to do the work of removing the rock, which was the only work contemplated in the written contract. Such evidence was admitted, and, we held, properly so. But the appellant, as its so-called second cause of action, pleaded an alleged oral agreement which would extend the time of performance beyond the legally implied reasonable time for the removal of all the rock to such time as it might find necessary to crush the rock, and sell it at a profit. As we said on the rehearing en banc:

"Such an agreement would change the whole tenor of the written contract. It would extend the time of performance beyond the legally implied reasonable time for the removal of all the rock to such time as the appellant might find necessary to crush the rock and sell it at a profit. This would contradict and change the whole scope and meaning of the written contract touching a stipulation upon which the writing is clear and unambiguous. The written contract was not for a sale of rock, but for the removal of rock; hence no damages could be recovered for a loss of profits upon the rock without first showing that the respondent terminated the contract and re-entered before the expiration of a reasonable time for the removal of all the rock, not before the expiration of a reasonable time for crushing and selling of all the rock at a profit. These two things are so widely different that a contract for the one is wholly inconsistent with an agreement for the other."

If in the *Interstate Engineering Case* the plaintiff had pleaded an oral agreement that it should have such time to furnish the iron as might be required to purchase it at such price as to make a profit on the written contract to furnish the iron to the defendant, proof of such a collateral agreement would have been plainly inadmissible. It would have changed the whole tenor of the written agreement to furnish the iron at a given price for a given purpose. It would have had no tendency to prove what was a reasonable time to *furnish the iron*. Furnishing the iron was the definite purpose covered by the writing. The distinction is just this: The rule that the failure to fix a definite time in the writing to do the definite thing provided in the writing to be done will admit parol proof of what is a reasonable time to do *that definite thing* does not authorize parol proof of what would be a reasonable time to do *that thing and something else not mentioned nor implied in the writing*.

Counsel quotes with emphasis the following from the en banc opinion:

"In the case before us the appellant, by its so-called second cause of action, did not merely seek to plead facts showing what was a reasonable time for the removal of all rock, * * * but sought to set up and substitute for such reasonable time an oral agreement that the appellant should have such time as would be re-

quired to crush and dispose of the rock by the sale at a profit as the agreed time for the removal of the rock."

He then says that this construction of the second cause of action is not borne out by an inspection of the complaint, because "nowhere in the complaint is it alleged that the time for performance was to be extended for the purpose of enabling appellant to find purchasers or for any other purpose." He then immediately states that, under the allegations of the second cause of action, he was at the first trial permitted to introduce evidence "respecting the difficulty of finding a market for the crushed rock and of delays in the work consequent thereon." Further along in the same connection he argues:

"Now, since the oral portion provided that the rock, when removed, should become the property of the appellant as an additional consideration, then it was proper to inquire and introduce evidence to prove under what circumstances and conditions the rock so contracted to be removed could be rendered available and valuable as an additional consideration, and the question of what constituted a 'reasonable time' for performance was to be determined in the light of those conditions as they might be disclosed by the evidence. This line of inquiry was permitted to some extent by the court at the former trial, and it was thereby disclosed, as commented upon by this court, that the value of the rock when crushed, likewise the demand therefor, was dependent upon a variable market, which was controlled in turn to a large extent by the business conditions of the city of Spokane and the amount of public work in progress wherein crushed rock might be used as a building material. These things, we repeat, were undoubtedly in the minds of the contracting parties at the time of the execution of the contract, and necessarily constituted the surrounding circumstances and conditions which must be considered in order to arrive at a just conclusion as to the time within which performance was to be completed."

If in this counsel does not construe his own pleading precisely as we construed it in the quotation from our en banc opinion, which he criticizes, then his language has no meaning at all. Nothing which we could say could make it plainer than this language of counsel does that the purpose of the second cause of action was to plead, in order to prove as an additional consideration to that named in the writing, a contemporaneous parol agreement contradicting the terms, enlarging the scope, and varying the purpose of the contract as written, and thus, under the guise of proving an additional consideration, ingraft on the written agreement new terms and covenants by parol so as to enlarge the time of performance. Counsel cannot in one breath disclaim that purpose for his second cause of action as pleaded, and in the next breath claim that purpose for *the only evidence offered under that pleading*.

[5] Counsel intimates that the question of the sufficiency of the complaint was not raised in the briefs on the former appeal, and

complains that the arguments in support of it "were the exclusive products of the industry of the court." The point was raised in respondent's opening brief on the first appeal, and was thereafter discussed in the appellant's reply brief, and again in appellant's brief on rehearing en banc. Moreover, the trial court discussed the point in his oral ruling on the motion for a new trial. It is simply idle to intimate that the question was not presented in the record. The statement that the arguments in support of our opinion en banc were the product of the court's industry is largely true, but furnishes no just ground for criticism. The responsibilities of this court as a court of review are not limited to what the briefs may offer. Many appeals are presented in which the respondent fails to appear and file any brief, but we never treat the appellant's case as confessed on that account. In such a case we always make an independent investigation to the extent that our limited time will permit, and endeavor to reach a correct result. For an example see *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917.

[6] Finally, the appellant, though insisting that the second trial should have been had on the pleadings as they stood when the new trial was granted, somewhat inconsistently now claims that the trial court erred in refusing to permit an amendment of the second cause of action. The trial court committed no error in this respect. The purpose of the proposed amendment was to claim a breach of the contract on respondent's part in failing to pay 90 per cent. of the monthly estimates of rocks removed as provided in the written contract. This was not claimed as a breach in the original amended complaint. To have permitted the amendment would have introduced an entirely new cause of action. Moreover, to now assert this as a reason for the appellant's delay in removing the rock would be a plain departure from the position taken by appellant in its reply, wherein it is alleged, in substance, that its delay in removing the rock was contemplated by a collateral oral agreement that appellant should have such time to remove it as might be necessary to dispose of it to third persons for commercial purposes. To permit such a departure by amendment would be to encourage successive trials on wholly different theories and to entertain appeals in piecemeal. Such a course would lead to a never-ending litigation of the same transaction. *Perrault v. Emporium Department Store Co.*, 83 Wash. 578, 145 Pac. 438, and cases there cited.

Affirmed.

MORRIS, C. J., and FULLERTON, CHADWICK, and ELLIS, JJ., concur.

(39 Wash. 38)

MUMFORD v. SMITH et al. (No. 12665.)
(Supreme Court of Washington. Jan. 6, 1916.)1. EXCHANGE OF PROPERTY ⇐8 — LAND —
RESCISSION—EVIDENCE.

In an action to rescind a contract for the exchange of real estate, evidence held sufficient to show that plaintiff was induced to make the exchange through defendant's false representations.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. ⇐8.]

2. EXCHANGE OF PROPERTY ⇐5—EXCHANGE
OF LAND—FALSE REPRESENTATIONS.

Where defendant, with intent to deceive and defraud plaintiff, induced her to exchange her farm and vacant lots for his apartment house by making false representations regarding the present and prospective value of the house, the rents obtainable, nearby prospective improvements, the desirability of the neighborhood, and his ability to close a pending sale to her large profit, and the house was grossly inadequate as a consideration for plaintiff's property, plaintiff was entitled to the rescission of the contract, since the transaction was a fraud upon her.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 5, 6, 8-10; Dec. Dig. ⇐5.]

3. EXCHANGE OF PROPERTY ⇐3—FALSE REP-
RESENTATIONS—MATERIAL FACTS.

Such misrepresentations being not merely opinions excusable as seller's praise, but misrepresentations of material facts whose falsity was not readily ascertainable, plaintiff might rely upon them in making the exchange.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 7; Dec. Dig. ⇐3.]

4. EXCHANGE OF PROPERTY ⇐8 — FRAUD —
DECREE.

Where defendant, directly after the exchange, sold part and mortgaged part of the property so obtained from plaintiff to innocent third persons, precluding a complete restoration in an action to rescind such contract of exchange, plaintiff is entitled in her decree to a money judgment over for the amount of her loss through such sale and mortgage.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. ⇐8.]

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Harriet Mumford against Carmichael J. Smith and others to rescind a contract for the exchange of land. Judgment for defendants, and plaintiff appeals. Reversed.

Aust & Terhune, of Seattle, and J. Y. Kennedy, of Everett, for appellant. El. C. Dalley, of Everett, for respondents.

FULLERTON, J. [1] In the early part of the year 1913 the respondent Carmichael J. Smith, a real estate broker doing business in the city of Everett, inserted an advertisement in a local paper offering to exchange a hotel in that city for farm lands. The appellant, Mumford, noticing the advertisement, called upon Smith with a view of making such an exchange. Mrs. Mumford at that time owned a 40-acre tract of land situated near Marysville, in Snohomish county, and some 100 lots

in an addition to the town of Des Moines, in King county. Together they visited the hotel mentioned in the advertisement, and the appellant expressed her satisfaction therewith, but no serious, if any, negotiations were had with the owner looking to an exchange of property. Smith had in the meantime acquired the legal title to an apartment house and the lots on which the same was situate in the city of Everett, and he immediately directed the appellant's attention to this property, offering it in exchange for her property. After some negotiation an exchange was effected, the appellant taking the apartment property, and the respondent taking the 40-acre tract and some 71 of the lots in the Des Moines addition. The deeds were exchanged on June 13, 1913. Later on the appellant conceived that she had been overreached in the transaction, and brought the present action to rescind the contract. In her complaint she set forth at length the negotiations between herself and the respondent Smith leading up to the exchange, and charged him with falsely misrepresenting the income derived from the property, and with making false representations concerning its condition, its desirability as an apartment house, and its proximity to certain improvements about to be instituted by a public corporation which would greatly enhance its value. Issue was taken on the complaint, and a trial had, which resulted in a judgment for the respondent.

The trial judge made no findings of fact, nor does the record otherwise disclose the grounds upon which he rested his decision. The evidence makes it clear, however, that he could not have found that the appellant was not defrauded. On this question there is no room for even a reasonable doubt. She gave up property in the exchange which the respondent admits had a substantial value, and which conservative witnesses estimated to be worth from \$4,000 to \$5,000 over and above its incumbrances. She received nothing in the exchange other than the apartment house property and certain furniture contained therein. No disinterested witness valued the apartment property in excess of \$3,500, or the furniture in excess of \$300, and some of them placed the values at even a less sum. The apartment property was taken subject to two mortgages, the one for \$1,300, on which the interest was in arrears for more than a year, and the other for \$1,500, on which the interest was in arrears for more than a year and a half; in fact, on the latter mortgage no interest had been paid since its execution. Giving the property its highest valuation, she did not receive for the very considerable property she deeded to the respondent values in excess of \$400 or \$500.

There is but little question also that she was actually deceived and overreached by the respondent. While many of the representations she charges him with are denied by

him, the record leaves but little doubt in our minds as to where the truth lies. He represented that the property would produce in rentals \$24 per week, whereas it could not subsequently be made to bring as much as half of that sum, and this under the management of the respondent himself. He represented to her that the property was in a desirable locality for an apartment house, whereas it was shown that it is situated in what was formerly a restricted district, and because of its locality was not sought by a desirable class of tenants. He represented that a railway company had recently purchased lands in the vicinity for a right of way, and would shortly erect a depot near the property, whereas no such right of way had been purchased nor was the building of a depot, so far as shown, even contemplated by a railway company. He represented that the property could be turned into cash within a short period at a price which would net the appellant the values she placed upon the property she was given in exchange, and that he had a customer ready to take it at such a price, or, to use her language:

"He said he wanted three months' time within which to sell the property, because he had a purchaser from Seattle waiting for their money to be handed over to them when the court decided to buy the Knapp place. He said they had been up several times, and were perfectly satisfied with the place, and just asked for time until their money could be got from the East. They seemed to be heirs, as I understood it, and their case was in court, and was to be decided in a short time, and by the time the case would be decided, the depot would be started, and he would get \$12,000 for that place. That was the way the deal was planned. He was to sell the Knapp property to those people and give me, less the commission, \$12,000; the mortgage to be deducted."

Whereas, he knew that the property could not be so sold for the price stated; that he had not shown it to any Seattle parties, and, in fact, had no customer. As we say, there can be no other conclusion drawn from the evidence than that the appellant believed these representations and was induced to make the exchange she did make because of them.

[2, 3] The further question is: Do these representations justify a rescission of the contract? It is our opinion that they do. In the first place, the difference between the values of the properties exchanged was so gross as to challenge the good faith of the transaction. In so far as the appellant is concerned, there was a gross inadequacy of consideration—for the thousands that she gave up she received only hundreds in return—and gross inadequacy of consideration has always been regarded as a badge of fraud. In the second place, all of the representations made by the respondent were not mere "seller's praise" or mere matters of opinion. Some of them at least related to matters of fact the truth or falsity of which could not readily be ascertained by the appellant. She could not readily ascertain, for

example, whether a right of way had been purchased by a railroad company for a line of railway which would run near the property, and that a depot building was to be constructed near the property, nor could she readily ascertain whether the appellant had under way a sale of the property which was being delayed merely because of certain necessary formalities in court procedure; and these, we think, were representations with reference to material matters, purposely used with the intent to deceive and defraud. We said in *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55, that all the cases agree that the purchaser may rely upon representations of the vendor where for any reason the falsity of the representations are not readily ascertainable, and, clearly, the principle is applicable to certain of the representations made here. Some of the representations claimed to have been false and fraudulent may fall under the denomination matter of opinion, but the result of the whole was that the appellant was overreached, and the respondent, because thereof, obtained an unjust and unconscionable advantage. The observation of Judge Root in *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799, therefore seems pertinent, namely:

"Where it is to the court perfectly plain that one party has overreached the other, and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, we do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness. It is well known that many good people, and people of average or greater intelligence, are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts. Such people should not find encouragement in the thought that, by keeping their machinations within the letter of the law, they may find sanction for their practices and reap the reward of their craftiness. To the victim it is of little import whether his property is taken from him by a bold and forcible robbery or by an ingenious and unsuspected deception. The injury to him is the same; and the evil effect of court decisions which permit the wrongdoer to enjoy the fruits of his chicanery is of no small import when viewed from the standpoint of public policy. It is not the function of courts to make contracts for parties, or to relieve them from the effects of bad bargains. But, where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, we think a court of equity may with propriety interpose."

[4] It remains to inquire what form of decree should be directed. After receiving possession of the deeds the respondent immediately sold the lots at the town of Des Moines, and increased the mortgage on the 40-acre tract from \$1,000 to \$1,200, retaining, however, the legal title to the latter proper-

ty. It is not questioned that the purchasers of the lots situated at Des Moines and the mortgagee of the 40-acre tract acted in the utmost good faith, and, under well-known principles, the interest acquired by them cannot be questioned by the appellant. This precludes a recovery in specie of the lots, or any modification of the mortgage, but (the defendant being insolvent) it does not prohibit a recovery in specie in so far as recovery affects only the immediate parties to the contract, with a judgment over against the party perpetrating the wrong for the value of the property he has placed beyond the reach of the process of the court. This principle would entitle the appellant to a recovery of the 40-acre tract in specie, and to a judgment against the defendant Carmichael J. Smith for the value of the Des Moines lots, plus the difference in the amount of the mortgage on the 40-acre tract at the time of the exchange and the amount to which it was subsequently increased. There is some contrariety of opinion in the evidence as to the value of the Des Moines lots, but conservative witnesses valued them at from \$1,000 to \$1,500. The appellant received certain small sums in rents from the apartment house with which the respondent must be credited. Striking a balance, we find that the money judgment to which the appellant is entitled is \$1,250. The appellant must also reconvey to the respondent the apartment property.

The decree of the lower court is therefore reversed, and the cause remanded with instructions to enter a decree in accordance with this opinion.

MORRIS, C. J., and ELLIS and CHADWICK, JJ., concur.

(89 Wash. 168)

In re CONNOLLY'S ESTATE.
FARLEY et al. v. HOPKINS.
(No. 12658.)

(Supreme Court of Washington. Jan. 10, 1916.)

1. WILLS \S 302—DOCUMENTARY EVIDENCE—IDENTITY OF SIGNATURES.

That an alleged forged signature is fac simile of an admittedly genuine signature, is, where the writer was illiterate, strong and well-nigh conclusive evidence of forgery.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. \S 302.]

2. APPEAL AND ERROR \S 1011 — REFUSAL — FINDING.

A finding of the trial court on conflicting evidence, where it had the witnesses before it, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. \S 1011.]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Proceeding by John Farley and the State of Washington against James Hopkins, as executor of the last will and testament of

Edward Connolly, deceased, to contest the will. From a judgment in favor of contestants, defendant appeals. Affirmed.

Lucius G. Nash and Nuzum, Clark & Nuzum, all of Spokane, for appellant. Tolman & King, Luby & Pearson, John B. White, and Fred J. Cunningham, all of Spokane, for respondents.

MOUNT, J. The purported will of Edward Connolly, deceased, is contested by one asserting himself to be an heir, and by the state of Washington. The case took the usual turn of such cases, and there is much conflict of testimony.

After very thorough inquiry the trial judge found the will to be a forgery, and held, further, that the right of the state to claim the property under the laws providing for the escheat of property of deceased persons would not be prejudiced by his holding. The witnesses to the will testified that it was executed by the deceased, and its whereabouts is accounted for by the testimony of other witnesses from about the time it was executed until it was offered for probate. On the other hand there is testimony tending to show that the deceased had not executed a will, and that he had manifested an intent not to do so.

Several experts in handwriting were offered as witnesses, and they concur in the opinion that the purported signature to the will is a forgery. The fact that the experts agree in this case may be attributed to the unusual instance that they were all testifying on the same side of the case.

At least two men who were familiar with the signature of the deceased, and with the deceased and his characteristics, expressed the opinion that the signature was that of Edward Connolly.

We have read the whole of the record with more than our usual care, keeping in hand the several exhibits to which the witnesses were addressing their testimony. We have made the same examinations and comparisons in the same way and with the same instruments employed by the expert witnesses and, but for the fact that there was offered by the proponents of the will an admitted signature of Edward Connolly and which became the principal basis for comparison, we would be inclined, notwithstanding the opinion of the experts, to hold that the signature to the will is genuine. But when the two signatures, the one upon the will and the one referred to as Exhibit No. 7 are considered, we believe, as the court below must have believed, that the signature upon the will is a tracing of the genuine signature. Edward Connolly was not a man of education, nor was he given much to writing.

[1] It is understood of all men that no two signatures are exactly alike, or so nearly alike that they will bear a superimposition

of one upon the other, and if they do, it is one of the strongest evidences of a forgery. The subject of identity of signatures and the conclusions to be drawn therefrom are learnedly discussed by Mr. Osborn in his finished work on Questioned Documents, chapter XVI. After noting that it is the natural thing for the model to go undiscovered, he says:

"Strange as it may seem, however, in many important cases the model writing is actually put in the case to prove the forged writing to be genuine by means of it."

It has so happened in this case. We have the model—the authenticated signature—and the questioned signature. All the books agree that if exactly similar they will prove too much.

"This coincidence of a disputed signature with a genuine one when superimposed against the light has long been held by the courts to be proof of simulation." *Matter of Burtis*, 43 Misc. Rep. 437, 80 N. Y. Supp. 441.

"That an illiterate man, capable of writing his name * * * could, without tracing and painstaking design, produce two signatures so precisely alike," is deemed incredible. *Matter of Koch*, 33 Misc. Rep. 153, 68 N. Y. Supp. 375.

"It is a fact well known, and may be readily verified, that no two signatures, actually written in the ordinary course of writing them, are precisely alike. The character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent. But the coincidence is seldom, if ever, known, where a genuine signature of a person, when held up to the window pane, superposed over another genuine signature of the same person, is such a fac simile that the one is a perfect match to the other in every respect. * * *

"But where two or more supposed signatures are found to be counterparts, I think the simulation is detected by that circumstance. Genuine signatures will not lap with perfect similarity one over another." *Hunt v. Lawless*, 7 Abb. N. C. 119.

"It does not seem hardly possible that one, without design, can write his name twice so exactly alike, in spaces between and height of the letters, and their slope or angles, as that a tracing of one will accurately measure the other in every respect. Indeed, numerous experiments show that it cannot be done when it is sought to be done. Such a perfect coincidence as in the case of these two signatures in this cause is at least highly improbable, and but barely possible, if attainable at all." *Day v. Cole*, 65 Mich. 129, 31 N. W. 823.

And so conclusive is this circumstance that at least one court has followed it to the exclusion of other evidence. It is said:

"* * * And for this reason it does not need the testimony of experts to demonstrate that these signatures were not genuine, but tracings. The resemblance in each is so striking that it cannot help but be observed upon a bare inspection, and if a measurement be made from any given point in one, it will be found to correspond to the merest fraction of an inch in the other; in other words, each signature will superimpose the other, a similarity which does not appear in the concededly genuine signatures introduced in evidence, and which from the very nature of things could not occur." *Matter of Rice*, 81 App. Div. 223, 81 N. Y. Supp. 68.

[2] We have not overlooked the point that is made that the will antedates by three

months the authenticated signature to which we have referred, but we are mindful that it is not likely that one who is disposed to forge a signature would hesitate to endeavor to discount or destroy the evidence of his forgery by dating the forged instrument upon a day when the signature relied upon as a copy was not in existence.

In short the testimony is conflicting. We have weighed it carefully, and we think that the findings and decree of the trial judge are sustained by a preponderance of the evidence. We have come to this conclusion endeavoring in our own minds to reject entirely the testimony of two of the principal witnesses for the contestants, that is to say, Stephen Doyle and George Morris. The testimony of these witnesses is vigorously assailed by counsel. We believe ourselves that their testimony is so freighted with fabrication as to make them unworthy of belief.

There is no question of law in this case. The trial judge had the advantage of seeing and hearing the witnesses, and of marking their demeanor while upon the witness stand. We find nothing that would sustain a holding that the preponderance of the evidence is not with the contestants.

The decree of the lower court is affirmed.

MORRIS, C. J., and ELLIS, CHADWICK, and FULLERTON, JJ., concur.

(89 Wash. 243)

SMITH et al. v. CRAVER et al.
(No. 12792.)

(Supreme Court of Washington. Jan. 11, 1916.)

MUNICIPAL CORPORATIONS §582—EMINENT DOMAIN — LOCAL IMPROVEMENT — DELINQUENT ASSESSMENT—DEED TO PURCHASER—NOTICE TO "OWNER."

Within Rem. & Bal. Code, § 7808, as to issuance of deeds to the purchaser of certificates of delinquency issued on eminent domain local improvement assessments, the owner of the lots being after lapse of two years first given 60 days' notice within which to redeem, which notice can be given by publication if the owner cannot be found in the state after diligent search, S., in whose possession the lots have been for 10 years, who was the record owner when the assessments were levied, whose name appeared as owner on the assessment rolls and in the certificate of delinquency, and who has always lived in the immediate vicinity of the lots, is the "owner" to whom notice must be given, she having continued to be the actual owner, though after the issuance of the delinquent certificates she gave a mortgage in the form of an absolute deed to G., which was recorded, whereby he became the apparent record owner.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1299, 1300; Dec. Dig. §582.

For other definitions, see *Words and Phrases*, First and Second Series, Owner.]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge. Action by Effie E. Smith and others against L. H. Craver and others. From a judgment

of dismissal, plaintiffs appeal. Reversed and remanded.

Barker & Rozema, of Seattle, for appellants. A. C. MacDonald, of Seattle, for respondents.

PARKER, J. The plaintiffs, Effie E. Smith et al., seek to have set aside two tax deeds issued to the defendant L. H. Craver by the city treasurer of the city of Seattle for lots 11 and 12, respectively, of block 3, Evans & Blewett's addition to the city of Seattle. The deeds were issued upon delinquent eminent domain local improvement assessments and certificates of delinquency issued therefor, and are claimed by the defendants to rest upon valid proceedings regularly had under section 7808, Rem. & Bal. Code, relating to such delinquent assessments. The defendant L. H. Craver demurred to the plaintiffs' complaint upon the ground of insufficiency of facts to constitute a cause of action. The demurrer was by the court sustained: and, the plaintiffs electing to not plead further, judgment of dismissal was rendered against them, from which they have appealed.

The controlling facts may be summarized from the allegations of the complaint as follows: Appellant Effie E. Smith was the actual and also the record owner of the lots at the time of and long prior to the issuance of the delinquent certificates here involved. Her name appeared upon the assessment rolls as the owner of the lots, and her name also appeared on the delinquent certificates as the owner of the lots. In November, 1912, after the issuance of the delinquent certificates, George E. Gowen became the apparent record owner of the lots. While the conveyance to him was by deed absolute in form, it was intended as a mortgage only to secure a loan of \$445, made by him to appellant Effie E. Smith. The record of this deed in the office of the auditor of King county made him the apparent record owner of the lots. In April, 1913, respondent L. H. Craver, having then become the owner by assignment of the certificate of delinquency against lot 11, gave notice to George E. Gowen, by publication, of his intention to apply to the city treasurer for a deed to that lot if not redeemed within 60 days from the date of the first publication of the notice. In April, 1913, M. L. Ash, the original holder and then owner of the certificate of delinquency against lot 12, gave notice to George E. Gowen, by publication, of his intention to apply to the city treasurer for a deed to that lot if not redeemed within 60 days from the date of the first publication of the notice. Thereafter respondent L. H. Craver, became the owner of that certificate of delinquency by assignment from M. L. Ash. These published notices were addressed to George E. Gowen only. They were evidently so addressed and given, upon the assumption that George E. Gowen was the owner of

the lots and the only person to whom notice of application for the deeds was required to be given. No other notice was given to any one. Thereafter respondent L. H. Craver filed with the city treasurer his affidavits, stating, in substance, that he was the owner of the certificates; that notice had been given by publication to George E. Gowen; that George E. Gowen was the record owner of the lots; "that immediately before publishing the notice hereinafter referred to, affiant made, and caused to be made, diligent search for the said George E. Gowen, and that affiant has been unable to find him, and believes that said George E. Gowen is not now within the state of Washington, and was not at the time of the first publication of the notice of application for a deed;" and that all other taxes against the lots had been paid. Respondent L. H. Craver thereupon demanded of the city treasurer that he issue deeds to him for the lots as holder of the unredeemed certificates of delinquency. Thereafter, on July 8, 1913, the city treasurer executed and delivered to respondent L. H. Craver a deed for each of the lots; the same not having been redeemed. No notice of any application for the deeds, or either of them, was ever given to appellant Effie E. Smith, nor did she have any actual notice or knowledge thereof. Thereafter appellant Effie E. Smith, for the purpose of effecting a redemption from the sale of the lots, caused to be tendered to L. H. Craver the sum of \$425 in payment of the delinquent assessments for which the certificates were issued, including additional taxes and assessments paid by respondent Craver and his predecessor in interest, which tender was refused. In her complaint Effie E. Smith offers to pay all taxes, assessments, and lawful charges to whomsoever due for the redemption of the lots. Touching the question of the necessity of notice to appellant Effie E. Smith of the applications for the deeds, giving her opportunity to redeem as owner of the lots, she alleged:

"That said plaintiff Effie E. Smith is now, and has been for more than 10 years last past, the owner in fee simple and in possession of lots 11 and 12, block 3, Evans & Blewett's addition to the city of Seattle, in said county, as her separate property. * * * The plaintiff Effie E. Smith is now, and has been for several years last past, a resident of the city of Seattle aforesaid, and for a long time prior to the publication of said notice lived in the immediate vicinity of said lots 11 and 12, and her whereabouts and her ownership of said lots could have been ascertained at any time before the publication of said notice, if any diligence at all had been exercised."

This action was brought about one year following the issuing of the deeds by the city treasurer.

No question is made as to the validity of the assessments, or the validity of the certificates of delinquency. The deeds were issued, as claimed by counsel for respondents, in accordance with procedure regularly had, and notice given as prescribed by section

7808, Rem. & Bal. Code, which, so far as we need here notice its provisions, reads:

"Every piece of property sold for an assessment shall be subject to redemption by the former owner, or his grantee, mortgagee, heir or other representative at any time within two years from the date of the sale. * * * Should no redemption be made within said period of two years, the treasurer shall, on demand of the purchaser or his assigns, and the surrender to him of the certificate of purchase, execute to such purchaser or his assigns, a deed for the piece of property therein described: Provided, that no such deed shall be executed until the holder of such certificate of purchase shall have notified the owner of such piece of property that he holds such certificate, and that he will demand a deed therefor; and if, notwithstanding such notice, no redemption is made within sixty days from the date of the service or first publication of such notice, said holder shall be entitled to said deed. Said notice shall be given by personal service upon said persons: Provided, that in case said parties are nonresidents of the state or they cannot be found therein after diligent search, then such notice may be given by publication in a weekly newspaper published in said city once each week for three successive weeks or if no newspaper be published in said city, then publication shall be made as provided in section 7792. Such notice and return thereto, with the affidavit of the person claiming such deed showing that such service was made, shall be filed with the treasurer. Such deed shall be executed only for the piece of property described in the certificate, and after payment of all subsequent taxes and special assessments thereon."

The principal contention of counsel for appellants is that Effie E. Smith was the owner of the lots at all times here involved, within the meaning of the provisions of section 7808, above quoted, requiring notice to be given to "the owner" by the holder of the certificate of delinquency of his application to the city treasurer for a deed, so as to furnish such owner an opportunity to redeem before the issuance of such deed. We are constrained to agree with this contention, assuming, of course, that the allegations of the complaint are true. Counsel for respondents proceed upon the theory that the notice need only be given to the record owner, that is, the record owner as shown by the instruments of conveyance of record in the county auditor's office, and that since there was of record in that office a conveyance absolute in form for the lots from appellant Effie E. Smith to George E. Gowen, respondent L. H. Craver had the right to rely absolutely upon such conveyance as showing George E. Gowen to be the owner of the lots. Now this law is silent as to who shall be deemed the owner for the purpose of giving notice of application for deeds within the meaning of section 7808 above quoted. This law is, in this respect, unlike those tax laws which provide that for the purpose of service of notice or process, those persons shall be deemed owners whose names appear upon the tax rolls or some other specified public record. This law uses the word "owner," in this connection, unqualifiedly; and we think it means the real owner, unless the real owner has done something which works an es-

toppel against him, asserting that he is the real owner and as such entitled to notice furnishing him an opportunity to redeem. It might be that if the same name appeared as owner upon the assessment rolls, in the certificate of delinquency and in the record of conveyance in the auditor's office, and in addition thereto the lot was not in possession of any one, such evidence of ownership would entitle the holder of the certificate of delinquency to a deed upon giving notice to such owner, regardless of who the true owner might be. But we have no such case here. We have seen that these lots have been in the possession of appellant Effie E. Smith for more than 10 years past; that she was the record owner when these assessments were levied; that her name appears as owner upon the assessment rolls; that her name appears as the owner in the certificates of delinquency; and that she now lives, and for a long time prior to the publication of the notices had lived, in the "immediate vicinity" of the lots. We think these are facts to which respondent L. H. Craver could not shut his eyes. We are not dealing with the foreclosure of a general tax lien, a lien which the law itself furnishes to all owners, in a measure, an annual notice of its existence. But we are dealing with a local assessment lien, the creation of which the owner of the property charged may never have any actual notice, and which is sought to be foreclosed in this summary manner instead of by judicial process. More, this is an eminent domain local improvement assessment, for which property at some considerable distance from, and not abutting upon, the improvement may be assessed, so that the mere making of the improvement may not suggest to the owner that his property is to be assessed therefor, as it generally does where his property abuts directly upon an ordinary local improvement which he sees being constructed. Hence the necessity, which the law has always recognized in such cases, of requiring the strictest compliance with the prescribed statutory prerequisites for the issuance of a deed, divesting the owner of title in satisfaction of such an assessment. These observations suggest the exercise of great caution and require strict adherence to the notice and procedure prescribed in section 7808, above quoted, before it can be held that the owner is divested of his title in satisfaction of such a local assessment by the issuance of a deed by the city treasurer, especially where the required notice furnishing the owner an opportunity to redeem is not personal, but constructive only, as the notice here relied upon was.

In *Albring v. Petronio*, 44 Wash. 132, 140, 87 Pac. 49, 51, Justice Crow, speaking for the court, said:

"Our view is that this statute must be strictly construed as against the respondent; that he must be held to a complete and exact compliance with all of its provisions as a condition

precedent to obtaining his deeds. Had he succeeded in giving personal notice to the appellants, a less stringent rule might be invoked in his behalf."

This observation, it is true, was made in connection with defects of procedure preliminary to the issuance of a deed by the city treasurer not exactly of the same nature as that here involved, but the principle involved is the same, and the statute there involved was, in substance, the same as the above-quoted provisions from section 7808, Rem. & Bal. Code. *Loeb v. Asberry*, 44 Wash. 427, 87 Pac. 510, and *Jones v. Seattle Brick & Tile Co.*, 56 Wash. 168, 174, 105 Pac. 238, lend support to this view.

We are of the opinion that appellants' complaint states a cause of action, entitling them to redeem from the sale evidenced by the certificates of delinquency upon which the deeds of the city treasurer were issued. It follows that the sustaining of respondents' demurrer to appellants' complaint and the dismissal of the case were erroneous.

The judgment is reversed, and the cause remanded for further proceedings.

MORRIS, C. J., and MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

(89 Wash. 268)

JENSEN v. SCHLENZ et al. (No. 13041.)
(Supreme Court of Washington. Jan. 1, 1916.)

1. TRIAL \S 108½ — CONDUCT OF COUNSEL — REFERENCE TO INSURANCE.

If information that defendant in an accident case carries liability insurance comes about naturally, and is a mere incident to a lawful inquiry by counsel on examination of a juror into his business, and whether he has business relations with defendant, there is no error, but only when there is misconduct of counsel by injection of such information into the case in a collateral way for the purpose of bringing it to the jury's knowledge that it is held harmful.

[Ed. Note.—For other cases, see Trial, Dec. Dig. \S 108½.]

2. APPEAL AND ERROR \S 1060 — HARMLESS ERROR—CONDUCT OF COUNSEL.

There was no prejudice in plaintiff's counsel objecting to counsel for defendant H. further participating in the case, there being then a confusion of ideas as to whether H. was in or out of the case, because of an unresisted motion for a nonsuit as to him, and on the objection being made a judgment of nonsuit as to H. being entered by consent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4135; Dec. Dig. \S 1060.]

3. DISMISSAL AND NONSUIT \S 26 — JOINT TORT-FEASORS—DISMISSAL OF ONE.

Entering a judgment of nonsuit with consent of plaintiff, equivalent to a voluntary dismissal, as to one defendant in a negligence case, is not a matter of which the other defendants may complain.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. \S 46, 48-59; Dec. Dig. \S 26.]

4. APPEAL AND ERROR \S 1066 — HARMLESS ERROR—INSTRUCTIONS.

Instructing in an action for falling into a manhole that there was no evidence to warrant a finding of fault in construction is not prejudi-

cial as to defendants, charged only with negligence in the manner of its maintenance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220; Dec. Dig. \S 1066.]

5. TRIAL \S 194—INSTRUCTIONS—COMMENT ON FACTS.

As to defendants, charged only with negligence in the manner of maintenance of a manhole into which plaintiff fell, an instruction that there was no evidence of fault in construction is not objectionable as a comment on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 413, 436, 439-441, 446-454, 456-466; Dec. Dig. \S 194.]

6. NEGLIGENCE \S 134—CIRCUMSTANTIAL EVIDENCE.

Negligence, while never presumed, may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 267-270, 272, 273; Dec. Dig. \S 134.]

7. TRIAL \S 295 — INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

An instruction will not be isolated for the purpose of criticizing it, but will be kept in its setting and construed with reference to and in relation to the other instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 703-717; Dec. Dig. \S 295.]

8. APPEAL AND ERROR \S 1066 — HARMLESS ERROR—SUBMISSION OF ISSUES.

Instructing that the jury might allow plaintiff for "depreciation in his earning capacity, if any," and for other things, is not prejudicial because of there being no evidence of such depreciation, but evidence that after six weeks he returned to his work, receiving the same wages as before; it being presumed that the jury had common understanding and did not predicate a recovery thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220; Dec. Dig. \S 1066.]

9. DAMAGES \S 216 — INABILITY TO FOLLOW OCCUPATION—EVIDENCE FOR JURY.

That plaintiff had for a time been unable to pursue his usual occupation authorizes an instruction that the jury might allow him "for inability to follow his usual occupation."

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 548-555; Dec. Dig. \S 216.]

10. DAMAGES \S 132—PERSONAL INJURY—EXCESSIVE RECOVERY.

A verdict of \$1,500 for injury to a man 60 years old—he testifying that he was in constant pain, that his work kept him on his feet all the time, that the injury had brought on a varicose condition of the veins in his leg, and that he was weak and became quickly exhausted, and there being medical testimony that his injuries are permanent and will not grow less, and he having thereby been kept from his usual occupation for six weeks—cannot be said as matter of law to be so large as to reflect the prejudice or passion of the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 372-385, 396; Dec. Dig. \S 132.]

Department 1. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by George Jensen against the City of Tacoma and others. From an adverse judgment, defendants F. C. Schlenz and another appeal. Affirmed.

A. F. Williams, of Seattle, for appellants. P. V. Davis, of Seattle, Gordon & Easterday and T. L. Stiles, all of Tacoma, and Frank M. Carnahan, of Tacoma, for respondent.

CHADWICK, J. Respondent fell on a manhole and was injured. The manhole was maintained in the sidewalk for the purpose of putting fuel into the basement of a hotel which was conducted by appellants. It is alleged that the covering on the manhole was negligently maintained. Defendants Huth, the owners of the building, were dismissed out of the case during the progress of the trial. The jury found in favor of the city of Tacoma, and rendered a verdict in favor of respondent Jensen in the sum of \$1,500. There was testimony to sustain the finding of the jury that the cover to the manhole was negligently maintained, and a motion for nonsuit was properly overruled.

[1] Upon the examination of one of the jurors and in answer to the question, "Your business is what?" he answered, "I am with L. N. Hanson Company, liability insurance and surety bonds." He was then interrogated further:

"Q. Do you carry insurance on the Carlton Hotel? A. No. Q. Do you know Mr. Schlenz? A. That is in a business way? Q. That is you have done business with them? A. I think possibly. Q. Do you know what branch of your line of business which you have done for these different people, any of it indemnity? A. I think that for the Pacific Brewing & Malting Company we might have written some. Q. Any kind with the Schlenzes and Huths? A. Oh, I could not recall. I think possibly it was liability and such as that. Q. Ever hear of this case? A. I don't just recall as I have. I generally keep in touch with all these personal injury cases because that is my line, but I don't just recall the case now. Q. It is a part of your business, regular business to keep in touch with them? A. Yes. Q. And ascertain to what extent if at all your company is interested? A. Yes. Q. You don't recall whether you ever had occasion to look into this or not? A. No. Q. You don't know now whether your company is interested in the result of the suit? A. I don't think so. No. I am pretty sure it is not. Q. It may be and it has escaped your attention? A. I think possibly this would be in our general liability insurance policy. I think another company, that is— Q. You think you are not interested in that way in this case? A. No. Q. Well, we will pass you."

Counsel predicates error upon this incident, saying:

"This court has held in many instances that any attempt on the part of counsel to bring before a jury the question of insurance in a case of this character is reversible error."

We do not understand that the court has ever gone so far. The extent of our holding is that if it be apparent that counsel deliberately sets about, although in an indirect way, to inform the jury that the loss, if any, will fall upon an insurance company instead of the defendant, his conduct will be held prejudicial.

"In cases of this kind if it should appear that the purpose of the examination was to inform the jury that the burden of a judgment, if obtained, would fall upon an insurance company instead of the defendant, we would hold it such misconduct on the part of the attorney as would warrant a reversal." Hoyt v. Independent Asphalt, etc., Co., 52 Wash. 677, 101 Pac. 387.

Counsel had a right to inquire into the business of the juror and to know whether he

had any business dealings with any of the defendants, although the examination might reveal the ultimate fact that the defendant was insured. If such information comes about naturally and is an incident to a lawful inquiry, there can be no error. If it is injected in a collateral way it is held to be harmful. The gravamen of the offense is not in the disclosure of a collateral fact, but in the manner of its disclosure; that is, the misconduct of counsel. The cases to sustain our holding are collected in *Moy Quon v. Furuya*, 81 Wash. 526, 143 Pac. 99.

[2] It is objected that counsel for respondent was guilty of misconduct in that he objected to the further participation in the trial of the attorney for the defendants Huth after they had been dismissed out of the case. A motion for a nonsuit had been made on behalf of the Huths, which was not "resisted." There followed a confusion of ideas, and the court finally denied the motion. Counsel for respondent evidently proceeded upon the theory that the Huths were out of the case and other counsel that they were still in. Hence the objection to their further participation. When the objection was made all parties seem to have come to a common understanding and counsel for respondent "consented" that a judgment of nonsuit be entered. We can find no prejudice in the proceeding.

[3] Nor was it error to dismiss the defendants Huth. The consent that a judgment of nonsuit might be entered was equivalent to a voluntary dismissal. 14 Cyc. 411. Any one or more joint tort-feasors may be dismissed out of a case if the plaintiff consents thereto or takes no exceptions to an order of dismissal. It is not a matter of legal concern to his codefendants. *Birkel v. Chandler*, 26 Wash. 241, 66 Pac. 406; *Ronald v. Pacific Traction Co.*, 65 Wash. 433, 118 Pac. 311; *Groot v. Oregon Short Line R. Co.*, 34 Utah, 152, 96 Pac. 1018.

[4, 5] Error is predicated upon an instruction in which the court told the jury that there was no evidence to warrant a finding of fault in the construction of the manhole or—

"* * * any danger to pedestrians walking over the same if the covering over the manhole was inserted in the opening and was maintained by the persons in charge of the Carlton Hotel, in the way that it was designed to be maintained, and rubbish or debris were not permitted to lodge or accumulate in the space intended for the covering, and Huth and wife have been dismissed from the action. This leaves for your determination the question, whether or not the defendants City of Tacoma, or F. C. Schlenz and wife, or either or both of them, were guilty of negligence charged against them by the plaintiff in this action."

The instruction was wholly unnecessary, inasmuch as the Huths had taken a judgment of nonsuit; but we cannot see wherein it prejudiced appellants. Neither is it objectionable as a comment upon the facts. Granting that no witness did swear directly

that sticks and bark and rubbish had been permitted to accumulate in the collar of the lid of the manhole there is evidence from which the jury could have inferred the fact.

[6] Negligence, while never presumed, may nevertheless be proved like any other fact by circumstantial evidence. *Sweeten v. Pac. Power & Light Co.*, 153 Pac. 1054; *Abrams v. Seattle & Montana Ry. Co.*, 27 Wash. 507, 68 Pac. 78; *Sroufe v. Moran Bros.*, 28 Wash. 381, 68 Pac. 896, 58 L. R. A. 313, 92 Am. St. Rep. 847.

The court told the jury:

"I instruct you that you are not at liberty to conclude that the walk in question at the time and place of the accident, was in a dangerous condition simply because of the accident which happened to plaintiff. But you must consider all the facts and circumstances with relation to the condition of the walk at the time of the accident, and from all of the facts and circumstances in the case, as shown by the evidence and under the instructions I give you as to the law, determine in your own mind whether the place where plaintiff was injured was in a dangerous condition to persons traveling in the ordinary way, using ordinary care."

It is said:

"Under this instruction the jury would be justified in returning a verdict against the appellants regardless of whether any act of negligence had been established against them or not. The court in effect directs the jury that if they find that the sidewalk at the place and time where the plaintiff was injured was in a dangerous condition they must find a verdict for the plaintiff. No mention is made of this dangerous condition being caused by the negligence of appellants. The only question for the jury to determine was whether or not the sidewalk was in a dangerous condition."

[7] We have often held that an instruction will not be isolated for the purpose of criticizing it, but that we will keep it in its setting and construe it with reference to and in relation to the other instructions given to the jury. We will not now stop to assemble the cases. We have read the instructions and find that the court instructed fully upon the law of negligence, and that respondent could not recover unless the jury found that appellants were in fact negligent.

[8, 9] It is complained that the jury were instructed that it might allow respondent a recovery for "depreciation in his earning capacity, if any," and all loss and damages, "for inability to follow his usual occupation" whereas there was no testimony to show depreciation in earning capacity or inability to follow his usual occupation. It appears that respondent returned to his work in about six weeks, receiving the same wages he had received before the accident. We must credit jurymen with having the common understanding of men, and when told that they may allow for a particular damage, if any, that they will not accept that statement as a fact and predicate a recovery upon it, unless there is testimony to sustain it. It is not every misstatement or unnecessary statement of the law that will be held to be prejudicial.

It is only so held when the misstatement or unnecessary statement can be fairly held to be a misdirection of such consequence as to raise a presumption of prejudice. If the element of lessened earning capacity was the only question in the case, the instruction would have been erroneous; but it was not. The jury was not put to the stress of speculation. There was fact to rest the verdict upon and law to sustain it. The other objection is without merit. Respondent had for a time at least been unable to pursue his usual vocation. We cannot presume that the jury went beyond the evidence.

[10] Neither can we say, as a matter of law, that the verdict is so large that it reflects the prejudice or the passion of the jury. Respondent suffered a painful injury. He testified that he was in constant pain; that his work kept him upon his feet all the time; that the injury had brought on a varicose condition of the veins in his leg; and that he was weak and became quickly exhausted. Respondent was 60 years of age at the time the accident occurred, and there is medical testimony to the effect that his injuries are permanent and will not grow less in degree. We find no prejudicial error.

Affirmed.

MORRIS, O. J., and ELLIS, MOUNT, and FULLERTON, JJ., concur.

(89 Wash. 275)
PAINTER et ux. v. KENNEDY et al.
(No. 12559.)

(Supreme Court of Washington. Jan. 12, 1916.)

1. MORTGAGES \S 556—ASSUMPTION OF MORTGAGE—EFFECT.

Where a sale of mortgaged land was negotiated by a private individual, but, when the sale was made, the deed was taken in the name of a bank which, in fact, acted only as the agent of another person, and the bank did not undertake payment of the mortgages or agree to assume them, it could not be liable in an action for foreclosure for a deficiency judgment, since its mere taking the deed in its name did not create a liability to redeem the promise of the negotiator to assume the mortgage; such promise not being merged in the deed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1592-1595, 1597; Dec. Dig. \S 556.]

2. APPEAL AND ERROR \S 960—SCOPE OF REVIEW—ORDERS OF TRIAL COURT—DISCRETION.

The court on appeal will not disturb the order of the lower court striking the cross-complaint of one who, although not defaulted against, failed to answer until after trial below; such an order being largely in the discretion of the lower court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3825, 3832-3834; Dec. Dig. \S 960.]

3. JUDGMENT \S 569 — RES ADJUDICATA — WHAT CONSTITUTES.

In such case, where the purpose of the cross-complaint was to set up an independent cause of action, an order striking it as coming

too late would not be res adjudicata of the rights of the cross-complainant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 998; Dec. Dig. ¶569.]

Department 2. Appeal from Superior Court, Grant County; Guy C. Alston, Judge.

Action by S. K. Painter and Lena Painter, his wife, against J. A. Macauley and others, in which E. J. Kennedy and wife filed cross-complaints. From a deficiency judgment on foreclosure against the defendant Grant County Bank, the Bank appeals, and from an order striking the cross-complaint of the defendant Ralph C. Bell, trustee, he appeals. Judgment as to the Grant County Bank reversed and remanded, with instructions, and judgment as to Bell affirmed.

John Sandidge, of Everett, for appellant Bell. Hulbert & Husted, of Everett, and William M. Clapp, of Ephrata (Troy & Sturdevant, of Olympia, of counsel), for appellant Grant County Bank. Herr, Bayley & Wilson and Carl E. Croson, all of Seattle, for respondents Kennedy.

FULLERTON, J. On November 27, 1911, the defendants Kennedy and wife borrowed from the respondent S. K. Painter the sum of \$1,500, securing the same by mortgage on certain real property situated in Snohomish county. Subsequently Kennedy and wife mortgaged the premises to other parties to secure their several obligations, the total face value of all of the mortgages aggregating on December 28, 1912, some \$4,335. On the day last mentioned Kennedy and wife exchanged the property for certain property of one E. C. Davis situated in Grant county. Davis was then president of the appellant Grant County Bank, and the deed from Kennedy and wife of the Snohomish county property was made to the bank. There was also a mortgage on the Grant county property, and the deeds as exchanged severally recited that it was made subject to the incumbrances on the property therein described. There was no recital in either deed that the grantee therein assumed the incumbrances.

On January 5, 1914, the respondent Painter, his wife joining therein, brought the present action to foreclose the mortgage executed to him by Kennedy and wife. In his complaint he made parties defendant the original mortgagees, the subsequent lienholders, and the Grant County Bank. In the complaint as originally filed he asked for a deficiency judgment against all of the defendants, but subsequently filed a supplemental pleading disclaiming a right to a deficiency judgment against any of the defendants other than the mortgagors. The bank thereupon made no answer to the complaint.

On February 20, 1914, the defendants Kennedy and wife filed a cross-complaint in the action in which they alleged that the bank, in consideration of the exchange of the properties before mentioned, assumed and agreed to pay all of the incumbrances on the Sno-

homish county property existing at the time of such transfer, and thereby became liable to the original and cross-complainants for the payment of the original indebtedness, and consequently liable to the cross-complainants for any deficiency which might be chargeable after the foreclosure sale. The cross-complaint was served on the bank, and it made answer thereto by a general denial and by an affirmative plea to the effect that the actual purchaser of the property was one E. J. Duffey, and that it took the legal title to the property as security for certain notes executed and delivered to it by Duffey, and for no other purpose.

On the issues framed between Kennedy and the bank a trial was had resulting in findings to the effect that the bank had assumed and agreed to pay the incumbrances on the property conveyed to it, and in a decree to the effect that the plaintiffs recover over against the bank for any deficiency that may remain after the sale of the mortgaged property. From this decree the Grant County Bank appeals.

After the trial of the issues between the defendants Kennedy and the Grant County Bank had been concluded, and after the court had announced its judgment therein, one Ralph C. Bell, as trustee, who was made defendant in the original action, filed an answer and cross-complaint, serving it upon Kennedy and wife and the Grant County Bank with an original summons, seeking a foreclosure of certain of the junior mortgages and a sale of the property thereunder. A deficiency judgment was also sought against the bank for any deficiency that should remain after the sale of the mortgaged premises and the application of the proceeds of the sale properly applicable thereto in payment of the amount due on the junior mortgages. The bank moved to strike this complaint as coming too late, which motion the trial court granted. Bell appeals from the order evidencing the ruling of the court upon the motion.

[1] Noticing first the appeal of the Grant County Bank, we are unable to find anything in the record upon which the judgment against it can rest. It was testified by both Davis and Kennedy that the property in Grant county, given in exchange for the property conveyed to the bank was the property of Davis, and that all of the negotiations leading up to the exchange were had between Davis and Kennedy and their representatives. Davis denied that a promise to assume the incumbrances was made by any person. Kennedy testified that the promise was made by Davis, but even he does not say that Davis made the promise for or as the representative of the bank. In fact, nowhere in the record, in so far as we can discover, was the bank's name mentioned in the transaction until all of the negotiations were concluded, and nothing remained to be done but execute and deliver the deeds. If the fact be that Davis

promised to assume the incumbrances, and then caused the deed to run in the name of the bank, it would not of itself create a liability on the part of the bank to redeem the promise. Such a promise does not become merged in the deed and thereby bind the person to whom it is executed. Indeed, it is only on the principle that such a promise "is not merged in the deed, and is not contradictory, but independent, of it," that it can be enforced at all. *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892. The bank can be held only in the case that it promised to pay the incumbrances. It stands, therefore, in so far as the record discloses, precisely in the position it would have stood had the property been originally conveyed to Davis and by Davis subsequently conveyed to it.

We conclude, therefore, that the court was in error in entering a deficiency judgment against the Grant County Bank.

[2] On the appeal of the defendant Bell we do not feel inclined to disturb the order of the court. Whether the court would permit the defendant at that late day to come into the case was a matter largely within its discretion, and this court is not authorized to disturb its order unless it plainly appears that there was an abuse of such discretion. We cannot so find. While it is true no formal default had been entered against the defendant, yet he was so far negligent that to grant his request would compel the court to try the action anew.

[3] Moreover, the answer and cross-complaint discloses that its chief purpose is to charge the Grant County Bank with the payment of the mortgages. If the bank is liable for their payment, recovery can be had in an independent action. The order is not *res judicata* of any right the appellant may have in that respect.

The judgment is reversed on the appeal of the Grant County Bank, and the cause remanded, with instructions to so modify it as to relieve the bank from any personal liability for the obligations mentioned in the plaintiffs' complaint. On the appeal of Bell it is affirmed.

MORRIS, C. J., and ELLIS and CHADWICK, JJ., concur.

(89 Wash. 132)

STATE ex rel. GILBERT, Pros. Atty., v. DIMMICK et al. (No. 13202.)

(Supreme Court of Washington. Jan. 10, 1916.)

COUNTIES \S 43—COUNTY COMMISSIONERS—APPOINTMENTS TO FILL VACANCIES—POWER OF GOVERNOR.

Under Rem. & Bal. Code, § 8988, providing that the Governor has power "to see that all offices are filled, and the duties thereof performed," and in view of Laws 1913, p. 461, § 13, providing that, after the recall of an officer, the vacancy shall be filled as provided by the Constitution and laws of the state, the Governor

had power to appoint commissioners to fill two of the vacancies caused by the recall of all three of the commissioners of a county; Const. art. 11, § 6, providing that the board of county commissioners shall fill all vacancies occurring in any county office, not applying where the offices of all the county commissioners become vacant.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 51; Dec. Dig. \S 43.]

En Banc. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Quo warranto by the State, on the relation of Harold B. Gilbert, Prosecuting Attorney, against W. L. Dimmick and others. From judgment for defendants, relator appeals. Affirmed.

Harold B. Gilbert, of North Yakima, for appellant. Snively & Bounds, of North Yakima, for respondents.

MOUNT, J. This is a proceeding in quo warranto to determine which of two sets of persons claiming to be county commissioners of Yakima county are entitled to hold such office. The trial court concluded that the respondents, W. L. Dimmick, W. E. Coumbe, and Yancey Freeman, were the legally qualified commissioners, and entered a judgment to that effect. The relator has appealed therefrom.

The facts are not in dispute. It appears that prior to October 6, 1915, J. Lancaster, J. Stuart, and William Stahlhut, were the duly elected and qualified commissioners of Yakima county. On that day a recall election was held in compliance with chapter 146 of the Laws of 1913, and these officers were all recalled. Under the provisions of section 13 of that act, the offices of all three of the county commissioners became vacant. Thereupon the Governor appointed Messrs. Dimmick and Coumbe as commissioners for the First and Second districts. These officers then qualified, and appointed Mr. Freeman as commissioner of the Third district. Mr. Freeman thereupon qualified as county commissioner. The question in the case is whether the Governor, under the Constitution and laws of the state, was authorized to appoint these commissioners in the place of those recalled.

Section 13 of chapter 146, Acts 1913, p. 461, after providing that after the recall of such officers and the vacancy of the offices caused thereby, provides:

"And such vacancy shall be filled in the manner provided by the Constitution and the laws of the state of Washington, or the charter and ordinances of the municipality, as the case may be."

The Constitution (section 6 of article 11) provides:

"The board of county commissioners in each county shall fill all vacancies occurring in any county, township, precinct, or road district office of such county by appointment, and officers thus appointed shall hold office till the next gen-

eral election, and until their successors are elected and qualified."

It is apparent that this section does not control in this case, because at the time of the appointment by the Governor, the offices of all three of the commissioners of Yakima county were vacant on account of the election of October 6, 1915. There is no other provision of the Constitution directly referring to the manner in which the office of county commissioners may be filled when all of such offices become vacant at one time.

In the case of *State ex rel. Pendergast v. Fulton*, 37 Wash. 271, 79 Pac. 779, where one vacancy had occurred, and the Legislature had passed an act authorizing the judge of the superior court to act with the remaining members of the board of county commissioners, it was held that the act was in violation of the provisions of the Constitution above quoted, and that it was the duty of the remaining commissioners to fill the vacancy.

The Constitution, at section 5 of article 3, provides as follows:

"The Governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed."

Section 18 of that article provides:

"When, during a recess of the Legislature, a vacancy shall happen in any office the appointment to which is vested in the Legislature, or when at any time a vacancy shall have occurred in any other state office for the filling of which vacancy no provision is made elsewhere in this Constitution, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

The Legislature of 1890 passed an act relating to the general powers and duties of the Governor (Rem. & Bal. Code, § 8988), which provides:

"In addition to those prescribed by the Constitution, the Governor has the power and may perform the duties prescribed in this and the following sections: * * * (2) To see that all offices are filled, and the duties thereof performed, or in default thereof, apply such remedy as the law allows; and if the remedy is imperfect, acquaint the Legislature therewith at its next session."

It is contended by the respondent that the provision in section 5 of article 3 of the Constitution, above quoted, that the Governor "shall see that the laws are faithfully executed," is sufficient to authorize the appointment of county commissioners under the circumstances in this case, and that section 13, to the effect that, when during a recess of the Legislature a vacancy shall happen in any office the appointment to which is vested in the Legislature, the Governor shall fill such vacancy by appointment,

is sufficient to authorize the appointment. We think it is not necessary to enter into a discussion as to the proper construction of these two constitutional provisions. We think it is plain that, if the Legislature was in session, and a vacancy should occur in a county office for which the Constitution made no provision to fill, the Legislature might fill such vacancy.

In the case of *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717, this court held that the Legislature, in the creation of a new county, might authorize the Governor to appoint commissioners for the new county, and that such authorization was not in contravention of the Constitution. It follows from that decision that, if all the commissioners of a county are recalled, or for some reason all three of the commissioners' offices should become vacant upon the happening of some contingency, the Legislature would clearly have a right by legislative act to authorize the Governor to fill such offices by appointment on account of the emergency.

The county commissioners of a county are the business agents of the county, and the ordinary business of a county cannot be conducted without their authorization. It follows that, when all the offices of county commissioners in a county become vacant, there is necessarily a cessation of county government, and there must be some power lodged somewhere to prevent such hiatus. This has been done by the Legislature. The act of 1890 above referred to provides that, in addition to the powers prescribed by the Constitution, the Governor has power "to see that all offices are filled, and the duties thereof performed." We think it is plain that the Legislature had the right to pass this act, and that, where there is no provision in the Constitution for the appointment of commissioners of a county, and where a majority of the offices of the board of county commissioners become vacant, then it is within the power of the Governor to fill such vacancy by appointment. This seems so clear that it is not necessary to further inquire into the subject, or discuss decisions from other states upon the question. We have no doubt that, under the statute of 1890, the Governor was authorized to make the appointments which he did make, and that these officers are de jure officers, and are qualified county commissioners of Yakima county.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., and ELLIS, CHADWICK, FULLERTON, PARKER, HOLCOMB, and MAIN, JJ., concur.

(89 Wash. 63)

STATE v. SCOTT et al. (No. 12526.)

(Supreme Court of Washington. Jan. 5, 1916.)

1. NAVIGABLE WATERS ⇐37—"TIDELANDS"—DEEDS—LANDS CONVEYED.

Under Laws 1897, p. 230, § 4 (Rem. & Bal. Code, § 6641), defining "tidelands" as all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, and excepting oyster lands, a deed issued March 18, 1911, pursuant to a purchase from the state on July 7, 1900, conveying "all the tidelands not disposed of by the state situate in front of, adjacent to, and abutting on lot 3, * * *" and a deed issued June 18, 1901, conveying "all that portion of the tidelands of the second class owned by the state * * * situate in front of, adjacent to, and abutting on lot 4, * * *" carried title only to the lands above the line of mean low tide, and excepting oyster lands theretofore conveyed under the Callow Act (Rem. & Bal. Code, §§ 6806, 6807).

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. ⇐37.]

For other definitions, see Words and Phrases, First and Second Series, Tideland.]

2. NAVIGABLE WATERS ⇐37—"TIDELANDS"—DEEDS—LANDS CONVEYED—"IN FRONT OF"—"SOLD OR CONVEYED."

Laws 1911, p. 130, § 1, subd. 2 (3 Rem. & Bal. Code, § 6641), defines "tidelands" as "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, * * * excepting oyster reserves." Laws 1911, p. 130, § 2 (3 Rem. & Bal. Code, § 6641-1), provides: "That the * * * preference right to purchase all tidelands of the second class lying between the line of mean low tide and the line of extreme low tide in front of all tidelands of the second class heretofore sold or conveyed by the state * * * is hereby granted for * * * ninety days * * * to the purchasers, their grantees or successors in interest, of any tidelands of the second class heretofore sold or conveyed by the state * * *." A deed dated June 6, 1911, recited that it conveyed "all tidelands of the second class owned by the state * * * lying between the line of mean low tide and the line of extreme low tide and in front of lots 1, 2, 3 and 4, * * * excepting such portions of said tidelands as are included in said oyster reserves and subject to such rights * * * as may have been acquired by the purchaser of any part of said lands as tidelands suitable for the cultivation of oysters." Held to convey not only the tidelands between such lots and oyster lands theretofore deeded to others under the Callow Act, but also any tidelands, if there be any, in front of the lots beyond such intervening oyster lands to the line of extreme low tide; the words "in front of" as used in the statute, giving a preference right to purchase, having reference to lands other than those adjoining lands theretofore sold or conveyed, and the Callow Act claimants, since they did not hold fee-simple title, not being owners of tidelands "theretofore sold or conveyed" within the meaning of such statute so as to be entitled to the preference right to purchase tidelands in front of their claims.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. ⇐37.]

For other definitions, see Words and Phrases, First and Second Series, In Front of; Sold and Conveyed.]

3. NAVIGABLE WATERS ⇐36—"TIDELANDS"—"EXTREME LOW TIDE."

The term "extreme low tide" is used in Laws 1911, p. 130, § 1, subd. 2, redefining "tide-

lands," to extend the boundary of the state's tidelands out to the line separating land so continuously covered with water that it might be leased for deep-sea oyster culture.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. ⇐36.]

4. NAVIGABLE WATERS ⇐37—"TIDELANDS"—LOCATION OF EXTREME LOW TIDE.

Where, in a controversy between the state and the grantee in a deed from the state, relative to the ownership of a portion of the bed of Puget Sound, there is extreme doubt whether the land in controversy lies below or above the "extreme low tide" fixed by Laws 1911, p. 130, § 1, subd. 2, as the outer boundary of tidelands, the doubt should be resolved in favor of the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. ⇐37.]

5. NAVIGABLE WATERS ⇐36—"MEAN LOW TIDE"—"MEAN LOWER LOW TIDE"—"HARMONIC PLANE."

The term "mean low tide," as applied to Puget Sound, signifies the mean or average level of the low tides, including both the long and short daily runout. "Mean lower low tide" signifies the mean level of the daily extreme low tides. "Harmonic plane" is the zero adopted by the United States Coast and Geodetic Survey of the Department of Commerce upon which its tidal tables, charts, and maps are based. It is an arbitrary plane, and is the lowest plane of the tide in the Sound recognized by that department, being approximately two feet lower than mean lower low tide, and approximately four feet lower than mean low tide.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. ⇐36.]

6. NAVIGABLE WATERS ⇐37—"TIDELANDS"—SUFFICIENCY OF EVIDENCE.

Evidence in an action by the state to quiet title to a portion of the bed of Puget Sound held to show that the land in controversy lies below the plane of extreme low tide save insignificant portions around the border, and that hence a deed conveying from the state to defendants nothing below the plane of extreme low tide did not convey such land, but left the title thereto in the state.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. ⇐37.]

7. ADVERSE POSSESSION ⇐68—"TIDELANDS"—COLOR OF TITLE.

Persons claiming title to the bed of Puget Sound beyond the plane of extreme low tide under a deed conveying title to them only to the extreme low tide were without color of title, and therefore could not obtain title thereto by adverse possession aided by improvements and payment of taxes.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 387-393; Dec. Dig. ⇐68.]

8. ADVERSE POSSESSION ⇐7—"PRESCRIPTIVE TITLE"—ACQUISITION AGAINST STATE.

Under the express provisions of Rem. & Bal. Code, § 187, adverse possession cannot be made the basis of title as against the state to a portion of the bed of Puget Sound.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. ⇐7.]

Department 1. Appeal from Superior Court, Thurston County; O. E. Claypool, Judge.

Action by the State against J. H. Scott and

others. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

W. V. Tanner, R. E. Campbell, and Lindsay L. Thompson, all of Olympia, for the State. Gordon & Easterday, of Tacoma, for respondents.

ELLIS, J. This is an action by the state of Washington to recover possession of and quiet title to a portion of the bed of Puget Sound, commonly known and referred to in the record as the "pothole," and to enjoin the defendants from trespassing thereon. The defendants admit that the state upon its admission into the Union acquired title to the pothole by virtue of section 1, art. 17, of the state Constitution, whereby the state asserted title to the beds and shores of all navigable waters within its boundaries. They contend, however, that the state conveyed the pothole to them by certain deeds of second-class tidelands which are pleaded in their answer. The state admits the issuance of the deeds, but denies that they conveyed the pothole or any part of it. The evidence shows beyond question that the pothole and the channel leading out of it to deep water lie below the line of mean low tide. Between the pothole and the strip of tidelands lying in front of and contiguous to government lots 3 and 4 are situate certain tideland tracts or oyster claims forming a continuous chain, deeded to Jim Simmons, J. A. Gale, and J. H. Tobin for oyster purposes. These oyster claims were deeded under the provisions of chapter 25, Laws of 1895 (Rem. & Bal. Code, §§ 6806, 6807), commonly known as the Callow Act. We shall hereinafter refer to them as the Callow Claims. The deeds upon which the defendants rely as conveying to them the pothole are: First, a deed from the state dated March 18, 1911, conveying to the defendant J. H. Scott "all of the tidelands undisposed of by the state situate in front of, adjacent to, and abutting upon lot 3, section 22, township 19 north, range 3 west"; second, a deed from the state dated June 18, 1901, conveying to the defendant J. H. Scott "all that portion of the tidelands of the second class owned by the state of Washington, situate in front of, adjacent to and abutting upon lot 4, section 22, township 19 north, range 3 west"; third, a deed from the state dated June 6, 1911, to both defendants, conveying "all tidelands of the second class owned by the state of Washington lying between the line of mean low tide and the line of extreme low tide and in front of lots 1, 2, 3, and 4, section 22, township 19 north, range 3 west, W. M., with a total frontage of 81.81 lineal chains, more or less, measured along the meander line, according to a certified copy of the government field notes of the survey thereof on file in the office of the commissioner of public lands at Olympia, Wash., excepting such portions of said tidelands as are included in state oyster

reserves, and subject to such right, title, or interest as may have been acquired by the purchaser of any part of said lands as tidelands suitable for the cultivation of oysters under any deed or contract heretofore issued by the state of Washington."

Much testimony was introduced of experts from observations taken at the pothole and as to general tide conditions on Puget Sound and testimony of witnesses long acquainted with the pothole as to whether it has ever been entirely uncovered at the lowest tides, all with the view of determining whether, in fact, the pothole lies below the plane of extreme low tide.

The court found, in substance, the situation of the land as we have outlined it, and that the defendants had at all times since July, 1900, been in open, notorious, exclusive, and peaceable possession of the pothole, paying all taxes thereon since that time; that the land described as the pothole lies above the line of extreme low tide; that the state of Washington does not now, and did not when this action was commenced, own the pothole or any portion thereof; and that it had failed to establish the material allegations of its complaint. Upon these findings and appropriate conclusions of law the court entered a decree denying to the plaintiff the relief prayed for and dismissing the action. The plaintiff appeals.

The appellant contends: (1) That the deeds upon which the respondents rely conveyed no title to the pothole, in that the pothole is not in front of and adjoining the upland or any tidelands of the second class owned by the defendants in front of and adjoining the upland; (2) that the defendants acquired no title to the pothole by any of these deeds, because the evidence shows that the pothole is below the line or plane of extreme low tide. The first of these contentions presents a question of law; the second a question of fact.

[1] 1. At the time that the first two deeds were initiated by purchase of the tidelands therein described, tidelands were defined by statute as follows:

"*Tide Lands*.—All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, * * * and excepting oyster lands." Chapter 89, § 4, p. 230, Laws 1897; 2 Rem. & Bal. Code, § 6641.

See *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 107 Pac. 349, 832, 135 Am. St. Rep. 1007.

The first deed, though issued on March 18, 1911, was made in pursuance of a purchase by George C. Israel from the state on July 7, 1900, long before the act of 1911, to which we shall hereinafter refer, had extended the outer line of the state's tidelands to the line of extreme low tide. It is clear, therefore, that this deed conveyed only what Israel had purchased, and carried title no further than to the line of mean low tide.

The second deed of June 18, 1901, likewise carried title only to the line of mean low tide. It was made in pursuance of a purchase

long antedating, and itself long antedated, the extension act of 1911. These two deeds are limited by the express terms of the statute defining tidelands then in force to lands above the line of mean low tide, and excepting oyster lands. *Pearl Oyster Co. v. Heuston*, supra. They did not convey any of the lands theretofore deeded under the Callow Act. This court specifically so held in *Scott v. Olympia Oyster Co.*, 63 Wash. 364, 115 Pac. 737.

[2] At the time the third deed above referred to was issued the outer line of the state's tidelands had been extended. "Tidelands" were then defined by statute as follows:

"Tide Lands.—All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, except in front of cities where harbor lines have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line and excepting oyster reserves." Chapter 36, § 1, subd. 2, p. 130, Laws 1911; 3 Rem. & Bal. Code, § 6641.

It is obvious that but for the exception of lands theretofore deeded the description in the third deed would have carried title to the line of extreme low tide, wherever that may be. It is equally obvious, as it seems to us, that with the exception it carries title to all of the tidelands to the line of extreme low tide, save those excepted. The appellant contends, however, that this deed, when construed in accordance with the law of 1911 pursuant to which it was made, conveyed nothing beyond the intervening Callow grants. The purchase was under the preference right accorded by section 2 of the act of 1911, which provides:

"That the prior and preference right to purchase all tide lands of the second class lying between the line of mean low tide and the line of extreme low tide in front of all tide lands of the second class heretofore sold or conveyed by the state of Washington is hereby granted for the period of ninety days from the date this act goes into effect to the purchasers, their grantees or successors in interest of any tide lands of the second class heretofore sold or conveyed by the state of Washington. * * * Chapter 36, § 2, p. 130, Laws 1911; 3 Rem. & Bal. Code, § 6641—1.

Appellant insists that the words "in front of," contained in this section, mean "adjoining," quoting in support of that claim from *State ex rel. Lehman v. Bridges*, 24 Wash. 363, 64 Pac. 518, where it is said:

"From a geometrical point of view 'in front of' might include everything between the prescribed line and infinity; but, as applied practically to measurements on the surface of the earth, we believe it can only mean immediately in front of, that is, adjoining."

It is argued that, under that decision, the third deed above mentioned did not convey to the respondents any lands outside of the Callow claims, in that lands outside of those claims lay in front of, that is, adjoining the Callow claims, and not in front of or adjoining the tidelands of the respondents lying between the upland and the Callow claims.

Construed in relation to its facts, the *Lehman Case* does not sustain the appellant's contention. That case merely holds that lands "in front of" the limits of an incorporated city or town included only such lands as were adjoining and in front of such city or town on the same side of the channel of navigable, water, and that the term was not used in the absolute or geographical sense which would include all tidelands lying between the side lines of the city extended to infinity so as to embrace tidelands on the other side of the channel. Though it defines the words "in front of" as meaning "immediately in front of, that is, adjoining," this definition is plainly intended as a conclusion from what precedes it. So read, it is clearly meant to apply to the whole body of tidelands on the given side of the channel, without regard to segregated ownership, that is, all lands in front of and adjoining in the sense of lying on that side of the channel. We cannot adopt the view of the Attorney General that the Callow Act claimants are owners of tidelands "theretofore sold and conveyed" within the meaning of the act of 1911 so as to be entitled to the preference right to purchase the tidelands in front of those claims lying between the lines of mean low tide and extreme low tide under that act. Though they had such a right as prevented their claims from passing by the state's tideland deed, and such, in fact, that the state could not convey their land at all without first declaring a forfeiture of their claims for cause, they did not hold the fee-simple title. *Scott v. Olympia Oyster Co.*, supra. On principle it would seem that nothing short of a fee-simple title could be a sufficient basis for the preference right to purchase in fee simple the frontal tidelands between mean low and extreme low tide. The case of *Bleakley v. Lake Washington Mill Co.*, 65 Wash. 215, 118 Pac. 5, cited by appellant in this connection, goes no further than to hold that lands located below the line of high water and above the meander line on the shore of Lake Washington, and hence subject to overflow, when patented by the government prior to statehood, and thereafter owned as private property, is not "shore land," within the meaning of the statute, but is to be regarded as upland by force of the government's survey and patent in fee, the ownership of which carries the preference right to purchase unpatented shore lands belonging to the state and fronting or abutting upon the patented land. The patented land, though actually overflow land, being by legal convention upland, carried as an incident the preference right of purchase to its owner in fee simple.

We fail to see wherein the case of *State v. Sturtevant*, 76 Wash. 153, 135 Pac. 1035, 138 Pac. 650, also cited by appellant, when confined to its facts, has any bearing on the question before us. That case involved accretions or relictions resulting from the lowering of the waters of Lake Washington in-

uring to the abutting owner with an undefined water boundary. As indicated in that case, there is a marked difference in the definition of shore lands and tidelands found in Rem. & Bal. Code, § 6641, as to their outer boundaries, the outer boundary of shore lands being left undefined, while the outer boundary of tidelands was defined first as extended to mean low tide, and subsequently by the act of 1911 to extreme low tide.

2. Impelled, as we are, both by the terms of the third deed and by the statute under which it was made, to hold that it conveyed all tidelands between the lines of mean low tide and extreme low tide in front of those conveyed by the two prior deeds to the respondents, the issue is reduced to the evidential question: Is the pothole below the line or plane of extreme low tide? If it is, the third deed not convey it to the respondents, and the title still remains in the state. If it is not, that deed did convey it to the respondents.

[3, 4] Preliminary to a determination of that question a brief resumé of the state's pertinent tideland legislation will be illuminating as to what was intended by the use of the term "extreme low tide" in the statute (chapter 86, Laws 1911). The first act relating to the disposition of tidelands (Laws 1889-90, p. 431) prescribed no outer boundary for the state's tidelands. They were sold by metes and bounds fixed by surveys made by the applicant in each case. The resulting irregularity of privately owned tracts led to the passage of the act of 1895 (2 Rem. & Bal. Code, § 6641) *supra*, defining tidelands and adopting the line of mean low tide as their outer boundary. Thereafter this court, in *Pearl Oyster Co. v. Heuston*, *supra*, held that state deeds of tidelands conveyed nothing between the lines of mean low tide and extreme low tide. This in turn led to the passage of the act of 1911, amending the definition of tidelands by extending the outer line to the line of extreme low tide. The original definition of 1895 and as re-enacted in 1897 excepted "oyster lands," and the amended definition of 1911 excepted "oyster reserves." By an act of 1899 (section 6808 to 6818, inclusive, Rem. & Bal. Code) passed for the encouragement and protection of deep-water oyster culture, provision had already been made for the leasing of lands lying below the line of extreme low tide for deep-sea oyster planting. With this act and the prior definition before it, we must assume that the Legislature, in using the term "extreme low tide" in redefining tidelands in the act of 1911, meant to extend the boundary of its tidelands out to the line separating land so continuously covered with water that it might be leased for deep-sea oyster culture from the tidelands of the state. This, as it seems to us furnishes a practical definition of the term "extreme low tide" as a boundary, and, in view of the exception of oyster lands in both definitions of tidelands and of the settled

policy of the state to encourage oyster culture, evidenced by the act of 1899, furnishes an impelling reason, where the question whether a given tract lies below or above that line is one of extreme doubt, for resolving the doubt in favor of the state. This view accords also with the rule that grants by a sovereign state are to be construed most strongly against the grantee, which rule is as applicable to tideland grants as to any other. *Pearl Oyster Co. v. Heuston*, *supra*. Indeed, it would seem that this rule should be especially applicable where, as here, its observance tends to subserve a settled policy of the state.

A detailed review of the evidence is incompatible with the reasonable compass of an opinion. It is largely technical. We shall attempt no more than to indicate its nature and tendency.

[5, 6] The state sought to show that the pothole lies below the lowest recognized plane of extreme low tide. On Puget Sound there are two high and two low tides occurring in approximately each 24 hours. The alternate high and low tides are unequal. There is an extreme daily low tide and an extreme daily high tide. The term "mean low tide" signifies the mean or average level of the low tides, including both the long and the short daily runoff. "Mean lower low tide" signifies the mean level of the daily extreme low tides. The "harmonic plane" is the zero adopted by the United States Coast and Geodetic Survey of the Department of Commerce upon which its tidal tables, charts, and maps are based. It is an arbitrary plane, and is the lowest plane of the tide in Puget Sound recognized by that department. It is approximately two feet lower than mean lower low tide, and approximately four feet lower than mean low tide. The plane of extreme low tide as established by the United States army engineers through some 20 years of observation at Seattle is approximately two feet lower than the harmonic plane. The state sought to show that the pothole lies below this plane as fixed by the army engineers.

Edward Dohm, the field engineer of the state's land department, took soundings at the pothole in order to determine its relation to the plane of extreme low tide. The following method was pursued: In July, 1913, he set a gauge on a pile near the mouth and at the east end of the pothole, and another at the west end, and took a series of readings covering 2 days in July and 10 days in the following January. From these readings and from others taken at the same time at Seattle by the United States Coast and Geodetic Survey he determined the difference in elevation between his gauge at the pothole and those at Seattle, and, taking the average of these differences, adjusted his gauges to the same level as that at Seattle. He found that his gauges at the pothole were set .05 too low. In taking the soundings in the pothole, and in the preparation of the map of

the pothole showing his soundings, which is in evidence, due allowance was made for this discrepancy, and also for the change of tides during the time of taking the soundings. One man was located at the gauge recording the height of the water, and another man in a boat was at the same time recording the depth of the water at each sounding. The bottom of the pothole and the channel as compared with the line of extreme low tide at the pothole, as determined by the soundings and readings taken by the witness, adopting the line of extreme low tide as shown by the records of the army engineers and indicated upon the map made by the witness, is from one to seven feet below that plane.

The respondents sought to meet this evidence with the testimony of J. L. Clapp, a civil engineer formerly connected with the United States engineer's office at Seattle, who testified, in substance, that in order to determine the depth of water below the plane of extreme low tide he would have followed the same course as that pursued by Dohm, but that Dohm's deductions were unreliable, because his observations did not extend over a sufficient length of time. He testified that, to be accurate, it would be necessary to take a great number of readings over a long period of time. He also testified that, calculating from maps prepared by the United States Coast and Geodetic Survey, the bottom of the pothole is about a foot below the line of extreme low tide, and the bottom of the channel leading out of the pothole is about a foot above the line of extreme low tide. It is thus apparent that the real controverted point in evidence is as to the depth of the channel, since the respondents' own evidence concedes that the pothole proper lies a foot below the plane of extreme low tide as fixed by the government engineers. With due deference to the opinion of the learned trial court, we believe that greater weight should be given to the testimony of the witness Dohm, which is based upon actual measurements, though covering only a short period of time, but admittedly made upon a proper plan, than to estimates of the respondents' witness Clapp. But, even conceding that the testimony of these witnesses might be considered as leaving the matter indeterminate, we have in the record the testimony of a considerable number of witnesses, some of whom had lived on the shores of Oyster Bay for a great many years and were familiar with the tide fluctuations in and about the pothole, all of whom testified that they never saw the greater portion either of the pothole or of the channel leading therefrom denuded of water during the lowest tides. Their testimony indicates that there was always a depth of from one to two feet of water in the pothole proper and from four to six inches of water in the channel during low tide. Some of the respondents' witnesses and one

of the respondents himself testified to the same effect. To meet this testimony the respondents introduced evidence to the effect that there are many springs flowing into the pothole from the upland, and sought to deduce therefrom that the water in the pothole during low tide comes from these springs, but the evidence shows that the water flowing out of the pothole during low tide exceeds in volume that flowing in from seepage and springs, and tends strongly to the conclusion that the water in the pothole at the lowest stage of the tide is not seepage from springs, but is sea water. We have examined the evidence with much care. We are satisfied that it strongly preponderates in favor of the view that both the pothole and the channel leading from it lie below the plane of extreme low tide, save certain insignificant portions around the border. We conclude, therefore, that the deed from the state to the respondents, which both in law and by its terms conveyed nothing below the plane of extreme low tide, conveyed to the respondents neither the bed of the pothole nor of the channel, and that the title thereto still remains in the state.

[7, 8] We find no merit in the claim of the respondents to a title by adverse possession aided by improvements and payment of taxes. If we are correct in our findings on the evidence, it is clear that the respondents have no color of title, and the case therefore falls within the rule of *State v. Sturtevant*, supra, wherein we held that the possession of a mere squatter is insufficient to initiate a title by adverse possession or to start the running of the statute of limitations. We find nothing in the record sufficient to estop the state from asserting title to this land, and it is elementary that adverse possession cannot be made the basis of title as against a sovereign state. *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *West Seattle v. West Seattle Land, etc., Co.*, 38 Wash. 359, 80 Pac. 549. See, also, *Rem. & Bal. Code*, § 167.

It seems to be conceded that the description contained in the state's complaint is not an absolutely accurate description of the land lying below the line of extreme low tide as determined by the evidence of the state's engineer, Dohm, and as shown upon the map made by him which was introduced in evidence, showing the limits of the land actually below that plane.

The judgment is therefore reversed, and the cause is remanded, with direction to the trial court to permit the state to recast its description so as to include only those lands falling below the line of extreme low tide as shown upon the map, excluding, however, such parts of these lands as fall within any of the Callow grants, and enter a decree quieting title to the land so described and in other respects as prayed for in the complaint.

If any question is raised as to the correctness of the new description as compared with the map, the court is directed to take evidence and determine therefrom whether such new description conforms to the map now in evidence, and from such evidence correct any discrepancy which may be made to appear.

MORRIS, C. J., and MAIN and FULLERTON, JJ., concur.

(89 Wash. 250)

PAYZANT et al. v. CAUDILL et ux.
(No. 12882.)

(Supreme Court of Washington. Jan. 11, 1916.)

1. JUDGMENT \S 199—JUDGMENT NON OBSTANTE VEREDICTO—EVIDENCE.

Where there is any evidence in favor of the defendants upon the only issue of fact determining their liability, plaintiff's motion for judgment non obstante veredicto is properly denied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 367-375; Dec. Dig. \S 199.]

2. TRIAL \S 260—INSTRUCTIONS—REPETITION.

In a broker's action for commission on a real estate trade, instructions stating that the broker had been made the defendant's agent, that he had made the sale and procured a buyer who was ready, able, and willing to comply with the terms of sale, and was entitled to his commission, absent subsequent alteration of the original contract, are sufficient to present the issue of agency, so that it was not error to refuse a requested instruction defining a real estate broker and stating the law as to when a real estate broker is entitled to his commission.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 651-659; Dec. Dig. \S 260.]

3. BROKERS \S 88—ACTIONS—COMPENSATION—QUESTION FOR JURY.

Evidence held sufficient to justify submission to the jury of the issue whether a broker's contract to sell real estate for a commission was subsequently altered to waive the commission in case of sale for cash.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 121, 123-130; Dec. Dig. \S 88.]

4. APPEAL AND ERROR \S 1005—APPROVAL OF VERDICT—CONTRARY STATEMENT OF COURT.

Although the trial judge, during the progress of the case, indicated that certain testimony was improbable and incredible, and that if the jury found otherwise he would be impelled to set the verdict aside, his conclusion on rendition of the verdict that the verdict was proper was conclusive upon the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3860-3876, 3948-3950; Dec. Dig. \S 1005.]

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by H. C. Payzant and another against B. F. Caudill and wife. From an order overruling plaintiffs' motion for judgment non obstante veredicto or for new trial, the plaintiffs appeal. Affirmed.

Robert Mulvihill, of Everett, for appellants. E. C. Dailey, of Everett, for respondents.

HOLCOMB, J. Appellants' motion for a directed verdict in their favor, against respondents, having been denied and the case submitted to the jury on the evidence, the

jury found for the respondents. Appellants then unsuccessfully moved for judgment n. o. v., or for a new trial.

[1] The court should not have granted the motion for directed verdict or for judgment n. o. v. for appellants, for the reason that there was evidence on behalf of respondents on the one issue of fact which determined the respondents' liability, viz., whether if the equity in respondents' property was sold to appellants or to any other person, at the price fixed therefor for cash, no commission was to be paid.

[2, 3] There was a contract between appellants and respondents, whereby appellants were to and did procure an exchange of certain property owned by a Mrs. Austin, valued at \$2,600, for an equity of respondents in certain other property over and above a certain mortgage of \$2,900, which equity was valued at \$2,600, and for which appellants agreed to accept a commission of \$200. Respondents by letter and wire agreed to the exchange on the precise terms stated by appellants, but proposed that appellants take \$50 in cash as part payment of their commission and take respondents' note for \$150, the balance, for six months. Mrs. Austin was ready, able, and willing to make the exchange, and in fact moved at once into the respondent's property. A Mrs. Wright was acting, in part, as agent for respondents, and she asserts that:

She was unable to procure the consummation of the exchange from appellants because they "insisted on having all their commission in cash, and would not turn the Austin property over until they got it; that the negotiations between her and appellants continued from September 19th to October 28th."

As the case developed under the evidence, the court instructed the jury to the effect that:

"Under the undisputed evidence and the admissions in the pleadings, the defendants entered into the contract for the exchange of their property for the property described in the contract [Mrs. Austin's] and upon stated terms; that the undisputed evidence in the case is that plaintiffs obtained such purchaser according to the contract, and respondents' property was actually sold by appellants and possession delivered to Mrs. Austin for \$3,860; that under the evidence the appellants are entitled to the commission, not exceeding \$210, unless you further find that the plaintiffs, subsequent to the execution of the original contract between plaintiffs and defendants, agreed with defendants that, if the sale was made for cash, the plaintiffs would charge no commission for the sale."

The court also further instructed that:

"Really the only issue submitted to you in this case is the question whether or not the plaintiffs did agree, subsequent to September 19, 1914, that, if a sale of the Caudill property was made for cash, they would charge no commission for making such sale. If you should find that the plaintiffs so agreed, then your verdict should be for the defendants."

Thus were the issues reduced to their ultimate in giving the case to the jury. There was, therefore, no error in refusing

the instructions tendered by appellants, defining a real estate broker and stating the law as to when a real estate broker is entitled to his commission. The instructions given referred to the jury but one issue, which expressly stated that appellants had been made the brokers or agents of respondents; that they had made the sale, procured a buyer who was ready, able, and willing to comply with the terms of sale, and were entitled to their commission unless there had been a subsequent alteration of the original contract. The manner of submission to the jury was entirely favorable to the appellants unless the court erred in submitting the one issue to the jury that was submitted. Upon this appellants say that there was no issue for the jury; that the lower court submitted an issue as to which there was no evidence to support it, viz.: "Did the appellants agree that they would not charge any commission if the sale was made for cash?" It is asserted that the testimony is to the effect that appellants would purchase the Austin property after the trade was made, and if the appellants purchased any of the property they would not receive any commission; that they were not to receive a commission if they purchased, and this was all the evidence on a cash sale; that the appellants did not purchase the property; that the burden was upon the respondents to show by clear and substantial evidence that appellants made a contract by which they were to perform services and receive no pay.

While it is a fact that the facts as testified to by Mrs. Wright, the agent for respondents, would seem to be improbable, yet one of appellants, Mr. Smith, testified as follows:

"Question: Isn't it a fact, that when you showed them the Lowell [Mrs. Austin's] property, you told them that they could either have the Lowell property, or you would sell the Lowell property and pay his equity in cash clear, without any commission? Isn't that true, Mr. Smith? Answer: Yes; this \$1,000 or \$1,100 would have been the amount net to them without a commission. Q. Without a commission? A. Yes, sir; and that is what—for your information, that is what I was trying to do, this 30 days; was to get them that cash net to them."

The Lowell or Mrs. Austin's property was sold according to appellants' testimony, and appellants furnished the money to pay cash for the equity, and improbable as it would otherwise seem, it may be inferred that no commission was to be paid. We think, therefore, that the court properly submitted this issue to the jury.

[4] The same question in effect is raised in argument in support of appellants' motion for a new trial. It appears that the trial judge, in passing upon appellants' motion for a directed verdict, very forcibly intimated that the testimony that, if the sale was made for cash, no commission was to be charged, was improbable and incredible, and that in case the jury found otherwise, he felt that he

would be impelled to set it aside. But in passing on a motion for a new trial, it seems that the trial judge, after further reflection and deliberation, concluded that the facts supported the verdict, probably considering that the jury were better judges of the credibility and probably of the truth of the testimony than was the court, and refused to grant a new trial. Having thus undoubtedly exercised his discretion, we are concluded. It is our province under the repeated decisions of this court to correct manifest abuses of discretion on the part of the trial courts in granting or refusing new trials, but not to interfere with the clear exercise of the discretion of trial courts.

There is no error. The judgment is affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and PARKER, JJ., concur.

(89 Wash. 239)

BEMISS v. PUGET SOUND TRACTION, LIGHT & POWER CO. (No. 12736.)

(Supreme Court of Washington. Jan. 11, 1916.)

1. CARRIERS ⇐318—INJURY TO PASSENGER—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence, in an action for personal injury alleged to be due to the negligence of defendant when its outbound car, approaching at full speed, without warning, or any attempt to stop until within 10 feet of plaintiff, struck him as he was about to board an inbound car, held to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. ⇐318.]

2. CARRIERS ⇐347—INJURY TO PASSENGERS—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In such action, and notwithstanding the plaintiff's negligence in failing to take any precautions for his safety while waiting to board the inbound car, yet if the motorman on the outbound car either saw, or in the exercise of proper care could have seen, him in time to have slackened the speed of his car and avoided the accident, it could not be said as a matter of law that such negligence was the proximate cause of the injury, but the question was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. ⇐347.]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by John M. Bemiss against the Puget Sound Traction, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. B. Howe and A. J. Falknor, both of Seattle, for appellant. Walter S. Fulton, of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damages for personal injuries alleged to be due to the negligence of the defendant. In the answer the negligence was

denied, and contributory negligence on the part of the plaintiff was affirmatively pleaded. The affirmative defense was denied by a reply. Upon the issues thus framed, the cause was tried to a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$8,000. Judgment being entered upon the verdict the defendant appeals.

[1] The assignments of error challenge only the sufficiency of the evidence to sustain the verdict. The facts which were either admitted or which the jury had a right to find from the evidence introduced are substantially as follows: At about 7 o'clock a. m. on December 31, 1913, the respondent, at the intersection of Yesler Way and Twenty-Seventh avenue in the city of Seattle, was struck by a street car operated by the appellant, and sustained a severe injury. Yesler Way is a street running from the business section of the city in an easterly direction. Twenty-Seventh avenue extends north and south and intersects Yesler Way at right angles. Both streets at the place of the accident were paved. The appellant owns and operates a double track cable street railway on Yesler Way, the cars being propelled by an underground cable, which is operated at a speed of 10 miles an hour, and when going at full speed, the cars are operated at the speed of the cable. The outbound cars are operated upon the southerly track, and the inbound cars upon the northerly track. The distance between the inside rails of the two parallel tracks is 7 feet. The cars operating upon the tracks overlap the tracks a distance of 30½ inches, and as the two cars pass each other on the parallel tracks, the nearest point between the outsides of their running boards is 23 inches. The cars operated upon these tracks have an inclosed portion in the middle, and on each end an open section. On each side of the open section is a long seat, running lengthwise of the car and facing outward, which seat is reached by a running board one step below the floor of the car. Passengers are allowed to board and alight from the cars from either the front or rear section. At the time of the accident in question, and for some years prior thereto, the respondent had lived to the south of Yesler Way and a little to the east of Twenty-Seventh avenue. It had been his custom, in going to his business in the morning, to take the westerly or inbound Yesler Way car at Twenty-Seventh avenue and Yesler Way. On the morning in question, when he reached the corner of Yesler Way and Twenty-Seventh avenue, he observed the inbound car about 150 feet to the east. He then crossed the street and stood upon or near the south track, waiting for the car to approach, when he would board it at the front open section, as he usually did. In crossing the street he gave no attention to any other car that might be coming from the west. When the inbound car approached the respondent, it

stopped for the purpose of receiving him as a passenger, he then being opposite the south side of the rear section of the car, the front open section having passed him. While in this position, and before he boarded the car, another car, approaching from the west, struck him, causing the injury complained of. This latter car was proceeding at full speed without warning, and no attempt was made to stop it, or slacken its speed until it was within approximately 10 feet of the place where the respondent was preparing to board, or in the act of boarding the inbound car. After striking the respondent, the car ran practically its full length before it was stopped; the rear open section, after the car stopped, overlapped the rear open section of the inbound car. It was a dark and rainy morning, but was sufficiently light so that the motorman on the outbound car could have seen the respondent when he was approximately 150 feet distant. It was the custom for west-bound cars at this point to receive passengers from the south side. No objection at any time was interposed by the appellant to passengers boarding the car from that side. At the conclusion of the respondent's case the appellant moved for a nonsuit; and at the conclusion of all the evidence challenged the sufficiency of the evidence and moved for a directed verdict. These motions were denied.

[2] The appellant's principal contention is that the respondent was guilty of contributory negligence in standing on or near the south track without taking any precautions to avoid being hit by a car coming from the west upon that track. The respondent claims that the appellant was guilty of negligence in that the car upon the outbound track approached the place where the respondent was boarding the inbound car at full speed. Notwithstanding the fact that the respondent may have been guilty of negligence in failing to take any precaution for his safety while he was waiting to board the inbound car, if the motorman upon the outbound car either saw, or in the exercise of a proper degree of care could have seen, him in time to have slackened the speed of the car, and thus have avoided the accident, it cannot be held as a matter of law that the negligence of the respondent was the proximate cause of the injury. The question was for the jury. *Morris v. Seattle, R. & S. Ry. Co.*, 66 Wash. 691, 120 Pac. 534; *O'Brien v. Washington Water Power Co.*, 71 Wash. 688, 129 Pac. 391; *Mosso v. E. H. Stanton Co.*, 75 Wash. 220, 134 Pac. 941.

The case cited by the appellant which is most nearly in point in sustaining its contention is *Miller v. St. Paul City Ry. Co.*, 42 Minn. 454, 44 N. W. 533. A careful reading of that case will disclose a material difference in one respect between the facts there and the facts in this case. But even though the holding in that case would sup-

port the contention of the appellant here, it would not be controlling. Under the facts in the present case it is ruled by the cases of *Morris, O'Brien, and Moss*, supra.

The judgment will be affirmed.

MORRIS, C. J., and PARKER, HOLCOMB; and ELLIS, JJ., concur.

(89 Wash. 187)

TACOMA MILL CO. v. NORTHERN PAC. RY. CO. (No. 12533.)

(Supreme Court of Washington. Jan. 11, 1916.)

1. DEEDS \Leftrightarrow 99 — CONSTRUCTION — REFERENCE TO OTHER INSTRUMENT.

Where a right of way deed referred to a written agreement of the parties and the agreement referred to the deed, the two instruments must be considered in *pari materia*.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 261-265; Dec. Dig. \Leftrightarrow 99.]

2. EVIDENCE \Leftrightarrow 461 — DOCUMENTARY EVIDENCE—CONSTRUCTION—PAROL EVIDENCE.

Where the intention of the parties to a written contract and right of way deed can be discovered from the language employed, extrinsic evidence is not admissible for the purpose of ascertaining intention.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2129-2133; Dec. Dig. \Leftrightarrow 461.]

3. CONTRACTS \Leftrightarrow 147—CONSTRUCTION.

A written contract should be read as a whole and all of its provisions considered, and too much effect cannot be given isolated provisions.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. \Leftrightarrow 147.]

4. CONTRACTS \Leftrightarrow 147—CONSTRUCTION.

The duty of the courts, when construing questioned contracts, to search out the intention of the parties, is well established, but that duty arises out of an ambiguity, and, when the instrument is not ambiguous, effect must be given to its terms.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. \Leftrightarrow 147.]

5. RAILROADS \Leftrightarrow 73—CONSTRUCTION—RIGHT OF WAY DEED.

Plaintiff, who owned extensive premises used for the manufacture of lumber, by a written instrument in 1906 which restored an original agreement granting to defendant's predecessor a right of way over a portion of the premises, granted defendant a right of way over the premises for its Bay Side extension. The instrument and right of way deed required defendant to lease certain water lots to plaintiff, to erect a fire-proof tunnel over the right of way, and to maintain crossings and a siding for plaintiff's sole benefit. Thereafter defendant extended its Bay Side line, and many trains were run. This interrupted defendant's use of the crossings. Held that, in view of the fact that a grant of a right of way entitles a railroad company to make every use of the land the traffic requires, and the original compensation is presumed to cover such added use, plaintiff was not entitled to enjoin defendant from running additional trains on the right of way so granted.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 179-182; Dec. Dig. \Leftrightarrow 73.]

6. EMINENT DOMAIN \Leftrightarrow 318—RIGHTS OF WAY—GRANT.

Where land is taken for a railroad right of way, the railroad company is entitled to make all the use of the land which the necessities and

convenience of the public may require; the original compensation being presumed to cover such added use.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 841-846; Dec. Dig. \Leftrightarrow 318.]

Morris, C. J., and Chadwick, J., dissenting.

En Banc. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by the Tacoma Mill Company against the Northern Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Hughes, McMicken, Dovell & Ramsey, of Seattle, for appellant. Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for respondent.

HOLCOMB, J. Negotiations initiated September 2, 1887, by respondent's predecessor, Northern Pacific Railroad Company, and carried on between it and appellant, resulted in an agreement and deed to the railroad company for a right of way through appellant's premises. The original agreement was drawn up in writing, and, passing from hand to hand and from party to party, was mislaid and lost a number of times before it was fully executed by the signatures of both original parties. Subsequent negotiations were had from time to time, during many years, to restore the original agreement, which finally culminated in an agreement which was formally made and executed in writing by the present railway company respondent and appellant, in the following terms:

"R. W. No. 33.

"This indenture made this 24th day of January, A. D. 1906, by and between the Tacoma Mill Company, a corporation duly incorporated under the laws of the state of California, and doing business at Tacoma, in the state of Washington, the party of the first part, and the Northern Pacific Railway Company, a corporation incorporated under the laws of the state of Wisconsin, the party of the second part, witnesseth as follows:

"Whereas, in the month of May, A. D. 1888, the said party of the first part made an agreement with the Northern Pacific Railroad Company, then duly incorporated and organized as a railroad corporation, under an act of Congress of the United States approved July 2, A. D. 1864, which said agreement was never executed, and was in words and figures following, to wit:

"This agreement made and entered into this day of May, A. D. 1888, by and between the Tacoma Mill Company, a corporation duly incorporated under the laws of the state of California, the party of the first part, and the Northern Pacific Railroad Company, a corporation duly incorporated by act of Congress approved July 2, A. D. 1864, witnesseth:

"Whereas, the said parties to this agreement heretofore, to wit, on April 20, 1888, by their respective attorneys thereunto duly authorized, executed a certain memorandum of agreement relative to a right of way to be granted through the mill property of the said party of the first part in the city of Tacoma, Pierce county, Washington Territory, for what is known as the Bay Side extension of said company's railroad along the water front of Commencement Bay,

and which said agreement provided for the execution of and delivery of a deed by said party of the first part conveying to said party of the second part the said right of way, for the consideration and upon the conditions and with the reservations therein and hereinafter set forth, and which said agreement also provided that a contract should be entered into by and between said parties in proper form setting forth the contents of said memorandum, and the conditions upon which said right of way was granted, and all the agreements, covenants, and stipulations of the parties relating thereto;

"And whereas, the said party of the first part has this day duly executed said conveyance of said right of way to be delivered to said party of the second part upon its execution of this agreement, which said right of way is located upon a strip of land twenty (20) feet in width (being ten [10] feet in width on each side of the center of said proposed line of railroad as surveyed and laid out, and hereafter to be constructed) across the lands in section twenty-nine (29), township twenty-one (21) north, of range three (3) east, W. M., owned by the Tacoma Mill Company, the center line of said strip of land beginning one hundred (100) feet east and sixty-nine and thirty-one one-hundredths (69.31) feet north from where the center line of Second street, in Tacoma, W. T., intersects the western boundary of section twenty-nine (29), township twenty-one (21) north, of range three (3) east, W. M., running thence south 76° 25' east, two hundred and six-tenths feet; thence on a 7° curve to the right two hundred and twenty-six and two-tenths feet; thence south 60° 35' east, two hundred and eighty feet; thence on a 12° 30' curve to the right one hundred and sixty feet; thence south 40° 35' east, one hundred feet; thence on a 12° 30' curve to the left to a point one thousand two hundred and fifteen feet east of the western boundary of section twenty-nine (29) aforesaid, assuming said western boundary of section twenty-nine a meridian of reference in the foregoing description; and it is to be held by said second party as in said conveyance is set forth:

"Now, therefore, in consideration of the premises, and to carry out said memorandum agreement the parties hereto agree as follows:

"First. The said Northern Pacific Railroad Company shall inclose their track and roadway to be laid and located upon said right of way with a good house or tunnel, constructed of iron or other fireproof material, and shall occupy in construction as little room as possible; the said tunnel shall begin near the eastern boundary of said mill company's property, not exceeding twenty feet west of gate leading to log pond, and to continue on through the property with said house or tunnel as the said mill company may direct; said tunnel shall not exceed nineteen feet in the clear above the rails, and is to be kept and maintained in good and safe condition by said railroad company and at its expense, and said track and roadway across said Mill property must be established at such a grade so that said tunnel, when constructed, will clear the chutes and other connections with said mill as the same shall be altered to provide for said construction, and will not interfere with the operation of said mill.

"Second. The railroad company shall repair or replace, as the case may be, all chutes and roadways leading to and from the mill, machine shops, messhouse, and other buildings on said mill company's property, wherever the same are in any way impaired or torn away in course of construction of said railroad, and shall put said chutes and roadways in as good working order or condition as they were before said interference with the same before construction, or shall bear the expense of so doing; the planer mill to be added to where any portion is removed or taken away in construction, and the planers moved and put in as good working

order as they were before removal, at the expense of said railroad company.

"Third. The line of said railroad is to pass within eight (8) feet of the gate leading to log pond, and said railroad company is to construct a span sufficiently long so as not to interfere with the booming privileges or the sluicing of logs through said gate into the log pond, but said span not to exceed fifty (50) feet in length; thence in a westerly direction, the said line passing the mill and machine shop with as little damage thereto as possible; after passing said machine shop line of railroad to be as near the bank as possible.

"Fourth. The said Northern Pacific Railroad Company shall remove so much of the western end of the two railroad tracks and trestle on which same are laid lying east and adjoining the mill property as is situate upon lots 1 and 2 of the water front lots of the Northern Pacific Railroad Company hereinafter mentioned; the space so vacated, to wit, the western end of what is known and designated as lots numbered one (1) and two (2) on the map called the map of the water front lots of the Northern Pacific Railroad Company, which said map is to be found in the office of the assistant general manager of the said railroad company at Tacoma, Washington Territory, and a blueprint copy of which was furnished on or about April 20, 1888, to said mill company to identify said lots, the said lots being at the western extremity of the property of the Tacoma Dock and Warehouse Company on said water front. And said railroad company shall in due form execute and deliver a lease of said lots to said mill company, to have and to hold the same for its sole use as a dumping or booming ground for its logs, free of any rental charge, and to be used and occupied for such purpose by said mill company as long as the said railroad company shall use the property granted by said mill company as a right of way for railroad or other purposes, and the delivery of said lease shall be concurrent in point of time with the delivery of said deed.

"Fifth. It is also agreed that the wagon road now leading from the Mill property in a westerly direction across the property of the Tacoma Land Company, and connecting with Second street, in the town of Old Tacoma, shall remain and be kept open in its present location, and to the extent of its present width (thirty feet), until such time as such other wagon road or street shall be opened up through said property leading from the mill property and connecting with Second street, as shall equally as well, or better, accommodate and suit the convenience of said mill company in reaching points west of their Mill property in Old Tacoma, by wagon road, and that the railroad company shall put in and maintain a good and sufficient crossing for said road.

"Sixth. The said Northern Pacific Railroad Company shall also put in and maintain in said tunnel as many doors, openings, or gangways leading to and from the mill, machine shop, and other buildings as may be necessary in adapting to the successful operation of said mill and its business the obstruction caused thereto by the construction of said tunnel. The said Northern Pacific Railroad Company shall also put in and maintain a side track or spur for the sole use and benefit of the mill company in shipping or receiving lumber or goods, said spur to leave the main track at a point beginning opposite to the western end of the machine shop, and extending northwardly and westwardly, in a parallel direction with said main track, over the western portion of said mill company's property to a point on the western line of the mill company's property a distance of five hundred feet. The said railroad company also shall do all switching of cars necessary in the use of said railroad in the carriage or moving of said mill company's lumber or goods to and from said mill, free of any charge to the said mill com-

pany so long as the line of said railroad over and through said mill property shall be used and operated by said railroad company, and while the said right of way is used by it for a railroad or other purposes; said switching to be done promptly, as the business of said mill company shall require: Provided, however, that in all cases of switching referred to it is to be understood that the switching to be done free is for business that has reached the city of Tacoma by the Northern Pacific Railroad and for business originating at the mill company's mill to be shipped out by way of the Northern Pacific Railroad.

"Seventh. All foundations to mill or shops disturbed by said railroad company in the construction of said road shall be renewed or thoroughly repaired; the removal or altering of chutes made necessary in the construction of said line to be made so as not to interfere with the operation of the mill; that is to say, the change to be made either when the mill is idle, or so made as to change one chute at a time, so as not to in any way delay the work of the mill by making said change; all buildings damaged or removed by the railroad company to be fully repaired or moved at the expense of the said railroad company; that the mill company shall have the right at all times to cross the track and roadway either over or under the track of said railroad with any water, sewerage, or steam pipes, and that the work of crossing the property and making the changes, building tunnel, etc., by the railroad company shall be completed within sixty (60) days after the commencement of the work.

"Eighth. And the said railroad company hereby agrees to well, truly, and faithfully keep and perform each and all of the agreements, stipulations, and conditions by it to be kept and performed as herein stated, and that this contract and the deed to be executed and delivered by said Tacoma Mill Company in pursuance thereof shall be considered and taken as one transaction, and that said railroad company accepts said grant of said right of way upon the conditions and with the reservations herein set forth.

"Ninth. Two blue maps, one being a plat showing the location of the Northern Pacific Railroad Bay Side extension through the Tacoma Mill Company's property, and the other being a map of the water front lots, showing proposed railroad tracks of the Northern Pacific Railroad Company at Tacoma, and showing the location of said lots one (1) and two (2) herein set apart for the use of the Tacoma Mill Company for dumping and booming purposes, and which were furnished by said railroad company to said mill company on or about April 20, 1888, are hereby referred to as illustrating the situation of the premises in question, and by such reference are made a part hereof.

"And whereas, said Northern Pacific Railway Company, said party of the second part, is the successor in interest of said Northern Pacific Railroad Company, and has acquired its property, including the right of way referred to in said agreement of May, 1888, and has agreed to fulfill the terms and conditions thereof, and has ratified the said agreement:

"Now, therefore, the said Tacoma Mill Company, party of the first part, for and in consideration of one dollar, and other good and valuable consideration, the receipt whereof is hereby acknowledged, does hereby grant to the said Northern Pacific Railway Company, said party of the second part, the right of way for railroad or other similar purposes, over certain real property owned in fee by said party of the first part, situate in Pierce county, state of Washington, and particularly described as follows:

"A strip of land twenty (20) feet in width through section twenty-nine (29), township twenty-one (21) north, range three (3) east, of

the Willamette meridian, being ten (10) feet on each side of the center line of said railway, as now constructed and operated, and described as follows: Beginning at a point marked by a monument, eighty-four and seventy-six hundredths (84.76) feet north, and one hundred (100) feet east of the intersection of center line of North Thirtieth (30) street, in the city of Tacoma, Washington, and the western boundary line of section twenty-nine (29), township twenty-one (21) north, range three (3) east of the Willamette meridian; thence on a curve to the left of five hundred seventy-three and sixty-nine hundredths (573.69) feet radius a distance of one hundred thirty-two (132) feet, said curve being tangent at its point of beginning to a line bearing south sixty-three degrees (63°) twenty-six minutes (26') east; thence south seventy-six degrees (76°) forty minutes (40') east a distance of one hundred thirty-three and nine-tenths (133.9) feet; thence on a curve to the right of eight hundred nineteen and two hundredths (819.02) feet radius a distance of two hundred twenty-seven and four-tenths (227.4) feet; thence south sixty degrees (60°) forty-five minutes (45') east a distance of two hundred seventy-six and five-tenths (276.5) feet; thence on a curve to the right of four hundred fifty-nine and twenty-eight hundredths (459.28) feet radius a distance of one hundred fifty-three and six-tenths (153.6) feet; thence south forty-one degrees (41°) thirty-three minutes (33') east a distance of one hundred twenty-four and one-tenth (124.1) feet; thence on a curve to the left of four hundred fifty and eighty-nine hundredths (450.89) feet radius a distance of two hundred forty-five and six-tenths (245.6) feet to a point marked by a monument, which monument is located three hundred and fifty-three and four one-hundredths (353.04) feet north of the south boundary line of section twenty-nine (29), township twenty-one (21) north, range three (3) east, Willamette meridian, when measured at right angles thereto from a point located in said south boundary line one thousand two hundred and fifteen (1,215.0) feet east from the southwest corner of said section twenty-nine (29) when measured along the south boundary line of said section—assuming said western boundary of said section twenty-nine (29) as a meridian of reference in the foregoing description.

"To have and to hold the said described property to the said party of the second part as long as the said party of the second part, its successors and assigns, shall use the same as a right of way for railroad or other similar purposes.

"This deed is made upon the express condition and upon the understanding of both parties hereto that the property herein conveyed shall be used by the said party of the second part, its successors and assigns, for the uses and purposes above stated, and shall be null and void, and the land herein conveyed shall revert to the said party of the first part, its successors and assigns, if the said party of the second part, its successors or assigns, shall transfer, lease, sell, or convey the said right of way, or any part thereof hereby granted, for any other purpose excepting as above stated, to any other party, without the written consent of the president of the said Tacoma Mill Company.

"The party of the second part accepts the deed, and hereby covenants and agrees that it will pay promptly when they may fall due all taxes and assessments against the said right of way premises hereinbefore conveyed, and every part of the same, as long as said party of the second part shall occupy said premises as a right of way for railroad or other purposes.

"The covenants and conditions herein and in said agreement shall be binding and inure to the benefit of the successors or assigns of each party hereto, and each and all of the covenants in said agreement shall be deemed as covenants running with the land hereby conveyed, and shall be binding and obligatory upon the respec-

tive successors and assigns of each of the parties hereto.

"In witness whereof the parties hereto have caused these presents to be executed in their corporate names, by their duly authorized officers, and their corporate seals to be hereto affixed, this 24th day of January, 1906. Tacoma Mill Company, by H. C. Chesebrough, Its President. [Seal.] Attest: Jno. W. Classen, Secretary. Northern Pacific Railway Company, by Howard Elliott, Its President. [Seal.] Attest: R. H. Relf, Assistant Secretary."

On the same date as the original agreement, May 26, 1888, a deed of the right of way granted to respondent was executed, but not delivered by appellant, the material part of which is as follows:

"In consideration of the execution this day by the party of the second part of a certain collateral agreement of even date herewith, made and entered into with said party of the first part relative to the right of way hereinafter granted, and defining the rights and obligations of each of the parties to said agreement respecting said right of way, and stating the conditions and reservations upon and with which the said right of way is granted, the said party of the first part has bargained, sold, conveyed, and confirmed, and by these presents does bargain, sell, convey, and confirm, to the said party of the second part, its successors and assigns, the following described tract of land, as a right of way for the construction, operation, and maintenance on, across, over and through the same by the Northern Pacific Railroad Company, of a standard gauge track railroad to be used and operated as the Bay Side extension of said company's railroad along the water front of Commencement Bay, in the city of Tacoma, Pierce county, Washington Territory, situated and more particularly described as follows, to wit: [Then follows description by metes and bounds.]"

The original agreement made on May 26, 1888, as was said, was mislaid a number of times before signing by both parties, and it required about 18 years to bring about a formal restoration of the original agreement from the office copies of the parties at the time and the execution of the formal writing of January 24, 1906, by both parties, expressing, as might be supposed, the meeting of their minds. The history of the transaction, as shown by the record, discloses that very eminent and able counsel, among whom were the late H. G. Struve, Mr. Ashton, and the present senior member of the appellant's firm of counsel, acted in the matter for appellant. Mr. McNaught and Mr. Mitchell, former counsel for respondent's predecessor, and Mr. Grosscup, former counsel for respondent, all had much to do with the preparation of the writings, and carefully examined and considered them before their final approval and execution. Notwithstanding all this, it is now contended by appellant that the writings are open to construction and subject to evidence as to the intention of the parties to the agreement.

[1] It will be observed that the written agreement refers to the right of way deed given by appellant to respondent, and the deed also refers to the written agreement of the parties in recital of its consideration

and purposes. The two instruments must therefore perforce be considered in pari materia. Broadly and briefly stated, the issue between the parties is whether the easement granted and conveyed by the mill company is an absolute and unqualified grant of the described right of way for any and all railway and other similar purposes within the railway company's public and corporate powers, or whether it contemplated merely a limited and qualified easement of the right of way for the uses and purposes of the so-called "Bay Side extension" of the railway company, to be used for a freight and industrial track only.

The pleadings are voluminous, and cannot be extensively set out without making this opinion much too long. The complaint proceeds upon the theory that it was represented by respondent's predecessor and understood and agreed upon by and between the parties that the Bay Side extension of the railway was to be constructed along the water front of Commencement Bay, in the city of Tacoma, over and across appellant's property, solely for the accommodation of the property owners and industries then or thereafter to be located along the water front, and that the engines and cars of the railway would only pass over the road as often as necessary to get freight and do switching for such property owners and industries; that now the railway company has extended its line from the former terminus of the Bay Side extension as then constructed, and maintained and operated for a period of over 20 years a number of miles to Tenino on its old main line; that the railway company intends and threatens to operate all its trains between Tacoma and Portland and intervening points and all points in southwestern Washington, save and except such freight and passenger trains as it may be necessary to run over the heretofore existing main line to take care of local business between Tacoma and the point of intersection with the new line; that it is its further intention to contract for its own profit with the Oregon-Washington Railroad & Navigation Company and the Great Northern Railway Company, heretofore using the existing main line between Tacoma and Portland, by which the last-named companies will operate their trains from Tacoma to Portland through the premises of appellant over the new line; that appellant will be irreparably injured by such intended and threatened additional uses and burdens, for which it cannot be adequately compensated in damages; for which appellant prays injunctive and other equitable relief.

The respondent traverses the appellant's allegations as to the representations, understanding, and agreement alleged to have been made by and between the parties, other than as shown and fully expressed in the written agreement and right of way deed set up by appellant, and admits that it has

constructed and intends to use for its general railroad purposes the extension of its "Bay Side extension" to Tenino; that it has agreed with the Oregon-Washington Railroad & Navigation Company to allow it the joint use of the track for a valuable consideration; that it has granted the Great Northern Railway Company 5 years within which to determine whether it will desire the use of the track over which to run its trains between Tacoma and Portland under a joint operation contract, but that that line has so far declined such offer, and signified no intention to enter into such an arrangement, it denies the allegations of the complaint as to irreparable injuries and damages and possible future injuries, hazards and damages. Respondent further affirmatively alleges that it is the grantee and successor in interest of the Northern Pacific Railroad Company and of all its property, franchises, and rights, including the right of way in controversy; that the track constructed and operated upon that right of way was in no sense a spur track or siding; that the growth of the population served by respondent's railway system, and of its business as a common public carrier, has made it necessary for it to increase its carrying capacity and facilities and to use the right of way in question for main line purposes; that it is so authorized and empowered by the instrument of conveyance from appellant dated January 24, 1906, and that such use is in no way inconsistent with the terms of that instrument or in violation thereof. It further alleges in its answer that the growth of population, business, and traffic created an existing public necessity that the respondent construct, maintain, and operate what it calls its "Point Defiance grade line" from Tacoma to Tenino, for the purpose of eliminating grades and curves in its old main line, and to use as a part of the "Point Defiance grade line" the right of way over and across appellant's property as conveyed to respondent; that it has constructed the "Point Defiance grade line" at a cost of many million dollars; and that the public interests and necessities require its operation. There are further affirmative allegations in the answer not now necessary to notice; all of which were put in issue by the reply. Testimony was introduced by each party supporting its allegations, over the objection of the opposite party.

Ever since the execution of the contract on January 24, 1906, the respondent has maintained and operated the Bay Side extension through the tunnel across appellant's premises as a freight track, to serve the industries situated along the water front of Commencement Bay between the main terminus of the original railroad and the Tacoma smelter. It has in the meantime constructed a double-track branch line from its main line at Tenino in Thurston county to the east shore of Puget Sound, and thence

northerly along the shore to Point Defiance, and thence has constructed a double-track tunnel 4,500 feet in length through Point Defiance to the northwesterly shore of Commencement Bay, whence it parallels the Bay Side extension to a point immediately northwest of the premises of plaintiff, where the new line intersects the Bay Side extension. This line is known as the respondent's Point Defiance line, and it proposes to use the right of way through the premises of plaintiff as a part of its Point Defiance line to reach its station in the city of Tacoma, and likewise it proposes to use the Point Defiance line as its main line from Tacoma to Portland and to southwestern Washington, and to operate thereon its freight and passenger trains, with the exception of some local trains between the same points of intersection on the old line, and to permit the operation over the new line of freight and passenger trains of the Oregon-Washington Railroad & Navigation Company, and possibly in the future the Great Northern Railway Company. The evidence discloses that the right of way through plaintiff's premises is 20 feet wide, and is built along the shore beneath the bluff on which plaintiff's mill is situated, and that the right of way is covered by a fireproof structure or tunnel which at places is only 17 feet high, and at no place exceeds 19 feet in height. In this tunnel are four $12\frac{1}{2}$ -degree curves. A switch track is constructed within this tunnel, beginning near the center, and extending to the northwestern margin of appellant's premises, as provided in the contract, for appellant's use. A grade crossing through the tunnel is maintained near the northwestern end of appellant's premises, connecting its offices, wharves and lumber yards with the city by way of Old Town and another grade crossing through the tunnel near the southerly end of appellant's premises connecting with the streets extending toward Pacific avenue, in Tacoma. These crossings are used by appellant for the purpose of marketing its lumber and slabs in the local market, and the crossings are at right angles to the city thoroughfares with which they connect, and persons and teams approaching the crossings are unable to see approaching trains. When the mill is in operation teams are required to use these crossings, going or coming, every five or six minutes during the day, and in hauling heavy loads teams are likely to become stalled on account of the grade at the crossings. There is evidence also that, if respondent is permitted to use this track as proposed, there will be considerable noise and vibration in appellant's offices during the passage of heavy trains; that it will be difficult to market the lower grade of its lumber in the local market by reason of the difficulty of access to its plant; that it will therefore be difficult to compete with other mills in the prosecution of its lumber busi-

ness. There is also evidence that it is believed the mill property will be subjected to a greatly increased fire hazard.

[2] At the outset it is conceded by appellant that, if the intention of the parties may be clearly and certainly determined from the language they employ, recourse will not be had to extrinsic evidence for the purpose of ascertaining their intention. It is contended that an examination of the instrument discloses that it is not, as the trial court assumed, a mere deed granting a right of way for railroad purposes, a unilateral contract, but a mutual agreement formally executed by both parties; that the intention of the parties is not, therefore, to be determined solely by consideration of the words of grant, and in the construction of such a contract courts must be governed by certain fundamental rules of construction.

[3] It is, as contended by appellant, undeniably true that a fundamental rule of construction is that a written contract shall be read as a whole, that all its provisions are to be considered, and that the general design must not be frustrated by allowing too much force to single words and clauses.

"The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them." *O'Brien v. Miller*, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469.

On the other hand:

"The controlling canon for the interpretation of deeds, if unambiguous, is to ascertain the intention of the grantor from the words employed." *Bernero v. McFarland Real Estate Co.*, 134 Mo. App. 290, 114 S. W. 531.

[4-6] The written instrument of January 24, 1906, is both a deed of conveyance of the right of way described therein and a contract containing conditions to be performed by the parties thereto. This contract reached back and incorporated and interpreted the original agreement and deed between appellant and respondent's predecessor of May, 1888. The present contract provides for the execution of certain conditions to be performed by the parties, viz.: (1) For the respondent to make and deliver a lease of certain water lots owned by it to the appellant; (2) for the appellant to grant the right of way through its mill property as expressed in the agreement "for what is known as the Bay Side extension of said company's railroad along the water front of Commencement Bay." These provisions were performed, and by the eighth paragraph of the agreement the agreement and the right of way deed are to be "considered and taken as one transaction." The grant of the right of way is as follows:

"Now, therefore, the said Tacoma Mill Company * * * does hereby grant to the said Northern Pacific Railway Company * * * the right of way for railway or other similar purposes," etc.

But appellant insists that the description by metes and bounds following this paragraph does not measure the grant, but simply defines the area of land over which the easement granted is to be exercised; that, if the granting clause read "does hereby grant the [said] right of way for railroad or other similar purposes," it would not be contended that the right of way grant was other than for the Bay Side extension.

Viewing the contract as a whole, it itself discloses that a large manufacturing plant belonging to appellant then existed, and was to be maintained upon the same premises, and that appellant would be adequately compensated for the grant of the proposed right of way by the new facilities to be given; that this property was to be protected by covering the right of way with a fireproof tunnel which should not exceed 19 feet in clear above the rail; that all roadways leading to and from the premises should be restored by the railroad company and all changes in the buildings made at its expense; that additional facilities should be afforded for the storage of plaintiff's logs; that doors, openings, and gangways should be put in and maintained in the tunnel for the convenience of appellant's business; that a side track should be built in this tunnel for the sole use and benefit of appellant in shipping and receiving lumber or goods; that the railroad company should do all switching of cars for appellant in its business free of charge, and that such switching should be done promptly as the business of appellant should require; that the right of way should be but 20 feet in width.

It is insisted that the proposed use of the right of way by respondent will greatly diminish or wholly destroy some of the privileges thus reserved to the appellant by the terms of the agreement; that if, in addition to the uses of the original track as a freight or industrial track, it may lawfully use the same for the number of trains now proposed to operate over its line, then it may hereafter lawfully make such increased use as the exigencies of the future shall demand, and that it is certainly probable that the future demands upon its main line adjusted at this point to one track will require the practically continuous use thereof. But the same thing may be said if it were construed to be the original intention of the parties that nothing but freight cars or switch engines should be moved over the original Bay Side extension, as it was called. It is evident that the Bay Side extension was not a mere side track or industrial spur, but was a sort of branch railroad, extending from the terminus of respondent's predecessor, and as long thereafter used by respondent in the city of Tacoma, to a smelter in the city of Tacoma near Point Defiance. There were a number of industries situated along that track to which side tracks or spurs were

constructed and maintained for the purpose of handling freight. It is very obvious that the growth of a very large city might have compelled the location of a vast number of industries along this water front and along this Bay Side extension, to move the freight to and from which would require almost or entirely the continuous use of the track; that freight cars and engines might have to move upon it very frequently. Such being the case, it seems plain that the parties originally contemplated that such might be done. There is nothing in the original or the present contract between the parties whereby the respondent or its predecessor was bound not to extend the Bay Side extension to any other point, should it find it necessary, and there is nothing in either of the instruments prohibiting respondent or its predecessor from running any more than a certain number or kind of trains upon that track. The fact that the railroad track is designated and described in the agreement as the Bay Side extension does not operate to limit the nature of the use of the railroad in any way. The track was at that time known and designated as the Bay Side extension. It appears that there was a plan on foot, at the time the original negotiations were entered into between appellant and the railroad company, on the part of one Allen C. Mason, to construct an independent railroad, to be called the Washington Short Line Railroad, from the terminus of the Bay Side extension at or near appellant's property to the then proposed site of the Tacoma smelter. It was desired by the railroad company to construct and operate such railroad itself, and steps were taken to acquire all the rights of Mr. Mason for the purpose of extending the Bay Side extension to the proposed site of the Tacoma smelter. This shows to a slight extent at least that the railroad was not considered merely a side track or industrial spur, but was in a certain sense a railroad, and, as such, was contemplated and designed to be a part of the railroad company's system and an extension thereof, although it was not then contemplated to be a main line railroad or any part thereof. The ultimate public and industrial demands and increased traffic, no matter to how large extent, must have been contemplated by the parties as part of the maintenance and operation of the road. Appellant further urges, however, that it is our duty, in defining the relative rights of the parties, to ascertain their intent, and, when found, to give effect to that intent, and that the language employed is to be construed in the light of the facts and circumstances existing at the time of its execution and the objects and purposes the parties had in view, citing a number of authorities.

The same contention was made in the case of *Kanaskat Lumber & Shingle Company v. Cascade Timber Company*, 80 Wash. 561,

142 Pac. 15, wherein this court, per Chadwick, J., observed:

"The duty of courts, when construing questioned contracts, to search out the intention of the parties, is well established, but that duty arises out of an ambiguity or omission that demands the reception of testimony to illustrate their intent, or to harmonize apparent conflicts. There is a presumption of finality which attends all written contracts, and courts will not deliberately raise doubts or conjure ambiguities for the mere pleasure of construing them. *Fairbanks Steam Shovel Co. v. Holt & Jeffery*, 79 Wash. 361, 140 Pac. 394 [L. R. A. 1915B, 477]. Nor will the fact that a party has made a hard or improvident bargain warrant the court in binding the other party to terms raised by construction or implication. These propositions are admitted as elementary by appellant; but it is said that the whole contract, when construed in the light of the facts and circumstances existing at the time the contract was made and the general object and purpose of the parties, demands a ruling that respondent was bound to keep appellant's mill in operation.

* * * There is nothing, unless we go outside of the written contract, to bring the parties within the rule announced in *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 93 N. W. 459, where the court found the contract to be ambiguous, and applied the rule as it relates to an established business having a certain demand for a certain amount of stock, which must have been known to the opposite party who was held to have contracted with reference thereto.

* * * We have discussed this phase of the case enough to demonstrate that to receive testimony or to imply terms would lead to confusion, whereas courts invite testimony to clear up ambiguous contracts and to make that certain which is uncertain. Although questioned by counsel, we think the case of *Hamlyn & Co. v. Wood & Co.*, 2 Q. B. Div. (1891) 488, is in point. We agree with the observation by Lord Esher, M. R., that authorities are of little use in cases of this character; for, at best, they merely show that, in a particular case, an implication was or was not made."

In *Hamlyn & Co. v. Wood & Co.*, 2 Q. B. Div. (1891) 488, cited by Chadwick, J., it was observed by the opinion writer that:

"When parties have put into writing the terms upon which they agree, more especially in the case of mercantile contracts, it is a dangerous thing lightly to imply what they have not expressed. Here it is clear that there is no breach of the contract as expressed upon the face of the written document."

"It is a well-settled principle of law that all prior negotiations of the parties are merged into a contract in writing when one is entered into covering the subject-matter of such negotiations, and we are not aware of any rule which will authorize oral proof as to representations made before the execution of such contract to be introduced in evidence for the purpose of contradicting or enlarging the scope of such contract, without an allegation in the pleadings that such contract was, in fact, signed by the party making such allegations by mistake or fraud, or without full knowledge of the conditions thereof. As we have seen, such allegations were entirely wanting in the case at bar, and we think all representations or negotiations prior to the execution of said contract were, under the circumstances of this case, entirely immaterial, if the contract in question was unambiguous." *Staver & Walker v. Rogers*, 3 Wash. 603, 28 Pac. 906.

So in the case at bar. Appellant did not plead any mistake or fraud. There was no fiduciary relation between the parties. They dealt at arm's length. Each party was rep-

resented by extremely competent counsel. They proceeded with the utmost care and deliberation.

Without reviewing all the cases cited by appellant upon this phase of the case, it will be found that in nearly all of them appears some fact or circumstance tending to show fraud or mistake aside from the mere reliance upon the representations of the other party to the contract as to its contents.

"A deed which is upon its face an absolute grant is not subject to have reservations or limitations engrafted thereon by parol or extrinsic evidence of intentions, understandings, or agreements contradictory to or at variance with its clear language." 17 Cyc. 620.

"In order to let in evidence of a collateral agreement between the parties, such agreement must be consistent with the terms of the writing; and the evidence must not tend to vary or contradict the terms of the written instrument or to defeat its operation." 17 Cyc. 714.

See, also, *Hubenthal v. Spokane & Inland Empire R. Co.*, 43 Wash. 677, 86 Pac. 955; *Hathaway v. Yakima Water Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. Rep. 874; *Smith Land & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163.

The conveyance in question conveys by absolute grant the right of way for railroad and other similar purposes to the respondent. There are no reservations or limitations ingrafted upon it limiting or qualifying the grant for railroad and other similar purposes. Had appellant desired to limit its use as a right of way by providing that it should be used only for freight purposes, or only as an industrial spur, or that only a certain number of trains, engines, or cars should be moved thereon during the day or during certain hours, or that, in case of being used for additional purposes other than the uses and purposes immediately contemplated, appellant should be compensated by the payment of further damages than the consideration expressed in the contract, all those things could easily have been included in the contract, and, not having been included, it is reasonable to infer that they were not intended to be required. The legal effect of the grant to the railroad company of a right of way to be used for railroad and other similar purposes is that the land thus taken and paid for for public use may be used for a public use by those corporations which act as agents and trustees for the public, that such corporations have a right to make all the use of the land which the necessities and convenience of the public may require, and that the landowner receives in damages a compensation which in theory of law is all the indemnity for all such uses. *Brainard v. Clapp*, 10 Cush. (Mass.) 6, 57 Am. Dec. 74, *Western Union Tel. Co. v. Polhemus*, 178 Fed. 904, 102 C. C. A. 105, 29 L. R. A. (N. S.) 465. The purpose of the taking must fix the right. *Newton v. Perry*, 163 Mass. 319, 89 N. E. 1032.

In an action to recover damages claimed to

result from the increased use of the defendant's railroad, it was held that the grant of a right of way to a railroad company "for all uses and purposes or in any way connected with the construction, preservation, occupation, and enjoyment of said railroad" is broad enough to embrace all uses for railroad purposes, however much increased, and that it will be conclusively presumed that all damages to the land outside of the right of way, past, present, and future, were included in the consideration paid for such grant. *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363. This case was reaffirmed by the Supreme Court of Illinois in *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578, 59 N. E. 240.

Certain property owners executed a deed to a railroad company, granting the right of way for a branch road across their property. The Supreme Court of Minnesota in that case (*Liedel v. Northern Pacific R. Co.*, 89 Minn. 284, 94 N. W. 877) held that the road constructed pursuant to the contract was not a private line for the benefit of the property owners only, but was a public line, a part of the company's railroad system, and subject to general state laws governing railroads. In that case it was said:

"Considering the contract in all its bearings, we are satisfied that it is not susceptible of the interpretation put upon it by respondent. The grant is absolute of a strip of land through the property described to be used for a right of way for the railroad track. In consideration of this grant the railroad company agreed to construct a track over the right of way and to transfer or switch cars from it and its main railroad to and from any private tracks connecting therewith at no greater than the usual charges for such services. The effect of these provisions was to make this branch road a part of the main system, and, in connection therewith, to subject it to the regulations of the state Railroad and Warehouse Commission. This branch is in no sense a private track, but is a complete and efficient part of appellant's railway system. It may be used for the benefit of the public as well as the private property referred to, and the company may establish a station or freighthouses and condemn property for its uses in connection therewith to the same extent that it may for the benefit of any other part of the road. This inference is not modified by the language pointed out by respondent, viz., that the track is for the accommodation and use of the parties to the deed. That clause neither adds to nor takes away from the effect of the contract. If it be stricken out, it would follow that the track became a part of the main system, and for that reason must be operated for the accommodation of the company; but it must be operated for the benefit of the grantors also, without regard to that clause, for the reason that it is required to be connected with their private side tracks, and that cars be delivered at reasonable rates. Neither does the other provision add to or take away anything from the effect of the contract, viz., that the rights of the company shall cease and determine at any time when the strip of land ceases to be occupied for such railroad track. In the absence of such an agreement, it does not follow that the railway company, of its own volition, might arbitrarily abandon the track, and leave the grantors without railroad facilities. In this respect the company is also under the dominion of the laws of the state."

In *Abraham v. Oregon & C. R. Co.*, decided by the Supreme Court of Oregon, 37 Or. 495,

60 Pac. 899, 64 L. R. A. 391, 82 Am. St. Rep. 779, Bean, J., writing the opinion, said:

"We come, then, directly to a consideration of the question as to whether parol evidence is admissible to show that the words 'legitimate railroad purposes' were used in the deed in a particular sense. It is an elementary rule of law that parol evidence cannot be admitted to contradict or vary a written instrument; and it is equally well settled that parol evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were, in fact, so used. * * * 1 Greenleaf, Evidence (15th Ed.) § 295. And Lord Chief Justice Tindall says: 'The general rule I take to be that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves, and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.' * * * 'Ambiguous words or phrases may be reasonably construed to effect the intention of the parties, but the province of construction, except when technical terms are employed, can never extend beyond the language employed, the subject-matter, and the surrounding circumstances.' It is therefore not competent for either of the parties to a contract, where its language is plain and unambiguous, to prove by parol evidence how it was understood, or the meaning of the words used. * * * Applying this rule to the case in hand, it is clear that the plaintiff cannot show by parol testimony that the deed from himself and Willis to the railroad company was not intended to, and did not, convey to such company the right to use the property for all legitimate railroad purposes."

In *St. Louis & R. Elect. R. Co. v. Van Hoorebeke*, 191 Ill. 633, 61 N. E. 326, the court said:

"If the appellees desired to reserve the right to build crossings across the right of way, and across the road-bed of the appellant, they should have embodied such a provision in the contract. * * * Where a railroad company obtains a right of way by purchase from the landowner, having power under the Constitution and law to do so, all the incidents attach to such right as are acquired by eminent domain when the right of way is obtained by condemnation, it being conceded or established that such company can lawfully exercise the power of eminent domain. In other words, a railroad company acquires the same rights and privileges under a private grant as to the construction and operation of its road, as under a right of way acquired by condemnation, where it has the power, under the law, to receive by grant and to acquire by condemnation. Had this right of way been lawfully acquired by condemnation, appellees would have received compensation for the value of the strip of land, and also an assessment of all damages to the residue of their tract to result from the construction and operation of the road. 'The rule is that the appraisal of damages in a case of condemnation embraces all past, present, and future damages which the improvement may

thereafter reasonably produce.' * * * Here the strip of land is, by the terms of the contract, to be conveyed for the purpose of a railroad right of way and for the purpose of constructing and operating thereon a double-track electric railway."

It is not contended by appellant in this case that the proposed additional use by respondent of the right of way in question is not a legitimate railroad purpose. We can see nothing ambiguous in the contract that subjects it to extrinsic construction. We are impelled to the conclusion that the judgment of the lower court was right.

Affirmed.

FULLERTON, ELLIS, MOUNT, MAIN, and PARKER, JJ., concur.

MORRIS, C. J. I cannot concur in the majority opinion. Time and pressing engagements prevent my writing a formal dissent. I wish, however, to express in a casual way the reasons for my views.

The majority opinion is based upon the fundamental error that the contract of January, 1906, is an unlimited grant of a right of way for general railroad purposes. The first rule of interpretation as applied to grants is that the contract must be viewed with reference to its subject-matter, its obligations, and the manifest purpose and intention of the parties. The majority opinion concedes this rule, then departs from it, holding that the granting words in the so-called deed of January, 1906, are broad enough to entitle the railway company to use the right of way for general main line purposes, ignoring in so holding, not only the basic rule of interpretation, but the manifest intention of the parties as expressed in the instrument itself. It is as clear as language can make it, when the agreements of January, 1906, and May, 1888, are read together, as they should be, that the parties were dealing with only one contemplated use—a right of way for the so-called Bay Side extension. All parties knew and contracted with knowledge of the fact that this extension was a freight service track for the accommodation of industries along the water front. Now, after so using this right of way all these years (a use confirming the limited character of the granted right as contemplated by the parties), the railway company constructs a new main line intersecting this extension right of way at the northwest boundary of appellant's property, and has since such construction used this right of way, not only for the purposes of its Bay Side extension, but also for trackage for the freight and passenger service of the Northern Pacific Railway Company, the Oregon-Washington Railroad & Navigation Company, and the Great Northern Railway Company in connection with the new main line to the south, known as the Point Defiance line. It is frankly conceded by the railway company that such a use was never dreamed of at the time the right of way was granted, and it is now permitted because it is said that

the so-called deed of January, 1906, is an absolute grant of a right of way for railroad purposes, and parol evidence is not admissible to vary or contradict its terms.

I deny: First, that the agreements of January, 1906, and May, 1888, show an absolute grant for railroad purposes; and, second, that there is an attempt here to vary or contradict the terms of a written agreement. To contradict a written agreement is one thing. To admit evidence to enable the court to ascertain the real intention and agreement of the parties and enforce it accordingly is another thing. The first may not be done; the second may, either by reforming the instrument itself or by treating it as reformed.

Those are, in the main, the reasons why I cannot concur. More time might enable me to make them plainer. I have, however, said enough to indicate the ground of my dissent without attempting to show the extent to which the facts and law sustain my views.

CHADWICK, J., concurs with Judge MORRIS.

(39 Wash. 264)

STATE v. KETTERMAN. (No. 12900.)
(Supreme Court of Washington. Jan. 11, 1916.)

1. RECEIVING STOLEN GOODS — SUFFICIENCY — "LARCENY."

Under Rem. & Bal. Code, § 2601, making guilty of "larceny" every person who with intent to deprive or defraud the owner thereof: (1) Takes the property of another; (2) obtains from the owner his property by aid of any order for payment, knowing it to be false; or (3) having property in his possession and secreting it or appropriating it to his own use; or (4) having received property by mistake with knowledge thereof, withholds or appropriates it to his own use, and (5) every person who, knowing the same to have been "so appropriated," shall receive or aid in selling or withholding any property wrongfully appropriated—the words "so appropriated" refer to the manner of the original larceny in each of the preceding four subdivisions.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 9-14; Dec. Dig. § 7.]

For other definitions, see Words and Phrases, First and Second Series, Larceny.]

2. RECEIVING STOLEN GOODS — SUFFICIENCY.

In charging the offense of receiving stolen goods it is not necessary to allege the facts of the original unlawful taking.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. §§ 9-14; Dec. Dig. § 7.]

3. CRIMINAL LAW — TRIAL — CHALLENGE TO SUFFICIENCY OF EVIDENCE — DEFINITENESS.

In a prosecution for receiving stolen goods, a challenge to the sufficiency of the evidence, consisting only of a motion to withdraw the case from the jury and to instruct the jury to return a verdict of not guilty on the evidence presented by the state, was insufficient to raise the question of defendant's connection with the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. § 695.]

4. CRIMINAL LAW — SUFFICIENCY OF EVIDENCE — SCOPE OF REVIEW — SUFFICIENCY OF EXCEPTIONS.

The question of defendant's connection with the offense cannot be considered on appeal, not having been presented to or decided by the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Dec. Dig. § 1028.]

Department 2. Appeal from Superior Court, Whitman County; R. L. McCroskey, Judge.

Wallace Kettermann, alias Jack Long, was convicted of receiving stolen goods, and he appeals. Affirmed.

Charles R. Hill and O. H. Horton, both of Colfax, for appellant. R. M. Burgunder and Thomas Nell, both of Colfax, for the State.

PARKER, J. The defendant, Wallace Kettermann, was charged by information filed in the superior court for Whitman county with the crime of receiving stolen goods. His trial before the court and a jury resulted in verdict and judgment against him, from which he has appealed to this court.

Counsel for appellant first contend that the trial court erred in overruling their demurrer to the information, which reads, in part, as follows:

"Wallace Kettermann, alias Jack Long, * * * did then and there willfully, unlawfully, and feloniously, with the intent to deprive the owner thereof, and knowing the same to have been stolen, receive at substantially the same time, from some person whose name is unknown to the prosecuting attorney, and withhold, one saddle and bridle, the personal property of Ivan Marsh, of the value of \$30, one saddle, the personal property of J. H. McCroskey, of the value of \$25, and one saddle, the personal property of William Horton, of the value of \$25."

This was intended to charge the crime as defined by section 2601, Rem. & Bal. Code, which reads:

"Every person who, with intent to deprive or defraud the owner thereof (1) Shall take, lead or drive away the property of another; or (2) Shall obtain from the owner or another the possession of or title to any property by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune telling; or (3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employe, trustee, executor, administrator, guardian or officer of any person, estate, association or corporation, or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; or (4) Having received any property by reason of a mistake, shall with knowledge of such mistake secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; and (5) Every

person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this act—steals such property and shall be guilty of larceny."

[1] The theory of counsel's contention touching the sufficiency of the information is not made very clear to us, but it seems to be: (1) That the words "so appropriated," in the fifth subdivision above quoted, refer only to property appropriated in the manner specified in the fourth subdivision immediately preceding; and (2) that the information is defective, in that the manner of the original larceny is not charged as being that defined in the fourth subdivision. As to the first, we are of the opinion that the words "so appropriated," in the fifth subdivision, refer to the manner of the original larceny of property specified in each and all of the preceding four subdivisions.

[2] As to the second, it is the law that:

"It is not necessary to allege the facts going to constitute the original unlawful taking or embezzlement, as would be required in case of prosecution therefor." 34 Cyc. 520.

Our own decisions in *State v. Druxinman*, 34 Wash. 275, 75 Pac. 814, and *State v. Ray*, 62 Wash. 582, 114 Pac. 439, lend support to this view, though not directly in point. We conclude that the information is sufficient.

[3] It is further contended that the trial court erred in overruling the challenge to the sufficiency of the evidence to support conviction, made by counsel for appellant in their motions for directed verdict of acquittal. These motions were made at the close of the state's evidence and at the close of all the evidence. The first was simply:

"If the court please, at this time I move that the case be withdrawn from the jury and the jury instructed to return a verdict of not guilty on the evidence presented by the state."

The second was no more specific. Neither was argued by counsel. It is plain from the record that this is not a case of no evidence. The evidence was ample to show the commission of the crime, though not very certain as to appellant's connection therewith. This is the particular defect now for the first time urged by counsel for appellant. Answering a similar contention in *State v. Hyde*, 22 Wash. 551, at page 564, 61 Pac. 719, at page 723, Judge White, speaking for the court, said:

"This motion is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind, the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters. The record fails to disclose that the objection to the evidence in the particular matter, as to the kind, amount, and value of money, was called to the attention of the court, and in a case of this kind the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds there-

for." *State v. Tamler*, 19 Or. 528, 25 Pac. 71, 9 L. R. A. 853; 12 Cyc. 596.

[4] To now rule upon these motions contrary to the ruling of the trial court would, in effect, be ruling upon a question not fairly presented to that court.

The judgment is affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and HOLCOMB, JJ., concur.

(89 Wash. 226)

UNION MACHINERY & SUPPLY CO. v.
DARNELL. (No. 12721.)

(Supreme Court of Washington. Jan. 11, 1916.)

1. FRAUDS, STATUTE OF §33 — PROMISE TO
PAY DEBT OF ANOTHER—ORIGINAL PROMISE.

A promise for a valuable consideration made by one person to another to pay such other's debt to a third person is an original undertaking of the promisor, and not a promise to pay the debt of another within the statute, though resting in parol.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 38.]

2. CONTRACTS §187—PROMISE FOR BENEFIT
OF THIRD PERSON—RIGHT OF ACTION.

Where one promises to pay another's debt to a third person, such third person may sue directly upon the promise.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 798-807; Dec. Dig. § 187.]

3. EVIDENCE §441 — PAROL EVIDENCE —
TERMS OF CONTRACT.

As between the parties to a formal written contract parol evidence is inadmissible to prove any additional promise for the benefit of a third person which would tend to contradict or enlarge the terms and purpose of the written contract.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441; *Contracts*, Cent. Dig. § 1616.]

4. EVIDENCE §419—PAROL EVIDENCE—AD-
DITIONAL CONSIDERATION.

Though an additional consideration not inconsistent with that expressed in a written contract may usually be shown by parol evidence, it is not competent to ingraft parol conditions upon a contract complete and unambiguous on its face under the guise of proving an additional consideration.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.]

5. EVIDENCE §419—PAROL EVIDENCE—DEED
—CONSIDERATION.

The primary purpose of a deed being to convey title, explanation of variation of the consideration expressed, short of proving that the deed was without consideration, does not tend to defeat its purpose and is admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.]

6. MORTGAGES §137—NATURE AND EFFECT.

In Washington a "mortgage" is not a conveyance with a defeasance as it was at common law, but is the mere written evidence of a contract of security, the prima facie purpose of which is to secure a debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 270-276; Dec. Dig. § 137.]

For other definitions, see *Words and Phrases*, First and Second Series, *Mortgage*.]

7. EVIDENCE §419 — PAROL EVIDENCE — MORTGAGE—CONSIDERATION.

A mortgage to defendant to secure the payment of \$4,000, with interest, according to the terms and conditions of three promissory notes of specified dates and amounts and times of payment, covering the mortgagor's described realty and providing against foreclosure within two years, under seal, signed by the mortgagors, executed on the same day with an agreement between plaintiff, a creditor, and the mortgagor, and defendant, the mortgagee, and with a chattel mortgage on timber executed to plaintiff, in the absence of fraud or mistake, could not be varied or enlarged by showing that defendant, to obtain his additional security, promised the mortgagors to pay \$1,000 on their indebtedness to plaintiff, in view of the fact that the purpose of the mortgage was not to convey with a defeasance, but to evidence a contract of security, as the contract itself might be resorted to as the source of authority for receiving parol evidence, and since it showed a formal and deliberately complete agreement, parol evidence to enlarge its scope was inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. §419.]

8. MORTGAGES §37 — PAROL EVIDENCE — DEED AS MORTGAGE.

It is competent to prove by parol evidence that a deed absolute on its face was intended as a mortgage, that being an exception to the general rule against excluding parol evidence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. §37.]

9. EVIDENCE §433, 434—PAROL EVIDENCE—WRITTEN CONTRACT—FRAUD OR MISTAKE.

It is competent to show fraud or mistake by parol evidence opening the door to the fullest investigation as to the real intention of the parties to a written contract, and so defeat or reform it; that being an exception to the general rule excluding parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1990-2020; Dec. Dig. §433, 434.]

10. EVIDENCE §419 — PAROL EVIDENCE — MORTGAGE—ADVANCES.

When a mortgage is given to secure a sum of money, the receipt of which is acknowledged generally, parol evidence is admissible to show that it was given to secure future advances and the actual amount of such advances, or to otherwise explain the nature of the debt to be secured.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. §419.]

11. EVIDENCE §419 — PAROL EVIDENCE — CONSIDERATION OF MORTGAGE NOTE.

Where a mortgage is given to secure a specific note described therein, parol evidence is admissible to prove the true consideration of the note and what debts the note is intended to evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. §419.]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by the Union Machinery & Supply Company against James K. Darnell. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to dismiss.

Brightman, Halverstadt & Tennant, of Seattle, for appellant. Walter S. Fulton, of Seattle, for respondent.

ELLIS, J. Action upon an alleged promise of the defendant to pay to the plaintiff \$1,000 on an indebtedness owing from John and George England, loggers, doing business as England Bros., to the plaintiff. The material facts are as follows: In the year 1912, the England Bros., were engaged in logging certain lands in Pierce county. To finance these operations they borrowed from the defendant Darnell \$4,000, evidenced by three promissory notes—one for \$1,500, dated June 14, 1912, due one year after date, with interest at 7 per cent., payable semi-annually; one for \$1,000, dated July 1, 1912, due on or before one year after date, with interest at 7 per cent. per annum, payable at maturity; and the third for \$1,500, dated October 2, 1912, due six months after date, with interest at 8 per cent. per annum, payable at maturity. The first two notes were executed by both of the Englands and their respective wives, the third by George England and wife. At the time of the giving of the first of these notes the England Bros. gave a bill of sale of the timber to the defendant, by the terms of which they were permitted to cut and remove the timber. Operations continued under this agreement and a supplemental agreement of May 26, 1913, not now material, until the middle of June, 1913, but nothing was realized over and above the expense of operation to apply on the indebtedness.

In the meantime the Englands had become indebted to the plaintiff Union Machinery & Supply Company for logging equipment in a sum approximating \$3,000. The plaintiff was urging payment. Shortly prior to June 16, 1913, the defendant's notes being wholly unpaid, except six months interest on the first, the first and last notes being due, and much of the timber having been removed, the defendant went to John England's home and had a conference with England and his wife, which resulted in their giving to the defendant a mortgage on their home to secure the three notes. This mortgage was executed on June 16, 1913, and, omitting caption and acknowledgment, reads as follows:

"The mortgagors, John England and Mary E. England, his wife, mortgage to Jas. K. Darnell to secure the payment of \$4,000 lawful money of the United States, together with interest thereon at the rate of 7 and 8 per cent. per annum until paid, according to the terms and conditions of three certain promissory notes, dated June 14, 1912, July 1, 1912, and October 2, 1912, respectively for \$1,500.00, \$1,000.00 and \$1,500.00 respectively payable on or before one year after date on or before one year after date and on or before six months after date, respectively, with interest at 7%, 7%, and 8% respectively to the order of Jas. K. Darnell the following described real estate lot thirteen, block eleven in Seaview Park situated in the county of King, state of Washington.

"This mortgage shall not be foreclosed before two years from this date.

"Dated this 16th day of June 1913.

"John England. [Seal.]

"Mary E. England. [Seal.]"

On the same day and admittedly for the purpose of enabling England Bros. to continue their logging operations the England Bros. and the defendant entered into an agreement in writing with the plaintiff, signed by all of them, which, after reciting the indebtedness of England Bros. to the plaintiff, and that the plaintiff had declined to extend further credit without security, provided as follows:

"That the boom of logs now in the water adjacent to said camp may be sold by them and the proceeds employed in the liquidation of current labor bills.

"That the next three booms of logs shall be handled by the Union Machinery & Supply Company, sold by them, and out of the proceeds they shall retain \$1,000 in cash on each of said three booms, and that after paying the expenses of transportation and sale the balance shall be paid by the Union Machinery & Supply Company to the order of said England Bros. and J. K. Darnell.

"Said \$3,000 shall apply on the indebtedness of England Bros. to the Union Machinery & Supply Company."

On the same day the England Bros. and Darnell gave to the plaintiff a chattel mortgage on the timber in question. Apparently Darnell signed this agreement and chattel mortgage to give them precedence over his prior chattel mortgage on the timber. Thereafter the Englands sold one boom of logs, the plaintiff a second boom, and the third was disposed of by the Seattle Merchants' & Credit Men's Association by common consent of the creditors of England Bros., including the plaintiff. On July 17, 1914, plaintiff brought this action, alleging that on June 16, 1913, when John England and wife gave the above-mentioned mortgage to the defendant as additional security for the three notes, the defendant, for the purpose of securing such additional security and keeping the logging camp running, promised England and wife to pay to the plaintiff the sum of \$1,000 to apply on their indebtedness to the plaintiff. This alleged promise is the basis of the action. At the trial the plaintiff was permitted, over objection, to introduce the testimony of John England and wife and their daughter to the effect that as a consideration for the execution of the mortgage the defendant promised to pay \$1,000 of the indebtedness of the England Bros. to the plaintiff. The defendant denied that any such promise was made, and testified in substance that the mortgage embodied the whole agreement between him and the Englands, and that the contract and chattel mortgage above referred to embodied the whole agreement between him and the plaintiff. The trial resulted in a verdict and judgment for the plaintiff. The defendant appeals.

The record and the assigned errors sufficiently present two contentions: (1) That the alleged contemporaneous agreement contravened the statute of frauds in that it was an undertaking to answer for the debt of another and was not in writing; (2) that the evidence of the oral contemporaneous agree-

ment was inadmissible in that it tended to change, vary, and enlarge the terms of a written contract complete and unambiguous on its face.

[1, 2] 1. The law is well settled in this state that a promise for a valuable consideration made by one person to another to pay such other's debt to a third person is an original undertaking of the promisor, and is not such a promise to pay the debt of another as to come under the ban of the statute of frauds, though resting in parol. *Nordby v. Winsor*, 24 Wash. 535, 64 Pac. 726; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101. It is also well settled that in such a case the third person may sue the first directly upon the promise as one made for his benefit. *Nordby v. Winsor*, supra; *Johnson v. Shuey*, 40 Wash. 22, 29, 30, 82 Pac. 123. The first point raised is without merit.

[3] 2. But it does not follow that every such promise may be proved by parol evidence. If the promise is asserted to have been made as a part of a transaction which is evidenced by a formal written contract complete and unambiguous upon its face, it is elementary that, as between the parties to the writing, parol evidence would be inadmissible to prove any additional promise which would tend to contradict, vary, or enlarge the terms, scope, or purpose of the written contract. *Ross v. Portland Coffee & Spice Co.*, 30 Wash. 647, 652, 71 Pac. 184; *Allen v. Farmers' & Merchants' Bank*, 76 Wash. 51, 58, 135 Pac. 621. The same rule excluding parol testimony which applies as between the parties to a written contract applies with like force to a third person whenever he claims as a beneficiary under a contract, bases his claim upon it or seeks to assert rights which originate in the contractual relation created by it. All rights primarily arising from the negotiations on which the written instrument rests, by whomsoever asserted, are merged in the writing. The fountain cannot rise higher than its source. In such a case the third person who claims that the promise was made for his benefit is affected by the same principles of estoppel to vary the contract as evidenced by the writing as affect the party who claims to have paid the consideration for the promise. Jones, after indicating that the general rule excluding parol testimony to vary a written contract does not apply as against strangers to the instrument, says:

"It is to be observed, however, that the right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument. So that where one, although not a party to the instrument, bases his claim upon it, and seeks to render it effective in his favor as against the other party to the action, by enforcing a right originating in the relation established by it, or which is founded upon it, the parol evidence rule applies." 3 Jones, Commentaries on Evidence, § 449, p. 220.

The following authorities amply sustain and exemplify the exception as stated: *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245;

Minneapolis, etc., Ry. Co. v. Home Ins. Co., 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390; Current v. Muir, 99 Minn. 1, 108 N. W. 870; Schneider v. Kirkpatrick, 80 Mo. App. 145; Selchow v. Stymus, 26 Hun (N. Y.) 145; Hankinson v. Riker, 10 Misc. Rep. 185, 30 N. Y. Supp. 1040; Schultz v. Plankington Bank, 141 Ill. 116, 30 N. E. 846, 33 Am. St. Rep. 290; Wodock v. Robinson, 148 Pa. 503, 24 Atl. 73. For an antithetical case stating this exception and illustrating its limits, see our own decision in the case of Ransom v. Wickstrom & Co., 84 Wash. 419, 146 Pac. 1041.

[4] As to the foregoing propositions there can hardly be a divergence of opinion. But the respondent contends that the real consideration for a written contract can always be shown, that evidence of the parol contemporaneous promise of the mortgagee in this case to pay \$1,000 of the mortgagor's debt to it as an additional consideration for the mortgage, was therefore admissible, or as respondent, in substance, puts it: The execution of security for appellant's notes was the consideration for the promise, which comes to the same thing. Though an additional consideration not inconsistent with that expressed in the written contract may usually be proved by parol evidence, it is not competent as between the parties to a writing, under the guise of proving an additional consideration, to ingraft upon a written agreement, complete and unambiguous on its face, new terms, conditions, and covenants by parol. *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 500, 142 Pac. 1163; *Morris v. Healy Lumber Co.*, 46 Wash. 686, 691, 91 Pac. 186; *Gordon v. Parke & Lacy Machinery Co.*, 10 Wash. 18, 38 Pac. 755; *Kingsland v. Haines*, 62 App. Div. 146, 70 N. Y. Supp. 873; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774; *Jackson v. Chicago, etc., R. Co.*, 54 Mo. App. 636; *Walter v. Dearing* (Tex. Civ. App.) 65 S. W. 380; *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825; 17 Cyc. p. 659.

As sustaining the admissibility of evidence of a contemporaneous parol agreement as an added consideration of a written contract, respondent cites four of our own decisions: *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964; *Johnston v. McCart*, 24 Wash. 18, 63 Pac. 1121; *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. Rep. 892; *Windsor v. St. Paul, etc., Ry. Co.*, 37 Wash. 156, 79 Pac. 613, 3 Ann. Cas. 62. An examination of these cases discloses the fact that the first two involve bills of sale of personalty, and the last two deeds conveying real estate. The tendency of modern authority is towards the doctrine that the effect of the acknowledgment of payment of a given consideration in a deed is only to estop the grantor from asserting a total lack of consideration, and thus defeating the deed, and that the usual consid-

eration clause is of no greater force than a separate receipt for the money; hence it is open to explanation by parol evidence. 3 Jones, Commentaries on Evidence, § 469.

[5] This is because the prime purpose of a deed is to convey title, and any explanation or variation of the consideration expressed, short of proving that the deed was without consideration, does not tend to defeat that purpose. *Ordway v. Downey*, supra; *Windsor v. St. Paul, etc., Ry. Co.*, supra. The same rule and reason applies in case of a bill of sale of personalty. *Don Yook v. Washington Mill Co.*, supra; *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934. It is a matter of common knowledge that in conveyancing, the acknowledged consideration in the deed is often, and it may be said, usually not the real consideration paid or agreed to be paid. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103.

[6, 7] But where, as in this state, a mortgage is not a conveyance with a defeasance as it was at common law, but is the mere written evidence of a contract of security, its prime purpose being to secure a debt, it seems to us that when the parties have specifically described the debt by stating the amount, as evidenced by specific notes, rate of interest, time of payment, and all the terms essential to a complete and unambiguous agreement, the recital of the amount and character of the debt should be held as invulnerable to parol attack as any other of the terms of the instrument, so long as the integrity of the instrument is not assailed for fraud nor a reformation sought for mistake. Such recitals as those found here are not mere "inattentive recitals common in conveyancing." They evidence, by their very particularity of description of the notes secured, a contractual intention as binding as any other contract.

"It is a universal rule that the written contract itself must be resorted to as the source of authority for receiving parol evidence, and where, as here, the contract shows a deliberate agreement complete in itself and formally executed, parol evidence to enlarge its scope or vary its terms is never admissible." *Allen v. Farmers' & Merchants' Bank*, 76 Wash. 51, 58, 135 Pac. 621, 624; *Gordon v. Parke & Lacy Machinery Co.*, supra; *Farley v. Letterman*, 152 Pac. 515.

To this rule neither a deed nor a mortgage is any exception. 6 Am. & Eng. Encyc. Law (2d Ed.) p. 775. Even in case of a deed when the statement of the consideration passes beyond the mere recitative acknowledgment of payment of money, common in conveyancing, and enters into specific details and conditions stipulating special terms evidencing not merely an intent to convey land, but to contract with reference to the consideration, such recitals bind the parties, and if complete on their face, can no more be altered, varied, enlarged, or controlled by parol

evidence of a contemporaneous oral agreement than other contracts. *Jackson v. Chicago, etc., R. Co.*, supra. In the case last cited Judge Ellison, speaking for the court, says:

"All written contracts, complete and definite, speak for themselves, and they cannot be altered, added to, or subtracted from, by oral testimony. This is an absolute rule of evidence adopted from motives of policy and founded upon the experience of mankind in dealing with the 'slippery memory' of men. So that it must follow that if parties express their contracts, as to the consideration, in terms which show that it is a contract, then, if complete upon its face, it can no more be altered or varied than any other contract. Whenever the statement of the consideration leaves the field of mere recital and enters into that of contract, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction. This may be illustrated: Suppose the consideration in a deed should be: 'In consideration of the sum of \$1,000 to be paid to me in beef cattle, weighing not less than 1,200 pounds each, at five cents per pound.' Would it be contended that a consideration thus expressed contractually could be orally shown to be other than as expressed? * * * But money may also be contracted for as the consideration in a written contract. And when the intention to so contract is disclosed by the written instrument, no other or additional consideration can be shown. Thus, suppose that the consideration was stated in the written contract to be '\$1,000 to be paid as follows: Two hundred dollars in 6 months from date without interest, \$400 in 12 months from date with 3 per cent. interest, and \$400 in 18 months from date with 10 per cent. interest from maturity, all to be secured by a mortgage' on certain described property. Could it be shown in contradiction to this that the consideration agreed upon was 50 head of cattle or an additional sum of money? Clearly not. The reason is that it has been contracted otherwise by the parties, and that contract has been reduced to writing."

Where a deed recited the consideration as the payment of a certain sum of money and the assumption by the grantee of certain specifically described debts of the grantor, it was held that the statement of the consideration was contractual, and that parol evidence was not admissible to show the assumption of other debts as an additional consideration. *Walter v. Dearing*, supra. See, also, *Kahn v. Kahn*, supra; *Baum v. Lynn*, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497.

The better considered authorities hold, and it seems to us a fortiori, that the same rule applies to mortgages. While we have found no case an exact parallel to the one before us on the facts, there are many which announce the governing principle. In *Dyar v. Walton, Whann & Co.*, 79 Ga. 466, 7 S. E. 220, it was claimed by the mortgagor that a settlement closed up by absolute notes and mortgages was, by a contemporaneous oral agreement of the parties, to be revised by crediting all errors. Evidence to that effect was held inadmissible. The court said:

"The defense, when analyzed, resolves itself into an effort to vary a written contract by parol, and to shun the consequences of gross negligence. If, at the time the notes and mortgages

were given, there was an agreement entered into, that they should be varied by the result of subsequent examination, that agreement ought to have been embodied in the written contract, or in some other writing whereby to establish it. The omission to do either is decisive of this branch of the defense. There is no allegation in the plea, and no indication in the evidence, that this agreement was intended to be embraced in any writing, or that it was left out by fraud or mistake."

In *Kenney v. Aitken*, 9 Daly (N. Y.) 500, the deed of trust involved was given to secure the payment of four specifically described notes. The maker of the trust deed brought an action upon an alleged contemporaneous parol agreement with the cestui que trust that the latter should repay to him the \$400 represented by the last note, as the value of certain property covered by the trust deed which was exempt from execution. *Van Brunt, J.*, said:

"In the case of *Cocks v. Barker*, 49 N. Y. 107, it was held that the recital in the bond of a fact, although the existence of that fact formed the consideration for the execution of the bond, was a substantive part of the agreement, and not like the consideration clause of a conveyance or other instrument which might within certain limits be explained and varied by parol. The plaintiff in this action seeks to add to the deed of trust another and different agreement from that which is contained in the recitals."

That case on principle cannot be distinguished from the one before us. See, also, *Union National Bank v. International Bank*, 22 Ill. App. 652; *Falke v. Fassett*, 4 Colo. App. 171, 34 Pac. 1005; *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399; *Bowery Bank of New York v. Hart*, 77 App. Div. 121, 79 N. Y. Supp. 46; *Knight v. Warren*, 56 Hun, 642, 9 N. Y. Supp. 380; *Cocks v. Barker*, 49 N. Y. 107.

[8, 9] While it is competent to prove by parol evidence that a deed absolute on its face was intended as a mortgage, or by an allegation of fraud or mistake to open the door to the fullest investigation as to the real intention of the parties to a written contract and thus defeat or reform it, the facts must be pleaded and the proof must be clear and convincing. These are well-recognized exceptions to the general rule excluding parol testimony. The first of these is *sui generis*, the second is not peculiar to mortgages, but applies to every kind of written contract. Neither is authority for the claim that an instrument purporting to be a mortgage complete upon its face and unambiguous as to the amount and character of the debt secured is any more subject to variation, extension, or contradiction by parol evidence than are other less formal contracts. To hold otherwise would render what commonly has been considered the surest security for a debt, the most precarious.

[10, 11] When a mortgage is given to secure a sum of money, the receipt of which is acknowledged generally as in the usual consideration clause of a deed, parol evidence is admissible to show that it was given to se-

cure future advances, and the actual amount of such advances, or to otherwise explain the nature of the debt intended to be secured. *Babeock v. Lisk*, 57 Ill. 327. So, also, where a mortgage is given to secure a specific note described therein, parol evidence is admissible to prove the true consideration of the note and what debts the note is intended to evidence. *Wilkerson v. Tillman*, 66 Ala. 532. But the case here is neither of these. We have been cited to no authority and know of none holding that where a mortgage is given to secure a certain indebtedness specifically described therein, the character and components of which are known and admitted, it is competent, without any allegation of fraud or mistake, to prove that by a contemporaneous parol agreement it was intended to secure a debt of a wholly different origin and character or an additional sum to be advanced by the mortgagee as an additional consideration for the mortgage. Much less is it competent to prove that by such an oral agreement an additional sum was to be paid as an additional consideration without any intention that it should be secured by the mortgage. Such proof in either case would not be proving the consideration merely, but varying and enlarging the contract by adding new terms and conditions and creating new burdens. We said in *Morris v. Healy Lumber Co.*, supra:

"Lastly it is contended that the court erred in excluding evidence as to the consideration that actuated the appellants in entering into the lease. But such evidence was immaterial to any issue made by the pleadings. While it is permissible for certain purposes to show by parol what the actual consideration was upon which a deed is founded, it is never permitted where the purpose of the evidence is to annex a condition to the instrument not expressed in it."

There is no reason either in law or logic why the same rule should not apply to a mortgage complete in every particular on its face. It will not do to say that the alleged agreement was a separate and independent contract. Clearly the promise here sought to be enforced, if independent of the mortgage, was without consideration, since the respondent on the same day agreed in writing not only with the Englands, but also with the appellant, on another consideration, to extend credit and permit the logging operations to continue. The alleged promise to pay the \$1,000 could not have entered into that agreement in any view of the case, since the respondent does not claim to have known of it until long afterwards.

We have gone into the matter thus fully for the reason that we are now satisfied that in the case of *Harbian v. Skinner*, 83 Wash. 596, 145 Pac. 582, we permitted ourselves to indulge a breadth of expression beyond the true rule and beyond the necessities of that case. That case was decided correctly, but should have been based alone upon the last ground stated in the opinion.

The mortgage gave the mortgagee the option of paying the taxes, assessments, and insurance premiums, and carrying the same under the mortgage at his election. Parol proof that at the time the mortgage was given, certain assessments and premiums were due, and that he then elected to exercise the option to pay and carry these items, did not tend to change, add to, or vary either the mortgage or the consideration upon which it was based.

In the case before us we are clear that the oral evidence of the alleged contemporaneous promise sued upon was improperly admitted.

The judgment is reversed and the cause is remanded, with direction to dismiss.

MORRIS, C. J., and CHADWICK, MOUNT, and FULLERTON, JJ., concur.

(39 Wash. 300)

RUSSELL & GALLAGHER v. YESLER ESTATE, Inc. (No. 12897.)

(Supreme Court of Washington. Jan. 11, 1916.)

1. CONTRACTS \S 198—AGREEMENTS TO ARBITRATE—CONSTRUCTION.

Where plaintiffs agreed with the defendants to build certain foundations for a building and agreed further that they should be paid an amount to which was added all extras for changes ordered by the architect and from which was subtracted all amounts by which the changes decreased the cost of the building, agreeing that the decision of the architect should be conclusive, but providing that in case of dispute as to the true value of any work added or omitted by the contractor the same should be arbitrated by appealing to the city superintendent of buildings, and further agreeing that in case any difference of opinion should arise in relation to the contract, the work to be performed under it or the plans, drawings, and specifications, the decision of the architect should be final and binding, and stipulating for liquidated damages for delay in performance, there was no agreement for arbitration by the architect as to the value of extra work or as to demurrage, in the absence of which agreement the plaintiffs were entitled to resort to the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-877, 879-883; Dec. Dig. \S 198.]

2. CONTRACTS \S 198—SUBMISSION—MATTERS SUBJECT TO ARBITRATION.

Although the law favors the settlement of disputes by arbitration, it will compel parties to resort thereto only when the terms of their contract are clear and certain in showing that they had such intention.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 861-877, 879-883; Dec. Dig. \S 198.]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by Russell & Gallagher, copartners, against the Yesler Estate, Incorporated. From a judgment for plaintiffs, defendant appeals. Affirmed.

Hughes, McMicken, Dovell & Ramsey, and R. J. Venables, all of Seattle, for appellant. Preston & Thorgrimson, of Seattle, for respondents.

PARKER, J. This is an action to recover a balance due upon a building contract including compensation for extra work and material. The case was tried before the court without a jury, resulting in findings and judgment in favor of the plaintiffs, from which the defendant has appealed.

In April, 1913, respondents, Russell & Gallagher, entered into a contract with appellant, Yesler Estate, Incorporated, agreeing to construct a certain portion of a building about to be constructed upon one of its lots in Seattle. The provisions of the contract, so far as here necessary to notice them, are as follows:

"That the said party of the first part [respondents], for and in consideration of the payments to be made to them by the said second party as hereinafter provided, do hereby covenant, contract, and agree to do and fully complete, by the 10th day of June, 1913, all of the digging, trenching, cribbing, pumping, cleaning, excavating, and build the foundation and basement walls, piers, and posts for a building to be erected, on the site described in the specification, according to the plans, specifications, and drawings (which are declared to be a part of this agreement), made by A. Wickersham, architect (acting as agent for said owner), in a good, substantial, and workmanlike manner, to the satisfaction of and under the direction of said architect. * * *

"It is also further agreed that the said party of the second part may make all alterations by adding, omitting, or deviating from the aforesaid plans, drawings, and specifications, or either of them, which it shall deem proper, and the said architect shall advise, without impairing the validity of this contract, and in all such cases the said architect shall value or appraise such alteration, and add to or deduct from the amount herein agreed to be paid to the said first party the excess or deficiency occasioned by such alteration, but should any dispute arise respecting the true value of any works added or omitted by the contractor, the same shall be arbitrated by appealing to the superintendent of buildings for the city of Seattle, who has been hereby mutually selected and whose decision shall be final and binding on all parties, each party paying one-half of the fee. It is further agreed that in case any difference of opinion shall arise between said parties in relation to the contract, the work to be or that has been performed under it, or in relation to the plans, drawings, and specifications, the decision of the said architect shall be final and binding on all parties hereto. * * *

"It is further agreed should the contractor fail to finish the work at the time agreed upon, they shall pay to or allow the owner, by way of liquidated damages, the sum of \$20 per diem, for each and every day thereafter the said works shall remain incomplete, subject to the right of arbitration above mentioned."

The real controversy is over claims of respondents for extra work and material required of them because of change in plans of the structure, and also a claim of demurrage made by appellant against respondents because of delay in the completion of the work.

It is contended by counsel for appellant that under the terms of this contract the architect became the agreed arbiter of the disputed items of charge claimed by respondents, and also the disputed item of demurrage claimed by appellant against respondents. We note that the superintendent of

buildings declined to act as arbiter, and that therefore there is no question of the necessity of submitting any disputed matter to him.

[1] We are not able to gather from the language above quoted an intention on the part of the parties thereto to make the architect the arbiter of the questions here involved, since there is not here involved any question of the proper performance of the work or the proper quality of the material entering into the structure, but only the question of the value of the extra work and possibly the quantity thereof, and the demurrage, all of which questions seem by the terms of the contract to be subject to arbitration before the superintendent of buildings. It seems to us that the language of the contract referring to such arbitration negatives the idea of the power of the architect in that respect, not only as to the value of the extra work, but also as to the amount of the demurrage, if any, chargeable to the respondents. It is in any event not at all certain that the parties to the contract agreed to make the architect the final arbiter of any of the questions here involved. This of itself would entitle respondents to resort to the courts.

[2] While the law favors the settlement of disputes by arbitration, it will compel parties to resort thereto only when the terms of their contract are clear and certain in showing they have such intention. In the early case of *Van Horne v. Watrous*, 10 Wash. 525, at page 527, 39 Pac. 136, at page 137, Judge Stiles, speaking for the court, observed:

"Courts will enforce contracts to arbitrate disputes and make the decision of arbitrators final where the parties to a contract make it clearly to appear that such was their intention; but whenever they leave it doubtful whether such a method of settling a disputed question was intended to be left to the final decision of arbitrators, the construction is in favor of the right to resort to the courts for redress in the usual manner."

In *Sweatt v. Bonne*, 60 Wash. 18, 110 Pac. 617, we said:

"Whatever the authority of an architect may be as an agreed arbiter between an owner and a contractor, the law will not regard the owner bound by a decision of the architect, except in so far as the owner has unmistakably agreed to be so bound. *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 642; *County of Cook v. Harms*, 108 Ill. 151; *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *Chicago & E. I. R. Co. v. Moran*, 187 Ill. 316, 58 N. E. 335; *Fay v. Muhlker* [1 Misc. Rep. 321], 20 N. Y. Supp. 671; *Fuller & Co. v. Young & Co.*, 126 Fed. 343 [61 C. C. A. 245]."

This observation is, of course, applicable to the rights of the contractor as well as to those of the owner.

All other questions here involved are of fact only. We think it would be unprofitable to analyze the evidence in detail, and feel that we are not called upon to say more than that we have painstakingly reviewed all of the evidence found in the statement of facts, and are inclined to the view that it preponderates

in favor of the conclusions reached by the trial court both upon the question of respondents' claims for extra work and material and upon appellant's claim of demurrage. In any event we cannot say that it preponderates to the contrary. We think the case does not call for further discussion.

The judgment is affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and HOLCOMB, JJ., concur.

(89 Wash. 115)

GRANDALL et al. v. LEE. (No. 12877.)

(Supreme Court of Washington. Jan. 7, 1916.)

1. FRAUDULENT CONVEYANCES \S 230, 241—REMEDIES OF CREDITORS—EXECUTION.

A creditor may levy an execution upon the property theretofore conveyed in fraud of his rights and sell it without resort to a creditor's bill, and without having an execution returned nulla bona.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 660-664, 694, 696-726; Dec. Dig. \S 230, 241.]

2. FRAUDULENT CONVEYANCES \S 264—TITLE ACQUIRED AT EXECUTION SALE — ALLEGATION AND PROOF.

A creditor suing to quiet title acquired at an execution sale must go further than to assert merely that the sale was made in fraud of his rights, and must allege and prove that the grantor had no other property out of which he could have satisfied the judgment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 767, 768; Dec. Dig. \S 264.]

3. FRAUDULENT CONVEYANCES \S 263—PURCHASE AT EXECUTION SALE — SUFFICIENCY OF COMPLAINT.

In a suit by the purchaser at an execution sale to quiet title to the land as against an outstanding deed to the debtor's wife, the purchaser must plead the facts upon which he relies, and a complaint in no way describing the deed, although it was a matter of record showing the relationship of the parties, or charging actual or constructive fraud, did not state a cause of action so as to put the defendant to the burden of proof.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 771-774, 776-779, 781; Dec. Dig. \S 263.]

4. FRAUDULENT CONVEYANCES \S 230—LEVY AND SALE BY CREDITOR—EFFECT.

A creditor may levy an execution and sell property assumed to be conveyed in fraud of creditors, but such proceeding will not remove the cloud of an outstanding deed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 660-664; Dec. Dig. \S 230.]

5. FRAUDULENT CONVEYANCES \S 278 — CONVEYANCE FROM HUSBAND TO WIFE—PRESUMPTION.

In view of Rem. & Bal. Code, \S 8768; providing that every deed from a husband to his wife shall divest the property from any claim as community property and vest it in the grantee as separate property, and that such conveyance shall not affect any existing equity in favor of the creditors of the grantor, a deed from a husband to his wife is not presumptively fraudulent, either as matter of substantive law or of pleading, but may be questioned as any other deed, and, if attacked by a sufficient pleading and preliminary proof, the burden is on the

one claiming the benefit of the transaction to explain it by clear and satisfactory evidence.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 801, 802; Dec. Dig. \S 278.]

6. FRAUDULENT CONVEYANCES \S 259—CONVEYANCE TO WIFE — BURDEN OF PROOF — STATUTE.

Rem. & Bal. Code, \S 5292, putting the burden of proving good faith of the transaction upon a wife to whom a husband has conveyed, does not exempt the transaction from the ordinary rules of pleading by one questioning the deed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 756, 757, 764-766, 769, 770; Dec. Dig. \S 259.]

7. FRAUD \S 41—PRESUMPTION.

Fraud is never presumed, and the burden of pleading fraud is always on the one who asserts it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. \S 36, 37; Dec. Dig. \S 41.]

8. APPEAL AND ERROR \S 889 — AMENDMENT ON APPEAL—STATUTES.

Under Rem. & Bal. Code, \S 307, providing that the court shall in every stage of an action disregard any defect in the pleadings not affecting the substantial rights of the adverse party, and section 1752, providing that the Supreme Court shall hear and determine all causes upon the merits and shall consider all amendments which could have been made, the complaint in a suit by the purchaser at a creditor's execution sale to quiet title as against an outstanding deed in the debtor's wife, where the complaint did not state facts to constitute a cause of action, and where the trial court made no findings of fact, would not deem the pleadings amended to conform to the proof, since, where there are no facts, there can be no amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3621, 3622; Dec. Dig. \S 889; Pleading, Cent. Dig. \S 1355, 1418.]

9. FRAUDULENT CONVEYANCES \S 259—PURCHASERS AT EXECUTION SALE — RIGHT OF ACTION.

A complaint in a suit by the purchaser at a creditor's execution sale to quiet title to the land as against an outstanding deed in the debtor's wife, merely asserting such hostile title, did not show that the foundation of the foreign judgment on which execution was had was either an existing debt or an existing equity at the time the deed was executed.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 756, 757, 764-766, 769, 770; Dec. Dig. \S 259.]

10. FRAUDULENT CONVEYANCES \S 295—EVIDENCE — SUFFICIENCY — EQUITY OF PLAINTIFF.

In a suit by the purchaser at an execution sale to quiet title to the land as against an outstanding deed in the debtor's wife, evidence held insufficient to show that plaintiff stood in the shoes of a creditor having an existing equity at the time the deed to defendant was made.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. \S 887-875; Dec. Dig. \S 295.]

Department 1. Appeal from Superior Court, Kitsap County; Walter M. French, Judge.

Suit to quiet title by W. F. Orandall and others against Elizabeth M. Lee. Judgment for defendant, and plaintiffs appeal. Affirmed.

Shorett, McLaren & Shorett, of Seattle, for appellants. Thomas Stevenson, of Bremerton, for respondent.

CHADWICK, J. On Feb. 6, 1911, the appellant W. F. Crandall and another brought suit against Milton S. Lee, husband of the defendant, in the district court of New Mexico. Judgment was rendered in the courts of that state on April 20, 1911. On February 1st Milton S. Lee conveyed the land now in controversy to respondent by deed sufficient in form. The property is situate in the county of Kitsap, in this state. At the same time Lee conveyed to respondent 480 acres of land in the state of Arkansas. The deed to the Kitsap county land was recorded in the office of the auditor on the 7th day of February, 1911.

On June 19, 1911, the judgment creditors began an action upon the foreign judgment, making Lee and his wife defendants. The Lees are nonresidents. Service was obtained by publication after the lands had been subjected to an attachment. The defendant Elizabeth M. Lee, respondent here, made answer, tendering the general issue, and that the court rendering the judgment had obtained no jurisdiction over her or the subject-matter of the action. Judgment was entered on June 29, 1912, against Milton S. Lee and the community consisting of Milton S. Lee and Elizabeth M. Lee. The property was thereafter sold at sheriff's sale to these appellants. The sale was confirmed and a sheriff's deed executed. Thereupon appellants brought an ordinary suit to quiet title to the land as against the outstanding deed of the defendant.

After a trial upon the merits the court, following the case of *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784, 28 Am. St. Rep. 56, as we are told, held that plaintiffs could not recover under their complaint. It is not clear from the record, but it would seem, that the court treated the action as a suit by creditors to subject land alleged to have been conveyed in fraud of their rights to the payment of their claims, and, under the authority of the case mentioned, held that it was necessary for the plaintiffs to allege and prove that the debtors had no other property subject to execution at the time the conveyance was made, and rendered a judgment in favor of the defendant upon the theory that the complaint did not state a cause of action.

Appellants contend: First, that they are within the rule of *Wagner v. Law*, if it be in point; and, second, that it is not in point, for the reason that in that case the conveyance was not made by a husband to a wife, and therefore "presumptively fraudulent" as to creditors; and, further, that the case went off on demurrer, whereas the present case was tried upon its merits, and we will, under a settled line of authority, deem the plead-

ings amended to conform to the proofs. Appellants brought their action, alleging no more than that they were the owners in fee of the property, that defendant claimed some right or title in it adverse to them, the exact nature of which they could not aver, and prayed that she be required to come in and set up her interest, if any, and that title be quieted in them.

[1, 2] The case of *Wagner v. Law* settled two legal propositions. They are: A creditor may levy an execution upon property theretofore conveyed in fraud of his right and sell it without resort to a creditor's bill and without having an execution returned nulla bona; and, second, if he brings an action to quiet the title acquired at an execution sale, he must go further than to assert merely that the sale was made in fraud of his rights, as was done in *Wagner v. Law*. He must allege and prove that the grantor had no other property out of which he could have satisfied the judgment. The case has been followed in: *Hamilton Brown Shoe Co. v. Adams*, 5 Wash. 335, 32 Pac. 92; *Samuel v. Kittenger*, 6 Wash. 266, 33 Pac. 509; *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101; *Preston Parton Mill Co. v. Dexter Horton Co.*, 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928. In the latter case the court said of *Wagner v. Law*:

"A careful examination of this case shows that it was an action by the judgment creditor to set aside a fraudulent conveyance which was alleged to be a cloud upon plaintiff's title. The plaintiff was a creditor, and had, under execution, purchased the property. The real question in the case seemed to be that the judgment creditor had a right to maintain his action to set aside the fraudulent conveyance after he had enforced his execution under his judgment; that it was not then too late for him to maintain his action. The suit was between the judgment creditor and the fraudulent grantor and grantee. But it was also held in that case that the complaint did not state facts sufficient to constitute a cause of action, when it failed to allege that there was no other property of the judgment creditor at the time of the conveyance out of which the creditor could satisfy his judgment."

It is clear that appellants' complaint is bad under the doctrine of these cases, unless, as it is contended, the burden was upon the defendant wife to come forward and plead and prove that the deed was executed in good faith, or that appellants were not creditors having an existing equity.

[3, 4] After mature consideration and a re-reading of the cases referred to, we are inclined to hold that one who questions a deed must plead the facts upon which he relies. This must of necessity be so, unless we admit appellants' contention that a deed from a husband to his wife is "presumptively fraudulent." If it is not to be treated as a void thing as to third parties, the complaint is clearly insufficient. Appellants contend in their brief that it is a void deed. The complaint does not in any way describe the deed, although it was a matter of record and re-

veals the relationship of the parties. To hold the complaint good would permit a plaintiff to claim title merely and put a defendant to the burden of setting up the deed which is assumed to be fraudulent and the facts which are relied on to exonerate it from an imputation arising from the single fact that the grantor was a husband and the grantee a wife.

If the law is as appellants insist it is, they would be entitled to judgment on the pleadings unless defendant had set up the good faith of the deed, although it is nowhere mentioned in the pleadings. On the other hand, if respondent had set up the deed and nothing more in answer to a complaint charging no fraud, but only title and an outstanding adverse interest, defendant would be entitled to a judgment on the pleadings, for the obvious reason, as we shall show, that the deed was neither fraudulent nor "presumptively fraudulent." In other words, respondent is not to be put to her burden of proof (there is no presumption; the difference in these terms is explained in *Welch v. Creech*, 153 Pac. 355) until a charge of fraud actual or constructive is made. This is but another way of saying that appellants' complaint does not state a cause of action.

We understand the rule governing the conduct of a creditor who questions a transaction of the kind now under consideration, as it is gathered from our decisions, to be: If he levies an execution and sells property assumed to be conveyed in fraud of creditors, he may do so, but such proceeding will not remove the cloud of an outstanding deed. If he does so sell, and would remove the cloud, he must make a direct attack upon the deed by alleging its fraudulent character, and by pleading and proving that his debtor has no other property out of which he can satisfy his debt.

[5] Expressions to the effect that a deed from a husband to a wife is "presumptively fraudulent" have crept into some of our opinions. *Dill v. Carver*, 70 Wash. 103, 126 Pac. 86; *Patterson v. Bowes*, 78 Wash. 476, 139 Pac. 225. In its proper setting of fact this statement may be true, but it cannot be laid down as a fundamental either of substantive law or of pleading. Such a deed may be questioned as any other deed, and, if attacked by a sufficient pleading and preliminary proof, the burden is upon the one who claims the benefit of the transaction to explain it by clear and satisfactory evidence. One who would do so must be a creditor having an existing equity—a cause of action—at the time of the transfer, and he must allege the relationship, the transfer, and that the grantor is without other property to satisfy his debt. Whenever the question has been squarely put up to the court, it has held that a deed from a husband to his wife carries no presumption of fraud. Such deeds have the sanction of the statute (*Rem. & Bal. Code*, § 8766).

"As between the parties [husband and wife] the conveyance was absolute and good as against the grantor," so good in fact, as the court continues, "no interest, legal or equitable remained in the grantor upon which a lien of a judgment subsequently rendered could attach." *Sawtelle v. Weymouth*, 14 Wash. 27, 43 Pac. 1101.

The effect of such deeds has been considered by the court in *Klosterman v. Harrington*, 11 Wash. 138, 39 Pac. 376; *Hayden v. Zerbst*, 49 Wash. 107, 94 Pac. 909; *Shorett v. Signor*, 58 Wash. 95, 107 Pac. 1033; *Powers v. Munson*, 74 Wash. 237, 133 Pac. 453; *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

In *Malloy v. Benway*, 34 Wash. 315, 75 Pac. 869, the court said, in considering the effect of a deed made by a husband to his wife:

"We think that it is a safe general rule to assume that parties in their dealings are actuated by proper motives; that therefore good faith with regard to such dealings will be presumed until the contrary is alleged or made to appear."

If any effect at all is to be given to the statute, it should follow that one who questions a deed from a husband to a wife should at least plead the making of the deed and a plain and concise statement of the facts that give him standing to question it. Otherwise we would be put to the holding that a defendant might be put to the burden of pleading no fraud where none is alleged.

[6] The statute relied on (section 5292) puts the burden of proving the good faith of the transaction upon a wife who is the grantee of her husband, but it nowhere exempts the transaction of the ordinary rules of pleading.

[7] Fraud is never presumed. The burden of pleading fraud is always on the one who asserts it.

It is said in *Wagner v. Law*, *supra*, there is no substantial distinction between a case that is brought before and one that is brought after a sale, and, further, that it is better to have a uniform practice, regardless of the particular proceeding adopted by the creditor.

[8, 9] In this connection it is not out of place to say that it may well be doubted whether appellants' complaint sets up an existing equity. The mere assertion of a hostile title—the complaint goes no further—would hardly fall within the definition of the term.

"One must be said to have an existing equity when he has an existing right to future payment, though it be contingent, of which it would be inequitable to deprive him." *Sallaske v. Fletcher*, 73 Wash. 596, 132 Pac. 648, 47 L. R. A. (N. S.) 320, *Ann. Cas.* 1914D, 760.

Nor do we think that appellants can recover under our holdings that, where a trial has proceeded on the merits, we will deem the pleadings amended to conform to the proofs. Sections 307, 1752, *Rem. & Bal. Code*. This case comes to us upon disputed facts, and to apply the rule of the statute we must find that the party who invokes it has sustained his right to maintain the case by competent evidence. If there are no facts, there can be no amendment. The trial court made no

finding of facts. What purports to be findings are no more than the legal conclusions that respondent has title and appellants have not.

Granting that, if the proofs were otherwise sufficient, we would hold that we would consider the pleading amended so as to allege that Milton S. Lee had no other property out of which the debt could be satisfied, appellants still could not attack the deed to respondent or invoke the aid of the statute of amendments unless they first show that the debt which is the basis of their claim was that of a creditor having an existing equity at the time the deed was made. Otherwise the deed is good as between the parties and as against all the world. It is not "presumptively fraudulent." It may be actually or constructively fraudulent as to such creditors as the statute makes the object of its solicitude, and who have proved themselves to have sufficient standing to put the respondent to her proof. The true rule can be best stated by resort to two of our former decisions.

"While it may be true that a conveyance from a husband to a wife is not of itself a badge of fraud, either under the rule of the statute or the general rule cited, it is nevertheless a fact, which naturally awakens suspicion, lends greater weight to other unfavorable circumstances, and will be for that reason set aside upon less proofs of fraud than will a transaction between parties not having the same confidential relation." *Bates v. Drake*, 28 Wash. 456, 68 Pac. 961.

"To attack the validity of a conveyance, the person asserting the fraud must be one who has been injured by the fraud; and accordingly a creditor of the debtor may so attack the conveyance. A conveyance made without consideration is presumptively fraudulent as to existing creditors of the grantor. *However, there is no presumption that such a transfer was made with a view to defraud subsequent creditors.* It becomes material, then, to determine whether Henry was a creditor of Yost and wife when the deed to Schroeder was executed." *Henry v. Yost*, 152 Pac. 714.

It will be seen, therefore, that there is no place to apply the rule, for appellants have not proven the debt which was the foundation of the foreign judgment to have been either "an existing debt" or "an existing equity" at the time the deed was executed. For these reasons the cases relied upon by the appellants, *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483, *Plath v. Mullins*, 151 Pac. 811, and *Benham v. Hawkins*, 82 Wash. 390, 144 Pac. 532, are not in point.

If, after a trial upon the merits, the court can find from the facts or from the fair inferences of facts that a material fact has been proven, although not pleaded, the court will readily apply the rule of these cases, but in none of our decisions, do we apprehend, has the court ever substituted for a material fact the grace and favor of the statute.

[10] After reciting the appearances, the trial judge certifies the course of the trial to be:

"Thereupon the plaintiffs introduced as plaintiffs' Exhibit A the deed of purchase issued by the sheriff of said county to the plaintiff Crandall covering the premises described in plaintiffs' complaint. The plaintiffs also introduced as plaintiffs' Exhibit B all of the records and files in cause No. 2637 in said Kitsap county entitled 'William Crandall and J. N. Conn, Plaintiffs, v. Milton S. Lee and Wife, Defendants,' including also the depositions in said cause of the said defendants Lee and wife. The defendant herein thereupon introduced in evidence as defendants' Exhibit 1, the deposition in this cause of the defendant herein, Elizabeth M. Lee, the wife of said Milton S. Lee, and also introduced, as defendants' Exhibit 2, the certain deed to the said premises in controversy executed by the defendant Milton S. Lee to his said wife Elizabeth Lee."

The findings of fact in the action in which the sale was had recites no more than the rendition of the judgment in the courts of New Mexico upon the 20th day of April, 1911, and the judgment, no more than that:

"The same is hereby established and declared to be a valid lien upon all the interest of the defendant Milton S. Lee individually, and the community interest of Milton S. Lee and Elizabeth M. Lee, his wife, in the lands," etc.

We know of no rule that would bind the respondent beyond the terms of the judgment. It is clear, therefore, that appellants have not proved that they stand in the shoes of a creditor having an existing equity at the time the deed to the respondent was made under the doctrine of *Henry v. Yost*, supra, and *Eggleston v. Sheldon*, 85 Wash. 422, 148 Pac. 575.

Affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(89 Wash. 214)

TRIANGLE TRADERS et al. v. CITY OF BREMERTON.

In re TRUNK SEWER, LOCAL IMPROVEMENT DIST. NO. 62.

(No. 12701.)

(Supreme Court of Washington. Jan. 11, 1916.)

1. MUNICIPAL CORPORATIONS—514—PUBLIC IMPROVEMENT—ASSESSMENT.

In view of Laws 1911, § 42, p. 469, declaring that, when any assessment, whether the same shall be an original assessment, an assessment upon omitted property, a supplemental assessment, or reassessment, shall be declared void, the council of such city or town shall make a new assessment or reassessment upon the property which has been or will be benefited by the improvement, a city is entitled, an assessment for a public sewer having been set aside because the provisions of Laws 1911 relating to publication and the spreading of the assessment were not strictly followed, to make a reassessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. 514.]

2. MUNICIPAL CORPORATIONS—562—PUBLIC IMPROVEMENTS—SETTLEMENTS.

Where a contractor for the construction of a sewer was under the contract entitled to compensation for extra work, a settlement for

extra work made by the city which was not impeached for fraud or collusion is conclusive, and evidence showing its excessiveness is properly rejected on appeal to the superior court on objections to the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1269-1271; Dec. Dig. ¶562.]

3. MUNICIPAL CORPORATIONS ¶450—PUBLIC IMPROVEMENTS—IMPROVEMENT DISTRICTS.

Though Laws 1911, p. 449, § 15, requires an assessment district to be outlined in conformity to topographical conditions, and to include as near as may be all territory which can be sewered or drained through a trunk sewer, land inadvertently left out of the assessment district may be subsequently included.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1073-1074; Dec. Dig. ¶450.]

4. MUNICIPAL CORPORATIONS ¶514—PUBLIC IMPROVEMENTS—SCOPE OF ASSESSMENT.

Under Laws 1911, p. 469, §§ 42, 43, relating to reassessments, and declaring that the reassessment shall be made on all property benefited, though not included in the original assessment, and that the fact that the contract has been made or completed shall not prevent assessment upon property omitted, property benefited by the construction of a trunk sewer which was not included in the first assessment roll may on reassessment be included.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. ¶514.]

5. MUNICIPAL CORPORATIONS ¶514—PUBLIC IMPROVEMENTS—ASSESSMENTS—ORDINANCE.

Under Laws 1911, p. 469, § 43, declaring that municipalities shall proceed with an assessment by passing an ordinance ordering the same, the city must make a reassessment by ordinance and cannot make it by resolution.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. ¶514.]

6. MUNICIPAL CORPORATIONS ¶466—ASSESSMENTS—VALIDITY.

An assessment for a trunk sewer should follow the statute and direct such amounts to be levied on the property lying between the termini of the improvement and back to the middle of the blocks along the marginal lines of the streets improved, as would represent the amount of a reasonable cost of a local sewer; the remainder being spread upon all real estate of the district benefited.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1109; Dec. Dig. ¶466.]

Department 2. Appeal from Superior Court, Kitsap County; Everett Smith, Judge.

Proceedings by the City of Bremerton, a municipal corporation, for the establishment of the Trunk Sewer, Local Improvement District No. 62. The Triangle Traders, a domestic corporation, and others, filed objections to a reassessment. The objections being overruled the objectors appealed to the superior court, and from a judgment there overruling their objections, they appeal. Reversed and remanded, with instructions to sustain objections.

Frank P. Lewis and Louis Henry Legg, both of Seattle, for appellants. Thomas Stevenson, of Bremerton, for respondent.

FULLERTON, J. On May 20, 1912, the city council of the city of Bremerton, by an order duly recorded in the minutes of its proceedings, directed the city engineer and the city attorney to take the necessary preliminary action relative to the construction of a trunk sewer on certain streets in such city, known as Warren and Ninth streets and Park avenue. Pursuant to such order the city engineer prepared plans for such a trunk sewer, and submitted the same to the council with an estimated cost thereof. The plans were adopted by the city council on motion to that effect and were "signed by the mayor and clerk." On July 29, 1912, the city council passed a resolution declaring its intention to order the improvement to be made. The resolution, while it contained much extraneous matter not required by the statute, contained all of the required essentials; it set forth the general nature of the improvement, described the routes along which the sewer was to be constructed, notified all persons who desired to object thereto to appear at a meeting of the city council at a time specified therein and present their objections, and directed the city engineer to report to the council at or before the time fixed for the hearing the estimated cost and expense of the improvement. The resolution was, however, published in but one issue of the official newspaper of the city, whereas the statute distinctly prescribed that it should be published in two of such issues. Laws 1911, pp. 444, 449, §§ 10, 16 (3 Rem. & Bal. Code, §§ 7892-10, 7892-16).

On September 9, 1912, the city council by ordinance ordered the sewer to be constructed. The ordinance described with sufficient certainty the routes along which the sewer was to be constructed, contained an estimate of the cost thereof, and provided that the cost should be borne entirely by the property benefited, and that no part thereof should be charged to the general fund of the city. The city council, however, did not therein "establish and fix the boundaries of the district to be assessed for such improvement," although the statute specifically provides that they shall do so. Laws 1911, p. 449, § 16; Id. § 7892-16. Nor did they in this ordinance, or in any subsequent ordinance, adopt "map, plans and specifications" for the improvement, notwithstanding this also is a specific requirement of the statute. Laws 1911, p. 449, § 16; Id. § 7892-16. In providing for the distribution of the assessment over the property benefited the city council in the ordinance provided that a specific sum should be assessed against the property lying between the termini of the sewer and back to the middle of the blocks lying on each side thereof, and that the balance of the cost and expense should be assessed against the remainder of the property in the dis-

trict, notwithstanding the statute specifically provides that:

"In distributing such assessments, there shall be levied against the property lying between the termini of the improvement and back to the middle of the blocks along the marginal lines of the streets or areas improved, such amounts as would represent the reasonable cost of a local sewer and its appurtenances, * * * and the remainder of the cost and expense of such improvement shall be distributed over and assessed against all of the property within the bounds of said entire district in accordance with the special benefits conferred thereon and in proportion to area." Laws 1911, p. 449, § 15; Id. § 7892-15.

After the passage of the ordinance the city council directed the clerk to advertise for proposals for the construction of the sewer. Several bids were submitted in response to the advertisement, and that of one L. Y. Stayton was accepted as the lowest and best bid. His bid was submitted on the unit basis; that is, at certain prices per lineal foot for the sewer pipe in place based upon dimensions, certain fixed prices for catch basins and man-holes complete, and certain fixed prices for the necessary connecting wyes. On October 15, 1912, a contract for the work was entered between the city and Stayton by the terms of which Stayton agreed to perform the work according to the plans and specifications reported by the city engineer at the prices stated in his bid; the estimated cost of the sewer completed at the prices named being \$21,988.10.

The contractor immediately began the work of construction, and proceeded therewith until some time in April, 1913, when he ceased work thereon for some reason not clearly explained in the record. On May 5, 1913, the city engineer, at the direction of the city council, notified the contractor to resume the work within five days thereafter. The contractor failed so to do, and the council on May 12, 1913, by resolution, declared his contract forfeited, notice of which was given to the contractor, to his bondsmen, and to a banking corporation to whom the contractor had assigned the sums to become due him under the contract. This led to a meeting of the parties interested, and to an agreement between them by which the city, in consideration of certain changes made in the original contract with reference to the mode of payment to the contractor and certain waivers of claims made by the other parties, agreed to rescind the resolution annulling the contract and to permit the contractor to complete the contract according to its terms as modified by the agreement. The resolution referred to was thereupon rescinded, and the contractor permitted to prosecute the work to its completion. The agreement thus entered into permitted the city to pay directly to the laborers and materialmen for the labor and material used in the construction of the sewer, and the subsequent liabilities for labor and material incurred by the contractor were so paid. On January 5, 1914, the engi-

neer submitted a final estimate of the cost of the work. This showed estimates according to the terms of the contract up to May 5, 1913, and from thence on the actual cost of the work as paid by the city, plus 10 per cent. on the amount thereof to the contractor; the aggregate totalling \$40,927.63.

On May 9, 1914, the city council passed a resolution giving notice of its intention to amend the original ordinance authorizing the construction of the sewer, and on April 13, 1914, passed an ordinance to that effect. The material change was the enlargement of the district by the inclusion therein of property not described in the original resolution of intention to order the work. The amended ordinance, like the original ordinance, provided for the assessment of named sums upon the half blocks abutting upon the sewer between the termini thereof, and for the assessment of the balance of the cost to the remainder of the property in the assessment district. Nowhere in the ordinance is it recited that the fixed sums directed to be levied on such abutting property "would represent the reasonable cost of a local sewer and its appurtenances," nor is it recited that such sum would equal that sum, plus the proportional share of the property for the balance of the cost. An assessment was levied pursuant to the ordinance, to which objections were filed by certain of the interested property holders. The objections were disallowed by the council. Appeal therefrom was taken by certain of the objectors to the superior court, which, after a hearing, entered a judgment setting the assessment aside and remanding the cause to the city council, with instructions to reassess the property "in the manner and mode provided by law."

On the remand, of the cause to the city council, that body by resolution ordered a reassessment of the property. The resolution did not specify with any minuteness how the reassessment was to be made, and the officer selected for that duty seems to have spread the assessment over the property much the same as before. He levied a fixed proportion of the costs on the property between the termini of the sewer and bordering thereon, and distributed the remainder over the property included within the so-called enlarged district. Exception was again taken to the assessment roll by interested property holders, which the city council overruled. Appeal therefrom was taken to the superior court, where the objections were again overruled, and the roll confirmed. This appeal is from the order of confirmation in the superior court. In this court the appellants have assigned numerous errors, all of which are pressed upon us with earnestness and ability. We shall not, however, notice them in detail, nor in the order in which they are presented, as they suggest certain general questions which can best be noticed in their general form.

[1] The first assignment to be noticed raises the contention that the city council was without jurisdiction to order a reassessment of the property because of the numerous departures from the statute made by the city council in the original proceedings under which the trunk sewer was constructed. Most of these departures we have heretofore pointed out, and, without enumerating further, it may be conceded that they justify holding invalid the original assessment. We are constrained to hold, however, that they were not sufficient in effect to prevent the court from directing a new or reassessment of the property. In the early case of *Fredrick v. Seattle*, 13 Wash. 423, 43 Pac. 384, construing the statute of 1893, which provided for a reassessment to pay the cost of a public improvement where the original assessment had been held void, it was held that the "Legislature intended to provide for a reassessment in all cases where the assessment had been held to be void, whether for irregularities or for want of prerequisites which went to the jurisdiction of the council to levy the assessment and to order the work done," and that such legislation was constitutional. The principle on which the case rests has been reannounced by us in many subsequent cases, and is now established law in this state. *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Stephens v. Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31; *Ryan v. Sumner*, 17 Wash. 228, 49 Pac. 487; *Franklin Savings Bank v. Moran*, 19 Wash. 200, 52 Pac. 858; *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 231, 55 Pac. 630; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Waldron v. Snohomish*, 41 Wash. 566, 83 Pac. 1106; *Kuehl v. Edmonds*, 85 Wash. 307, 148 Pac. 19; *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448; *Hapgood v. Seattle*, 69 Wash. 497, 125 Pac. 965; *Allen v. Bellingham*, 77 Wash. 469, 137 Pac. 1016.

The existing statute relating to assessments for local improvements is fully as broad in its provisions as the statute of 1893. It especially provides for a new or a reassessment whenever the original assessment is for any reason declared void; the part thereof particularly applicable to the present proceeding reading as follows:

"Whenever any assessment for any local improvement in any city or town, whether the same be an original assessment, assessment upon omitted property, supplemental assessment or reassessment, heretofore or hereafter made, has been or may hereafter be declared void and its enforcement [refused] by any court, or for any cause whatever has been heretofore or hereafter may be set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall make a new assessment or reassessment upon the property which has been or will be benefited by such local improvement, based upon the actual cost of such improvement at the time of its completion." Laws 1911, p. 469, § 42 (3 Rem. & Bal. Code, § 7802-42).

It was therefore within the province of the trial court, on setting aside the original

assessment, to order a reassessment, and within the province of the city council to make such an assessment notwithstanding some of the errors in the original proceedings may properly be termed jurisdictional.

[2] The next contention is that the contractor was allowed for the finished work a greater sum than that to which he was justly entitled under the contract, and that the sum attempted to be assessed against the property of the district is because thereof too large. The evidence chiefly relied upon to support this contention is the report of the city engineer. This, as we have said, allowed the contractor the sum earned under the contract up to a certain point in the work according to the prices fixed per unit for the pipe in place and from thence on the actual cost of the work with 10 per cent. added. But as we read the record, the city did not settle with the contractor on the basis of the engineer's report. During the course of the work a condition was encountered not foreseen or contemplated when the contract was entered into, which necessitated changes in the original plans and which materially increased the cost of the work. In the final settlement this condition was taken into consideration, and the contractor paid upon the basis of the contract price with an allowance for the extra services; the result being a less allowance than the engineer returned, but an increase over the contract price if calculated alone upon the basis of the bid for units in place. Clearly there was no error in this. The contractor was entitled to this extra compensation, not only on the principle of natural justice, but by the express terms of the contract itself which made provision therefor. Whether the amount allowed is excessive or otherwise is not open to inquiry in this proceeding. No fraud or collusion between the city and the contractor in making the settlement is either alleged or proven, and the rule in such cases is that the determination of the amount earned under the contract by the city authorities is conclusive upon the property holders. *Elma v. Carney*, 9 Wash. 466, 37 Pac. 707; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.

For a like reason there was no error in the ruling of the court in refusing to permit the witness Coe to testify to the cost of the sewer based upon the contract price. Since it was within the power of the city authorities to determine the question of the amount of the cost, the finding of the city authorities upon that question was, as we have said, conclusive.

[3] The property of certain of the objectors was not included in the assessment district as described in the original resolution of the city council wherein it declared its intention to order the construction of the sewer, but was brought in under the amendatory ordinance providing for an enlarged district. It

is the contention of the appellants owning such property that it was improperly included therein, as the statute relating to the creation of assessment districts to pay the cost of constructing trunk sewers does not contemplate the creation of enlarged districts. Since the statute relating to the construction of a trunk sewer (Laws of 1911, p. 449, § 15; 3 Rem. & Bal. Code, § 7892—15) provides that any district created to bear the assessment for such purpose "shall be outlined in conformity to topographical conditions, and * * * shall include as near as may be all the territory which can be seweraged or drained through such trunk sewer and the subsewers connected thereto," it would seem that any district created in conformity with the statute could not be enlarged, as such enlargement must of necessity embrace property not capable of sewerage or drainage through the sewer. But we think that, if assessment district originally created did not include all of the property susceptible of sewerage or drainage through the contemplated sewer, the city could by proper proceedings so enlarge the district as to include the omitted property, and it would make but little difference what terms it employed to denominate the new district.

[4] But this question is of no moment in the present controversy. This was a reassessment, made after the court had declared the original assessment invalid and had ordered such reassessment to be made. In such cases the city is specially authorized by statute (Laws of 1911, p. 469, § 42; Id. § 7892—42), "to assess or reassess all property which the council shall find to be specially benefited, * * * whether or not such property so to be assessed or reassessed * * * was included in the original assessment district." It is also provided (section 43):

"The fact that the contract has been let or that such improvement shall have been made and computed in whole or in part shall not prevent such assessment from being made, nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of law, the charter or ordinances governing such city or town, as to petition, notice, resolution to improve, estimate, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof, operate to invalidate or in any way affect the making of any assessment authorized in the preceding section: Provided, that such assessment shall be for an amount which shall not exceed the actual cost and expense of the improvement, together with the accrued interest thereon, it being the true intent and meaning of this act to make the cost and expense of local improvements payable by the property specially benefited thereby, notwithstanding the proceedings of the council, board of public works or other board, officer or authority of such city or town may be found irregular or defective, whether jurisdictional or otherwise; when such assessment is completed, all sums paid on the former attempted assessment shall be credited to the property on account of which the same were paid." 3 Rem. & Bal. Code, § 7892—43.

If, therefore, the property of these objectors is so situated that it can by the construc-

tion of lateral sewers be seweraged or drained through the trunk sewer as constructed, it is subject to assessment to pay the cost, regardless of the question whether the attempt of the city council to include it in the original assessment district was effective or otherwise.

[5] Finally, the appellant contends that the reassessment was made upon a fundamentally wrong basis, and this objection we are constrained to hold is well taken. As we have said, after the original assessment had been declared invalid by the judgment of the superior court, the city council directed a new or reassessment to be made by passing a resolution to that effect. The statute provides (Laws 1911, p. 469, § 43; Id. § 7892—43) that the city shall proceed with any such assessment "by passing an ordinance ordering the same." Elsewhere in the statute the wording makes it clear that the Legislature did not use the terms "resolution" and "ordinance" interchangeably. Nowhere is it said that a particular action may be taken by "resolution or ordinance," but in every instance specific directions are given as to the manner in which action shall be taken; that is, the direction is that the particular action shall be taken by resolution or that it shall be taken by ordinance, not that it may be taken either by resolution or ordinance. There may not be in every instance any clearly discernible reason why the one method should be employed rather than the other, but it is sufficient that the statute so directs, and it is in virtue of the statute that the city is empowered to act in the premises at all. Seemingly also the statute contemplates that the ordinance establish the boundaries of the district to be reassessed, and direct the manner in which the assessment is to be distributed over such district. In this latter respect the direction of the statute should be followed.

[6] It should be directed that there be levied against the property lying between the termini of the improvement and back to the middle of the blocks along the marginal lines of the street or areas improved, such amounts as would represent the reasonable cost of a local sewer and its appurtenances, and the remainder of the cost and expense distributed over and assessed against all of the property within the bounds of the entire district in accordance with special benefits and in proportion to area. This requirement of the statute is neither unreasonable nor unjust, and the city should not undertake to amend it. The abutting property required to bear the extra expense has the immediate benefit of the sewer, and is not thereafter liable to assessments for lateral or local sewers. The remaining property is not so situated. As to it the sewer is not of immediate use, and cannot be made so without the additional expense of the construction of lateral or local sewers, which the property

must subsequently bear. In the end the burden equalizes.

Since, therefore, the new or reassessment was not ordered by ordinance as the statute requires, and since the assessment was not spread over the assessment district in the manner directed by the statute, we are constrained to hold the assessment invalid.

The order of the trial court confirming the assessment is reversed, and the cause remanded, with instructions to sustain the objections without prejudice on the part of the city to levy a new assessment.

MORRIS, C. J., and ELLIS and CHADWICK, JJ., concur.

(51 Mont. 496)

STATE v. HARRIS. (No. 3716.)

(Supreme Court of Montana. Dec. 27, 1915.)

1. CRIMINAL LAW § 678—TRIAL—ELECTION BETWEEN OFFENSES—TIME.

In a prosecution for statutory rape, where the evidence tended to show several offenses, the action of the court, though earlier requested, in failing to require the state to elect until the close of its case, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.]

2. CRIMINAL LAW § 369—EVIDENCE—OTHER OFFENSES—RAPE.

In a prosecution for statutory rape, proof of similar acts by defendant and the prosecuting witness is always admissible to corroborate the latter's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.]

3. CRIMINAL LAW § 678—INFORMATION OF JURY AS TO PURPOSE OF EVIDENCE—STATUTE.

Under Rev. Codes, § 9147, declaring that the charge must be a statement of the facts constituting the offense in such language as to enable a person of common understanding to know what is intended, a defendant charged with statutory rape can be required to make defense only against a single act, and where the evidence tends to show the commission of several offenses he is entitled to have the jury informed, either before entering upon his defense, or in the formal instructions, that evidence of other acts than the one the state elects to rely on must be considered only for the secondary purpose of corroborating the prosecuting witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.]

4. CRIMINAL LAW § 1186—APPEAL AND ERROR—DISREGARD OF IRREGULARITY—STATUTE.

Under Rev. Codes, § 9415, providing that on appeal the court must give judgment without regard to technical errors or defects or to exceptions which do not effect the substantial rights of the parties, in a prosecution for statutory rape, where the evidence tended to show several offenses, but the court, though requested, did not require the state to elect until the close of its case, at most the matter was not more than an irregularity to be disregarded on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.]

5. CRIMINAL LAW § 783—TRIAL—INSTRUCTION—PURPOSE OF EVIDENCE.

In a prosecution for statutory rape, where the evidence tended to show several offenses, charges that unless it was proved beyond reasonable doubt that the defendant committed the act which the state had elected to rely on, then the jury should find defendant not guilty, and that any testimony as to any other acts should be disregarded, except as it was corroborative of the act upon which the state had elected to rely, sufficiently instructed the jury that evidence of other acts than that relied on could be considered only as corroborating prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 783.]

6. CRIMINAL LAW § 1172—APPEAL AND ERROR—PREJUDICIAL ERROR—INSTRUCTION.

In a prosecution for statutory rape, where there was no question but that the offense had been committed within the period of limitations, the submission of an instruction relating, in its latter part, to the period of limitation applicable, but from which, under other instructions, the jury could not have understood that they could convict for any act other than that on which the state had elected to rely, was not prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

D. H. Harris was convicted of crime, and from the judgment and an order denying his motion for new trial, he appeals. Affirmed.

H. C. Crippen, of Billings, for appellant. J. B. Poindexter and C. S. Wagner, all of Helena, for the State.

BRANTLY, C. J. The defendant, charged by information with statutory rape by having unlawful sexual intercourse with Vivian Brooke, a female under the age of 18 years, was convicted and sentenced to a term of service in the state prison. He has appealed from the judgment and an order denying his motion for a new trial.

The charge in the information is that the crime was committed on December 1, 1914. The evidence of the prosecuting witness disclosed that the first act of sexual intercourse between the defendant and herself, occurred on or about August 1, 1914, in the outskirts of the city of Billings. After the witness had testified to a similar act which she said had occurred about two weeks later, counsel for defendant objected to evidence tending to establish any act other than the first, and suggested that the county attorney be required to elect upon which act he would ask for a conviction. The objection was overruled and the suggestion disregarded. The witness then, without further objection, testified to several acts after that time, covering the period until January 1, 1915, the exact date at which any one of them occurred and attendant circumstances not being stated, except as to one which she stated had occurred in the defendant's barber shop in Billings on

the evening of December 25. At the close of the state's case the court, on formal motion of counsel, required the county attorney to elect upon which of the several acts he would rely. He elected to stand on the one which occurred on the evening of December 25th. The charge to the jury contained these paragraphs:

"No. 10. You are instructed in this case it is not necessary for the state to prove the date of the alleged offense precisely as charged in the information herein. Therefore, if you find and believe from the evidence in this case, beyond a reasonable doubt, that the defendant, D. H. Harris, at the county of Yellowstone and state of Montana, accomplished an act of sexual intercourse with the prosecuting witness, Vivian Brooke, as alleged in the information, and that at the time of such intercourse the said Vivian Brooke was under the age of 18 years, and not the wife of the defendant, and you further find that such intercourse was had at any time within five years prior to the filing of the information in this case, then you should find a verdict of guilty."

"No. 17. The court instructs the jury that the state in this case has selected the particular act of sexual intercourse alleged to have taken place at the defendant's barber shop on Christmas night of 1914, as the act upon which they are to depend for conviction, and you are instructed that in this case, unless it is proven to you beyond all reasonable doubt that the defendant had said act of sexual intercourse with Vivian Brooke, then you are to find the defendant not guilty."

"No. 18. The court instructs the jury that the state having selected the act of sexual intercourse alleged to have taken place at defendant's barber shop on Christmas night of 1914, as the alleged act of intercourse on which they intend to rely for conviction, any testimony as to any other acts of intercourse by the defendant with the complaining witness Vivian Brooke at any other time is to be disregarded, except in so far as it is corroborative of the act alleged to have been committed at the barber shop on Christmas night, and that unless the state proves to you beyond all reasonable doubt that the defendant had said particular act of sexual intercourse with Vivian Brooke, then you are to find the defendant not guilty."

[1-8] It is argued that the court committed prejudicial error in failing to require the county attorney to announce his election when the suggestion was first made. Some of the courts hold to the rule contended for by counsel. *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *People v. Williams*, 133 Cal. 165, 65 Pac. 323; *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; *State v. Hilberg*, 22 Utah, 27, 61 Pac. 215; *Newsom v. Commonwealth*, 145 Ky. 627, 140 S. W. 1042; *People v. Jenness*, 5 Mich. 305; *Elam v. State*, 26 Ala. 48. The rule deducible from these cases is that, while the specific act alleged in the information need not be proved as charged and conviction may be had upon proof of any of the acts of the same kind, provided it occurred within the period of limitation prior to the filing of the information, when the evidence discloses two or more offenses, the defendant is entitled to know against which he is required to defend; and if the court does not require an election to be made at the opening of the trial, the law makes the election of the first act disclosed. The reasoning of

these cases is exemplified by this quotation from *People v. Jenness*, supra:

"The prosecutor having the right to select among all the acts of the kind which he could prove to have been committed between the parties, within the period alluded to, and within the jurisdiction, any one of those acts, before evidence had been introduced, was as properly the act charged in the information, as any other. In other words, until evidence of some such act had been given, the charge in the information was floating and contingent, aimed as much at one as another, and at no one act in particular; and it remained for the evidence to point the charge to the particular act intended. But when evidence had been introduced tending directly to the proof of one act, and for the purpose of procuring a conviction upon it, from that moment that particular act became the 'act charged.' What had, till then, been floating and contingent, had now become certain and fixed. The prosecutor had made his election, and could not elect again; nor could he be allowed to prove any other act of the kind as a substantive offense upon which a conviction might be had in the cause. The information could be used as a drag net only till the first act had been entangled in its meshes; every other act must be allowed to escape this throw of the net; and thenceforward the evidence must be aimed at this act. If others of the same kind lie in the same range, they can only be noticed for a secondary purpose, as they may be connected with or bear upon this."

This reasoning seems to us to give importance to form rather than substance. Other courts have announced the view that an election made at the close of the state's case serves all useful purposes, and we think this view is founded upon the better reasoning. *State v. Acheson*, 91 Me. 240, 39 Atl. 570; *State v. Parish*, 104 N. C. 679, 10 S. E. 457.

It is settled law in this jurisdiction that in this class of cases proof of similar acts by the defendant and the prosecuting witness is always admissible to corroborate the testimony of the latter. *State v. Peres*, 27 Mont. 358, 71 Pac. 162; *State v. Vinn*, 50 Mont. 27, 144 Pac. 773. The rule is recognized by all the cases cited. Since the evidence is admissible, what substantial difference can it make to the defendant whether it comes into the case prior or subsequent to the time at which he is given the information that conviction will be asked for upon the particular act? Of course he is entitled to have this information before he enters upon his defense, and either by admonitions given the jury at the time or in the formal instructions to have them specifically informed that evidence of other such acts than the one selected is to be considered for the secondary purpose of corroboration only. He cannot be required to make defense against but a single act. The statute declares that the charge must be "a statement of the facts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Rev. Codes, § 9147. But when he has committed several acts constituting a series, upon proof of any one of which he may be convicted, of what substantial consequence is it to him that the prosecuting

officer does not make his selection of the particular act until the close of the state's case? To be sure it would be the more orderly procedure to require an earlier selection, but the court may in its discretion control the order of proof, and if at the proper time and in the proper way it admonishes the jury as to the particular one for which alone a conviction may be had, the defendant has no just cause of complaint. At most, the course of procedure adopted by the trial court can be regarded as nothing more than an irregularity which this court must disregard. Rev. Codes, § 9415. The omission to give specific instructions would be prejudicial error for otherwise each juror would be left to select the particular act upon which he would cast his vote, and the result might be that the defendant would be convicted of several acts instead of one. We think the court fully discharged its duty in requiring the county attorney to elect at the close of the state's case. If a jury is to be regarded as having any intelligence, in view of the specific directions in instructions 17 and 18, supra, the jury in this case could not have entertained any doubt as to the limitation imposed upon them.

[8] It is argued that the court committed prejudicial error in submitting paragraph 10 of its charge. We agree that under the facts in this case, the latter part of the instruction relating to the period of limitation applicable, should have been omitted. There was no question that the offense, if committed at all, had been committed within that period. Evidently the court had in mind the section of the statute (Rev. Codes, § 9152) declaring that the precise time of the criminal act need not be alleged in the information, but that it may be alleged as having occurred at any time before the filing thereof. Under the specific direction given in paragraphs 17 and 18, an instruction on this subject was not necessary. Even so, under these instructions the jury could not have understood that they could convict for any act other than that which occurred on December 25, 1914. Nor do we think the paragraph in conflict with the others. As limited and explained by them, the power of the jury was sufficiently defined.

The judgment and order are affirmed.
Affirmed.

SANNER and HOLLOWAY, JJ., concur.

(51 Mont. 503)

STATE ex rel. LANE v. DISTRICT COURT OF SECOND JUDICIAL DIST. IN AND FOR SILVER BOW COUNTY et al.
(No. 3765.)

(Supreme Court of Montana. Dec., 1915.)

1. PROCESS \S 120—SERVICE—PRIVILEGE—FOREIGN WITNESSES.

Where a resident of another state was served with summons while in the state for the sole purpose of attending the district court as a wit-

ness, such service was void and inoperative; defendant being exempt under the universal rule privileging foreign witnesses from service of process while in attendance on court and for a reasonable time in coming and going.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 150; Dec. Dig. \S 120.]

2. APPEARANCE \S 24—APPEARANCE AS CONFERRING JURISDICTION—STATUTE.

Under Rev. Codes, § 8526, providing that the voluntary appearance of a defendant is equivalent to personal service of the summons and a copy of the complaint upon him, a general appearance must be voluntary to constitute a waiver of defective service of process.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. \S 24.]

3. APPEARANCE \S 24—GENERAL APPEARANCE—"WAIVER OF LACK OF SERVICE."

Where defendant, resident of another state and served with summons while in the state solely to attend the district court as witness, appeared specially to object to the jurisdiction, saving his exception, and again reserving the question raised by his special appearance in his answer, he did not, by general appearance, waive his right to object to the jurisdiction, since a "waiver" is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, while a party who saves his exception shall not be deemed to have waived it unless his intention is manifested.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118-143; Dec. Dig. \S 24.]

For other definitions, see Words and Phrases, First and Second Series, Waiver.]

4. TRIAL \S 419—MOTION FOR NONSUIT—WAIVER BY PROCEEDING.

An exception to an order overruling a motion for nonsuit is not waived by proceeding with the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. \S 419.]

5. PROHIBITION \S 10—EXISTENCE OF REMEDY AT LAW—STATUTE.

Under Rev. Codes, § 7228, providing that the writ of prohibition may be issued where there is not a plain, speedy, and adequate remedy in the ordinary course of law, where relator sought prohibition to restrain the district court from proceeding with an action in which he had been served with process while in the state for the sole purpose of attending district court as a witness, though he was a nonresident, the writ will be granted, despite the existence of a remedy by appeal, since an application of such character is addressed to the sound discretion of the court, and whenever it is made to appear that under no conceivable circumstance can the district court render a valid judgment because of lack of jurisdiction, the writ should be issued to save needless litigation.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. \S 10.]

Prohibition by the State, on the relation of Thaddeus S. Lane, against the District Court of the Second Judicial District for the County of Silver Bow and the judges thereof. Peremptory writ to issue.

John F. Davies, of Spokane, Wash., T. J. Davis, of Butte, and Gunn, Rasch & Hall, of Helena, for relator. Nolan & Donovan, of Butte, for respondents.

HOLLOWAY, J. In an action pending in Silver Bow county wherein William H. Hall was plaintiff, and Thaddeus S. Lane, a res-

ident of Spokane, Wash., was defendant, service of summons was made in Butte while Lane was there for the sole purpose of attending the district court as a witness. A motion to quash the service was overruled; in the absence of the defendant and his counsel and by order of the court, the defendant was directed to answer within 20 days. Pursuant to the order, an answer was filed, admitting some of the allegations of the complaint and denying all others. Application was then made to this court for a writ of prohibition to stay further proceedings. Three questions are presented: (1) Was Lane exempt from service of summons under the circumstances? (2) Was service of summons waived by filing the answer? and (3) Is prohibition an available remedy?

[1] 1. The overwhelming weight of authority in this country sustains the rule announced in 32 Cyc. 492, as follows:

"Suitors and witnesses coming from foreign jurisdictions for the sole purpose of attending court, whether under summons or subpoena or not, are usually held immune from service of civil process while engaged in such attendance and for a reasonable time in coming and going."

Considerations of public policy and the due administration of justice prompt the enforcement of the rule, to the end that the personal presence of witnesses from foreign jurisdictions in the local courts may be encouraged.

In *Diamond v. Earle*, 217 Mass. 499, 105 N. E. 363, 51 L. R. A. (N. S.) 1178, Ann. Cas. 1915D, 984, the court expressed itself upon the subject as follows:

"The rule has been stated generally that suitors and witnesses from a foreign jurisdiction are exempt from service of civil process while attending court and for such reasonable time before and after as may enable them to come from and return to their homes. This statement is broad enough to include the parties plaintiff as well as defendants and witnesses. The rule is an ancient one. The reason upon which it rests is that justice requires the attendance of witnesses cognizant of material facts, and hence that no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony. Nonresidents cannot be compelled to come within the jurisdiction to testify. As such testimony may be essential in the due administration of justice, they ought to be protected in coming voluntarily into our courts to aid in the ascertainment of truth and in the accomplishment of right results by the courts. It is not merely a privilege of the person; it is a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice. Every party has a right to testify in his own behalf. He cannot do this freely, if hampered by the hazard that he may become entangled in other litigation in foreign courts. The rule is applied almost universally in behalf of witnesses coming from a foreign state." *Skinner, Mounce & Co. v. Waite* (C. C.) 155 Fed. 828; *Fox v. Hale, etc., Min. Co.*, 108 Cal. 478, 41 Pac. 308; *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 3 L. R. A. 263, 10 Am. St. Rep. 48; *Coatsworth v. Hally*, 177 Mich. 565, 143 N. W. 881; *Cooper v. Wyman*, 122 N. C. 784, 29 S. E. 947, 85 Am. St. Rep. 731; *Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547; *Malloy v. Brewer*, 7 S. D. 587, 64 N. W. 1120, 58 Am. St. Rep. 866.

We think the trial court erred in refusing to quash the service of summons.

[2, 3] 2. Does a party who appears specially to test the jurisdiction of the court and who reserves his exception to the adverse ruling upon his motion, waive the advantage by his general appearance thereafter? Upon this question the authorities are in hopeless conflict. The author of the article on *Appearances*, in 3 Cyc. 525, treats the subject as follows:

"In many jurisdictions the rule is well settled that, where a defendant appears specially, any error of the court in deciding adversely to him is waived by a subsequent general appearance; though in many others, and by what seems the sounder reasoning, it is held that a defendant does not lose the benefit of his attack on the jurisdiction by thereafter answering and pleading to the merits, provided he obtain a ruling in relation to the objection to jurisdiction, and save exceptions to such ruling."

To the same effect are 2 R. C. L. 339; 2 Ency. P. & P. 629. In the note to *Fisher v. Crowley*, 4 Ann. Cas. 290, will be found collected the cases which sustain the doctrine that such appearance does not constitute a waiver of the defective process or service.

In *Black v. Glendenin*, 3 Mont. 44, the court, considering the question now before us, said:

"The respondent insists that the appellant waived these errors and irregularities by filing his answer and proceeding to a trial. This position is not tenable. It has been held in California that a party who moves to dismiss a defective summons, or set aside the return of the service of a summons, and saves his exception to the action of the court in overruling the motion, does not waive his right to be heard thereon upon appeal, by appearing subsequently and answering and submitting to a trial. *Deidesheimer v. Brown*, 8 Cal. 339; *Gray v. Hawes*, 8 Cal. 562; *Lyman v. Milton*, 44 Cal. 630; *Kent v. West*, 50 Cal. 186. The exceptions of the appellant were saved properly, and were not waived by his conduct in the action after the motions to set aside the proceedings under the summons and subpoena were refused."

About the same time the Supreme Court of the United States, in *Harkness v. Hyde*, 98 U. S. 479, 25 L. Ed. 237, reached the same conclusion, which was later approved in *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

Counsel for respondents, however, insist that in *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622, the decision in *Black v. Glendenin* was in effect, if not in fact, overruled. *Black v. Glendenin* involved the precise question now under consideration. *State ex rel. Mackey v. District Court* involved a question of waiver under these circumstances: In the case of *Lemcke v. Makey et al.* substituted service upon nonresident defendants was sought to be made. Mackey appeared specially to question the jurisdiction of the court, and, his objection being overruled, he then applied to the court for, and secured, an order granting him 40 days within which to answer to the merits. The decision in *Black v. Glendenin* proceeds upon the theory that

the answer to the merits being made by order of the court, was not altogether the voluntary act of the defendant, and therefore not a waiver. In *State ex rel. Mackey v. District Court*, we held that defendant Mackey could not invoke the jurisdiction of the court to secure an order advantageous to him, and at the same time insist that the court was without authority to make the order. The distinction between the principles involved in these cases is recognized by the authorities generally. 2 *Ency. P. & P.* 630. In order for a general appearance to constitute a waiver of defective process or service, it must be voluntary. *Rev. Codes*, § 6526. A party ought not to be deemed to have waived a right unless his intention to do so is manifest.

"A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *State ex rel. Driffill v. City of Anaconda*, 41 Mont. 577, 111 Pac. 345; *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714.

Since this relator made a proper objection to the jurisdiction of the lower court, saved his exception, and in his answer again reserved the question which he had raised by his special appearance, we think he ought not to be held to have waived whatever advantage he had obtained.

[4] A party who suffers an adverse ruling upon his demurrer or upon the introduction of evidence, does not waive the advantage by submitting to the ruling and proceeding according to the court's views. If the trial court commits error in passing upon a motion for change of venue or a challenge to a juror, the exception properly saved is available on appeal though the party against whom the ruling is made, proceeds to trial in that court and submits his controversy to the objectionable juror. So likewise, an exception to an order overruling a motion for nonsuit is not waived by proceeding with the trial; the defendant merely assuming the risk of supplying the deficiencies in the plaintiff's case. *Cain v. Gold Mt. Min. Co.*, 27 Mont. 529, 71 Pac. 1004. These illustrations serve only to emphasize the rule that a party who once saves his exception shall not be deemed to have waived it unless his intention to do so is manifest. In *Black v. Glendenin*, there was not anything from which an intention to waive could be inferred; while in *State ex rel. Mackey v. District Court*, the application to the court for a favorable order indicated the purpose to submit to the jurisdiction, which had theretofore been questioned. Mackey could not be in court for the purpose of securing an advantageous order, and out of court for every other purpose.

We think the objection to jurisdiction was not waived by relator's general appearance.

[5] 3. It is urged that the remedy by appeal from an adverse final judgment is avail-

able to the relator, and that the writ of prohibition should be denied for that reason. While our Code provides that the existence of a remedy by appeal will defeat the right to relief by certiorari (*Rev. Codes*, § 7203), the like provision is not found in the section applicable to the writ of prohibition. Unless the remedy by appeal, or by other proceeding, is plain, speedy, and adequate, relief by prohibition may be granted in a proper case (*Rev. Codes*, § 7228). The existence of a remedy by appeal does not necessarily defeat the right to relief by prohibition. *State ex rel. Marshall v. District Court*, 50 Mont. 289, 146 Pac. 743. An application of this character is addressed to the sound discretion of this court (*State ex rel. Mackel v. District Court*, 44 Mont. 178, 119 Pac. 476); and whenever it is made to appear, as in this instance, that under no conceivable circumstances can the district court render a valid judgment because of a lack of jurisdiction, the discretion should be exercised in favor of issuing the writ, to the end that litigants may be saved the needless trouble and expense of prosecuting their litigation to a fruitless judgment.

The peremptory writ will issue in conformity to the prayer of the petition.

Writ issued.

BRANTLY, C. J., and SANNER, J., concur.

(17 Ariz. 462)

ARIZONA CORP. COMMISSION v. HERALDS OF LIBERTY. (No. 1485.)

(Supreme Court of Arizona. Jan. 13, 1916.)

1. MANDAMUS §—87—ACTS OF STATE CORPORATION COMMISSION—STATUTES—"PROCEEDING"—"PROPER PROCEEDING."

Civ. Code 1913, par. 3486, prescribes the form of application by foreign fraternal beneficiary societies to the Corporation Commission, licensed to transact the business of insurance in the state, and providing that, when the commission refuses to license any society, it shall reduce its ruling or order to writing, file it in its office, and furnish a copy thereof with a statement of its reasons to the officers of the society on request, and that its acts shall be reviewable by proper proceedings in any court of competent jurisdiction within Maricopa county. *Civ. Code*, par. 1558, provides: "If the proceedings be brought in the Supreme Court the court shall. * * * If brought in the superior court the trial shall be had in the county in which the proceeding is brought." Paragraphs 1553 and 1554 provide that a party beneficially interested, having no plain and adequate remedy at law, shall be entitled to mandamus from the Supreme Court or the superior court to any inferior tribunal to compel the performance of an act which the law specially enjoins on it, and for the forming of issues and a jury trial. A foreign fraternal beneficiary society made application for a license to transact business in the state in accordance with the statute, and the license was refused by the Corporation Commission on the ground that the refusal was within its discretion. *Held*, that the term "proceedings" meant the form of law or the mode in which a judicial transaction is to be transacted; that mandamus was within the term "proper pro-

ceedings," and would lie to review the commission's action.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 189-194; Dec. Dig. § 87.

For other definitions, see *Words and Phrases*, First and Second Series, Proceeding.]

2. MANDAMUS § 87—FOREIGN BENEFICIARY SOCIETY—RIGHT TO DO BUSINESS IN STATE—STATUTE—"MAY."

Constitution, art. 15, § 5, provides, that the Corporation Commission shall have the sole power to issue licenses to foreign corporations to do business in this state as may be prescribed by law. Civ. Code 1913, par. 3486, declares any society entitled to a license to transact business within the state upon filing with the state Corporation Commission the papers and statements therein enumerated, and furnishing it with such other information as it may deem necessary to a proper exhibition of its business and plan of insurance, and that the commission may issue a license to such society to do business in the state. *Held*, that the Constitution gave the sole power to issue licenses to the commission, leaving the Legislature to prescribe the kinds of corporations that might do business in the state, and made it the duty of the commission to issue licenses to such corporations upon proper application; that the word "may" was not used in a permissive or optional sense, but was mandatory, having the sense of "shall" so that the commission, on a proper application, could not arbitrarily refuse to issue a license, and that mandamus would lie to compel its issuance.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 189-194; Dec. Dig. § 87.

For other definitions, see *Words and Phrases*, First and Second Series, May.]

Appeal from Superior Court, Maricopa County; R. O. Stanford, Judge.

Mandamus by *Heralds of Liberty*, a foreign fraternal beneficiary society, against the Arizona Corporation Commission. Judgment making the alternative writ absolute, and the defendant appeals. Affirmed.

Wiley E. Jones, Atty. Gen., and Leslie C. Hardy and Geo. W. Harben, Asst. Attys. Gen., for appellant. George J. Stoneman, of Phoenix, for appellee.

ROSS, C. J. The appellant, the Arizona Corporation Commission, prosecutes this appeal from the judgment of the superior court of Maricopa county in mandamus proceedings requiring and compelling it to issue to the appellee, a foreign fraternal beneficiary society incorporated under the laws of the state of Alabama, a license authorizing the appellee to transact and carry on the business of fraternal insurance. The appellee showed in its complaint that it was one of the kinds of fraternal beneficiary societies described in article 6 of title 24 of Civil Code 1913, and that it had filed with the appellant, Corporation Commission, on the 22d day of April, 1915, its application for license to transact the business of insurance in the state of Arizona, which application was made a part of the complaint. In the particulars required by paragraph 3486 of said chapter and title the application for license was sufficient, in that it showed the filing with the Corporation

Commission of all the papers, instruments, and statements, with proper verifications, therein especially named and enumerated. It is alleged that, notwithstanding the application for license to transact business, which in all respects conformed to the law, the "said Arizona Corporation Commission, without just or legal ground or excuse, and without assigning any legal reason therefor, has refused and neglected, and still does refuse and neglect, to grant to plaintiff a permit and license to transact business in the state of Arizona. * * *"

No return to the alternative writ was made, but the appellant moved to strike it, and filed its demurrer to the complaint. The motion to strike and the demurrer both raised the point that the complaint showed upon its face that the writ of mandamus was sought to control the discretion and the judgment of the appellant Corporation Commission in the performance by it of a duty imposed by law that is quasi judicial in its nature. The appellant answered, admitting that:

It "is required by article 6 of title 24, Civil Code 1913, * * * to grant to all foreign, fraternal, and beneficiary societies coming within the definition and description of such societies as contained in said article and title which have complied with the requirements regulating such foreign, fraternal, and beneficiary societies a license, certificate, and permit to transact business in the state of Arizona, and further admits that plaintiff made an application for license and permit to transact its business in the state of Arizona to the Arizona Corporation Commission on the 22d day of April, 1915."

Upon the trial it was admitted by the appellant that:

The appellee "had performed the physical acts and had filed with the Corporation Commission of the state of Arizona the several instruments set forth in its verified complaint and application for alternative writ of mandamus filed herein."

Upon the pleadings and the stipulation judgment was entered making the alternative writ absolute. From the judgment and the orders of the court overruling the demurrer and motion to strike, this appeal was taken.

[1] It is seen from the admitted facts that the appellee had conformed to the requirements of law, and was entitled to a license to do business in the state, unless the contention of the appellant that the Corporation Commission's act in refusing the license was a discretionary one or a quasi judicial act is well founded, and not subject to revision in this proceeding. Paragraph 3486, supra, provides, among other things, that:

"When the Corporation Commission refuses to license any society, or revokes its authority to do business in this state, the commission shall reduce its ruling, order or decision to writing and file the same in the office of the Corporation Commission and shall furnish a copy thereof, together with a statement of its reasons, to the officers of the society, upon request, and the action of the Corporation Commission may be reviewable by proper proceedings in any court of competent jurisdiction within the county of Maricopa, state of Arizona."

"The action of the Corporation Commission," whether it be determined to be ministerial, discretionary, or judicial, is by this statute made reviewable in the courts. From the Constitution and laws of the state we think the superior court of Maricopa county was the proper and competent tribunal to appeal to for a review of the action of the Corporation Commission. Whether mandamus is the "proper proceedings" mentioned in the statute is another question. It is evident that the legislative intent was to refer the complaining party to some well-known statutory or common-law proceeding. It might have provided for a summary hearing and review of the action of the Corporation Commission in the superior court, as it did in paragraph 3381, Civil Code, in reference to the revocation or suspension of licenses to do business by other kinds of insurance corporations than fraternal. It did not see fit to do that, but, instead, provided that when the Corporation Commission refused to issue a license or revoked a license to a fraternal corporation that such corporation could have such action reviewed "by proper proceedings in any court of competent jurisdiction."

We think that proceeding or "proceedings," as here used, has reference to "a prescribed mode of action for carrying into effect a legal right." The word has many different meanings, depending upon the context in which it is used, but we think its ordinary meaning and the meaning here intended, as gathered from the context, is the form of law or the mode in which a judicial transaction is to be conducted. 32 Cyc. 406.

It is said that "under the Code of some states mandamus is regarded as a special proceeding." 26 Cyc. 142. Our statute defining mandamus and prescribing its procedure in paragraph 1558, Civil Code, says:

"* * * If the proceedings be brought in the Supreme Court the court shall. * * * If brought in the superior court the trial shall be had in the county in which the proceeding is brought."

In *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, the Supreme Court of the state of Washington, in discussing a proceeding in mandamus and the use of the writ, said:

"Formerly mandamus was regarded as a prerogative writ, issued, not as of right, but at the pleasure of the sovereign or state, in his or its name, as an attribute of sovereignty; but with us the writ is not in any sense a prerogative writ, or a writ to be issued at the discretion of the court. It is a procedure under the Code, and any person who has a cause that calls for its invocation has the same right to sue out the writ as he has to commence a civil action to redress a private wrong. As we said in *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, a proceeding in mandamus 'is a judicial investigation, the object of which is the determination of civil rights, the same as in ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment.' In our practice mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The pro-

cedure has in it all the elements of a civil action. The facts stated in the affidavit for the writ may be controverted by a return, raising both questions of law and fact. The return likewise may be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee, as the court may order. Judgment can be entered on the verdict or findings not only directing the issuance of a peremptory mandate, but for damages and costs, on which execution may issue. In other words, the statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of willful violations of recognized rights or denials, made in good faith, that the rights contended for exist. The right to sue out the writ is not made to depend on the character of the dispute, but on what answer is given to the question: Can the ordinary course of law afford a plain, speedy, and adequate remedy? If the ordinary course of law will furnish such a remedy, the writ will not issue; otherwise it will. It was to avoid circuity of action, thus doing away with the necessity of resorting to more than one proceeding for the enforcement of a right, that the law was framed. This court has many times recognized the differences between the modern and the ancient writ, and has repeatedly upheld the remedy in cases where formerly it would have been denied."

We know of no form of action or proceeding, statutory or otherwise, open to appellee and offering relief, unless it be the proceeding by mandamus. Our statute provides that a party beneficially interested, there being no plain, speedy, and adequate remedy in the ordinary course of law, shall be entitled to a writ of mandamus from the Supreme Court or superior court, as the case may be—

"to any inferior tribunal, corporation, board (whether the Governor is a member of such board or not) or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

Paragraphs 1553 and 1554, Civil Code 1913. It provides for the forming of issues, and, if the answer raises any question of fact essential to the determination of the matter or affecting substantial rights of the party, a jury trial, in the discretion of the court, may be granted.

Mandamus has been recognized as a "proper proceeding" by the courts of other states upon the application of insurance companies to compel insurance commissioners to issue licenses and permits to transact business where, by the local law, such commissioners are the designated agencies for such purpose. And, where the insurance company has complied with the requirements of the law in its application, the courts have directed the issuance of a license. *State ex rel. v. Fidelity & Casualty Co.*, 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 34 Am. St. Rep. 573; *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 South. 627, 72 Am. St. Rep. 143; *Guy L. Wallace & Co. v. Ferguson*, *State Insurance Commissioner*, 70 Or. 308, 140 Pac. 742, 141 Pac. 542; *People ex rel. U. S. Grand Lodge*

v. Payn, 161 N. Y. 229, 53 N. E. 849; State ex rel. v. Vorys, 69 Ohio St. 56, 68 N. E. 580.

We think the form or mode of action adopted in this case by the appellee is within the terms of the statute when it used the phrase "proper proceedings."

[2] The statute provides that the commission shall reduce its ruling, order, or decision to writing and file the same in the office of the Corporation Commission, and shall furnish a copy thereof, together with a statement of its reasons, to the officers of the society. The court is empowered to review the commission's action as expressed in its order, ruling, or decision, together with its reasons. The appellant does not undertake to justify its action by any order, ruling, or decision in writing, nor does it assign any reason in its answer for refusing to issue a license, except that it contends the law lodges in it the discretion to grant or refuse a license as it may choose and in doing so it is exercising quasi judicial functions.

The appellant relies in part on section 5 of article 15 of the state Constitution as justifying its refusal to issue a license. That section reads as follows:

"The Corporation Commission shall have the sole power to issue certificates of incorporation to companies organizing under the laws of this state, and to issue licenses to foreign corporations to do business in this state, as may be prescribed by law."

We think the meaning of this provision of the Constitution is that the sole and exclusive power to issue certificates and licenses is lodged in the Corporation Commission, but that the Legislature may prescribe the kinds of corporations that may do business in this state and their qualifications and make it the duty of the Corporation Commission to issue to such corporations, upon proper application and showing, licenses and certificates. In other words, the Legislature may not authorize any other commission, board, body, or person to issue certificates and licenses, that right or power being by the Constitution lodged in the Corporation Commission, but it may prescribe by law the kinds and qualifications of corporations and the rules and regulations for the conduct of their business. And it would seem that, if the Legislature has set forth what corporations may enter this state to transact business and the steps to be taken by them to secure that privilege, and it is ascertained, by the method provided, that any such corporation has met the conditions of the law, which seems to be the case here, nothing remains for the Corporation Commission to do but to issue a license or certificate. The power of the Legislature to define the kinds of corporations and their qualifications to do business in this state is unlimited, except that it may not lodge the duty of issuing the certificate or license in any other agency than the Corporation Commission. The commission cannot license corporations other than those named by the

lawmaking body, neither can it refuse arbitrarily or capriciously to license those named and possessing the qualifications prescribed by law, and which corporations have complied with all the provisions of the law entitling them to a license. This we say, in view of the language used in the above constitutional provision, and also in paragraph 3486, Civil Code, supra. This paragraph says:

"Any society shall be entitled to a license to transact business within this state" upon filing with the commission the papers and statements therein enumerated "and furnishing the Corporation Commission with such other information as the commission may deem necessary to a proper exhibit of its business and plan of working."

"Other information" mentioned which the commission is authorized to demand is information that the commission may require from the corporation applying for license, other than that specifically enumerated and named in the law. In this case no "other information" was asked for or demanded of the appellee. It would seem that for some reason of its own, not in any way exhibited or shown in its order of refusal or answer to the complaint, the appellant, Corporation Commission, refused to issue the license applied for upon a showing in all respects fulfilling the requirements of the law.

Notwithstanding the provision in the above statute that "any society shall be entitled to a license to transact business in this state" upon qualifying as provided, that absolute right, it may be contended, is qualified by the further statement that "the Corporation Commission may issue a license to such society to do business in this state until the first day of the succeeding April." If there is no obligation on the part of the commission to issue a license upon a proper and sufficient application, then the right to one, as given in this section, may be completely nullified by the nonaction or the arbitrary and capricious action of the commission. Their judgment of the qualifications of an applicant to do business will be substituted in that event for the judgment of the Legislature. We do not think that the word "may" is used in a permissive or optional sense, but that it has the equivalent meaning of "shall," and that it is the duty of the commission to issue a license when the applicant has in all respects shown itself qualified in the particulars named by the Legislature, and in addition thereto given "such other information as the commission may deem necessary to a proper exhibit of its business and plan of working." The commission is an agency of the state created for the purpose of exercising certain functions and performing certain duties for the state, not for the purpose of prohibiting or restricting insurance business, but for the purpose of regulating it in the manner provided by law. Persons and corporations whose business is that of insurance are vitally interested in the privileges conferred by licenses to do business. They are forbidden to operate in this

state without a license; with a license they may carry on the business for which they were organized. In *McLeod v. Scott*, 21 Or. 94, 28 Pac. 1061, it is said:

"It is a general principle of statutory construction that, when the word 'may' is used in conferring power upon any officer, court, or tribunal, and the public or a third person has an interest in the exercise of the power, then the exercise of the power becomes imperative, and *Endl. Interp. St. par. 310, Sedg. St. & Const. Law, 377, and Potter, Dwar. St. p. 220, note 27, are referred to as authority. Smith v. King, 14 Or. 10, 12 Pac. 8, is to the same effect, and the undoubted weight of authority is the same way. People v. Commissioners [130 Ill. 482] 22 N. E. 596, 6 L. R. A. 161, and note."*

Again it is said:

"It is well settled in statutory interpretation that the word 'may' may be read 'shall.'" *Rock Island County Supervisors v. United States, 71 U. S. (4 Wall.) 435, 18 L. Ed. 419.*

This rule of interpreting "may" as meaning "shall" in cases like this is so well settled we refrain from citing authorities to any extent. It is possible that cases might arise wherein the commission, passing upon an application for licenses to transact business in this state by a foreign fraternal society or corporation, would be required to exercise discretion or judicial functions, but clearly this is not shown to be a case of that kind. Should such a case arise, it will then be time enough to determine whether the action of the commission may be reviewed and revised by the proceeding in mandamus.

We think the act of issuing a license to the appellee authorizing it to do the business of insurance under the facts of this case was specially enjoined as a duty resulting from the office of the Corporation Commission, and the judgment of the lower court should be sustained.

Judgment affirmed.

FRANKLIN and CUNNINGHAM, JJ., concur.

(17 Ariz. 472)

NAVAJO-APACHE BANK & TRUST CO.
et al. v. **DESMONT** et al. (No. 1503.)

(Supreme Court of Arizona. Jan. 13, 1916.)

1. APPEAL AND ERROR ¶1 — NATURE OF REMEDY.

The right to appeal in any case depends wholly upon the statute permitting an appeal in such case.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. ¶1.*]

2. APPEAL AND ERROR ¶93 — APPEALABLE ORDERS — "FINAL ORDER" — DEMURRER — PLEA IN BAR.

Civ. Code 1913, par. 1227, provides for an appeal from: (1) Final judgments in actions in the superior court; (2) from certain enumerated orders; (5) from orders affecting a substantial right and determining the action and preventing judgment from which an appeal might be taken. Paragraph 1230 provides that, on appeal from a final judgment the Supreme Court may review any intermediate order involving the merits and necessarily affecting the judgment. Paragraph 1231 requires the Supreme Court to review all

orders assigned as error only upon appeals from a final judgment. Paragraph 509 provides that all issues of law arising on the pleadings and all pleas in abatement or which do not go to the merits shall be disposed of by the court before trial on the merits. In an action for an accounting, from orders overruling defendant's general and special demurrer and disallowing his plea in bar, he appealed. *Held*, that while the orders appealed from determined the issues of law raised by the pleading applicable to the facts, they left the questions of fact unsettled, and were intermediate orders in contemplation of the trial on the merits, and not final appealable orders.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. §§ 643-647; Dec. Dig. ¶93.*

For other definitions, see *Words and Phrases, First and Second Series, Final Order.*]

Appeal from Superior Court, Apache County; George W. Crosby, Jr., Judge.

Action by *Caroline Desmond* and another against the *Navajo-Apache Bank & Trust Company*, a corporation, and others. From orders overruling a general demurrer and disallowing a plea in bar, defendants appeal. Dismissed.

E. S. Clark, of Prescott, and *Fred W. Nelson*, of St. Johns, for appellants. *George Estes*, of El Paso, Tex., for appellees.

CUNNINGHAM, J. This action was commenced by the appellees praying for an accounting and other relief, resulting from transactions dating from the year 1906, involving a note and a chattel mortgage on sheep to secure the note and payment on account. The appellants defended upon the grounds of misjoinder of parties defendant and nonjoinder of a necessary party and upon the grounds that the action is barred by the five-year statute of limitations; that the complaint fails to state facts sufficient to constitute a cause of action; that the matters and things set forth in the complaint have been formerly adjudicated by a competent court in three separate actions and are barred; and an answer denying all and singular the allegations of the complaint. On the 13th day of June, 1915, the court ordered the said pleas and special demurrer overruled. The court ordered the general demurrer overruled and the plea in bar, setting forth former adjudication, disallowed, whereupon the defendants gave notice in open court of appeal to the Supreme Court "from all orders and rulings of the court as to the case. * * *" On July 2, 1915, the court refused to set the case for trial on the issues of fact pending the decision of the Supreme Court as to whether or not the orders involved are appealable orders. The documents specified by the defendants as necessary to present the questions involved on appeal were filed with the clerk of this court on September 10, 1915. On November 29, 1915, the plaintiffs, as appellees, appeared and moved to dismiss the appeal, because the orders appealed from are not final orders with-

in the contemplation of the statute of appeals and subject to appeal. Appellants have made no reply to this motion, although the affidavit of the attorney for the movant alleges and shows that a true copy of the motion and a copy of the brief was mailed to one of the attorneys for appellants with sufficient postage thereon on the 27th day of November, 1915.

[1, 2] The right to appeal in any case depends wholly upon the statute permitting an appeal in such case. Paragraph 1227, Civil Code Ariz. 1913, provides that:

"An appeal may be taken to the Supreme Court from a superior court in the following cases:

"(1) From a final judgment entered in an action or special proceeding commenced in a superior court, or brought into a superior court from any other court.

"(2) From an order granting or refusing a new trial, or granting a motion in arrest of judgment; granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment or garnishment; from any special order made after final judgment; from any interlocutory judgment, order, or decree made or entered in actions to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem and directing an accounting; from an interlocutory judgment in any action for partition which determines the rights and interests of the respective parties, and directs partition to be made, and from any interlocutory judgment which determines the rights of the parties and directs an accounting or other proceeding to determine the amount of the recovery.

"(3) From [orders and judgments in probate matters].

"(4) From [orders and judgments adjudging a person insane].

"(5) From any order affecting a substantial right, made in any action when such order in effect determines the action and prevents judgment from which an appeal might be taken.

"(6) From a final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment.

"(7) From an order or judgment in habeas corpus cases. * * *

The orders overruling a demurrer, a plea in abatement, or a plea in bar, are not such final determinative orders as are made the subject of appeal and separate review within the purview of the said statute. Until final judgment in the cause, the trial court retains the power to vacate such orders upon proper grounds appearing, and grant the relief sought without appeal. Such orders may affect the final judgment, yet they are necessarily intermediate orders, made in contemplation of the trial on the merits as provided in paragraph 509, Civil Code Ariz. 1913, as follows:

"All issues of law arising on the pleadings, and all pleas in abatement and other dilatory pleas remaining, and all pleas which do not go to the merits of the case shall be disposed of by the court before the case is called for trial on the merits."

Paragraph 1230, Civil Code Ariz. 1913, provides that:

"Upon an appeal from a final judgment the Supreme Court may review any intermediate order involving the merits and necessarily affecting the judgment."

Paragraph 1232, Civil Code Ariz. 1913, limits the right to appeal to any person aggrieved in the cases prescribed in chapter 1, tit. 6, of the Civil Code.

If the statute permits appeals from the orders disposing of the issues of law arising on the pleadings, the pleas in abatement and other dilatory pleas and all pleas which do not go to the merits of the case, then necessarily, an appeal would lie from each of said orders, and in order to receive the benefit of an appeal, all further proceedings must be suspended from the time of taking an appeal until the appeal is finally adjudicated. Paragraph 1231, Civil Code Ariz. 1913, requires this court to review all orders and rulings made by the court below, which are assigned as error, only upon appeals from a final judgment. The orders appealed from certainly determined the issues of law raised by the pleading applicable to the facts, yet the questions of fact remained unsettled, and for that reason such orders are not, in their nature, final judgments in contemplation of appeals. 2 Cyc. 587; Potter v. Talkington, 5 Idaho, 317, 49 Pac. 14.

"Sometimes several issues of law and of fact are presented for the consideration of the court in the same suit or proceeding. In such case, there can be no judgment from which an appeal may be taken until all the issues are determined. For although the determination of an issue of law is a trial, and the decision rendered thereon is not an order, * * * but a judgment, still it is not until final judgment is entered that an appeal will lie." Freeman on Judgments (3d Ed.) § 10.

Such is the clear meaning of our statute, and consequently the motion is well taken.

The appeal is dismissed, and the cause remanded, for further proceedings according to law.

ROSS, C. J., and FRANKLIN, J., concur.

(28 Idaho, 290)

GOLDEN MARGUERITE SILVER & COPPER MINING CO., Limited, v. NATIONAL COPPER MINING CO., Limited.

(Supreme Court of Idaho. Dec. 28, 1915.)

Costs \$146, 162—TAXATION—ITEMS TAXABLE.

Under the statutes of this state, only such costs as are necessarily incurred in an action or proceeding in the courts of this state are chargeable against the losing party as costs, unless the statute clearly provides that other necessary disbursements may be charged up as costs in an action or proceeding.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 567-569, 572-574, 580; Dec. Dig. §§ 146, 162.]

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action by the Golden Marguerite Silver & Copper Mining Company, Limited, against

the National Copper Mining Company, Limited. From an order denying motion to tax costs, defendant appeals. Reversed and remanded, with directions.

John P. Gray, of Cœur d'Alene, and Therrert Towles, of Wallace, for appellant. A. G. Kerna, of Wallace, for respondent.

SULLIVAN, C. J. This is an action brought under the provisions of section 2326, Rev. Stats. of the U. S. (U. S. Comp. St. 1913, § 4623) in support of an adverse claim against an application for patent to certain mining ground. The appeal is from an order of the court taxing costs. The items of the memorandum of costs which the court allowed and from which order this appeal is taken, are as follows:

To filing fees paid the land office on filing protest and adverse claim	\$10.00
To paid for certified copy of notice for the land office	1.50
To paid for copy of articles of incorporation for the land office	2.50
To paid for abstract of title for land office	4.00
Total	\$18.00

The judgment was in favor of the adverse claimant, and awarded the area of conflict to the adverse claimant. After judgment was entered the adverse claimant, who is respondent here, filed his memorandum of costs, and taxed, among other costs, the above set forth items. The allowance of said items of cost is assigned as error.

The contention of appellant is that the allowance of costs is a matter dependent wholly upon the statute, and where there is no statute authorizing it, no costs can be allowed, and cites in support of that contention *Cronan v. District Court*, 15 Idaho, 462, 98 Pac. 614, *Schmelsel v. Board of Coun-*

ty Com'rs, 16 Idaho, 82, 100 Pac. 106, 21 L. R. A. (N. S.) 199, 133 Am. St. Rep. 89, 17 Ann. Cas. 1226, *Steensland v. Hess*, 25 Idaho, 181, 136 Pac. 1124, and other authorities on the proposition that statutes allowing costs are penal and must be strictly construed, and appellant also contends that costs expended in the United States Land Office in support of an adverse claim under the provisions of said section 2326, Rev. Stats. of the U. S., cannot be recovered in a suit in the district court of this state.

Under the provisions of section 4912, Rev. Codes, the party in whose favor the judgment is rendered and who claims his costs must, within five days after the verdict or notice of the decision of the court or referee, file with the clerk, and serve upon the adverse party or his attorney, a copy of the memorandum of the items of his costs and necessary disbursements in the action or proceeding. This section of the statute, as well as other sections, refers only to such costs and disbursements as are occasioned in the action or proceeding in the courts of this state, and does not contemplate costs occasioned by proceedings in the United States Land Office.

We conclude, therefore, that the court erred in allowing the items of cost above mentioned, since they were all incurred on account of proceedings in the United States Land Office.

The order of the district court must therefore be reversed and the cause remanded, with instructions to sustain the motion and disallow the items of cost above mentioned amounting to \$18. Costs are awarded to appellant.

BUDGE and MORGAN, JJ., concur.

(97 Kan. 22)

LESLIE v. HARRISON NAT. BANK et al.
(No. 19784.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***1. ESTOPPEL — 90—EQUITABLE ESTOPPEL—PUBLIC LAND—WILLS.**

Where a settler upon public land of the United States died, leaving a will giving a life estate in all his property to his wife, with a remainder to their children, and the widow enjoyed during her life all the rents and profits of the land, which was patented to the heirs, she and the children supposing that title had passed in accordance with the terms of the will, no estoppel thereby arose such as to vest an equitable title to the fee in the children, subject to a life interest in the mother.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 242-244, 248-256; Dec. Dig. § 90.]

2. DEEDS — 114—PROPERTY CONVEYED—INTEREST OF GRANTOR — MISTAKE AS TO EXTENT.

A grantor who, in fact, owns an undivided one-eighth interest in a tract of land derived from the government, but who supposes that he owns an undivided one-fourth interest subject to a life estate derived from a will, passes all the title he has by a deed describing the property conveyed as a one-fourth interest arising under the will; the warranty clause containing an exception as to the life estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 316-322, 326-329, 338; Dec. Dig. § 114.]

3. JUDGMENT — 782—LIENS—GIFT OF LAND.

Where one, under the mistaken belief that he is the owner of an interest in a tract of land, executes a warranty deed thereto as a gift to his son, a title afterwards acquired by him will pass to the grantee only in subjection to the lien of any judgment existing against the grantor at the time of acquiring the title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1351; Dec. Dig. § 782.]

4. EXECUTION — 171 — SALE — INJUNCTION—OWNER OF UNDIVIDED INTEREST IN LAND.

An owner of an undivided one-fourth interest in land, one eighth interest being subject to the payment of a judgment against his grantor, and the other eighth not, is entitled to an injunction against the sale of more than an undivided one-eighth interest in the land under an execution issued on such judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. § 171; Judgment, Cent. Dig. §§ 794, 795, 813, 825.]

Appeal from District Court, Reno County.

Action by Frank Leslie against the Harrison National Bank and another. From a judgment for defendants, plaintiff appeals. Modified and affirmed.

C. M. Williams, of Hutchinson, for appellant. Fairchild & Lewis, of Hutchinson, for appellees.

MASON, J. The Harrison National Bank, having a judgment against J. F. Leslie, levied an execution upon the undivided one-fourth interest in two tracts of land, and was about to sell it as his property, when his son Frank Leslie brought an action to enjoin the sale on the ground that he was the owner of the interest sought to be sold. Upon a trial re-

lief was denied, and an appeal is taken from the decision refusing the injunction.

On June 18, 1878, Alexander Leslie (father of the judgment debtor, and grandfather of the plaintiff in the injunction action) made a will which, without describing any specific property, gave a life interest in all the estate, both real and personal, of which he should die seised, to his wife, with a remainder in equal shares to their four sons, one of whom was J. F. Leslie. At the time of making the will both tracts referred to were government land, occupied by the testator with a view to acquiring title under the pre-emption and timber culture acts. He died July 2, 1878. The widow elected to take under the will. Patents were issued on one tract in 1880, and on the other in 1890, to the heirs of Alexander Leslie, who were his widow and the four sons named in his will. The will, of course, did not affect the title to the land, which by virtue of the federal law passed to the heirs as grantees of the government. *Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757; *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920. No question is made regarding this proposition, but Frank Leslie maintains that the conduct of the heirs produced the same result as though they had entered into an effective agreement with each other that the land should be held in accordance with the terms of the will. Oral evidence was introduced by Frank Leslie to the effect that they all understood that each son owned an undivided one-fourth interest, subject to a life estate in their mother, and that she enjoyed all the rents and profits until her death.

On August 2, 1904, J. F. Leslie (his wife joining) executed to his son Frank Leslie, for a recited consideration of \$1 and love and affection, a general warranty deed in which the property conveyed was thus described:

"Our undivided one-fourth interest in and to the east one-half of section thirty (30), in township twenty-two (22) south, of range nine (9) west of the 6th P. M., being the interest arising under the will of Alexander Leslie, deceased, the father of John F. Leslie."

The warranty clause contained an exception as to the life interest of Elizabeth Leslie. The bank sued J. F. Leslie July 21, 1901. Its judgment was rendered September 16, 1904. Elizabeth Leslie died May 17, 1913, leaving all her property in equal shares to the four sons already referred to. The execution levied upon the real estate in question was issued October 20, 1913.

[1] I. Frank Leslie maintains that his grandmother, having acquiesced in and received the benefits of the arrangement by which she was treated as owning a life estate, was estopped to assert any other title, and therefore that his father should be regarded as having owned a one-fourth interest in the land when he executed the deed.

No doubt, the heirs of Alexander Leslie could have made any agreement they saw fit as to the disposition of the property, and, even although not in writing, it would have been enforced if it had been so far acted upon as to take it out of the statute of frauds. *McCullough v. Finley*, 69 Kan. 705, 77 Pac. 696. But it does not appear that any contract was made. The mother and her sons seem to have acted upon the assumption that the land was disposed of by the will. But we cannot regard the acquiescence in that view by all concerned, under a common mistake, and the innocent acceptance by the mother of the temporary fruits of the error, even for a period extending over many years, as accomplishing by estoppel a change in the equitable title to the property. The mother's election to take under the will could not have such an effect. That was a proper proceeding in any event, having no necessary connection with this land, which was not specifically referred to by the testator.

[2] 2. The bank contends that the deed executed by J. F. Leslie purported to convey only the interest arising under the will, and therefore that it conveyed nothing at all, since no title whatever was derived from that source. Considering the language of the deed in connection with the undisputed facts it is clear that the grantor intended to convey all the interest he had in the property. He supposed it to be an undivided one-fourth, subject to a life estate in his mother, when, in fact, it was a present right to an undivided one-eighth; he supposed that he derived what title he had from the will, when, in fact, he derived it from the government by operation of law. He was mistaken as to the extent and as to the exact source of his title, but knew in a general way that an interest in the land came to him through the death of his father. Since he obviously intended to dispose of all the interest he had, and since he employed words sufficient to convey even more, the deed should be interpreted as conveying that much. 13 Cyc. 656, 657; 8 R. C. L. 1060.

[3] 3. Upon the death of his mother (May 17, 1913) J. F. Leslie acquired from her an additional eighth interest in the property. As he had already executed a warranty deed to his son for a quarter interest, this newly acquired title doubtless inured to the benefit of the grantee. Gen. Stat. 1909, § 1656. But in the meantime the bank had obtained a judgment against him, the lien of which attached to his interest in the land as soon as he received it, and remained an incumbrance notwithstanding the immediate vesting of title in Frank Leslie. *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945.

[4] 4. It follows that the bank was entitled to sell upon execution an undivided one-eighth interest in the land, being the in-

terest which J. F. Leslie acquired under his mother's will. It claims, however, the right to reach also the other eighth interest, which J. F. Leslie derived directly from the government, not only on the ground already stated, that the deed passed no title, but also on the theory that it was made in fraud of creditors. No showing was made, however, that J. F. Leslie was insolvent when it was executed. Moreover, no attack having been made upon it for more than nine years after the judgment was rendered, the statute of limitations had barred an action to set it aside on the ground of fraud. *Donaldson v. Jacobitz*, 67 Kan. 244, 72 Pac. 846. Frank Leslie was entitled to a judgment enjoining the sale of more than an eighth interest in the land. The considerations that permit the full owner of a tract to obtain an injunction against its sale as the property of some one else, apply with equal force where an effort is made to sell upon execution an interest larger than may rightfully be subjected to the payment of the judgment.

The judgment will be modified to the extent indicated, and, as so modified, affirmed. All the Justices concurring.

(97 Kan. 103)

HALL v. KANSAS CITY TERRA COTTA CO. et al. (No. 19850.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. GARNISHMENT ~~§~~51—**PROCEEDS OF BUILDING CONTRACT.**

Where a defendant corporation assigned to a bank the proceeds of a contract due and to become due for furnishing materials and labor to a building contractor, such assignment is valid as against a garnishment of the funds in the hands of the building contractor.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 74, 97-101; Dec. Dig. ~~§~~51.]

2. CHATTEL MORTGAGES ~~§~~5—**REGISTRATION—NECESSITY—GARNISHMENT.**

Such an assignment is not a chattel mortgage requiring registration to be valid against the claim of another creditor proceeding by writ of garnishment.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 4-13, 16; Dec. Dig. ~~§~~5.]

Appeal from District Court, Montgomery County.

Action by W. C. Hall against the Kansas City Terra Cotta Company, wherein the Southwest National Bank of Kansas City, Mo., was impleaded. From a judgment for plaintiff, interpleader appeals. Reversed, with directions to render judgment for interpleader.

Ellis, Cook & Barnett, of Kansas City, Mo., and W. E. Ziegler, of Coffeyville, for appellant. A. R. Lamb and J. H. Keith, both of Coffeyville, for appellee.

DAWSON, J. The plaintiff, W. C. Hall, commenced this action on October 12, 1912, against the Kansas City Terra Cotta Company to recover on the defendant's promissory note, and on the same day caused garnishment proceedings to be served on Albert Neville, a Coffeyville contractor. Neville, the garnishee, answered and alleged that on July 26, 1912, he had entered into a written contract with the defendant, the Kansas City Terra Cotta Company, for certain materials to be delivered to him at Coffeyville on or before September 20, 1912. Other allegations covered failure of the terra cotta company to comply in full with its contract, consequent damages to garnishee, including freight bills which he was compelled to pay for the defendant, etc. He also pleaded that on November 16, 1912, he had been notified by the Southwest National Bank of Kansas City that the claim of the terra cotta company had been assigned to it on September 16, 1912, and advising him that all the proceeds of his contract should be paid to the bank. He also prayed that the bank should be impleaded and required to set up its rights, and that he be protected.

By leave of court, the bank filed its answer and cross-petition, and by agreement of parties, and with the approval of the court, Neville, the garnishee, was permitted to pay into court a sum of money and was discharged. This action thereupon proceeded between the plaintiff and the interpleading bank.

Incorporated in the terms of the terra cotta company's note of September 16, 1912, to the bank was the following:

"Having deposited with said bank as collateral security (being the legal holder) for the payment thereof, and also for all other present or future demands or claims of any kind of the said bank against the undersigned, due or not due (give brief description or summary of collateral here), sundry contracts which the makers and indorsers hereof hereby authorize said bank, or its president or cashier, to sell without notice at public or private sale at option of said bank or its assigns (and with the right to said bank or its assigns to be the purchaser of all or any part of said collateral, or any such sale), in case of nonperformance of the promise, applying the net proceeds to the payment of the note, including interest, and accounting for the surplus, if any, and in case of deficiency, promise to pay said bank, or its order, the amount thereof forthwith after such sale, with interest as provided above; and in case of any exchange of, or additions to, the collaterals above named, the provision of this note shall extend to such new or additional collaterals. The margin of collaterals to be kept satisfactory to said bank, or in default thereof, the note to become due and payable."

The instrument purporting to assign the Neville contract to the bank professed on its face to be an "Assignment of Collateral, Contracts for Work and Material." In substance it recited that the terra cotta company was a customer of the bank, indebted to it, and contemplated further indebtedness, and to secure the payment thereof, the debtor set over to the bank certain items including the Neville contract, and continues thus:

"The purpose of this assignment is to transfer to assignee the net contract price, that is to say, the sums due and to accrue upon this contract to assignor over and above necessary expenditures of like nature at the point of construction—no allowances for outlays or expenditures at point of manufacture to be made except upon written consent of assignee.

"To avoid embarrassment to business of assignor and to relations of assignor with contracting parties, assignor is hereby made agent of assignee, to receive and receipt for sums due and payable and to become due and payable upon the above assigned items; however, same to be for account and use of assignee, and all sums so collected by said assignor to be forthwith turned over to assignee for credit in pursuance of the purpose above stated. Provided however, that this agency is to be subject to revocation by assignee, and right of accounting at any and all times is expressly reserved."

The district court found that the terra cotta company was indebted to the bank, and that for the purpose of securing the same and to procure a further loan which was then made, the contract between Neville and the terra cotta company was assigned and delivered to the bank on September 16, 1912; that the bank did not notify Neville until about a month after this action and garnishment were begun. The court's judgment, in part, proceeds thus:

"The court further finds that said assignment, taken and considered in connection with a number of similar transactions between the said Terra Cotta Company and the bank, and their method of doing business and course of dealing, as shown by the evidence, is and was a conveyance intended to operate as a mortgage of personal property, and that it was not accompanied by a delivery to the bank of the property, nor was it followed by any actual or continued change of possession of the property covered by the conveyance. The court further finds that neither said assignment from said Terra Cotta Company to said bank, nor any copy thereof was ever filed or made of record in the office of the register of deeds of Montgomery county, Kan., or elsewhere, and that the said assignment is void as against the plaintiff, W. C. Hall."

From this judgment and its incidents the bank appeals.

[1] The general rule is that garnishment, like other proceedings in invitum, only affects the actual property, money, credits, and effects of the debtor in the hands of the garnishee, and the rule relating to bona fide holders or purchasers without notice has no application. *Investment Co. v. Jones*, 2 Kan. App. 638, 42 Pac. 935; *Bradley v. Byerley*, 3 Kan. App. 357, 42 Pac. 930; *Johnson v. Brant*, 38 Kan. 754, 17 Pac. 794; *Lumber Co. v. Trust Co.*, 54 Kan. 124, 37 Pac. 983; *Bank v. Bank*, 80 Kan. 205, 207, 101 Pac. 1005; *Mason v. Saunders*, 89 Kan. 300, 131 Pac. 562. In 20 Cyc. 1012, it is said:

"Where the principal defendant has made a valid assignment of the garnishee's indebtedness, or conveyance of the property in his possession belonging to such defendant, before the service of the summons upon the garnishee, the latter cannot be charged on account of such debt or property.

"The above rule is especially applicable to bills of exchange, promissory notes, and other evidences of indebtedness, and where such paper is assigned or transferred in good faith before the drawer, maker, or indorser thereof is served in

garnishment proceedings by a creditor of the payee, or of the last holder thereof, the rights of the assignee or transferee are not affected by such proceedings." Page 1013.

"In the absence of statutory provision prescribing the mode of assignment, no particular mode or form is necessary to effect a valid assignment of property, claims, or debts so as to defeat garnishment proceedings by a creditor of the assignor. If the intent of the parties to effect an assignment be clearly established, that is sufficient, and the assignment may be in the form of an agreement or order or any other instrument which the parties may see fit to use for that purpose. * * * The rule is sometimes broadly stated that an assignment is not complete so as to defeat proceedings in garnishment until the garnishee is notified thereof; however, this rule seems to be subject to limitations; thus as between assignor and assignee, it is not necessary to the validity of an assignment that the garnishee be notified thereof; and the assignment will likewise be complete as against creditors of the assignor instituting garnishment proceedings after assignment and before notice of the assignment to the garnishee, provided that notice of the assignment be given to the garnishee in time to permit him to disclose the assignment in his answer to the garnishee process." Pages 1016, 1017.

The district court treated the assignment of the contract between the terra cotta company and Neville as a chattel mortgage. If it were treated as a mortgage of the contract, then the possession of the contract by the bank would obviate all necessity for its registration. Nothing is more common than the advancement of funds to contractors and manufacturers, and while banks with proper prudence usually take more tangible security than the potential and possible future profits of the pending contracts of the borrowers, yet there is no impropriety in taking an assignment of the latter also; nor does the statute require such assignments to be recorded.

When the borrower thus assigns his contract or the possible profits of his contract in good faith, such assignments should be respected. Nor can a later garnishing creditor justly complain. The garnishment process only reaches the property, assets, and credits of the debtor, and not that of which the debtor was formerly the owner, nor that which he has lawfully assigned to a third party.

This view seems to be amply sustained by the authorities. In *James Clark & Co. v. Wiss & Ballard*, 34 Kan. 553, 555, 9 Pac. 281, 283, it was held that:

"A debt due for goods sold and delivered, and resting for evidence on a book account, may be assigned, and such assignment is valid if made by mere delivery."

In the case at bar, the debt due from Neville to the terra cotta company for goods sold and delivered and resting for evidence on a written contract, was assigned to the bank, and such assignment must likewise be valid though made only by mere delivery of the contract.

In *Bank v. Bank*, 80 Kan. 205, 207, 101 Pac. 1005, 1006, it was said:

"We understand that when personal property is pledged the pledgee acquires a right thereto which is superior to any right that can thereafter be given by the pledgor or be acquired by a subsequent attachment issued in an action against him. 22 A. & E. Encycl. of L. 867, 868, and notes; *Bank v. Harkness*, 42 W. Va. 156 [24 S. E. 548, 32 L. R. A. 408]. The assignment and delivery of the certificate constitutes a delivery of the property represented thereby. 22 A. & E. Encycl. of L. 958. In the second edition of *Jones on Pledges and Collateral Security*, § 17, it is said: 'A delivery of a document of title, which serves to put the pledgee in possession of the goods, is equivalent to an actual delivery of them.' This question was discussed and authorities were collected in the case of *Bank v. Harkness*, 42 W. Va. 156 [24 S. E. 548, 32 L. R. A. 408]. See, also, *Continental Nat. Bank v. Elliot Nat. Bank* (O. C.) 7 Fed. 369. The great weight of authority seems to be that this kind of delivery is sufficient to constitute a pledge. A completed pledge has the effect of depriving the pledgor of all control over the property, as far as the interest of the pledgee is concerned. He can neither sell nor encumber it so as to dispose of or impair the rights of the pledgee therein. It seems clear that what he cannot do personally cannot be done by a writ of attachment. Generally, the rule has been that an attachment takes only the interest which the owner has when the writ is levied."

The latter case is also pertinent on the question of the necessity for registration or other notice. It was said:

"The fact that the attachment creditor acted in good faith and without notice of the pledge is not important, as there is no law requiring pledges to be recorded."

It is urged that the assignment of this contract was only part of a larger transaction in which the terra cotta company mortgaged its entire plant and assets to the bank, and since such mortgage was unrecorded, it and all its incidents, including this assignment, are void against the plaintiff armed with a writ of garnishment. This view did not meet the approval of this court in *Clark v. Wiss*, supra, where the assignee of the book accounts prevailed against the garnisheeing creditor, notwithstanding the defects in the mortgage under which the assignee also claimed. Again, it is urged that under the assignment, the bank was only to receive whatever net profit might result from the Neville contract, and there was none such at the time of the assignment, consequently nothing was conveyed to the bank. To this there appears to be two answers: (1) Neville has paid a sum of money into court, which seems to settle the question as to whether he owed the terra cotta company. (2) The instruments from the terra cotta company which we have set out above do not justify the interpretation that only the net profits of the Neville contract were assigned to the bank. The pertinent clause is:

"The purpose of this assignment is to transfer to assignee the net contract price; that is to say, the sums due and to accrue upon this contract to assignor over and above necessary expenditures of like nature at the point of construction—no allowances for outlays or expenditures at point of manufacture to be made except upon written consent of assignee."

The "point of construction" was Coffeyville, and the "point of manufacture" was Kansas City. The net proceeds thus included the cost of manufacture, so that the assignment fairly read covered much more than mere possible net profits. It virtually covered the value of the goods furnished, less possible charges at Coffeyville.

[2] This brings us to the concluding question, and, indeed, to the only question which presents any serious difficulty in this case. We have said that if this conveyance were treated as a chattel mortgage, the physical possession of the contract by the bank would obviate the necessity of its registration. The law is equally well settled that if it were treated as a pledge, neither registration nor notice would be necessary to enforce it. But the appellee with much force and show of authorities insists that the appellant cannot rely on these settled principles because the bank did not have exclusive control over the contract and its pertinent incidents; that the bank left the terra cotta company in control; that the bank disavowed any responsibility to carry out the contract assigned to it; that the terra cotta company afterwards changed and reduced the contract price with Neville without the knowledge and consent of the bank; that it adopted the assignor as its agent to receive and receipt for sums due and to become due under the contract, requiring it to account to the assignee for the moneys thus collected.

Does this situation create any distinction recognized by the precedents? As a chattel mortgage it undoubtedly would do so, for however binding such a mortgage would be between the parties, it would not affect third parties where the mortgage was not recorded and the mortgagee was not in exclusive possession. *Swiggett v. Dodson*, 38 Kan. 702, 17 Pac. 594; *Boot & Shoe Co. v. Ware*, 47 Kan. 483, 28 Pac. 159; *Geiser v. Murray*, 84 Kan. 450, 114 Pac. 1046. The same necessity as to possession applies to pledges; the pledges must secure and maintain exclusive control of the thing pledged. *Raper v. Harrison*, 37 Kan. 243, 245, 15 Pac. 219; *Gray v. Doty*, 77 Kan. 446, 448, 94 Pac. 1008; *Atkinson v. Bush*, 91 Kan. 860, 139 Pac. 393; 5 R. C. L. 387.

But in our opinion the assignment was neither a chattel mortgage nor a pledge. It was simply what it purported to be—an assignment of a sum or sums of money due and to become due. There was nothing about the transaction which was unusual or against public policy. This general subject is one which might well be regulated by statute, but so far it has been left free to develop in the usual course of modern business. *Cameron, Hull & Co. v. Marvin*, 26 Kan. 612 (Syl. pars. 4, 5); *Columbia Finance & Trust Co. v. First Nat. Bank*, 116 Ky. 364, 76 S. W. 156; *Thayer v. Daniels*, 113 Mass. 129;

Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222; *Muir v. Schenck*, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; *Niles v. Mathusa*, 162 N. Y. 546, 57 N. E. 184; *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314, 62 N. E. 387; *United States v. Vaughan*, 3 Bin. (Pa.) 394, 5 Am. Dec. 375; *Downer v. South Royalton Bank*, *Chamberlain et al. Claimants*, 39 Vt. 25; *Tingle, Adm'r, v. Fisher*, 20 W. Va. 497; *Bank v. Harkness*, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408; 4 Cyc. 17, 20.

We do not think the fact that the terra cotta company was made the agent of the bank to collect the proceeds of the contract can affect the validity of the assignment. Neither can the later modification of the contract by remitting \$330 of the contract price. That deduction in plain terms recognized that "this money is subject to the order of the court." Recurring to the proposition first laid down, that the garnisheeing creditor can reach only the property of the defendant in the hands of its debtor, the plaintiff could not reach or attach that which had already passed by lawful assignment, and this necessitates a reversal of the judgment with instructions to render judgment for the interpleader. All the Justices concurring.

(97 Kan. 39)

YOUNG v. BUCK et al. (No. 19794).*

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES — 259—PETITION BY JUDGMENT CREDITOR—DEMURRER—LACHES.

A petition, asking that lands fraudulently conveyed be subjected to the payment of a judgment against the grantor, is not rendered demurrable by the fact that it shows two years and eight months to have elapsed between the execution of the deed and the filing of the petition, where it contains allegations that during all that time the action on the plaintiff's original claim was pending, although no reason is given for its not having been brought to an earlier conclusion.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 756, 757, 764-766, 769, 770; Dec. Dig. —259.]

2. FRAUDULENT CONVEYANCES — 249—ACTION—LACHES—JUDGMENT CREDITOR.

Where the original demand is sued upon in due time, and an action in the nature of a creditor's bill is brought promptly upon the obtaining of judgment, the plaintiff is not to be denied relief on the ground that he failed to prosecute his case with due diligence, merely because several continuances were brought about by his consent, or by the mistake, or even misconduct, of his attorney.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 735-737; Dec. Dig. —249.]

Appeal from District Court, Allen County.

Action by Rena Buck Young against L. D. Buck and others. Demurrers to the petition were sustained, and plaintiff appeals. Reversed and remanded, with directions.

(97 Kan. 31)

L. & M. MERCANTILE CO. v. WIMER.*
(No. 19788.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***1. JUSTICES OF THE PEACE ⇐147—APPEAL—RIGHT.**

A plaintiff has a right to appeal from a judgment rendered in its favor by a justice of the peace, where a controversy arises as to which one of several actions was tried, and the judgment rendered is not satisfactory to the plaintiff.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 493-501; Dec. Dig. ⇐147.]

2. JUSTICES OF THE PEACE ⇐159—APPEAL—BOND.

An appeal bond in a justice of the peace court is not necessarily void because it fails to follow all the statutory requirements, and, if defective, a proper bond may be filed in the district court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. ⇐159.]

Appeal from District Court, Scott County.

Action by the L. & M. Mercantile Company against O. A. Wimer. From judgment for plaintiff, defendant appeals. Affirmed.

Lee Monroe, of Topeka, and R. D. Armstrong, of Scott City, for appellant. H. A. Russell, of Scott City, for appellee.

MARSHALL, J. This is an appeal by the defendant from an order of the district court denying the defendant's motion to dismiss the plaintiff's appeal from a judgment of a justice of the peace, and from an order of the district court dismissing the action upon the application of the plaintiff.

The plaintiff filed five actions at the same time in a justice of the peace court, each for a monthly installment of interest due on a note. Trial was had before the justice of the peace in one action, resulting in judgment in favor of the plaintiff. A controversy then arose as to the action that was tried. On the same day, after judgment was rendered, the plaintiff filed its motion to dismiss the action and afterward filed a motion for a new trial. These were heard and both denied. The defendant then filed a bond for stay of execution. The plaintiff filed an appeal bond, which was approved by the justice of the peace. This bond was in statutory form, except that it did not run to the defendant or any other person, and provided only for satisfaction of such judgment for costs as might be rendered against the plaintiff. The papers were then transmitted to the district court. There the plaintiff tendered a new and sufficient appeal bond. The plaintiff moved to dismiss the action. The defendant moved to dismiss the appeal. The court dismissed the action and denied the defendant's motion to dismiss the appeal.

[1] 1. The defendant argues that because the plaintiff recovered the judgment asked

for by it in its bill of particulars, it has no right to appeal from the judgment of the justice of the peace. The plaintiff's answer to this is that the judgment was rendered in an action not tried; that the plaintiff introduced evidence in one action, and the justice of the peace considered that evidence, and entered judgment in another action, one not on trial, for an amount \$7.60 less than was asked for in the action tried, but being the amount due in the action in which the judgment was rendered; and that no judgment was rendered in the action the plaintiff tried. After the judgment was rendered the plaintiff asked the justice first to dismiss the action, and later to grant a new trial. This he refused to do. The statute providing for an appeal reads:

"In all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered." Gen. Stat. 1909, § 6487 (Civ. Code, § 120).

This statute places no restriction on the right to appeal. Either party may appeal if he so desires. The plaintiff was not satisfied with the judgment rendered in its favor. It had a right to appeal.

[2] 2. Another argument of the defendant is that the appeal bond was void, and for that reason no appeal was taken, and the court did not have jurisdiction of the cause. We do not agree with the defendant. The appeal bond was defective, but it was not void. A new appeal bond could have been given that would have complied with the statute and have fully protected the defendant. *McClelland Bros. v. Allison*, 34 Kan. 153, 8 Pac. 239; *C. & W. Rld. Co. v. Town-Site Co.*, 42 Kan. 97, 104, 21 Pac. 1112; *St. L. K. & S. W. Ry. Co. v. Morse*, 50 Kan. 99, 105, 31 Pac. 676; *Ottawa v. Johnson*, 73 Kan. 165, 84 Pac. 749, 9 Ann. Cas. 707; *Ellott v. Bellevue*, 82 Kan. 78, 80, 107 Pac. 794. The appeal bond was sufficient to give the district court jurisdiction. That court could have compelled the plaintiff to give a new bond or could have dismissed the appeal upon failure of the plaintiff so to do.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 85)

McCUE v. HOPE. (No. 19840.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***ACCOUNT STATED ⇐8, 12 — LIMITATION OF ACTIONS ⇐37 — FRAUD — RIGHT TO OPEN ACCOUNT—EVIDENCE OF CORRECTNESS.**

Two parties who owned the stock of a corporation agreed that one of them should purchase the stock and interest of the other for a certain price, the purchaser to pay the outstanding liabilities of the company, and a settlement between them was effected on the basis of an account stated, which purported to contain a complete list of all of the assets and liabilities of the company, and was a part of their written

agreement. In an action subsequently brought by the purchaser he alleged that the account stated was incorrect, in that it omitted certain specified liabilities of the company of which he had no knowledge, and which he has been compelled to pay; that the account was not only incorrect, but it was fraudulently made so by the seller. *Held*, that the action is one to reopen the account and settlement and remake it in accordance with the agreement of the parties; that such an account stated is only prima facie evidence of its correctness; that it may be opened up for mistake or fraud; that the averments of fraud of the seller as stated in the petition were pertinent and proper; and that the action pleaded is not to be regarded as one for relief on the ground of fraud, and therefore is not barred by the two-year statute of limitation.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 50-56, 73-76; Dec. Dig. §§ 8, 12; Limitation of Actions, Cent. Dig. §§ 182-186, 477; Dec. Dig. §§ 37.]

Appeal from District Court, Finney County.

Action by B. M. McCue against J. W. Hope. From adverse rulings on motions to strike and demurrer to plaintiff's petition, he appeals. Reversed in part and affirmed in part.

F. Dumont Smith, of Hutchinson, for appellant. Wm. Easton Hutchison and C. El. Vance, both of Garden City, for appellee.

JOHNSTON, C. J. Plaintiff and defendant, who were each the owners of one-half of the capital stock of the Garden City Land & Immigration Company, in November, 1910, entered into a written contract whereby defendant was to transfer to plaintiff his stock in said corporation in consideration of which plaintiff was to cause the corporation to convey certain properties and securities to defendant, and assume and pay all debts and obligations of the corporation and relieve the defendant from any liability on account thereof. Attached to the contract was a statement of the condition of the company, with a guaranty that the same was correct "errors and omissions excepted." This action for the sum of \$5,557.49 was brought by plaintiff in the year 1914, who alleged in his petition that soon after the transaction above mentioned it was discovered that at the time of the exchange of property the corporation owed certain obligations, totaling \$2,114.98, a half of which was claimed and sued for in plaintiff's action; that these obligations were not shown upon the statement, and that the defendant, conniving with the bookkeeper of the corporation, one Chan. B. Campbell, had concealed the existence of these obligations. As a second cause of action, plaintiff alleged that at the time of the transaction mentioned, defendant had in his possession \$4,500 of the corporate funds, the existence of which fact he also concealed. The court sustained a motion made by defendant to strike out all allegations of fraud, and also sustained a demurrer as to the first count of plaintiff's amended petition, but overruled the same as to the second count.

Upon these rulings plaintiff brings the case here.

It is contended by defendant that the parts stricken out of plaintiff's petition were immaterial for the reason that the petition showed upon its face that the action was one for relief upon the ground of fraud, and, being brought more than two years from the time the fraud was alleged to have been discovered, it did not state a cause of action. Defendant also complains that the court should have sustained his demurrer as to the second count of plaintiff's petition. The action is based on the account stated, which formed a part of the written agreement. This account purported to contain an itemized list of all the assets and liabilities of the company. The account is an acknowledgment of the statements made therein as well as of liability, but it is only prima facie evidence of its correctness. It may be opened up for mistake or fraud and corrected within a reasonable time. *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548; *Schmoker v. Miller*, 89 Kan. 594, 132 Pac. 158; 1 Cyc. 451. It is alleged that the account in question is not only incorrect in that a number of liabilities of the company, which the plaintiff has since been compelled to pay, were omitted, but that this was done through the connivance and fraud of the defendant. Fraud being one of the grounds for opening and correcting the account, the allegations that the settlement and accounting were fraudulently done were pertinent and proper, and the ruling striking out the averments as to the fraud of the defendant cannot therefore be sustained. That the account is open to correction is shown further by a provision of the agreement made between the parties. In it is a statement that the account is correct "errors and omissions excepted," and therefore on its face it does not purport to be a finality.

It is insisted by the defendant that the case should be treated as an action for relief on the ground of fraud, and that, so considered, it was barred after two years from the time it accrued. It is rather an action to open up an account and settlement between the parties, to make a new settlement, and to adjust the rights of the parties under their written agreement. The mere fact that mistakes occurred, or that there was deception practiced in the settlement sought to be set aside so that a new settlement may be made, does not make the action one for relief on the ground of fraud. It is still an accounting under the written agreement, and does not fall within the two-year statute of limitations.

The decision of the trial court striking out of the petition the averments of fraud, as well as the one sustaining a demurrer to the first count of the petition, is reversed, and the decision overruling the demurrer to the second count of the petition is affirmed. All the Justices concurring.

(97 Kan. 74)

ROUTH v. WEAKLEY. (No. 19830.)
(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS — 706 —
STREETS—AUTOMOBILE ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

In an action against the owner of an automobile, which collided with and killed a girl 8½ years of age, who had suddenly left the sidewalk and run diagonally out into the street, without looking ahead of her, being pursued by two other girls, of whom she was slightly afraid, contributory negligence on her part is not established as a matter of law by a finding that she knew conduct of this kind to be dangerous.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. 706.]

**2. MUNICIPAL CORPORATIONS — 706 —
STREETS—AUTOMOBILE ACCIDENT—PLEADING—NEGLIGENCE—QUESTION FOR JURY.**

The petition held to allege negligence on the part of the defendant and the evidence to support the charge.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. 706.]

Appeal from District Court, Wyandotte County.

Action by Winnie Routh against J. J. Weakley. From judgment for plaintiff, defendant appeals. Affirmed.

James F. Getty, of Kansas City, for appellant. L. O. Carter, of Kansas City, for appellee.

MASON, J. A girl 8½ years old ran diagonally out from the sidewalk into a much-traveled city street, and was struck and killed by an automobile. Her mother brought an action against the owner, and recovered a judgment, from which he appeals.

[1] 1. A reversal is asked principally on the ground that the undisputed facts and the special findings establish such contributory negligence on the part of the decedent as to preclude a recovery. The jury found that she had been accustomed to passing the place of the accident on her way to and from school; that she knew that the street was there greatly used by automobiles and other vehicles; that she knew it was dangerous to run diagonally from the sidewalk out into the portion of the street traveled by vehicles without looking ahead of her; and that just prior to being run over, and while looking behind her, she suddenly and quickly turned off from the walk and ran toward and in front of the automobile. Based on the rule that her age is of importance only as an indication of her mental capacity, the argument is made that, since it was established that she knew it was dangerous to run out into the street without looking ahead of her, and that she did this very thing, the conclusion is unavoidable that she failed to exercise ordinary care, according to the standard applicable to the case. The fault of

this reasoning is that it loses sight of the fact that, to be chargeable with contributory negligence, she must have had the capacity, not only to know the danger ordinarily involved in the conduct mentioned, but to realize and appreciate the risk under the circumstances in which she was placed, and to exercise the judgment and discretion necessary to avoid it. Evidence was given that there had been a disagreement between her and two other girls, that they ran after her, and that she was a little bit afraid, and ran away from them. Whether in this situation she used the care reasonably to be expected of a child of her age, intelligence, and experience was a fair question for the jury. She may have known as an abstract proposition that there was danger in being upon the traveled part of the street without watching where she was going, but have lacked the discretion to keep this in mind while seeking to escape from the children who were pursuing her. It has been held in other states that even a very young child who crosses a street car track without looking for an approaching car, or who on seeing it attempts to cross in front of it, may be held guilty of contributory negligence as a matter of law. *Poland v. Union Railroad Company*, 26 R. I. 215, 58 Atl. 653, and cases there cited. Here, however, there is room for the inference that the decedent's conduct was affected by her fright; that panic over an imaginary danger made her forgetful of a real one. In any event the result is controlled by a recent decision of our own. *Ratcliffe v. Speth*, 95 Kan. 823, 149 Pac. 740. Differences between the facts of that case and of this are pointed out by the defendant, but they are important only as affecting his conduct. Upon the question of contributory negligence the two cases are substantially parallel. There a girl 13 years of age collided with an automobile while she was running diagonally across a street and looking in the opposite direction, toward some boys who were throwing Osage apples at her. True, in the present case there is a specific finding that the decedent knew it was dangerous to run out upon the street without looking ahead of her. But in the other it was said of the injured girl that:

"She was sufficiently mature to understand the peril of stepping in front of an automobile even when running at a rate of from six to eight miles an hour."

[2] 2. The defendant maintains that a peremptory instruction in his favor should have been given on the ground that the petition made no charge of ordinary negligence, but only of wantonness, of which there was no evidence, and also that, considered as a whole, the evidence in behalf of the plaintiff showed conclusively that there was no negligence in operating the automobile. The petition characterized the defendant's con-

duct as reckless, but it alleged specifically that he was negligent in driving his machine at a high, dangerous, and excessive rate of speed, and thereby presented the issue of ordinary negligence. Several of the plaintiff's witnesses testified that, in their judgment, the car was going over 30 miles an hour. Others gave testimony tending to impeach the accuracy of these estimates, but the net effect of all this evidence was for the jury.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 94)

ARMENT et al. v. DODGE CITY et al.
(No. 19845.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. APPEARANCE ~~§~~19—GENERAL APPEARANCE
—OPPOSITION TO INJUNCTION.

Defendants appearing by counsel to resist the granting of a temporary injunction are in court for all purposes without the issuance of summons.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 79-82, 84-90; Dec. Dig. ~~§~~19.]

2. MUNICIPAL CORPORATIONS ~~§~~513—PAVING
ASSESSMENT—DEFENSE—LIMITATIONS.

The defense to an assessment for paving that it was really for a storm sewer is cut off by the 30-day statute of limitations. Laws 1913, c. 112, § 1.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188-1193, 1195-1206; Dec. Dig. ~~§~~513.]

Appeal from District Court, Ford County.

Action by J. A. Arment and others against Dodge City, Kan., and others. From a judgment for defendants, plaintiffs appeal. Affirmed in part, and reversed in part, and remanded.

F. Dumont Smith, of Hutchinson, for appellants. W. Karl Miller, of Dodge City, for appellees.

WEST, J. The plaintiff sued the city and its commissioners to enjoin the paving of a certain street. The defendants in response to a notice appeared by counsel, and successfully resisted the granting of a temporary injunction. No summons was issued. It was averred, among other things, that the defendants had entered into a contract for the paving, and had appointed appraisers who were appraising all the lands in the paving district, instead of the abutting property, which alone would be liable; that the resolution declaring the necessity of the work had not been published as required by law. All this was before the passage of any ordinance ascertaining the amount of the assessments. More than 30 days after the passage of such ordinance the plaintiffs filed an amended and supplemental petition, and summons was issued and served on the defendants, who moved to strike from this pleading the words "amended and supplemental" because no summons had been issued upon the original peti-

tion, which motion was sustained. The defendants then answered, denying the plaintiffs' allegations, and pleading the 30-day statute of limitations (Laws 1913, ch. 112, § 1). An agreed statement of facts was presented which contained the admission that the resolution declaring the necessity of the work had not been published as required by law, and that the ordinance ascertaining the amount of the assessment was not published until nearly 2 months after the date when the defendants appeared in response to the motion and resisted the granting of the temporary injunction. The cause came on for hearing "upon the legal questions involved therein," and during the progress of the hearing the trial court made the following, among other, statements:

"Nothing shown here that indicates the city did not have authority to act, authority to adopt the ordinance and provide for the paving, and to assess the cost of it against the property. Now, it may be that they made a mistake and assessed it against property to the center of the block when they should have assessed it only against the abutting property owners. It may be, but is that such a question now that can be raised at this time as to the 30-day limitation? I question it very much, gentlemen. * * * It may be they made a mistake in where they ought to have collected the money, but was it not the intention of the Legislature to provide this 30-day provision to cover just such cases as this? If a party was wrongfully assessed and he ought not to have been assessed, should he not have come in within 30 days, so that the city may change the assessment and repeal their orders to pass new ones and fix the costs where they ought to be? Is not that the real purpose, rather than permit people to come in a year and a half later, perhaps, when the property is being sold for taxes, and then object? I think that is the fair way to look at the matter."

Again:

"It is needless for the court to say further that the amendment to the petition made upon March 19th and the summons issued at that time will not date back to the time when the petition was first filed, September 19, 1913, and that the case as now presented to the court cannot be deemed to date back any further than March 27, 1914, which was the date of the amendment or the filing of the supplemental petition, so called. * * *"

Two points are presented by the appeal: The effect of the appearance by the defendants; and the right to raise by supplemental pleading after the 30-day period had expired the question that the improvement, instead of being a pavement of the usual convex kind, was in reality a storm sewer or a concave pavement of a street through a low part of the city for general city drainage purposes. The defendants have filed no brief.

[1, 2] When the original petition was filed, and the notice served upon the defendants, and they appeared by counsel without attempting in any way to limit their appearance, they were in court for all purposes. It was needless to issue a summons to bring them into court because they were already in. *Hanson v. Hanson*, 86 Kan. 622, 122 Pac. 100;

Woodhouse v. Land & Cattle Co., 91 Kan. 823, 139 Pac. 356. Therefore the cause of action, if any, stated in the original petition was one which existed, not only before the expiration, but before the beginning of the 30-day period, and was entitled to consideration by the court.

It is argued that, if the improvement was for the purpose of draining a large section of the city the expense should have been charged to the city, and not to the abutting owners, and that such owners might not have consented to the destruction of their street by changing it into a sewer for the benefit of people who paid no taxes upon such street, and that such extraordinary result could not have been foreseen within 30 days from the time the amount of the assessments was ascertained. The court, however, following *Gardner v. City of Leavenworth*, 94 Kan. 509, 146 Pac. 1000, and cases there cited, holds that with the expiration of the statutory period this defense to the assessment was cut off.

The judgment as to the amended and supplemental petition is sustained. The judgment as to the original petition is reversed, and the cause is remanded for further proceedings in accordance herewith. All the Justices concurring.

(97 Kan. 13)

BRADY v. FARMERS' CO-OP. CREAMERY & SUPPLY CO. (No. 19775).*

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT \Leftrightarrow 82, 89—TRIAL \Leftrightarrow 404—GENERAL FINDING—AGENCY CONTRACT—CONSTRUCTION—COMMISSIONS.

The bills of particulars of plaintiff and defendant, their written contracts, and the evidence examined; and no error perceived in overruling plaintiff's demurrer to defendant's evidence, nor in the judgment in defendant's favor.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 216-219, 220-239; Dec. Dig. \Leftrightarrow 82, 89; *Trial*, Cent. Dig. §§ 957-962; Dec. Dig. \Leftrightarrow 404.]

Appeal from District Court, Morris County.

Action by J. O. Brady against the Farmers' Co-Operative Creamery & Supply Company, a corporation. From a judgment for defendant, plaintiff appeals. Affirmed.

Nicholson & Pirtle, of Council Grove, for appellant. C. A. Crowley, of Council Grove, for appellee.

DAWSON, J. On October 20, 1911, the plaintiff, J. O. Brady, and defendant, the Farmers' Co-Operative Creamery & Supply Company, of Omaha, Neb., entered into a contract whereby Brady became the agent of the creamery company for the purchase of milk and cream at Dwight, in Morris county, Kan. The contract provided:

"First party to pay second party a commission of 2 cents per pound for each pound of but-

ter fat received and shipped in good condition, as shown by weights and tests made by said first party at Omaha, said commission to be paid by said first party on the tenth of each month for all butter fat shipped during the preceding month, drayage 5¢ per can, rent \$5.00, station supplied, stamps, etc. If routes are run, 3¢ on route, 2¢ less than station price, 1½¢ for testing route cream."

The plaintiff worked for the defendant until about January 1, 1912, when for some reason not shown the state dairy commissioner canceled Brady's license as a cream tester. Brady resigned, and his son, A. M. Brady, a lad of 18 years, applied for the position; and the plaintiff wrote the company, urging that his son's application be given consideration. The younger Brady had a license as cream tester, and on January 23, 1912, the company and young Brady entered into a written contract substantially similar to the former one between his father and the company. The father and son continued the business about as they had done before the cancellation of the father's license and his resignation. Checks in payment of commissions were made by the company payable to the order of J. O. & A. M. Brady. The plaintiff brought this action to recover commissions on shipments of cream during April and May, 1912. The defendant denied the allegations touching the shipments in April and May; it set up the termination of its contract with J. O. Brady, and alleged that at the instance of the plaintiff it had entered into a contract with A. M. Brady, the plaintiff's son, on January 23, 1912. The defendant further pleaded:

"And the defendant further answering says that all of the butter fat or cream purchased for it at its station of Dwight, Kan., during the month of April and May, 1912, was purchased by the said J. O. Brady and the said A. M. Brady under and by virtue of said agreements, by the terms of which the commission to be paid for such service was to be as shown by weights and tests made by said defendant at Omaha, and the said plaintiff and the said A. M. Brady thereby guaranteed to sample and weigh all cream carefully and correctly, and it avers that such service was not rendered by them in accordance with the terms of said guaranty, and it further alleges that it has fully complied with the terms of said agreements and paid to the said J. O. Brady and A. M. Brady the full amounts due to them, after deducting the amounts due to the defendant for shortage in the amount of butter fat received from said station during said months, on account of the negligence and want of care or skill of the said J. O. Brady and A. M. Brady, and also for errors made by said parties in checks, issued by them for butter fat. And the said defendant denies that it is indebted to the said plaintiff in any amount whatsoever," etc.

The court without a jury heard the evidence, and gave judgment for the defendant.

The plaintiff assigns error: (1) In overruling demurrer to defendant's evidence; and (2) in not giving judgment for plaintiff "upon the law and the evidence."

1. Appellant does not show in what particulars the defendant's evidence was insuffi-

cient as against a demurrer, so far as the burden of proof devolved upon it. There was no jury to be misled by extraneous or irrelevant facts, and the court let in everything which would be of any value in determining the rights of the parties. Whether plaintiff could sue directly for his son's commissions on account of the son's nonage, if any were due him, without laying claim to those commissions under his right to the proceeds of his son's services, and after urging the defendant to make a contract with his son on account of his own disqualification, is doubtful. However, the whole matter was considered by the district court, and on the evidence it found nothing due the plaintiff on any view of the case.

2. It is not easy to see how it can be said by this court that plaintiff was entitled to judgment "upon the law and the evidence." The credence to be given to the testimony was for the trial court. It made a general finding for defendant. Every issuable fact upon which judgment might rest is by the general finding resolved in defendant's favor. *Wood v. Davis*, 12 Kan. 575.

Appellant contends that he should not lose his commission on cream lost in transit between Dwight and Omaha. But the contracts of employment speak for themselves, and the district court could not make a new or amendatory contract for the parties. The commissions were to be based on the tests on the amount of cream received in Omaha. There was no claim on a quantum meruit, nor was any issue raised touching the loss of cream in transit. Since the pleadings were those originally filed before a justice of the peace, they were properly considered with great liberality, but we can discern no tangible basis upon which to reverse this case.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 59)

DRYDEN v. PURDY. (No. 19819.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

NUISANCE §72—PRIVATE NUISANCE — INTERFERENCE — RIGHT OF ACTION — SPECIAL DAMAGE.

Plaintiff sought to enjoin as a private nuisance the keeping of wagons, buggies, and covered cabs in front of a livery stable which adjoined his residence, on the ground that the view from his front porch was thereby obstructed. *Held*, he failed to show that he suffered special damage or inconvenience different in kind from that of the public, and the action cannot be maintained.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. §72.]

Appeal from District Court, Neosho County.

Action by H. O. Dryden against J. N. Purdy. From a judgment for plaintiff, defend-

ant appeals. Reversed, with directions to enter judgment for defendant.

Lapham & Lapham, of Chanute, for appellant. T. F. Morrison, of Chanute, for appellee.

PORTER, J. In an action to abate a private nuisance the petition alleged that defendant maintained a livery stable in the city of Chanute adjoining plaintiff's residence. The nuisance complained of consisted in leaving buggies, covered cabs, and drays in front of the stable, thereby shutting off plaintiff's view of Main street. The court held that plaintiff could maintain the action; that obstructing the view of Main street from plaintiff's residence created an annoyance and inconvenience to plaintiff not suffered by the general public. The relief asked was granted, and the defendant appeals.

The only question for determination, which was raised by a demurrer to the petition and to the evidence, is whether the plaintiff showed some special damage or inconvenience suffered by him beyond that suffered by the general public. The general rule is that individuals are not entitled to redress against a public nuisance except by express statutory authority, and in determining what constitutes a private nuisance the rule is well established that the individual must show some damage, inconvenience, or annoyance peculiar to himself and different from that suffered by the public. There has been, however, much conflict and "some vacillation in judicial opinion as to what injuries were special within the meaning of the rule." *Mehrhof v. Del. L. & W. R. R. Co.*, 51 N. J. Law, 56, 16 Atl. 12. This court has quite uniformly held that it is not enough for the individual to show that he suffers to a greater extent than the public if it appears that the injury or damages is of the same nature. An obstruction in a highway which interferes more or less with the public travel, but which deprives a landowner of access to and egress from his property, has been held to constitute a private nuisance which the individual may enjoin. *Venard v. Cross*, 8 Kan. 248, 255. Cases will be found also which hold that, where the individual shows that he sustains the same injury but to a greater extent than the public at large, he has established the right to redress the wrong, because his injury in such case is necessarily special and peculiar to himself. *Carver v. San Pedro, L. A. & S. L. R. Co. (C. O.)* 151 Fed. 334. That doctrine, however, has never received recognition in this state. The rule uniformly adhered to in Kansas is well stated in the case of *School District v. Nell*, 36 Kan. 617, 619, 14 Pac. 253, 254, 59 Am. Rep. 575:

"If the loss of the plaintiff is simply greater damage of the same kind as that sustained by

the rest of the community, such fact will not be sufficient to constitute a cause of action in favor of the party complaining. The loss to the public consists in the inconvenience in, or the obstruction to, the use of the highway for travel, differing in degree, but not in kind, according to the frequency of use which proximity of residence or peculiarity of occupation may impose. For this no individual can sue, but must resort to such public actions as are given by law."

To the same effect see *Venard v. Cross*, 8 Kan. 248, supra; *Trosper v. Com'rs of Saline Co.*, 27 Kan. 391; *Ruthstrom v. Peterson*, 72 Kan. 679, 83 Pac. 825; *Borton v. Mangus*, 93 Kan. 719, 720, 145 Pac. 835, L. R. A. 1915D, 142.

In our opinion, the plaintiff has failed to bring himself within the rule so frequently declared in former decisions, and has not succeeded in showing that he sustains any peculiar injury or damage different from that suffered by the public; that the most that can be said is that he suffers to a greater extent the same kind of annoyance as does the public at large. It seems apparent that the view of other persons residing on the same side of the street must have been obstructed in the same way, though probably not to the same extent, as that of the plaintiff.

If the judgment can be sustained, then other suits of the same kind by persons suffering to a less extent the same annoyance could be successfully prosecuted. The avoidance of a multiplicity of actions was one of the reasons for the adoption of the rule denying to private individuals the right to maintain a suit to enjoin a nuisance which is public in its nature.

The judgment must be reversed, with direction to enter judgment for the defendant. All the Justices concurring.

(97 Kan. 77)

BLOUNT v. AETNA BUILDING & LOAN ASS'N. (No. 19831.) *

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. MORTGAGES §309—RELEASE—EXPENSE OF RECORDING.

Notwithstanding the provisions of section 5202, Gen. St. 1909, which requires that when a mortgage on real estate has been paid, the mortgagee or his assignee shall cause satisfaction thereof to be entered of record "without charge," the parties may bind themselves by an agreement that the mortgagee shall execute and deliver a release when the mortgage is paid, which shall be recorded at the expense of the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 864, 870, 899, 900, 902-905, 907-912; Dec. Dig. §309.]

2. MORTGAGES §312—FAILURE TO RELEASE—ACTION FOR PENALTY—DEFENSE.

In an action by the grantee of the mortgagor to recover the statutory penalty, the mortgagee interposed as a defense an agreement between the parties to the mortgage that the cost of recording the release should be paid by the mortgagor, and that a release had been executed

and delivered to him when the mortgage was paid. Evidence was offered in support of the further defense that the correspondence between the plaintiff and the defendant misled the latter as to the particular mortgage the plaintiff desired released. *Held*, it was error to take the case from the jury and to render judgment for the plaintiff.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 930-941; Dec. Dig. §312.]

3. MORTGAGES §312—FAILURE TO RELEASE—ACTION FOR PENALTY—AMOUNT OF ATTORNEY'S FEES—QUESTION FOR JURY.

It was error for the court to refuse to submit to a jury the question of the amount of attorney's fees in such an action.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 930-941; Dec. Dig. §312.]

Appeal from District Court, Montgomery County.

Action by Earl E. Blount against the Aetna Building & Loan Association, a corporation. From judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Ferry, Doran & Dean, of Topeka, and O. L. O'Brien, of Independence, for appellant. A. R. Lamb, of Coffeyville, for appellee.

PORTER, J. This is an appeal from a judgment against defendant for \$100 penalty for failure to release a mortgage on real estate and for \$50 attorney's fees in the action.

The real estate covered by the mortgage consists of two residence lots in the city of Coffeyville which belonged formerly to J. W. and Mary Blount, and upon which the defendant at different times made building loans. The first of these loans, which covered but one of the lots, was made in 1898, and was paid at maturity. On March 29, 1905, the defendant made another loan, covering both lots, which was paid in April, 1913. Subsequently, on October 27, 1913, J. W. and Mary Blount conveyed the property to the plaintiff, who is their son. The petition alleged that on October 28, 1913, the plaintiff through his attorney sent the defendant a registered letter, requesting that the mortgage made in March, 1905, be released of record, but that defendant had failed to comply with the request within 30 days. The petition prayed for the statutory penalty and attorney's fees. The answer contained a general denial, but alleged that the mortgage referred to in the petition was given to secure a loan made upon the written application of J. W. and Mary Blount, in which they agreed as part of the consideration of the loan, that in case the mortgage was paid before their stock in the association matured, they would pay for filing the release of the mortgage, and that in fact the mortgage was paid before the maturity of their stock. The answer also set out a copy of a second letter received by the defendant from plaintiff's attorney, dated

November 8, 1913, which it was alleged led the defendant to understand and believe that the only mortgage plaintiff desired released was the one made in 1898, and in compliance with the request as defendant understood it, a release had been at once executed and forwarded by mail to plaintiff, which he accepted without any request that defendant pay for recording the same. At the trial plaintiff admitted that when the indebtedness secured by the mortgage was paid in April, 1913, defendant executed and delivered to his father a release which his father handed to him October 27, 1913, when the title was conveyed to him, and that no demand was made on defendant to record a release until October 28, 1913. The letter of that date, after requesting information concerning an abstract of title to the property, concludes as follows:

"I also notice that the mortgage made by you on March 12, 1898, * * * in the sum of four hundred dollars on lot six block four * * * has not been released of record although the same has been paid. Please have the same released of record. I also notice that your mortgage under date of March 29th, 1906, given by J. W. Blount and wife Mary A. Blount in the sum of four hundred dollars covering lots five and six, block four, Gaverick's addition to the city of Coffeyville, Kansas, has not been released of record. Please have this mortgage released of record."

On October 30th, the defendant replied with a letter which, so far as it refers to the release, reads:

"In reply beg to advise that these mortgages were released by this association and the original mortgage and notes were sent out at the time the loan was paid, all the mortgages referred to in your letter have been released by this association and we presume the borrower has failed to record them. Under our contract for loan the cost of recording release is borne by the borrower but we would be glad to execute such releases as are necessary to straighten their title upon receipt of the abstract for our assistance."

On November 8, 1913, plaintiff's attorney replied as follows:

"I herewith inclose the abstract to lot 6 block 4 Gaverick's addition to Coffeyville, together with a satisfaction of mortgage to be executed by the secretary of the company in order that this abstract may be brought down to date and the title to this property cleared of record. *The mortgage that we wish released is shown on page nine of the abstract.* Please handle this matter as promptly as possible and return the abstract to me. Yours truly." (Italics ours.)

Four days later defendant returned the abstract, together with a release of the mortgage specifically mentioned in the last letter of plaintiff's attorney. Soon after the expiration of 30 days from the date of the first demand plaintiff brought this action.

[1] The statute (section 5202 of the General Statutes of 1909) provides that when any mortgage of real property has been paid, it shall be the duty of the mortgagee or his assignee, within 30 days after demand, to cause satisfaction of such mortgage "to be

entered of record without charge," and the statute further provides that any mortgagee or assignee who shall refuse or neglect to do so "shall be liable in damages to such mortgagor, or his grantee or heirs in the sum of one hundred dollars, together with a reasonable attorney's fee," which may be recovered in a civil action. It appears that when the borrower received the release at or about the time the mortgage was paid in April, 1913, he accepted it with no question as to any duty resting upon defendant to record it or to advance the fee for recording it. On the contrary, he kept the release until October, when he delivered it to the plaintiff along with the deed to the property. When the action was commenced, plaintiff had it in his possession and, according to the evidence, could have recorded it at the trifling expense of 30 cents. The statute, as well as one providing a similar penalty for neglecting to release a chattel mortgage, has been declared penal. *Thomas v. Reynolds*, 29 Kan. 304; *Parkhurst v. National Bank*, 53 Kan. 136, 35 Pac. 1116. Being penal, it must of course be construed strictly. 27 Cyc. 1426. This court has recognized certain conditions or limitations upon the strict and literal enforcement of its provisions. Thus, in the *Parkhurst Case*, supra, an instruction was approved which charged the jury that if defendant in refusing to release any of the mortgages acted in good faith and upon an honest belief that the same had not been paid, plaintiff could not recover the penalty. In the opinion it was said:

"If the mortgagee refuses to satisfy the mortgage from mere inadvertence, inattention, or indifference, the penalty may be incurred. To be relieved from the penalty, there must be a real controversy as to payment, and an honest doubt concerning the same on the part of the mortgagee." Page 138 of 53 Kan., page 1117 of 35 Pac.

[2] From the pleadings and the letters written by the defendant to plaintiff's attorney, it can hardly be said that defendant was neglecting to satisfy the record through inadvertence, inattention, or indifference, or that it was not acting in good faith in the honest belief that under its contract with the borrowers its only duty in the premises was to execute and deliver to them a sufficient release, and that the expense of recording it should be borne by them. The trial court, however, at the conclusion of the evidence, discharged the jury, and decided as a matter of law that no defense to the action had been established. This was error which requires reversal. Moreover, there was evidence to warrant the submission to the jury of another defense raised by the answer. If the letters written by plaintiff's attorney are read together, there is at least some ground for the inference that defendant was intentionally lulled into the belief that all plaintiff desired was the execution of a release of the old mortgage. The statute of limita-

tions barred an action to recover a penalty for failure to record that release, and plaintiff first obtained it and was satisfied to pay for recording it, and immediately sued to recover a penalty for failure to record the one to which the letter of November 8th makes no reference.

It is urged by the plaintiff that if such a contract existed as alleged in the answer, it was necessarily void for the reason that it would conflict with the express conditions of the statute which require the release to be made by the mortgagee or his assignee "without charge." There is, however, nothing in the statute which prevents the parties from entering into a valid contract that upon satisfaction of the debt the mortgagee shall execute and deliver a release which the mortgagor shall be at the expense of recording. The evil sought to be remedied was obviously the neglect and refusal of mortgagees and their assignees to release mortgages which had been satisfied. While enacting the requirement the Legislature also provided that the release should be without charge to the mortgagor, but it is not conceivable that the Legislature would have passed the law and imposed the penalty for the failure alone to pay the slight charge of recording a release promptly executed and delivered. But in any view of the statute, we can see no good reason why the parties may not bind themselves by an agreement such as the one relied upon here.

[3] Complaint is made of the action of the court in refusing to submit to the jury the question of the amount of attorney's fees. Since a new trial must be ordered, it may be said the complaint is well founded, and it has been held error to refuse to submit that question to the jury. *Gray v. Railway Co.*, 89 Kan. 325, 131 Pac. 555.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

(97 Kan. 11)

RANCE et al. v. ROBINSON INV. CO.,
(No. 19738.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

BROKERS \S 86—ACTION FOR COMMISSION—ORAL CONTRACT—SUFFICIENCY OF EVIDENCE.

A written contract between brokers and the owner of lands to procure a purchaser for them was superseded by an oral contract, and a dispute between the parties as to the conditions contained in the oral contract was determined by the jury in favor of the brokers. *Held*, that the evidence in the case supports the verdict and judgment.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. $\S\S$ 116-120; Dec. Dig. \S 86.]

Appeal from District Court, Johnson County.

Action by W. S. Rance and another against the Robinson Investment Company. From

judgment for plaintiffs, defendant appeals. Affirmed.

C. L. Randall and E. C. Owen, both of Olathe, and J. B. Larimer and D. H. Brannaman, both of Topeka, for appellant. S. D. Scott and J. R. Thorne, both of Olathe, for appellees.

JOHNSTON, C. J. This was an action brought by W. S. Rance and Ed Witthauer to recover from the Robinson Investment Company a balance of \$1,250 alleged to be due to the plaintiffs upon a commission for the sale of real estate. The trial resulted in a verdict in favor of the plaintiffs for \$1,250, and from the judgment rendered thereon the defendant appeals.

In August, 1912, the plaintiffs, who were partners doing business as real estate agents, were engaged by the defendant to find a purchaser for certain Canadian lands. In the written contract originally made it was provided that plaintiffs' commission should be \$4 per acre on improved farms, and \$4 per acre on unimproved lands, except that upon exchange of properties or where large tracts were sold at reduced prices or where changes were made in prices or terms, a special arrangement would be made and a special commission paid. Soon after the employment plaintiffs secured a buyer, a Mr. Kenton, for 800 acres of the Canadian lands. The regular list price at which plaintiffs held this land was \$44 per acre, but Kenton being unwilling to pay that much it was finally agreed that the land should be sold for \$40 per acre, and that defendant would take in payment \$2,000 in cash, and the remaining \$30,000 due to be paid by \$6,000 worth of South Dakota mortgages and the trading in of property owned by Kenton in the city of Olathe, estimated to be worth \$4,000. In view of the fact that the land was sold at less than list price and not upon a cash basis, it was agreed before the sale was made that plaintiffs' commission should be \$2,500, and would be payable when the South Dakota mortgages were converted into cash. The transaction was closed, and plaintiffs were paid one-half of their commission, leaving the balance of \$1,250, for which this action was brought. That the written contract made between the parties was superseded by an oral one appears to be conceded, but there is a dispute as to the provisions of the oral agreement. On the part of the defendant it is claimed that the plaintiffs agreed to sell the Olathe property accepted from Kenton for the price of \$3,500 net, and that the commission of \$2,500 was not to be due or payable until the plaintiffs disposed of that property at the price named or had procured a loan thereon to the extent of \$2,000. Upon this question the testimony was in direct conflict. The jury found that while the plaintiffs represented that the Olathe prop-

erty was worth \$3,500, there was no contract that they should sell it at that price, and that the payment of commission was not made upon the condition that such a sale would be made.

The jury upon sufficient testimony found that the oral contract made between the parties was substantially in accord with the testimony of the plaintiffs. The finding of the jury as well as the verdict appear to be abundantly supported by the testimony, and no substantial question of law is presented for consideration.

An instruction was asked by defendant based upon the theory of a partnership, but neither the pleadings nor the evidence warranted the submission of that question.

The judgment of the district court will be affirmed. All the Justices concurring.

(97 Kan. 28)

ELLIOTT et al. v. HOFFHINE et al.
(No. 19786.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

DEEDS — 208 — DELIVERY — PROOF.

A father executed and acknowledged a warranty deed conveying a farm to a minor son aged 19 years, and told the notary to keep the deed until he called for it, that he was not going to record it. Less than four weeks later during his last illness, he directed his brother and the grantee to get the deed and record it, which they did a few days afterward and following his death. During his illness he stated that he intended the grantee to have the farm because he believed his son, who was the eldest of the children, would keep the family together and pay off an existing incumbrance. *Held* sufficient to sustain a finding of the trial court that the deed was delivered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. — 208.]

Appeal from District Court, Washington, County.

Suit for partition by Ida May Elliott and others against William I. Hoffhine and others. From judgment for defendants, plaintiffs, appeal. Affirmed.

A. E. Lybolt, of Kansas City, Mo., and Edgar Bennett, of Washington, Kan., for appellants. J. R. Hyland, of Washington, Kan., for appellees.

PORTER, J. This is a suit for partition. The parties are children and heirs-at-law of John M. Hoffhine, who died intestate December 29, 1888, owning a farm of 160 acres, which he occupied with his family as a home. The plaintiffs appeal from a decree adjudging that defendant John P. Hoffhine, one of the sons of the deceased, owns the entire premises. The facts have been found separately by the trial court, and while plaintiffs have argued a number of questions, the only one which we think is necessary to consider is whether there was evidence to support the

finding that the deeds under which John P. Hoffhine claims title were delivered.

The grantor had been married three times, and there were three sets of children. On December 3, 1888, he and Mrs. Hoffhine, step-mother to the children of the former marriages, agreed upon a separation. She was given the custody of her infant child and relinquished all her interest in the farm in consideration of the payment of \$1,000. They went before a notary, where they executed and acknowledged a warranty deed conveying the farm to John P. Hoffhine, at that time a minor of about 19 years of age. Mrs. Hoffhine at the same time executed a quit-claim deed. Mr. Hoffhine paid her \$700 in money, and gave her his note for \$300, which was on the same day signed also by the son. After his father's death, which occurred a few weeks later, John paid his stepmother the note. The evidence to establish a delivery of the warranty deed was substantially as follows: When the notary had taken the acknowledgments he said the deed was ready to be recorded. The grantor said: "Well, you just keep it until I call for it; I am not going to record it." The notary then placed both deeds in his safe, where they remained until after Mr. Hoffhine's death, which occurred less than four weeks later. During his last sickness Mr. Hoffhine stated to different persons that he intended to convey the land to John, and that he thought John would be able to pay off the indebtedness and keep the family together. There was evidence, too, that a few days before his death he said to his brother: "You and John go and get those deeds and have them recorded." Immediately after his death, John and his uncle, to whom this statement was made, got the deeds from the notary and had them recorded.

While not tending in any respect to establish a delivery of the deeds, it should be said here that after the death of the father, the family remained on the farm, the younger children were kept in school, and all assisted in the usual farm work. John was the eldest and took charge of affairs. From the receipts of the place he paid the taxes and an old mortgage that existed on the farm, and kept the family together until the children came of age.

The general rules which control in determining what is necessary to constitute the delivery of a deed have so frequently been considered in recent cases that we shall not undertake to restate them nor to review the wilderness of cases involving the application of those rules to particular facts. As was said in *Alward v. Lobingier*, 87 Kan. 106, 123 Pac. 867, the general rules which govern in cases of this kind "do not admit of universal application," and "each case depends to some extent upon its own peculiar circumstances." Where manual delivery is relied upon, the conclusive test is whether the

grantor relinquished "the right to the immediate control of the deed." 87 Kan. 108, 123 Pac. 868. If no further evidence of delivery had been offered except to show what occurred in the presence of the notary, the authorities cited by plaintiffs would tend strongly to support their contention. The direction to the notary not to record the deed but to hold it until the grantor called for it indicates that he had no intention at that time to relinquish the right to the immediate control of the instrument, but, on the contrary, that he intended to and did retain the right of control; that if at any time thereafter he had changed his mind, he could have called for the deed and destroyed it. But there was further testimony showing that a few days before his death he directed his brother to go and get the deed and record it. That this direction was not carried out until after his death does not affect the situation. There was at least evidence to support the trial court's finding to the effect that he had divested himself of all control over the instrument and intended from that moment it should pass out of his control, and if this is true there was a legal delivery. Besides, the grantee was his son and a minor, and all the circumstances of the case—the father's statements during his illness, showing an intention to complete the conveyance so that the son should have the farm and keep the children together—were matters to which the trial court evidently gave due consideration. Since the title to the real estate passed immediately by the conveyances to John, the other questions urged by the plaintiffs go out of the case. His ownership is not affected by the character and extent of his possession, the knowledge or notice other members of the family had that he claimed title, or his absence from the state. The father saw fit to give the place to him upon considerations which were deemed sufficient, and, which are not open to inquiry.

There was evidence offered by the plaintiffs tending to show that when John's father made the statement directing the recording of the deed, he was to more or less extent under the influence of opiates; but the court has found the facts upon evidence sufficient to support them, and the judgment must be affirmed.

All the Justices concurring.

(97 Kan. 153)

Ex parte McKENNA. (No. 20427.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS ⇨216—INFORMATION—SUFFICIENCY.

Under the intoxicating liquor law of this state, an information charging one with unlawfully selling "certain liquids," without in any way charging that the liquids sold were spiritu-

ous, malt, vinous, fermented, or intoxicating liquors, does not state an offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 230-233; Dec. Dig. ⇨216.]

2. HABEAS CORPUS ⇨30—RIGHT TO REMEDY—DEFECTIVE INFORMATION.

A writ of habeas corpus will not issue to release one from the custody of an officer who holds the petitioner under a warrant issued on an information which does not state any offense under the laws of this state, where by amendment the information can be made to state an offense, and where the petitioner asks no relief of any kind of the court in which the information is filed.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⇨30.]

Original proceedings in habeas corpus by Ed McKenna. Writ denied.

Ferguson & Dierks, of Wichita, for petitioner. L. C. Kelley, of Newton, opposed.

MARSHALL, J. This is an original proceeding in habeas corpus. The petition for the writ alleges that the petitioner is restrained of his liberty by the sheriff of Harvey county upon a warrant issued out of the district court of that county on an information filed in that court charging:

"That on the 12th day of October, 1915, at the city of Newton, county of Harvey, and state of Kansas, said defendant, Ed McKenna, did then and there unlawfully sell and barter certain liquids, to wit, 'Temp-Brew,' the said 'Temp-Brew' being an imitation of beer, having the color of beer, foaming like beer, having a slight smell like beer, and that at the time of said sale the said Ed McKenna drew or pumped said 'Temp-Brew' from a cask or half barrel, and that said cask or half barrel resembled a beer keg, and that said 'Temp-Brew,' when drawn from said cask or barrel into a glass, resembled beer."

[1] 1. The information is defective in that it does not charge that the liquors sold were either spirituous, malt, vinous, fermented, or intoxicating liquors. The addition of either one or all of these words to the information will make it sufficient to sustain a judgment of conviction. We have no statute prohibiting the sale of liquors that are imitations of beer, that have the color of beer, that foam like beer, that smell like beer, or that are sold in a manner similar to that in which beer is sold. An information under the intoxicating liquor law of this state must charge an offense named in the statute.

[2] 2. This court will not release, on habeas corpus, one who is held under a warrant issued on an information that does not charge any offense, before an application of any kind is presented to the court issuing the warrant. Many informations are defective and must be amended before the defendant can be properly placed on trial on the charge attempted to be set out therein, but habeas corpus is not the means resorted to for the purpose of protecting the defendant. Section 699 of the Code of Civil Procedure (Gen. St. 1909, § 6295) prohibits habeas corpus where the one applying for the writ is

held on a warrant issued on an information. *Ex parte Phillips*, 7 Kan. 48; *In re Scrafford*, 21 Kan. 735, 747; *In re Gray*, 64 Kan. 850, 68 Pac. 658; *In re Terry*, 71 Kan. 362, 80 Pac. 586; *In re McElroy*, 10 Kan. App. 348, 58 Pac. 677.

We do not assume that the district court will hesitate to quash this information on proper application. If the information is not then amended under section 72 of the Code of Criminal Procedure (Gen. St. 1909, § 6647), we assume that the petitioner will be discharged. This protects the rights of the petitioner, and gives effect to section 699 of the Code of Civil Procedure (Gen. St. 1909, § 6295).

The writ is denied. All the Justices concurring.

(97 Kan. 97)

LIGHTNER v. PRUDENTIAL INS. CO. OF AMERICA. (No. 19846.)*

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. TIME — PAYMENT OF PREMIUMS — DAYS OF GRACE — COMPUTATION.

Under the terms of a life insurance policy giving one month—not less than 30 days—grace in the payment of premiums, when the last day of grace falls on Sunday, the insured has the following day in which to make payment.

[Ed. Note.—For other cases, see *Time*, Cent. Dig. §§ 34-52; Dec. Dig. § 10.]

2. INSURANCE — § 375 — LIFE INSURANCE — FORFEITURE FOR NONPAYMENT OF PREMIUM — WAIVER BY AGENT.

Forfeiture for nonpayment of a premium due on a life insurance policy which was issued by an agent at Grand Island, Neb., and which prohibits the waiver of any of its conditions except by certain named officers, and provides that no agent has power to extend the time for paying a premium or to waive any forfeiture or to bind the company by making any representation, cannot be waived by statements to the insured or to the beneficiary concerning the obligations of the company or the rights of the insured under the policy made by another agent at Abilene, Kan., who had nothing to do with issuing the policy or with receiving payment of the premiums thereon, and to whom no premium was paid.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 948-951, 956-965; Dec. Dig. § 375.]

3. INSURANCE — § 390 — LIFE INSURANCE — FORFEITURE — WAIVER.

In this case the forfeiture of the life insurance policy was not waived by the company's failure to take some affirmative action declaring such forfeiture.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1037, 1038; Dec. Dig. § 390.]

4. INSURANCE — § 310 — LIFE INSURANCE — FORFEITURE — NOTICE — APPLICATION OF STATUTE.

Chapter 212 of the Laws of 1913 has no application to a life insurance policy issued in Nebraska in 1912.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 703, 761, 780, 826, 840, 904; Dec. Dig. § 310.]

Appeal from District Court, Wyandotte County.

Action by Catherine Lightner against the Prudential Insurance Company of America. From judgment for defendant, plaintiff appeals. Affirmed.

Paul H. Ditzen and L. C. True, both of Kansas City, Kan., for appellant. Haff, Meservey, German & Michaels, of Kansas City, Mo., and David F. Carson, of Kansas City, Kan., for appellee.

MARSHALL, J. This is an action to recover on a life insurance policy. Judgment was rendered in favor of the defendant on a demurrer to the plaintiff's evidence. The plaintiff appeals.

The facts admitted by the pleadings and shown by the evidence are substantially as follows: In August, 1912, Carl C. Lightner obtained from the defendant a life insurance policy, in the sum of \$1,000, payable on his death to Catherine E. Lightner, his wife. The policy was signed at the defendant's office in New Jersey, and was applied for by and delivered to Carl C. Lightner at Grand Island, Neb., of which state he was then a resident. The premiums were \$10.15 each, payable quarterly on the 28th days of February, May, August, and November in each year, at the home office of the company, and might be paid to an agent of the company in exchange for official receipts signed by the president or secretary and countersigned by an authorized agent of the company. If not paid when due, the policy was void, except as therein provided. In the payment of any premium a grace of one month—not less than 30 days—was allowed, during which time the policy remained in force. The last premium paid by the insured became due August 28, 1913, and was paid September 29, 1913. The premium that became due November 28, 1913, was never paid. The policy contains this provision:

"If this policy be lapsed for nonpayment of premium, it will be revived any time after the date of lapse upon written application and payment of arrears of premiums, with interest at the rate of 5 per cent. per annum, * * * provided evidence of the insurability of the insured satisfactory to the company be furnished."

About January 1, 1914, the insured authorized his sister, Mrs. Glade, to pay the premium due November 28, 1913, to the company's agent at Grand Island. She had a conversation with this agent over the telephone, in which he stated that it was necessary to pay \$11.15; the extra dollar being for the expense of a medical examination of the insured. She stated that she would send him a check for that amount. This she did not do. She wrote to the insured, informing him of the agent's demand. The plaintiff answered the letter and told Mrs. Glade of a conversation she had with the company's agent at Abilene. Mrs. Glade, upon its receipt, informed the agent at Grand Island of this letter, and

he replied that he could take the \$10.15, but that he was positive the company would not accept it. About January 15, 1914, the defendant's agent at Abilene, Kan., told the plaintiff that there was no reason for paying for re-examination; that the agent at Grand Island was bound to accept the premium of \$10.15; that the plaintiff and the insured had no cause to worry about it at all; and that he could accept the premium and send it to Grand Island, but that the plaintiff could send the money herself. The premium was not paid to the agent at Abilene. The plaintiff relied upon these statements, but did not pay the premium. No written application for reinstatement of the policy was made, nor was any evidence of the insurability of the insured furnished at any time after December 28, 1913. Another agent of the defendant at Kansas City told the plaintiff that he could accept the premium, but nothing was paid to him. The insured died April 11, 1914. At the time of paying the August premium, and for some time previous thereto, he and his wife lived at 543 Greeley avenue, Kansas City, Kan., which was the then place of residence of the insured. The company never notified the insured that it intended to forfeit or cancel the policy on account of nonpayment of the November premium.

[1] 1. The plaintiff contends that the defendant, by accepting, on September 29, 1913, the payment due August 28, 1913, waived the right to demand payment of premiums within the strict time limits of the policy. September 28, 1913, was on Sunday. Payment of the premium on September 29th was within the 30 days' grace allowed by the policy. Gen. Stat. 1909, §§ 5251, 5338, 6343; 38 Cyc. 329; note 23 L. R. A. (N. S.) 759; 14 L. R. A. 120. Payment on that day did not waive the terms of the policy as to the time of payment under the laws of this state, nor under the statutes of Nebraska as set out in the defendant's answer.

[2] 2. The plaintiff's next contention is that the company waived the right to cancel the policy without notice, because the plaintiff and the insured were misled by the acts and representations of the company's agents. This concerns the conversations which the plaintiff and the insured had with the company's agents at Abilene and at Kansas City. Neither of these agents had anything to do with issuing the policy. We do not see wherein either the plaintiff or the insured had any right to rely on the statements made by either of these agents, or wherein they could bind the company by the statements made by them concerning the policy or the rights of the plaintiff or of the insured thereunder. So far as we are able to ascertain, all waivers of conditions of insurance policies have been made by the agents issuing the policies or by their successors or by superior agents or officers. It does not appear that the defendant's agent at Abilene belonged to

either of these classes. The policy in controversy contains this provision:

"No condition, provision, or privilege of this policy can be waived or modified in any case except by an indorsement hereon signed by the president, one of the vice presidents, the secretary, one of the assistant secretaries, the actuary, the associate actuary or one of the assistant actuaries. No modification or change shall be made in this policy except such as is in accordance with the law of the state in which the same is issued. No agent has power in behalf of the company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any representation or information."

This was notice to the plaintiff and to the insured of the limited authority of the defendant's agents. The statements of the agent at Abilene concerned the construction of the policy, and did not change or vary or waive any of its provisions. The agent at Grand Island insisted on the payment of what was necessary to procure a medical examination of the insured in order to satisfy the company of his insurability. Neither the plaintiff nor the insured was misled by the policy or by the agent at Grand Island. Under these circumstances, before the agent at Abilene could waive the conditions of the policy, even if he had authority so to do, he must have received the premium which he said was due. *Cohen v. Insurance Company*, 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; *Ware v. Millville Fire Ins. Co.*, 45 N. J. Law, 177; *Lantz v. Insurance Co.*, 139 Pa. 546, 21 Atl. 80, 10 L. R. A. 577, 582, 23 Am. St. Rep. 202; *May on Insurance* (4th Ed.) vol. 2, § 362. These conversations did not waive any condition of the policy.

[3] 3. The plaintiff argues that the company waived the right to cancel this policy by failing to take some affirmative action to declare the policy forfeited and by failing to issue a paid-up policy to the insured. The policy by its terms provided for its termination in default of the payment of premium. It was not necessary for the defendant to take any affirmative action to declare the policy forfeited on such default. *Joyce on Insurance*, vol. 2, § 1106.

[4] 4. The plaintiff's last argument is that the company failed to send the insured notice of its intention to declare the policy forfeited as required by the laws of this state, and for that reason the policy was not forfeited nor canceled. The plaintiff said:

"We urge the court to decide this point because it is a vital question in this case, and one which, when decided, will probably determine this action."

Section 1, c. 212, of the Laws of 1913 reads as follows:

"It shall be unlawful for any life insurance company other than fraternal doing business in the state of Kansas to forfeit or cancel any life insurance policy on account of the non-payment of any premium thereon, without first giving notice in writing to the holder of any such pol-

icy of its intention to forfeit or cancel the same."

Section 2 of the same act in part reads:

"Before any such cancellation or forfeiture can be made for the nonpayment of any such premium the insurance company shall notify the holder of any such policy that the premium thereon, stating the amount thereof, is due and unpaid, and of its intention to forfeit or cancel the same, and such policy holder shall have the right, at any time within thirty days after such notice has been duly deposited in the post office, postage prepaid, and addressed to such policy holder to the address last known by such company, in which to pay such premium; and any attempt on the part of such insurance company to cancel or forfeit any such policy without the notice herein provided for shall be null and void."

The policy in controversy is a Nebraska contract, and its provisions are governed by the laws in effect in that state when the policy was issued. *Grevenig v. Washington Life Ins. Co.*, 112 La. 879, 38 South. 790, 104 Am. St. Rep. 474; *Smith v. Mut. Life Ins. Co. of N. Y.* (C. C.) 5 Fed. 582; *Cooley's Briefs on the Law of Insurance*, vol. 1, pp. 655-660; and vol. 3, pp. 2290-2293; 25 Cyc. 747, 748; 7 *Encyc. of U. S. Sup. Ct. Rep.* 105. The presumption is that the laws of Nebraska are now the same as ours. No statute similar to ours has been cited to us as being in existence in Nebraska. We have examined the laws of Nebraska, and are unable to find a similar law in existence in that state. We should not be compelled to resort to presumptions in such a matter when the fact can be ascertained definitely.

Disregarding the law of Nebraska, does chapter 212 of the Laws of 1913 control this policy? It was issued in August, 1912. The statute makes a radical change in the terms of the policy, a change which affects the rights of the parties thereto, and which, if intended to apply to policies issued before the passage of the act, must be held in violation of section 10 of article 1 of the Constitution of the United States, prohibiting the states from passing any law impairing the obligation of contracts. *Shaw v. Berkshire Insurance Co.*, 103 Mass. 254; *Joyce on Insurance*, vol. 2, § 1105. There is nothing in the act, however, to show that it is intended to apply to any policies except those issued after its passage.

"Generally, a statute will be construed as applying to conditions that may arise in the future. An act will not be given a retrospective operation unless the intention of the Legislature that it shall so operate is unequivocally expressed." *Douglas County v. Woodward*, 73 Kan. 238, syl. par. 1, 84 Pac. 1023; *City of Wichita v. Railroad & Light Co.*, 96 Kan. 606, 152 Pac. 768.

See, also, *Hope Mut. Ins. Co. v. Flynn*, 38 Mo. 483, 90 Am. Dec. 438; *Germania Life Ins. Co. v. Peetz* (Tex. Civ. App. 1898) 47 S. W. 687; *Joyce on Insurance*, vol. 2, § 1179.

Under the policy, it was not incumbent on the defendant to give the plaintiff or the in-

sured 30 days' notice of its intention to forfeit or cancel the same.

We have examined all matters presented by the plaintiff, and are unable to agree with her in any of her contentions.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 127)

A. B. TEGLEY HARDWARE CO. v. CONTINENTAL INS. CO. (No. 19868.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

INSURANCE — § 419 — FIRE INSURANCE POLICY — PROPERTY COVERED — INTENT.

Recovery can be had on a fire insurance policy covering merchandise contained in different buildings situated on two adjoining lots, although the property insured is described as being situated on one of the lots, where the evidence shows that the insurance agent and the owner intended to insure the property while in the buildings on either or both of the lots.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1122-1124; Dec. Dig. § 419.]

Appeal from District Court, Jewell County.

Action by the A. B. Tegley Hardware Company against the Continental Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. H. Bailey, of Mankato, and Fyke & Snider, of Kansas City, Mo., for appellant. W. R. Mitchell, of Mankato, for appellee.

MARSHALL, J. This is an action to reform a fire insurance policy and to recover thereon. The plaintiff recovered judgment. The defendant appeals.

The policy was issued for \$1,000 on a stock of merchandise, consisting principally of wagons, buggies, plows, and other implements usually kept for sale in hardware and implement houses, also kaffir corn, alfalfa, and other seeds, automobiles, and all other goods, wares, and merchandise not more hazardous, kept for sale by the insured while contained in a one-story iron-clad metal roofed building and adjoining and communicating additions thereto, while occupied as a buggy and implement warehouse and for other purposes not more hazardous, situated on lot 6 of block 2, in Burr Oak, Kan. The plaintiff was engaged in the hardware business. Its buildings were situated on lots 6 and 7 of block 2. The kaffir corn, alfalfa, and other seeds kept for sale by the plaintiff were always kept in the building on lot 7. The plaintiff occupied several separate buildings situated on these lots. A fire destroyed the building and contents located on lot 7. The building on lot 6 extended about five feet over on lot 7. Neither the building on lot 6 nor the contents thereof were damaged. An automobile was burned. The plaintiff then owned but one. There were no seeds burned, but the other property burned fits the description set out in the policy. The defendant's agent that issued the policy was acquainted with the

plaintiff's business, knew the location of the buildings, and knew that the kaffir corn, alfalfa, and other seeds were kept and binned on lot 7. The plaintiff believed that the policy covered the property situated on lot 7. He did not read the policy until after the fire. The insurance rate on the contents of the building situated on lot 6 was \$1.21 per hundred, and on lot 7 \$1.46. The rate paid by the plaintiff was \$1.21.

The defendant contends that there was not sufficient evidence to justify the jury in finding that the policy was intended to cover the property situated on lot 7. The defendant objected to the introduction of certain evidence, demurred to the plaintiff's evidence, and requested certain instructions; all based on the theory that the policy did not cover any property on lot 7. We have examined the evidence, and are of the opinion that there was sufficient to justify the court in submitting to the jury the question of whether or not the policy was intended to cover property situated on both lots 6 and 7. The jury returned a verdict in favor of the plaintiff. That verdict, under the evidence, is conclusive in this court.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 142)

**TOPEKA BRIDGE & IRON CO. v. BOARD
OF COM'RS OF LABETTE COUNTY.**
(No. 20208.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

MANDAMUS §3—RIGHT TO REMEDY—COUNTY BRIDGE CONTRACT.

The plaintiff contracted with the board of county commissioners to erect a bridge over a stream. The contract provided that the board of county commissioners would close the site of the bridge against traffic and would put the plaintiff in possession of the site for the purpose of building the bridge. Before performance the board of county commissioners undertook to repudiate the contract on the ground of illegality. Held, mandamus is a proper remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. § 3.]

Original proceeding in mandamus by the Topeka Bridge & Iron Company against the Board of County Commissioners of Labette County. Defendant's motion for judgment on the pleadings overruled.

D. R. Hite, of Topeka, for plaintiff. S. M. Brewster, Atty. Gen., S. N. Hawkes, Asst. Atty. Gen., and E. W. Columbia, of Oswego, for defendant.

BURCH, J. The action is one of mandamus to compel the defendant to carry out a contract for the erection of a reinforced concrete bridge, which contract the defendant has undertaken to repudiate. No motion to quash the alternative writ was filed and the defendant answered. The answer, however,

contains paragraphs alleging that the court is without jurisdiction, that the alternative writ does not contain facts sufficient to warrant its issuance, and that the plaintiff has an adequate remedy at law. The defendant moves for judgment on these allegations.

The court has jurisdiction to entertain actions of mandamus, and the question is whether or not its power to issue the writ should be exercised in the present instance.

It is said that the alternative writ does not state sufficient facts, because there is nothing which the defendant may be commanded to do. The contract requires the defendant to close the site of the bridge against traffic and to give the plaintiff possession of the site for the purpose of building the bridge. This the defendant may be commanded to do now. Otherwise the plaintiff would incur liability for obstructing the highway and creating a nuisance to public travel.

The remedy by action at law for damages for breach of the contract is not fairly adequate. The profit to accrue to the plaintiff from building the bridge cannot be definitely ascertained in advance of performance, and the plaintiff is entitled to be placed in possession of the right secured to it by the contract.

The motion for judgment in favor of the defendant is overruled.

Some formal issues of fact are made by the pleadings. The real dispute between the parties, however, relates to the validity of the contract, the defendant contending that the plans upon which bids were invited were not sufficient to secure competitive bidding, and consequently that the contract was entered into contrary to law. While the ultimate question is one of law, the defendant desires to aid the court in its solution by presenting some testimony elucidating the subject of reinforced concrete bridge construction. Leave is granted both parties to make a succinct showing relating to this subject, in connection with the proof of such facts as cannot be covered by stipulation. In default of agreement the court will prescribe conditions as to time and method of taking testimony. All the Justices concurring.

(97 Kan. 144)

BEARD et al. v. KANSAS CITY.
(No. 20274.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

INJUNCTION §7—REMEDY BY APPEAL—EFFECT.

In a proceeding under section 1024 of the General Statutes of 1909 to extend a street, the report of the appraisers stated that they appraised and assessed the actual value of the land taken without reference to the projected improvement and the actual damages to all other property thereby. In the column of benefits opposite the tract of land owned by the plain-

tiffs were the figures "300," indicating \$300, while in the column of damages opposite the tract actually taken was the word "none." Held that, in view of the presumption and statement that the appraisers acted in accordance with the law, it can fairly be deduced from the entire report that they subtracted the value of the land taken from the benefits to the entire tract, giving a surplus of \$300, amounting, at most, to an irregularity which could be remedied by an appeal taken at proper time, and hence injunction will not lie.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 6, 34; Dec. Dig. ¶7.]

Appeal from District Court, Wyandotte County.

Action by C. C. Beard and another against the City of Kansas City, Kan. From a judgment for defendant, plaintiffs appeal. Affirmed.

David F. Carson and James T. Cochran, both of Kansas City, for appellants. R. J. Higgins, of Kansas City, for appellee.

WEST, J. The plaintiff sought to enjoin the city from taking possession of plaintiff's land for the purpose of opening a street under certain pretended condemnation proceedings, alleging, in substance, that they were void, and were had without in any manner assessing the damages caused thereby or ascertaining the actual value of the land proposed to be taken, or assessing the actual damages to other property affected thereby, or assessing against the city the amount of benefit to the public generally, and also that the appraisers through mistake or by inadvertence assumed or acted upon the presumption that plaintiff's land was a part of a public highway, and therefore that no compensation was due them. The report of the appraisers was set out as an exhibit, and showed that the amount of damages assessed was nothing, and the amount of benefits was \$300. The defendant demurred, and the demurrer was sustained upon the ground that facts sufficient to constitute a cause of action were not stated. Other complaints are made and other questions are argued, but the case turns upon the one point whether or not, under the amended petition and its exhibits, the defendant is shown to have taken the plaintiff's land without the required allowance of damages.

The plaintiff insists that, in the face of the allegation that no such allowance was made and of the exhibited report showing the word "none" under the heading "amount of damages allowed," it cannot be said that the statutory requirement was followed. The city contends that the real fact is shown by the report of the appraisers, which is that they did their duty and assessed the benefits \$300 greater than the damages, and simply stated in their report the difference, without giving the two basic items, the report itself stating that:

They "upon actual view proceeded to fairly and impartially ascertain, appraise, and assess

the actual value of the land proposed to be condemned and taken for such street, without reference to the projected improvement and the actual damages to all other property thereby, and we assessed the city the amount of the benefits to the public generally, * * * and we now return said schedule and list in full as a complete and impartial statement of said damages and benefits."

It is argued that the law requiring, in case of an appeal, a bond that the party appealing will pay all costs if he does not recover a judgment for a greater amount than that allowed him by the appraisers (Gen. Stat. 1909, § 1024), implies that the report must specify the sum actually allowed. But it seems beyond question that the allowance of nothing gives the same right of appeal as the allowance of a nominal sum would give, and if in case the benefits exceed the damages the appraisers should simply report the overplus of the former, instead of the two amounts with the remainder, the only effect would seem to be that the party aggrieved could appeal with a much smaller bond than would be required in case the other method had been followed by the appraisers in their report. In *Com'rs of Pottawatomie County v. O'Sullivan*, 17 Kan. 58, a case involving the appropriation of a right of way for a public road, in speaking of compensation to the owner, it was said:

"But this compensation is secured if the individual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We, of course, exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits." (Page 59 of 17 Kan.)

See, also, *Toble v. Com'rs of Brown County*, 20 Kan. 14; *Roberts v. County of Brown*, 21 Kan. *247; *Trosper v. Com'rs of Saline County*, 27 Kan. 391.

The owner was entitled to the value of the land taken less the benefit to his remaining land. The report shows that both the tract owned by the plaintiffs and the part thereof taken for the proposed improvement were considered, and the special benefits to the former assessed. While it does not clearly appear that the value of the strip taken was fixed, yet, upon the assumption and the general statement in their report that the appraisers did their duty and followed the statute, there is a basis for believing that they, in fact, named as benefits the surplus over the value of the land taken. If this be true, it amounts to nothing more than an irregularity, and the statute has provided an appeal from the award of benefit or damages to be taken ten days after confirmation and notice thereof, and it is the opinion of the court that this remedy was proper and ample and the one to be availed of, and that injunction will not lie.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 49)

CITY OF TOPEKA v. CENTRAL SASH & DOOR CO. (No. 19797.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***1. INDEMNITY §13—DEFECTIVE SIDEWALK—RECOVERY AGAINST CITY—LIABILITY OF ABUTTING PROPERTY OWNER.**

Where a city has been held liable for injuries sustained by a person lawfully using a defective sidewalk, the city can recover from an abutting property owner whose active fault caused that condition of the sidewalk.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29-35; Dec. Dig. §13.]

2. MUNICIPAL CORPORATIONS §808—DEFECTIVE SIDEWALK—INJURY TO PEDESTRIAN—LIABILITY OF ABUTTING PROPERTY OWNER.

The liability of an abutting property owner whose active fault caused a defective condition in a sidewalk does not depend on that liability being fixed by ordinance or by notice to repair.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. §808.]

Appeal from District Court, Shawnee County.

Action by the City of Topeka against the Central Sash & Door Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. G. Slonecker and J. M. Stark, both of Topeka, for appellant. W. C. Ralston, of Topeka, for appellee.

MARSHALL, J. This action was brought by the city of Topeka to recover from the defendant the sum of \$631.15, with interest, which the plaintiff alleged it was compelled to pay out in satisfaction of a judgment obtained against it for personal injuries sustained by a pedestrian on account of a defective sidewalk. The defendant demurred to the petition. This demurrer was overruled. From this the defendant appeals.

The petition alleges that the defective condition of the sidewalk was caused by the defendant in driving horses and wagons over the walk in front of a building owned and used by the defendant in its private business; that the defendant then permitted the walk to remain in that defective condition; that the ordinances of the city prohibited riding or driving over the sidewalk; that the defendant was notified of the action against the city and asked to defend in that action; that no defense was made by the defendant; and that the city paid the judgment rendered against it.

The argument of the defendant is that the parties to this action are in pari delicto, and that therefore the one cannot recover from the other; that, because the defendant is an abutting property owner and had a right to use the walk, it was under no duty to repair, and therefore it is not liable; that the ordinances of the city do not render the defendant liable; and that, because there was no

notice requiring the defendant to repair the sidewalk pleaded, it is not liable.

[1] 1. The defendant caused the defective condition of the sidewalk. The plaintiff did not participate in producing that condition. The plaintiff was negligent in permitting the condition to remain, but it did not in any manner cause the condition. The plaintiff was not in equal wrong with the defendant. In 40 L. R. A. (N. S.) 1165-1172, is found an exhaustive note on "Right of municipality to recover indemnity or contribution from one for whose tort it has been held liable." A large number of cases are there cited to support the proposition that, where municipalities have been held liable for injuries sustained by persons lawfully using defective streets or sidewalks, the cities can recover from those whose negligence or active fault as abutters, licensees, or volunteers caused the defective conditions. See, also, note 61 L. R. A. 591. The fact that the defendant was an abutting property owner and had a right to use the walk does not relieve it from liability to the city. Note 12 L. R. A. (N. S.) 951.

[2] 2. This liability of the original wrongdoer is not dependent upon the existence of any ordinance declaring his liability, nor upon the fact that there has been no notice given to the wrongdoer to repair the sidewalk. He is liable because of his active fault in producing the defective condition.

The demurrer to the petition was properly overruled. All the Justices concurring.

(97 Kan. 120)

STRAMEL v. HAWES. (No. 19861.)*

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***1. CONTRACTS §97—RATIFICATION—ACTION FOR BREACH.**

Where a party to a contract elects to sue upon it for damages resulting from an alleged breach of its terms by the defendant, he thereby ratifies it as a valid contract, binding alike upon himself and the defendant.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 442-446; Dec. Dig. §97.]

2. SPECIFIC PERFORMANCE §128—JUDGMENT FOR DAMAGES.

Although specific performance is still an equitable remedy, the granting of which rests in the discretion of the court, the Code has abrogated the rule, which formerly obtained, that a judgment for damages will not be awarded where specific performance is found impossible, unless the court, in its discretion and upon a consideration of the equities, concludes that it is just and equitable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. §128.]

3. SPECIFIC PERFORMANCE §128—RECOVERY OF DAMAGES—RIGHT.

The rule, which formerly obtained, that where a party knows at the time he brings suit for specific performance that the contract cannot be specifically performed or decreed, he will not be allowed to recover compensation in the

way of damages, has also been abrogated by the Code.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. ☞ 128.]

4. SPECIFIC PERFORMANCE ☞115—CROSS-PETITION—DAMAGES IN LIEU OF SPECIFIC PERFORMANCE.

In an action in which plaintiff sues to recover damages for the breach by defendant of a contract to exchange real estate, the defendant may set up a cross-petition, alleging that plaintiff breached the contract, and ask for specific performance, with a prayer in the alternative for damages, notwithstanding defendant is aware of the fact that plaintiff has put it beyond his power to perform.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 373; Dec. Dig. ☞115.]

5. APPEAL AND ERROR ☞1008—JUDGMENT—CONCLUSIVENESS.

Where plaintiff brings an action to recover damages for the defendant's breach of a contract to exchange real estate and the court finds that it was the plaintiff, and not the defendant, who breached the contract, a judgment in defendant's favor on his cross-petition for damages will not be set aside on considerations of equity, or because it appears that plaintiff made a bad bargain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ☞1008.]

Appeal from District Court, Edwards County.

Action by Anton Stramel against A. B. Hawes. From judgment for defendant, plaintiff appeals. Affirmed.

T. S. Haun, of Kinsley, and Jamison, Hutchison & Ostergard, of Kansas City, Mo., for appellant. Dyer & Moffat, of Kinsley, and F. Dumont Smith, of Hutchinson, for appellee.

PORTER, J. In some respects this is a remarkable case. The plaintiff sued to recover \$500 damages for the alleged breach by the defendant of a written contract for an exchange of real estate, claiming that he had paid that amount as commissions to one Joe Dome, his agent in procuring the contract. The defendant answered with a cross-petition, admitting the validity of the contract, but claiming that plaintiff had breached it; that defendant was and continued to be ready, able, and willing to comply with his part of it and to exchange properties. He asked a decree against plaintiff for specific performance, with a prayer in the alternative for damages in case plaintiff had placed it beyond his power to perform. The plaintiff then was willing to drop the matter, and filed his motion to dismiss the action, alleging that he had never authorized it to be brought. The court tried out that issue first, and found against the plaintiff, who then filed a reply, and the cause went to trial before the court. Separate findings of the facts and conclusions of law were made at the request of plaintiff, and among these

is the finding that Dome had no authority to sign the contract as agent for plaintiff; that the contract never bound the plaintiff to do anything until he ratified it by bringing his action upon it to recover damages for its breach. The court also found that it was the plaintiff, and not the defendant, who breached the contract, and that defendant was entitled to recover damages against plaintiff in the sum of \$4,520, and judgment was rendered accordingly. This left the plaintiff in a serious predicament, and it is not surprising that he appealed. At the time the judgment was rendered, the court added a post-script statement, which became a part of the record, and which reads:

"The trial court feels that the statement in this case is inequitable; that defendant could not have recovered in this case if plaintiff had not elected to hold said contract good and sue thereon; that the question of equity was not considered by the court in rendering judgment in this case, but the judgment is based solely upon the court's idea that plaintiff, in filing the suit in this case, has ratified said contract and is bound by the terms thereof. This statement is made in order that the Supreme Court may know the theory upon which judgment was rendered in this case."

By the contract, which is dated November 18, 1912, plaintiff agreed to trade three sections of land in Nebraska for an apartment house in Kansas City, Kan., belonging to defendant. The Nebraska land was represented as subject to mortgages amounting to \$7,000, due May 17, 1916. As a matter of fact, \$1,000 of the incumbrance was past due, and the balance matured a year later. The court found that the apartment house was represented to be subject to two mortgages aggregating \$5,000, due in five years. The contract is silent as to the date when these mortgages were due, and the court's finding is upon evidence of oral statements made to plaintiff by defendant's agent previous to the execution of the contract. The amount of mortgages on the Kansas City property turned out to be \$5,200, but before plaintiff declared his intention to refuse to make the trade, the defendant took up the \$200 incumbrance, and the release was noted on his abstract, which was returned to plaintiff for further examination. It appears also that a suit to foreclose one of the mortgages on the apartment house was pending in the district court of Wyandotte county, but defendant notified the plaintiff that arrangements had been made to dismiss the foreclosure and to extend the mortgage, and that he was waiting to learn whether the plaintiff would arrange to procure an extension of the mortgages on the Nebraska land. The correspondence between the parties and their attorneys, concerning requirements in respect to the abstracts, continued for several weeks after the expiration of the 30 days agreed upon for the completion of the trade. The court found that the plaintiff failed to return

defendant's abstract after it was sent to him the last time, or to answer inquiries respecting the defendant's requirements as to plaintiff's abstract, and that on April 14, 1913, plaintiff notified defendant that he refused to complete the trade, assigning as his reasons therefor that he had never made a valid contract, that defendant had failed to comply with his part of it, and that there were fraudulent representations made to him by defendant concerning the property and the incumbrances thereon.

The particular matters which doubtless impelled the trial court to conclude that the judgment is inequitable are the facts stated in finding No. 13, namely, that at the time the contract was made, plaintiff's Nebraska land was worth \$11,520, subject to \$7,000 incumbrances, while the apartment house was worth only \$5,000, and was incumbered for that amount, making the difference between the values of the properties \$4,520, the amount for which the court gave defendant judgment.

The plaintiff relies upon two assignments of error: First, that the court erred in its conclusions of law from the facts found; second, that it erred in rendering judgment in defendant's favor. The main contention is that the judgment is inequitable, and naturally much importance is attached to the statement of the trial judge that equitable considerations did not enter into its rendition. There is a statement in plaintiff's brief that this action was brought to recover as damages the commission which he paid to his agent "*because of defendant's fraud in procuring the contract, and his failure to perform it.*" That portion of the statement which we have italicized is not supported by the abstract. The petition to which plaintiff refers contains no averment of fraud in procuring the contract, the cause of action being placed solely upon the alleged failure of defendant to perform. While the court permitted plaintiff to prove a misrepresentation with respect to the amount of incumbrances on the Kansas City property made by defendant's agent before the contract was executed, it must be apparent that the validity of the contract was not in issue. Nor could its validity or binding effect as to himself have been raised as an issue by the plaintiff. In order to recover damages for its breach, it became necessary for him to affirm the contract, and as the trial court found, he did this when he brought his action on the contract.

[1] It hardly seems necessary to cite authorities to show that when plaintiff elected to sue upon the contract for damages resulting from the alleged breach of its terms, he thereby ratified it as a valid contract, binding alike upon himself and the defendant. But, see, *McNutt v. Nellans*, 82 Kan. 424, 429,

108 Pac. 834, 836, where the court used this language:

"He cannot be permitted to blow hot and cold—to seek the specific performance of a contract and in the same action claim that the contract itself is void."

"After the right to rescind a contract has accrued, the party having the right may waive it by instituting an action to recover damages for the breach of the other party, since such an action is based upon an affirmation of the contract." 24 A. & E. Encycl. of Law, 647.

[2, 3] The plaintiff assumes that because of the settled doctrine that specific performance is not a matter of right, but always an equitable remedy, the granting of which rests in the discretion of a court of equity, therefore a judgment for damages cannot be awarded when specific performance is found impossible, unless the court, in its discretion and upon a consideration of the equities of the whole case, concludes that it is just and fair to grant such relief. He doubtless relies upon a principle which is stated in the following language:

"It is well settled * * * that a court of equity will not grant pecuniary compensation in lieu of performance, unless the case made out is one for equitable interposition, and would entitle the plaintiff to performance in specie but for the intervening facts." 26 A. & E. Encycl. of L. 86.

The doctrine, however, obviously has no application to an action for damages in a court of law. It is like many other rules governing the procedure in suits for specific performance which still obtain in equity courts, such, for instance, as the rule that where the plaintiff knows at the time he files the suit for specific performance that the contract cannot be specifically performed or decreed, he will not be allowed to recover compensation in the way of damages for the reason that a court of equity would have no jurisdiction. As noted in 20 Cyc. 487, "these rules are abrogated by the Code."

Suppose the situation were reversed and all the advantages of the trade had been on plaintiff's side. He sues to recover damages for defendant's breach of the contract. Would it have been a sufficient defense to the cause of action for defendant to have pleaded that he had made a bad bargain; that the Nebraska land was not worth as much as the apartment house? Clearly not.

"Although inadequacy of consideration in contracts of sale, either in the price or property sold, may be a ground of defense, yet the facility of contracting and the free exercise of the judgment and will of the parties require that, as a general rule, they should be sole judges as to the value of the benefits to be derived from their bargains. * * * And such is now the rule. 'For courts of equity, as well as courts of law, act upon the ground that every person who is not from his peculiar condition and circumstances under disability is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for

courts of justice, but for the party himself to deliberate upon." Story's Eq. Juris. § 244." Waterman on The Specific Performance of Contracts, § 179.

In Missouri River, Ft. S. & G. R. Co. v. County of Miami, 12 Kan. 482, it was said:

"Mere inadequacy of price affords no ground to set aside a contract of sale, unless it be of so gross a nature and given under such circumstances as to afford a necessary presumption of fraud or imposition." Syllabus.

Trial courts frequently find it necessary to give judgments for damages for the breach of contracts which are harsh and inequitable, and this court is not permitted to reverse such judgments upon purely equitable considerations. The plaintiff cannot claim that he has been impeled upon the technicalities of the law. It is not a technical rule that one who is a party to a contract and who sues to recover damages for its breach, thereby affirms that the contract is valid and binding upon himself as well as the defendant. It is a substantive rule, founded in the very nature, essence, and reason of things, a rule which does not admit of exceptions for the purpose of allowing the plaintiff in such an action to change his foothold and, when met with a cross-demand of the other party based upon the theory that the contract is valid, then to assert that he is not bound by its terms.

[4, 5] In plaintiff's brief it is asserted that there is no allegation in the cross-petition, or evidence, or finding, to the effect that "plaintiff had disposed of his Nebraska land or in some other way put it beyond his power to comply with the contract." An allegation of that kind was neither necessary nor proper in view of the theory upon which the cross-petition was based, which was that defendant desired specific performance, but if for any reason that relief could not be decreed he wanted his damages. Under the rules which prevailed before the adoption of codes, as already noted, an allegation, showing that the complainant was aware of the fact that specific performance could not be decreed, would have made the pleading subject to demurrer. The cross-petition follows a form approved in Henry v. McKittrick, 42 Kan. 485, 22 Pac. 576. The defendant challenges the statement that there was no evidence showing that plaintiff had disposed of his Nebraska lands, and the challenge is supported by filing here certified copies of deeds executed by plaintiff, conveying the lands to a third party, which it appears were introduced in evidence, though not mentioned in the abstract. This disposes of the contention that there was no evidence of the fact; and the judgment in defendant's favor includes a finding that plaintiff had placed it beyond his power to perform the contract.

The judgment must be affirmed. All the Justices concurring.

STATE ex rel. CASTER et al. v. FLANNELLY, Judge, et al. (No. 20824.)

(Supreme Court of Kansas. Jan. 18, 1916.)

(Syllabus by the Court.)

1. REMOVAL OF CAUSES — MANDAMUS—
"CIVIL ACTION."

An original proceeding in mandamus is not removable from a state to a federal court for the reason that it is not a "civil action" within the meaning of the Removal Acts of Congress (Act March 3, 1911, c. 231, § 28, 36 Stat. 1094 [U. S. Comp. St. 1913, § 1010]).

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 11-20; Dec. Dig. —4.]

For other definitions, see Words and Phrases, First and Second Series, Civil Action.]

2. REMOVAL OF CAUSES — ANCILLARY
SUIT—RIGHT TO REMOVE.

A suit which is ancillary and supplemental to one previously brought in a state court, and which is so connected with the original suit as to form an incident thereto, and to be substantially a continuation thereof, cannot be removed into a district court of the United States, unless the original suit has been previously or may be simultaneously removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 21, 22; Dec. Dig. —5.]

3. MANDAMUS — COMPELLING PUBLIC
SERVICE—EXISTENCE OF OTHER REMEDY.

The Public Utilities Act makes it the duty of the Public Utilities Commission to require a public utility to render efficient service, and provides the machinery for an investigation by the Commission into all questions affecting the character and sufficiency of such service. This court will not entertain a proceeding in mandamus to compel a public utility to furnish efficient and sufficient service until the Public Utilities Commission has made an order requiring the defendant to furnish more efficient service, which the defendant has refused to obey.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. —3.]

4. MANDAMUS — ISSUANCE OF WRIT—
RIGHT.

Mandamus being a discretionary writ, the court will refuse to issue the writ where it would be useless, or futile, and of no public benefit.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. —16.]

5. COURTS — INJUNCTION — JURISDICTION—
SUPREME COURT.

In an original proceeding in mandamus, a supplemental petition was filed asking the court to enjoin the defendants from prosecuting an action begun in a federal court, the plaintiff claiming that the jurisdiction of this court in the original proceeding was thereby interfered with. Upon a consideration of the issues raised by the pleadings, the court finds that nothing substantial remains to be determined in the original or supplemental proceeding, and the injunction is therefore denied and the proceeding in mandamus dismissed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 597; Dec. Dig. —207.]

Original mandamus by the State, on the relation of H. O. Caster, as Attorney for the Public Utilities Commission, and others, against Thomas J. Flannelly, as Judge of the District Court of Montgomery County, and John M. Landon and others, as Receivers of the Kansas Natural Gas Company, to secure vacation of a restraining order, wherein a

petition was filed for removal and an injunction order was requested. Petition for removal denied, injunction denied, and proceedings dismissed.

H. O. Caster, A. E. Helm, F. S. Jackson, all of Topeka, for plaintiffs. Chester I. Long, of Wichita, J. H. Atwood, of Kansas City, Mo., T. S. Salathiel, of Independence, and Robert Stone and T. F. Doran, both of Topeka, for defendants.

PORTER, J. This is an original proceeding in mandamus. It was brought August 17, 1915, by the Public Utilities Commission as plaintiff against Thomas J. Flannelly, judge of the district court of Montgomery county, and the receivers of the Kansas Natural Gas Company, appointed by him. The main purpose of the proceeding was to vacate a restraining order issued by the district judge against the Utilities Commission affecting the rates to be charged for gas furnished by the receivers to the public. The receivers filed an answer which, in addition to other defenses, alleged that on July 16, 1915, the Utilities Commission had made a ruling denying their application for an order fixing a reasonable rate to be charged for gas supplied to their customers, and that the old rate was unreasonable and confiscatory. On October 4, 1915, a decision was rendered (State ex rel. v. Flannelly, 96 Kan. 372, 152 Pac. 22), in which it was held that the district court of Montgomery county obtained no jurisdiction over the Commission, and that its orders restraining the Commission from enforcing a rate should be vacated and set aside. The court at that time also held that the receivers of the gas company are under the control of the Utilities Commission; that the Commission has the exclusive power to fix the rates to be charged for the service rendered by the gas company while it is being operated by the receivers; that the receivers are not engaged in interstate commerce, at least that kind of interstate commerce which takes the business from the control of the state. It was held, however, that no writ of mandamus should issue, for two reasons: First, because the Public Utilities Commission had not in fact made a final order establishing a rate to be charged for gas; second, because the old rate of 25 cents was shown by the findings of the Utilities Commission itself to be unreasonable and confiscatory. In the opinion it was held that the court would retain jurisdiction of the cause as to the defendant receivers "for such orders and judgments as may be hereafter made."

Thereafter, the Public Utilities Commission granted the receivers a rehearing of their application to fix a reasonable rate, and on December 10, 1915, the Commission issued a final order, establishing a rate of 28 cents. The receivers accepted this rate under protest, and on December 28, 1915, fil-

ed with the Utilities Commission a schedule of rates and rules in accordance with the order of December 10th, and since the filing of the schedule the receivers have been charging the rate thus established. On the 29th of December, 1915, the receivers filed a suit in the United States District Court for the District of Kansas against the Public Utilities Commission, seeking to enjoin the enforcement of the order of December 10th, alleging, in substance, that the receivers are engaged in buying gas in the state of Oklahoma and in transporting it through pipe lines into and through the state of Kansas and into the state of Missouri, and in producing gas in the state of Kansas; that the gas taken in Oklahoma is commingled with the gas produced in Kansas and distributed from the pipe lines to customers in both Kansas and Missouri, and that in so doing, the receivers are engaged in interstate commerce; that the Public Utilities Commission of the state of Kansas has no jurisdiction to fix the rates and rules for the sale of gas by the receivers to their customers in Kansas; and further alleging that the order of the Commission of December 10th is unlawful for the reason that the rates fixed are unreasonable and confiscatory.

On January 8, 1916, the Public Utilities Commission presented an application in the original proceeding in mandamus, asking the court for an injunction order, restraining the receivers from further prosecuting the suit begun in the federal court. A temporary restraining order issued, and the application for a temporary injunction was set down for hearing. In the meantime, on January 7, 1916, the receivers of the gas company filed their petition for removal of the cause to the United States District Court for the District of Kansas.

[1] The first question before the court at this time is the application of defendants for removal, which has been contested by the plaintiff. The petition for removal renews again the contention of the receivers that they are engaged in interstate commerce, and alleges that the order of December 10, 1915, established an unremunerative and confiscatory rate, which imposes a burden upon the interstate commerce conducted by them.

It will not be necessary to consider many of the legal propositions presented and urged at the hearing and in briefs submitted by counsel on both sides, because in our view of the matter the controversy before us is narrowed down to two questions. This being an original proceeding in mandamus, it cannot be removed to a federal court. On May 18, 1915, we denied a petition for removal in the case of City of Garden City v. Garden City Telephone, Light & Manufacturing Co., on the ground that, being an original proceeding in mandamus, it was not removable. No opinion was written. In *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct.

633, 30 L. Ed. 743, it was held that an original proceeding in mandamus is not removable for the reason that it is not a suit of a civil nature within the meaning of the Removal Act of 1875.

[2] It should be stated also that the plaintiff the Public Utilities Commission, on January 3, 1916, filed a supplemental petition in this proceeding, in which, besides praying for a permanent injunction against the prosecution by the receivers of their suit in the federal court, a writ of mandamus is sought to compel the receivers to perform their official duties and to furnish to their customers efficient and sufficient service.

"A suit, which is ancillary and supplemental to one previously brought in a state court, and which is so connected with the original suit as to form an incident thereto, and to be substantially a continuation thereof, cannot be removed into a circuit court of the United States, unless the original suit has been previously or may be simultaneously removed." 34 Cyc. 1229.

See, also, *Western Union Telegraph Co. v. State ex rel.*, 165 Ind. 492, 495, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880; *State of Indiana v. Lake Erie & W. Ry. Co.* (C. C.) 85 Fed. 1; *State of Ohio v. Columbus & Xenia R. Co.* (C. C.) 48 Fed. 626; 34 Cyc. 1229, notes 89, 90.

[3] The petition for removal of the cause to the federal court is therefore denied for the sufficient reason that, being an action in mandamus to compel the receivers to perform their legal duties, the cause is not removable. At the same time, the court deems it proper to inquire what, if anything of substance, remains for consideration or determination in the original proceeding. At the hearing of the application for removal it was conceded that the receivers have complied with the order of the Commission, and have put into effect the rate fixed by the order of December 10, 1915. The fact that they are seeking by the suit in the federal court to enjoin the rate as confiscatory and unreasonable makes no difference. They have the right to question the reasonableness of the rate established by the Commission, and to choose the forum where that question shall be adjudicated. Public Utilities Act, Laws 1911, c. 238, § 21.

The original petition filed here in August, 1915, alleged that the defendants as receivers had neglected to comply with their legal duties and to supply to their customers throughout the state efficient and sufficient service, and the prayer of the petition asked that they be compelled to perform their official duties. No facts were alleged upon which the court could have made an order. It was not even alleged that the Commission itself had ever made any order requiring the defendants to supply efficient service or sufficient gas. Nor was the matter of the character of the service presented to the court on the hearing of the cause at the September term other than by incidental reference to the interest the public was supposed to have

in an early determination of the controversy. No order directing the receivers to do any specific thing was asked. The only questions argued or presented, aside from those respecting the jurisdiction of the district court of Montgomery county to make certain orders, were questions affecting the action of the Commission in declining to fix a reasonable rate at which the receivers should furnish gas.

This court saw no necessity for prolonging the litigation over rates, and believed that the interests of the public and the parties would be best served by making it unnecessary to go over much of the ground a second time, or to thresh out old straw, and therefore retained the cause, so that when the Public Utilities Commission should make such orders as it saw proper to make, either of the parties might in this proceeding have any questions as to rights or duties arising thereon promptly and speedily considered and judicially determined.

But it was conceded at the hearing of the petition for removal that the only order issued against the receivers by the Utilities Commission is the order of December 10, 1915, fixing rates, and that this order has been obeyed and enforced by the defendants. The Utilities Commission has made no order of any kind requiring that defendants render more efficient service. The supplemental petition in this cause, filed January 5, 1916, repeats the averments of the original petition, to the effect that the receivers neglect and refuse to furnish efficient and sufficient service, and asks that an alternative writ of mandamus issue to compel them to do so. The Public Utilities Act places the duty upon the Commission to require a public utility to render efficient service, and provides the machinery for an investigation by the Commission into all questions affecting the character and sufficiency of such service. Laws 1911, c. 238, §§ 9, 10, 13, 14, 15, 16. When the Commission upon due notice and inquiry has made a reasonable order requiring the defendant receivers to maintain more efficient service, the presumption is that defendants will obey and enforce the order. If not, the courts will entertain proceedings to compel them to do so.

[4, 5] Since it is conceded that the defendants have obeyed all the orders thus far made by the plaintiff, it is apparent that nothing substantial is left of the original proceeding in mandamus. This court has no original jurisdiction in injunction, and no power to issue an injunctive order, except for the purpose of protecting its own jurisdiction and the rights of the parties, until it has determined some controversy pending before it. *C., K. & W. R. Co. v. Com'rs of Chase County*, 42 Kan. 223, 21 Pac. 1071; *State v. Brewing Association*, 76 Kan. 184, 90 Pac. 777. Mandamus is a discretionary writ. The court has held that it would refuse to issue the writ

where it would be useless or futile and of no public benefit. *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 309, 150 Pac. 544.

We have then an action pending here in mandamus which is not removable, but the averments of the petition are vague and general; and since it is now conceded that the Public Utilities Commission has made no order requiring defendants to furnish better or more efficient service, the court would not be justified in granting the writ nor in longer retaining the proceeding. It follows, too, that there is no reason why the court should issue an injunction to protect its jurisdiction, and therefore the plaintiff's application for an order to restrain the defendants from prosecuting the suit begun in the federal court will be denied, and the proceeding in mandamus is dismissed. All the Justices concurring, except DAWSON, J., who did not sit.

(97 Kan. 110)

GALLOWAY v. HUTCHINSON INTERURBAN RY. CO. (No. 19857.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

CARRIERS \S 347—INJURY TO STREET CAR PASSENGER—CONTRIBUTORY NEGLIGENCE—QUESTION OF LAW.

Under the facts stated in the opinion, it is held that a passenger on a north-bound street car who alighted while the car was in motion, and before it reached the place for the discharge of passengers passed around the rear end of the car, and was struck by a south-bound car moving on a parallel track, was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. \S 347.]

Appeal from District Court, Reno County.

Action by Frank Galloway, by T. A. Galloway, his next friend, against the Hutchinson Interurban Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with direction.

A. C. Malloy and C. M. Williams, both of Hutchinson, for appellant. F. L. Martin, and Van M. Martin, both of Hutchinson, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained through the negligence of the defendant. The plaintiff recovered, and the defendant appeals.

The defendant operates a double-track street railway running north and south on Main street in the city of Hutchinson. The inside rails of the two tracks are 58 inches apart, and the clearance between cars is about a foot. The plaintiff was a passenger on a north-bound car operated on the east track. At a point on Eighth street, which extends east and west across Main street, he alighted at the rear and on the east side of the car; passed behind it, and was struck by a south-bound car operated on the west

track. Eighth street is 39.8 feet wide and 27 feet wide from curb to curb. North-bound cars stop to receive and discharge passengers at the north side of the street. The south-bound car was moving at a rate of speed placed at from 8 to 30 miles per hour. An ordinance limited the speed of cars in that part of the city to 15 miles per hour. There was evidence that no gong was sounded, and there was evidence that there was no one on the street as the two cars approached Eighth street. The plaintiff was riding on the rear platform at the side of the back door of the north-bound car. He testified as follows:

"A. I told the conductor I wanted off at Eighth, and he pulled the bell rope, and we were between the middle and the north side of Eighth, and when I started to alight the car had practically come to a stop—if it hadn't come to a stop, it had practically come to a stop—and he pulled the rope for the car to resume its speed, and as he pulled it I got off the car right there. I went around behind it; I went right around behind it; it wasn't over four feet from me when I went around behind it, and as I stepped out into plain view of the other track I saw the other car coming, and at that time it was, I should judge, three-fourths of a car length away from me. I tried to jump back then, and that is all I know about it. * * * Q. Where do you think he gave this signal to go ahead? A. It was between the center of Eighth street and the north side of it. It wasn't until he gave this signal that I got off; I was going to ride to the corner. Q. Somewhere between the center and the north side of Eighth? A. Yes, sir; I would judge it was then. I judge it was, because I was even with the sidewalk when I started across. Q. You say you judge it was; do you know where it was? A. I started—started to start across the street, perhaps a little angling to the northwest. Q. The car was in motion after you got off? A. It started in motion. Q. Started in motion? A. Yes, sir; it started to kind of move afterwards. Q. It never did stop? A. If it didn't come to a stop, it had just—in an instant it would stop. * * * Q. When you got over behind the street car and attempted to cross the track beyond, didn't you look to see whether there was any other car coming? A. I looked as I was crossing the street; yes, sir. * * * Q. How did you get off? A. I got off and stopped and went around behind the car. Q. Which way did you face as you got off? A. Well, sir; I just got off with my face toward the north, and then turned right around and went around behind it. Q. You got off facing towards the north? A. Yes, sir. Q. And as the car proceeded you turned toward the left to go across there? A. I went behind it; it hadn't made much progress yet. Q. It hadn't made any then, had it? A. Perhaps a few inches. Q. According to that the car must have stopped just prior to your getting off? A. Practically speaking; yes, sir. Q. I don't know what you mean by 'practically speaking.' A. It didn't stop prior to my getting off, but it had just about stopped. Q. It hadn't stopped then? A. If it was going at all, it was nothing that—it wasn't going at all practically. You might say it was stopped. Q. It was stopped? A. Yes, sir. Q. At what rate of speed were you proceeding across the street? A. Well, about my usual gait. Q. You mean by that what? A. Walking."

The jury discredited this testimony in important particulars, and returned the following special findings of fact:

"Q. 1. Did plaintiff get off the north-bound car while it was in motion? A. Yes.

"Q. 2. How fast was it going at that time?
A. Four miles per hour.

"Q. 3. Where, with reference to the south line of Eighth avenue, did the plaintiff get off?
A. South of the center of Eighth street.

"Q. 4. Did plaintiff run after getting off?
A. No. * * *

"Q. 6. Did plaintiff stop or look and listen to see if a car was approaching from the north before going on west track? A. Yes.

"Q. 7. Did plaintiff see the south-bound car before he got near enough for it to strike him?
A. No. * * *

"Q. 9. Could the motorman have stopped the south-bound car after seeing plaintiff in time to avoid the accident? A. No.

"Q. 10. Was there anything at or near Eighth avenue to apprise the motorman of the south-bound car of danger? A. Yes.

"Q. 11. If you answer the last question in the affirmative, state what it was? A. North-bound street car. * * *

"Q. 13. Where, with reference to the south line of Eighth avenue did plaintiff and south-bound car come into contact? A. Center of Eighth street."

The court set aside the sixth finding so far as it indicated that the plaintiff stopped before going on the west track. The negligence charged in the petition consisted in running the south-bound car at an excessive rate of speed without giving warning of its approach and without having it under control when passing the north-bound car which had just discharged the plaintiff at a street intersection. Motions were made for judgment on the special findings and for a new trial, which were overruled.

It is difficult to perceive in what particular the motorneer of the south-bound car was negligent toward the plaintiff, and breach of duty to use due care toward the aggrieved person is indispensable to recovery. *Express Co. v. Everest*, 72 Kan. 517, 522, 83 Pac. 817. The jury did not find and could not find from the evidence that the motorneer of the south-bound car was required to sound the gong, run at a moderate rate of speed, or have his car under control because of the amount of traffic or the number of pedestrians at the Eighth street crossing when he approached it. There was no dispute that he could see whatever there was to see as the two cars approached the crossing from opposite sides, and the jury limited the appearance of danger to the presence of the north-bound car alone. This car, however, was south of the center of the street when the plaintiff alighted. It had not reached the place where it should stop if passengers were to be discharged, and it was still moving at the rate of 4 miles per hour. The plaintiff was struck in the center of the street, substantially 20 feet south of the place where he should have alighted. The motorneer of the south-bound car had the right to believe, from the practice and from the motion of the north-bound car, that if passengers on that car were to be discharged at all, they would not be discharged south of the center of the street. If this were done, he would be safely beyond the place, and any one who alighted and desired to cross

the street would be at a distance in the rear of his receding car.

The court gave the jury the following instruction:

"The jury are instructed that the speed at which the defendant's south-bound car was running when it struck the plaintiff is to be considered in the light of all the circumstances. The speed that might be negligent under one set of conditions might not be negligence in another. A rate of speed greater than provided by the ordinances of the city might not be negligence under certain circumstances and a lower rate of speed than provided by the ordinances might be negligence under other circumstances. In this connection you should take into consideration the approaching car from the opposite direction, whether or not such approaching car stopped at the crossing where it was in the habit of permitting passengers to alight and every fact and circumstance surrounding the parties at the time that the south-bound car struck the plaintiff."

This instruction fairly stated the law. In the case of *Express Co. v. Everest*, supra, 72 Kan. 524, 83 Pac. 820, the court said:

"In every instance the duty of taking care presupposes knowledge, or its equivalent, of the particular state of facts out of which it arises. There must be prevision of danger and likelihood of injury, for the law imposes responsibility for that only which reasonable prudence can anticipate."

A north-bound car at a point south of the center of Eighth street, and proceeding at a rate of 4 miles per hour, was not a warning to the motorneer of the south-bound car that his car might encounter a passenger alighting from the other car, and furnished no occasion to reduce speed, put the car under control, or sound the gong. The finding of the jury to the contrary shows the view it took of the matter, and vitiates the general verdict.

The findings show that the plaintiff did not go directly across the east track, but walked in a northwesterly direction until he was struck. He testified to the same fact. He followed the car from which he alighted for some distance. The two tracks were so close together that when he passed from behind the north-bound car a movement over the space of about one foot placed him in danger. A single step at an ordinary gait from the place where his vision was obscured placed him irretrievably in danger. Unable to see until he was on the very verge of danger, he walked at his usual gait into a place of danger, looking as he walked. Such conduct is irreconcilable with the standard of due care which the law recognizes. Conceding that the rate of speed of the south-bound car ought not to have exceeded 15 miles per hour, the plaintiff was guilty of negligence which contributed to his injury. When he alighted he did not look along the east side of the car to see if a car were approaching from the north on the west track. Not hearing any gong while he was behind the north-bound car, he was called upon to make use of his eyesight before attempting

to cross the space between the two tracks. He should have allowed the north-bound car to move forward far enough for him to obtain a fair view of the west track or he should have looked north along the space between the two tracks before abandoning his place of safety. Instead of this, his movements projected his body into danger at the moment he gained an opportunity to see. He voluntarily prevented such use of his faculty of sight as the law required, and he was guilty of negligence as a matter of law.

That a street car track is a warning of danger, that each track where there are more than one is a warning, that a car may be expected at any time, and that a pedestrian must look and listen before attempting to cross, has been said so many times that a reference to the decided cases is not necessary. The purpose of looking for an on-coming car is to avoid the danger incident to getting in front of it or so near to it as to cause a collision. The time to do this is while the result of observation may be utilized and means and opportunity still exist to avoid a collision. The place to do this is necessarily a place far enough removed from the path of the car that it cannot strike while the observation is being made. If necessary, prudent and careful means besides looking and listening must be employed to ascertain whether or not a car is coming. *Burns v. Railway Co.*, 66 Kan. 188, 71 Pac. 244; *Adams v. Railway Co.*, 93 Kan. 475, 144 Pac. 999.

The case of *Railway Co. v. Ryan*, 69 Kan. 538, 77 Pac. 267, is quite similar with respect to the facts and is identical in principle with the one under decision. In the *Ryan* Case the double tracks of the street railway ran east and west. The plaintiff alighted at the rear and on the south side of an east-bound car on the south track. She went around the rear end of the car, and was struck by a west-bound car on the north track. As she was passing the west end of the standing car she looked eastward for a car, but could see only 10 or 15 feet toward the east along the north track. Her movements were hurried. Because she did not either wait for the car which obstructed her view to move on or look along the space between the two tracks before going upon the north track the court held she was guilty of contributory negligence. Here the plaintiff did not wait for the car which obstructed his view to move far enough in advance of him to give him a view of the west track, and he did not look along the space between the two tracks before moving across it. Only a part of that space constituted a zone of safety, and the same movement which gave him an opportunity to look carried him into danger. In the *Ryan* Case mention is made of the fact that by looking along the space

between the two tracks the plaintiff could have seen a car approaching at a distance of two blocks. The west-bound car, which was moving rapidly, was not that far away or the plaintiff would not have been injured. The important thing was, as in this case, that if the plaintiff had made proper use of her faculty of sight while in a place of safety, she could have remained there, and could have avoided collision with the car which overtook her immediately upon her leaving a place of safety.

The plaintiff cites the case of *Stuckey v. Dunham*, 96 Kan. 427, 151 Pac. 1107. In that case a car was propelled past a standing car which had stopped at the proper place for the discharge of passengers and was discharging its passengers. The plaintiff also cites the case of *Marple v. Railway Co.*, 85 Kan. 699, 118 Pac. 690. That case involved the question whether or not an approaching car was far enough away and its apparent speed was such that the plaintiff was justified in attempting to cross the track in front of it.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendant. All the Justices concurring.

(97 Kan. 8)

STOCKYARDS STATE BANK v. MERCHANTS' STATE BANK et al.
(No. 19670.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT \Leftrightarrow 132—BILLS AND NOTES—AGENTS—CONTRACTS—LIABILITY OF PRINCIPAL.

A bank loaned another bank the sum of \$3,500. The cashier of the borrower gave his individual note to the lender, not as consideration for the loan, but for stated reasons making that course advantageous to the borrower. Held, the borrower was under legal obligation to repay the money, although its name did not appear on the note and nothing on the note indicated the borrower's relation to the transaction.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 459, 467-471; Dec. Dig. \Leftrightarrow 132.]

Appeal from District Court, Sedgwick County.

On petition for rehearing. Rehearing denied.

For former opinion, see 96 Kan. 558, 152 Pac. 769.

Haymaker, Roberts & Jockems and Harris & Harris, all of Wichita, for appellant. Dale, Amldon & Madalene, Stanley, Vermilion & Evans, and Nofztger & Gardner, all of Wichita, for appellees.

BURCH, J. The plaintiff has filed a petition for a rehearing in which the following claims are made: The plaintiff's theory in the lower court was that the defendant was

attempting to charge the plaintiff as an undisclosed principal upon Brown's note. This defense could not be sustained otherwise than by varying the terms of a promissory note by parol evidence. This is distinctly forbidden by the decision of this court in the case of *Insurance Co. v. Martindale*, 75 Kan. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 362, 12 Ann. Cas. 677. The *Martindale* Case was cited in the plaintiff's original brief. It is sustained by an imposing array of authorities collated in a note appended to the report of the decision in 21 L. R. A. (N. S.) 1045. This court, in its opinion, *Bank v. Bank*, 96 Kan. 558, 152 Pac. 769, made no reference to the plaintiff's theory, made no reference to the *Martindale* Case, and made no reference to the authorities sustaining it in the note referred to. The *Martindale* Case ought to conclude the present controversy in the plaintiff's favor.

The court in its former opinion made no reference to the *Martindale* Case, which was cited in the plaintiff's brief, or to the note mentioned, because it could find nothing in the record making such a reference pertinent, and because the very L. R. A. note mentioned collates authorities which distinguish the controversy in the *Martindale* Case from the present one.

The plaintiff did not frame the defense to the action. The answer stated the defendant's claim, and the defendant did not seek to charge an undisclosed principal or to vary the terms of a promissory note. The note was Brown's note and, *prima facie*, indicated that he was the borrower. But, as stated in the former opinion, the answer raised the question, who borrowed the money, Brown or the bank of which he was cashier, and the obligation sought to be established was that of the actual borrower to return the money it had borrowed, independent of the security taken for the loan. The plaintiff could not dispose of the defendant's contention by proposing a theory of the answer which the pleading itself did not present.

If the plaintiff's theory at the time of the trial was as it is now stated to be, it did not get into the record. The defendant's answer was not attacked by motion or demurrer. No objection to evidence, contained in the abstract or discussed in the brief, raised the question now presented. It was not raised by a demurrer to the defendant's evidence, by any request for an instruction to the jury, or by the motion for judgment notwithstanding the verdict. On the other hand, the plaintiff's requests for instructions were all pertinent to the issue presented by the answer. In its requests for instructions the plaintiff undertook to aid the district court by citations of authority, and the *Martindale* Case is not among them.

In the *Martindale* Case, Stotler gave his note to Fist for the premium on a life insurance policy. Fist was agent of the in-

surance company. Fist sold and indorsed the note to Martindale, and thus became liable to Martindale as an indorser. When Martindale sued to recover on the note, he undertook to hold the insurance company as the undisclosed principal for whom the indorser, Fist, acted. The court held that nobody can be charged as an indorser on a negotiable promissory note unless his name appears upon it or unless something on the note indicates that relation, and such is the law. In this case the plaintiff, being a corporation, necessarily acted through an agent, its cashier. But the defendant claimed it made no loan to the agent or for the benefit of an undisclosed principal. It made the loan direct to the plaintiff, who was known and understood to be the actual borrower and to whom the credit was actually extended. The borrower, the plaintiff, gave no written obligation because its cashier wished to conceal from the bank commissioner the method by which the plaintiff's reserve was increased, and the cashier's individual note was taken, not as consideration for the loan, but as collateral security. This case therefore is somewhat similar in fact and is identical in principle with that of *Chemical Bank v. Bank of Portage*, 156 Ill. 149, 40 N. E. 328, cited in the L. R. A. note to the *Martindale* Case to which the plaintiff referred. The Portage Bank loaned the Chemical Bank the sum of \$5,000. The cashier of the Chemical Bank executed a note for that amount to a third person who indorsed without recourse to the Portage Bank. It was held that the Portage Bank could recover of the Chemical Bank on the common count for money had and received. Another case cited in the same note is that of *Van Haagen Soap Co.'s Estate* (Third Nat. Bank's Appeal) 141 Pa. St. 214, 21 Atl. 598. This case is reported in full in 12 L. R. A. at page 223. To the report is appended an extended note which begins as follows:

"Note.—The One Receiving Credit, the One Responsible for the Debt.

"The doctrine seems to be universal that the one to whom and upon whose credit money is loaned or property advanced is liable for the debt regardless of the fact that his name may not appear on the security taken, if such security is regarded by the parties purely as collateral."

If the defendant had been seeking to recover on Brown's note by charging the plaintiff as a maker in fact although undisclosed when the note was signed, the defendant would have been met by the *Martindale* Case. The distinction having been clearly drawn by the L. R. A. editors between cases like the *Martindale* Case and cases like this one, it did not seem necessary to duplicate the work in the former opinion when the record furnished no peg upon which to hang a discussion of the subject.

The petition for a rehearing is denied. All the Justices concurring.

(97 Kan. 42)

SIMON v. MISSOURI & KANSAS TELEPHONE CO. (No. 19795.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***NEGLIGENCE — 59 — TELEGRAPHS AND TELEPHONES — 15 — INJURIES FROM MAINTENANCE OF WIRE — "PROXIMATE CAUSE."**

The defendant maintained a telephone line consisting of one wire supported on poles placed at the side of a public highway close to a hedge. At one place the wire sagged to within 4 feet of the ground. Plaintiff, who was traveling with a team and wagon, stopped at noon to rest, and turned his horses out to graze on the road. A storm came up, and the horses went to the side of the road close to the hedge for shelter. While standing under the wire where it sagged they were killed by lightning which first struck one of the poles 150 feet distant. The telephone wire was not in itself dangerous to persons or animals using the highway for ordinary purposes of travel, and, even though it were held negligence to maintain the wire so close to the ground, it was not the proximate cause of the injury; that required a conjunction of conditions and circumstances of an extraordinary nature which it is not reasonable to say a person of ordinary prudence and foresight should have anticipated.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. 59; Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. 15.

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

Appeal from District Court, Montgomery County.

Action by J. S. Simon against the Missouri & Kansas Telephone Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

T. H. Stanford, of Independence, and D. E. Palmer, of Topeka, for appellant. Sullivan Lomax, of Cherryvale, for appellee.

PORTER, J. Plaintiff had two horses killed by lightning which he alleged was communicated to them by a telephone wire negligently maintained by defendant in a public highway. He recovered judgment for the value of the horses, and defendant appeals.

The plaintiff is an itinerant horse trader. On May 5, 1913, he was traveling with his family in a covered wagon from Cherryvale to the northern part of the state, and, while passing through Franklin county, stopped at the side of a public road for rest and dinner. He had four horses, which he turned out to graze along the highway, having them hobbled to prevent their getting beyond control. At the west side of the public road, and next to a hedge, the defendant maintained a telephone line of one wire which sagged to within about 4 feet of the ground. While plaintiff's horses were grazing at the side of the road a storm came up, and the horses went close to the hedge for shelter. Two of them were standing under the sagging wire, and were killed by a stroke of lightning.

Plaintiff testified that the horses fell at the instant of the flash, and that the lightning first struck a telephone pole 150 feet from where the animals were and was conveyed to them from the telephone wire. He admitted on cross-examination that this was his conclusion from the circumstances; that immediately after the storm he discovered fresh splinters and pieces of the pole lying on the ground.

One defense pleaded in the answer was that the horses were running at large on the public highway contrary to the herd law which it is admitted was in force in Franklin county. The principal contention is that no negligence was shown on the part of defendant which was the proximate cause of the plaintiff's loss. These defenses were raised by demurrers to the petition and to the evidence, and by a motion for a new trial.

Wholly apart from the question whether plaintiff's horses were running at large in violation of the statute, we think the judgment cannot be permitted to stand. Manifestly the fact that defendant is a corporation has nothing to do with the question of its liability for the injury. If the wire through which the stroke of lightning was transmitted to the horses had been a private telephone wire maintained at the roadside by a farmer, or had been part of his wire fence along the highway, his liability for plaintiff's loss would be determined upon precisely the same legal principles. Telephone and telegraph wires carry very light voltage, and can ordinarily be handled with as little danger as a fence wire. Either may furnish, as may water pipes, gas mains, etc., a conductor for lightning; but before the plaintiff can recover he must show some negligence of the defendant which was the proximate cause of his loss. The telephone wire was not in itself dangerous to any person using the highway for ordinary purposes of travel, because it was maintained at the side of the road next the hedge, and, although allowed to sag close to the ground, it interfered in no way with the traveled portion of the highway. But, conceding that it was negligence to maintain the wire so close to the ground, still nothing is more firmly settled in the law of negligence than the principle that to be the proximate cause of an injury the accident or happening of the injury must be a probable or natural consequence of the negligent act. Stated in another way, the negligent act is not the proximate cause, unless, under all the circumstances of the case, the injury or accident is one which might reasonably have been anticipated by a person of ordinary foresight and prudence.

"While one is responsible for such consequences of his fault as are natural and probable, and might therefore be foreseen by ordinary forecast, if his fault happened to concur with something extraordinary, and therefore not likely

to be foreseen, he will not be answerable for the extraordinary result." *Railway Co. v. Columbia*, 65 Kan. 390, 398, 69 Pac. 338, 340.

Where the alleged negligence of defendant merely furnishes a condition or gives rise to an occasion by which the injury is made possible, the defendant's negligence is regarded as the remote, and not the proximate, cause. *Railway Co. v. Columbia*, supra. The law makes every person liable for such results of his negligence as ought, reasonably to have been foreseen or anticipated by the exercise of ordinary prudence. Two comparatively recent cases illustrate the application of these principles. In *Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635, gas had been negligently allowed to escape into a cellar, and from some unknown cause exploded. It was held that the explosion was a probable and natural consequence of permitting large quantities of a highly explosive agency to accumulate in a confined place, and the gas company's negligence in permitting this was held to be the proximate cause of the accident without any evidence showing how the gas became ignited. In the *Dabney Case* (*Gas Co. v. Dabney*, 79 Kan. 820, 101 Pac. 488) the negligence was in permitting natural gas to escape from a well into the open air in the nighttime. An explosion occurred causing damage, but there was no evidence showing how the gas became ignited. It was said in the opinion that lightning might strike the well and ignite the gas, or some careless person might strike a match near it and cause an explosion, or fire might by other accidental means be brought in connection with the gas, but, in the usual and ordinary course of things, none of these consequences would reasonably be expected to occur, and the negligence in permitting the gas to escape into the open air was held not to be the proximate cause of the explosion.

The principle on which the case of *Eberhardt v. Telephone Ass'n*, 91 Kan. 763, 139 Pac. 416, was decided applies to the case at bar. Plaintiff was injured by being thrown from a wagon when a team of mules ran away and the wagon struck a guy wire which projected diagonally for a distance of four feet into a public highway, but did not extend to that portion of the highway graded and used for travel. Independent of whether the telephone company was negligent in maintaining the guy wire at the side of the road, it was held that this was not the proximate cause of plaintiff's injury. In the opinion it was said:

"The party placing the wire 4 feet and 4 inches from the pole in the grassy embankment north of the traveled portion of the road cannot be held to have foreseen that a team might become frightened 20 rods east thereof and run upon the embankment. Had the automobile not passed, had it not scared the team, had they not pulled out of the road in spite of the driver's efforts to keep them in it, no harm would have come from the wire, and to hold the company

placing it there liable would be to charge it with the duty to foresee all these most uncommon and unlooked-for conditions." 91 Kan. 765, 139 Pac. 417.

The telephone wire in the present case was no more dangerous than was the guy wire in that case. Had not the plaintiff turned his horses out to graze on the public road at that particular time and place, had not the storm occurred then, had the horses happened to seek shelter at the opposite side of the road, had not lightning struck when and where it did, the telephone wire would not have harmed the animals. As it occurred, the loss sustained by the plaintiff required the conjunction of conditions and circumstances of an extraordinary nature, which it is unreasonable to say a person of ordinary prudence and foresight should have anticipated.

The judgment is reversed, and the cause remanded, with direction to enter judgment for the defendant. All the Justices concurring.

(91 Kan. 16)

ROWELL v. ROWELL. (No. 19782).*

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. DIVORCE ⇐323—MAINTENANCE AND EDUCATION OF CHILDREN.

The duty and responsibility of parents for the maintenance and education of minor children are not altered by the rendition of a decree of divorce in which no provision is made for the children, and the obligation of the father therefor is not canceled by the fact that the divorce was granted to him because of the fault of the mother.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 826; Dec. Dig. ⇐323.]

2. DIVORCE ⇐323—SUPPORT OF CHILD—EXPENDITURES BY DIVORCED WIFE—RECOVERY FROM HUSBAND.

In such case, and where the father neglects to provide for the maintenance and care of the minor children, and leaves that burden entirely to the mother, she is entitled to recover from him a reasonable amount for the expenditures she has made in providing for their care and support.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 826; Dec. Dig. ⇐323.]

3. DIVORCE ⇐323—SUPPORT OF CHILDREN—OPENING OF DECREE—REMEDY OF WIFE.

While an independent action may be maintained by the mother for such relief, the more appropriate and complete remedy is by opening the decree of divorce, wherein an allowance may be made for past as well as future support of the children.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 826; Dec. Dig. ⇐323.]

Appeal from District Court, Osborne County.

Action by Lucinda Elizabeth Rowell against Asa B. Rowell. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. K. Rankin and W. F. Schoch, both of Topeka, for appellant. H. McCaslin, of Osborne, for appellee.

JOHNSTON, C. J. Lucinda Elizabeth Rowell, who is the divorced wife of Asa B. Rowell, brought this action against him to recover for the maintenance of their two minor children, Lloyd G. Rowell and Merritt L. Rowell, from September 1, 1907, the date of separation, until March 1, 1914, during which time she had the sole care of the children. She also asked for the future maintenance of the minors in the sum of \$2,040.41. They were married in 1875, and lived together until 1907, and of the six children born unto them three were minors at the time of the separation, but the oldest of the three was near majority and for his maintenance no recovery was asked. In a proceeding to obtain alimony brought by Mrs. Rowell in 1907 a division of the property was made based upon a stipulation of the parties under which she obtained property worth about \$8,500 which was given in lieu of all claims for alimony to her, while he was awarded real estate which was appraised at \$20,800. No provision was made for the maintenance of the children, but it was decreed that each of the minors might decide for himself the parent with whom he would live. In 1908 Rowell obtained a divorce from his wife on the ground of cruelty and neglect of duty, but in that decree no mention was made of the children, nor any provision made for their education or maintenance. On March 20, 1914, Mrs. Rowell brought an action against her former husband to recover for the money already expended by her for the education and maintenance of the two minor children, and also for their future maintenance. Being in doubt as to the procedure to obtain this relief, she also moved the court to reopen the divorce action and to have the court make provision for the children in that action. The court refused to open the judgment of divorce, and also denied her any award for the money already expended by her for the support and education of the children in the new action, but an award was made for the future maintenance of the children to the extent of \$27 a month until July 30, 1910, when Lloyd would reach majority, and \$18 a month thereafter until July 11, 1919, when Merritt will become of age. Mrs. Rowell appeals from the order refusing a recovery for the maintenance and education of the minor children prior to the judgment. She contends that, the decree of divorce being silent as to the maintenance and education of the minor children, the father of the children is liable for the money necessarily expended by her in their care and support the same as he would have been had the children been maintained by a stranger. On his part he contends that, as the divorce was granted to

him because of her fault, and as the children chose to reside with her, he is not liable to her to any extent. It appears from the decree that the custody and maintenance of the minor children was not adjudicated in the divorce proceeding. The award of alimony previously made to her was not intended or treated as a provision for the education and support of the children.

[1,2] The duty and responsibility of the parents were not altered by the award of alimony or the decree of divorce, and the parental relation and duty of the father to make a reasonable provision for the maintenance of the minor children continued after the granting of the divorce the same as before. This has been held to be the rule even where the custody of the children has been specifically given to the mother, and no provision made in the decree for their maintenance. *Riggs v. Riggs*, 91 Kan. 593, 138 Pac. 628, Ann. Cas. 1915D, 809. Some reliance is placed by appellee upon *Harris v. Harris*, 5 Kan. 46, but the opinion in the *Riggs* Case clearly demonstrates that the decision actually made in the *Harris* Case is in keeping with the holding in the *Riggs* Case, and not inconsistent with the ruling herein. Some other cases were referred to as expressing a contrary view, but the opinion in the *Riggs* Case makes it plain that none of the decisions were out of line with the *Riggs* decision, although some of the comments made in those cases were disapproved. The trend of the authorities on the question, which are not without conflict, may be found in a number of annotations. *Spencer v. Spencer*, 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N. S.) 851, 114 Am. St. Rep. 695, 7 Ann. Cas. 903; *Graham v. Graham*, 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N. S.) 1270, 12 Ann. Cas. 138; *De Brauwere v. De Brauwere*, 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508; *Alvey v. Hartwig*, 106 Md. 254, 67 Atl. 132, 11 L. R. A. (N. S.) 678, 14 Ann. Cas. 255.

The fact that the divorce was not contested and that she permitted a decree to be entered in his favor on the ground of her fault does not exonerate him from the duty and responsibility of providing for his children. Unless changed by a decree of court, the parents are under equal obligation to support and care for their children. The obligation of the appellee, as we have seen, has not been altered or affected by any stipulation or judicial decree. The appellant might by agreement or some adjustment as to maintenance have deprived herself of the right to recover from appellee for the moneys expended for that purpose, as was done in *Miller v. Morrison*, 43 Kan. 446, 23 Pac. 612; but it appears that no agreement or adjustment in respect to maintenance was made between the parties herein, and the custody of the children was not awarded to either parent. Although the decree separated the

father and mother and made them in a sense strangers to each other, it did not change the parental relation of the father to the children, nor absolve him from his obligation to care for them. In a number of cases it is said that he could not rid himself of the obligation to care for his children by his own misconduct, but neither can he be relieved from his natural and legal obligation to them or to society because of some misconduct of their mother. While the divorce was granted to him on the grounds of her cruelty towards him, it appears that he recognized her to be a suitable person to have the care and education of the children, and was willing that they should reside with her. No effort was ever made by him to obtain their custody, nor has he ever contributed anything toward their support. Emmett, the oldest of the three children who have been living with her since the separation, contributed the principal part of his wages to his mother, but the father has not aided in their care and support to any extent. His disagreement with their mother and separation from her did not change his relation or his duty to his offspring. They were not parties to the divorce proceeding, and are not to be deprived of their right to the support and protection of their father because the decree of divorce, in which the children are not even mentioned, was granted to him instead of to their mother.

The trial court adjudged that appellee was liable to appellant for the future support of the minor children, but denied her any recovery for what she had already expended for their maintenance and education. No reason is seen why appellant should not recover a reasonable amount for the expenditures made by her for the care and support of the children before the trial herein was had. It was argued by appellee that the proof of expenditures made for that purpose was not sufficient to warrant any recovery. Her son Emmett, who is 25 years old, and who has charge of her business, testified that she had paid all expenses of maintaining and educating the two minor children since the separation in 1907. He also stated that the rent of the properties owned by the mother was not sufficient to meet these expenses, and hence she had been compelled to sell a part of her property, so that what remains now is not worth to exceed \$3,500. He also testified that he has made a computation from bills paid and other data on hand of the amount paid by his mother for the care and support of the children, and found that she had expended about \$1,852.50 for the education and maintenance of Merritt and about \$2,060 for the education and maintenance of Lloyd. In his testimony he stated that he had earned his own living since he became of age, and, besides, had advanced some money to his mother to enable her to provide for the

minors. Her testimony corroborates him as to all matters as to which she had knowledge, and, while some of the testimony is not as definite as to the amounts expended for the children as it might be, it certainly is sufficient to warrant a substantial recovery.

[3] The appropriate method for obtaining the relief asked by the appellant is through the opening of the judgment of divorce. *Harris v. Harris*, 5 Kan. 48. In that case it was said that, when a decree is so opened, "the court can take into consideration all the facts and circumstances surrounding the parties, and do such full justice as the case requires, having reference to advances already made." 5 Kan. 53. In such a proceeding the court can award relief, not only for the expenditures already made, but may make suitable provision for their maintenance in the future. No reason is seen why the appellant might not maintain an independent action against the appellee for the recovery of the money already expended, but obviously the remedy is not as appropriate or complete as that which can be obtained by opening the decree of divorce. The court which renders the decree has a continuing jurisdiction in respect to the children, and may at any time, upon application and sufficient notice, modify the decree by making provision for the children that was overlooked in the first instance or such as may be required by the altered conditions or circumstances. In *re Pettit*, 84 Kan. 637, 114 Pac. 1071.

The judgments in the two cases brought up for review will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. All the Justices concurring.

(97 Kan. 29)

MEANS v. KENNEDY. (No. 19787.)
(Supreme Court of Kansas. Jan. 8, 1918.)

(Syllabus by the Court.)

PUBLIC LANDS § 54—ISLANDS—SALE AS SCHOOL LANDS—STATUTORY AUTHORITY.

While chapter 295, Laws 1913, was in force, there was no means provided for selling as school land islands which had been surveyed and entered under federal authority more than 20 years before such act took effect.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 152-164, 166-169; Dec. Dig. § 54.]

Appeal from District Court, Sedgwick County.

Suit by A. C. Means against F. S. Kennedy. From decree for plaintiff, defendant appeals. Affirmed.

F. Dumont Smith, of Hutchinson, for appellant. Holmes, Yankey & Holmes, of Wichita, for appellee.

WEST, J. Plaintiff filed his petition, alleging ownership and possession of certain land, that the defendant unlawfully and with

force entered and began erection of a building thereon, and had attempted, without due process of law, to oust the plaintiff and by force and stealth acquire possession; that the defendant was insolvent, and asked that he be enjoined from further interference with the property. A restraining order was issued, and the defendant filed an answer, containing a general denial and alleging that he entered upon a portion of the premises not occupied by the plaintiff for any purpose, either as a residence or for agriculture, and began the erection of a small frame house, with the intention of occupying so much of the premises as should be necessary for such house; that the plaintiff had no title to the real estate in question; that his pretended title was derived by mesne conveyances from the United States, and that the United States never had any title thereto; that the land is an island which grew up in the bed of the Arkansas river, its ownership being in the state of Kansas as school land, and subject to entry, settlement, occupation, and proof as such, and that the defendant entered for the purpose of complying with the school land law and proving up and obtaining title in accordance therewith; "that this court has no jurisdiction to determine the title to said land upon an injunction suit for the reason above stated; that no injunction order should issue in this cause for the reasons above stated, and for the further reason that plaintiff has an adequate remedy at law by way of ejectment or entry and forcible detainer." Upon final hearing the injunction was made permanent. The defendant declined to offer any testimony, objected to the introduction of any evidence, and appeals, asserting that as title was involved in the suit, the court had no right to proceed without a jury, and that the School Land Act (Laws of 1913, c. 295), which took effect February 24, 1913, provides a full, complete, and adequate remedy at law, thus taking the suit out of the domain of the court's equitable cognizance.

It was stipulated that the land was surveyed by the United States in 1874 and patented in 1875, and the plaintiff made a prima facie showing that it was an island before the admission of the state. The act of 1913 repealed the act of 1907, devoting certain islands to the use of the permanent school fund, and authorized the sale as school land of such islands only as had not been surveyed and entered under the authority of the federal government within 20 years prior to the taking effect of the act. While it is argued that this 20-year provision of chapter 295 and the whole of chapter 296, assuming to disclaim as to certain islands, are void—on which we express no opinion—still until its repeal by chapter 322 of the Laws of 1915, neither chapter 295 nor any other statute authorized the sale of islands surveyed and entered upon under federal authority,

when the land in controversy was concededly surveyed and patented.

Defendant's theory is that the government had no title and its patent granted none because the island belonged to the state, and neither such governmental action nor such legislative enactment as we have before us can divest the state's title. But even if all this be true, no method existed for selling as school land the island in question. Hence the other very interesting questions arising on the appeal become academic.

The decree is affirmed. All the Justices concurring.

(97 Kan. 150)

GRANTHAM v. CONNER et al.

(No. 20335.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. TRUSTS §17, 18, 83—CREATION—CONTRACT OF SALE—OPTION.

A parol agreement between one who has obtained an option to purchase a tract of land and another that the latter would buy the land, pay the full purchase price of it and also the amount paid by the first party to obtain the option, taking the title in his own name, and that he would, when the land was sold, pay the first party one-half of any increase that might be obtained for the land, did not create a valid express trust in favor of the first party; and, since no part of the purchase price was paid by him, a trust did not arise in his favor by implication of law under section 8 of the act (Gen. St. 1909, § 9701) relating to trusts and powers.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 15-24, 121-124; Dec. Dig. §17, 18, 83.]

2. PARTNERSHIP §11—CREATION OF RELATION—CONTRACT OF SALE.

Nor did the agreement of the parties create a partnership relation between them.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 26; Dec. Dig. §11.]

Appeal from District Court, Cherokee County.

Action by J. W. Grantham against T. Conner and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Sapp & Wilson and E. B. Morgan, all of Galena, for appellants. Grant Waggoner, of Baxter Springs, and A. F. Williams, of Columbus, for appellee.

JOHNSTON, C. J. This appeal is taken from an order overruling a demurrer to the petition filed by the plaintiff and giving defendants 20 days within which to file an answer.

In the petition it was alleged that J. W. Grantham obtained from S. J. Toovey a week's option, giving him the exclusive right to purchase 160 acres of land in Cherokee county for the price of \$9,600; that he paid Toovey \$100 for the option, the same to be applied on the purchase price in case he decided to buy the land. It was further alleged that Grantham entered into an oral contract

with John M. Cooper, whereby the latter paid the purchase price, including the \$100 paid by Grantham for the option, and took the title in his own name with the understanding that Cooper was to have an interest therein to the extent of the \$9,600 paid, and also one-half of the value then existing in or to be realized from said land, over and above the said sum of \$9,600, and the other one half to be held in trust for Grantham. It is alleged that Cooper openly acknowledged the interest existing in this property in favor of Grantham for a time, but later denied the same and continued to do so until his death on November 18, 1914. The defendants T. Conner and W. W. Wyatt are the executors and trustees of Cooper's estate, and Grantham filed his written demand with them, claiming an interest in the land; and, the latter having disallowed his claim, this suit was commenced. The appellant J. O. Goodwin was afterward made a party defendant for the reason that he claimed to have purchased the land from Cooper and that a deed to him from Cooper had been placed in escrow to be delivered upon payment of the purchase price.

[1] The demurrer of the defendant's is based upon the theory that the alleged trust in these lands in favor of plaintiff was void for the reason that it was not in writing, as required by the act relating to trusts in land, and that it does not come within the exception in section 8 of the act which relates to implied trusts, for the reason that the petition did not allege that the agreement was without any fraudulent intent, and that Grantham paid the purchase money or some part thereof. Is the oral agreement valid and enforceable? The statute provides, in effect, that a trust in land can only be created by a writing signed by the party or his duly authorized attorney, except when it arises by implication of law. Gen. Stat. 1909, § 9694. Is the oral agreement within the exception; that is, does a trust arise by implication of law under it? In section 6 of the act relating to trusts and powers it is provided that, in case a conveyance of land is made to one person and the consideration paid by another, a trust will not result in favor of the one who pays the consideration, except as provided in section 8 of the act; that is:

"Where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof." Gen. Stat. 1909, §§ 9699, 9701.

The essentials of the exception are absence of fraudulent intent, and that the one claiming that a trust results in his favor shall have paid the purchase price, or some part thereof. While Grantham held the option to purchase the land, he transferred his right to Cooper, who paid the full purchase price

of the land, as well as the money advanced by Grantham to obtain the option. The petition contains no express allegation that the agreement between the parties was free from fraudulent intent, but perhaps a liberal interpretation of the averments may warrant the inference that there was an absence of fraud in the transaction. The claim that a trust resulted in favor of Grantham, however, falls because of the lack of the element of payment. The oral agreement cannot be enforced and a trust declared in favor of Grantham under the exception, unless he has paid all or some part of the purchase price of the land. And it cannot be regarded as an express trust for the reason that it was not created in writing. *Morrall v. Waterson*, 7 Kan. 199; *Franklin v. Colley*, 10 Kan. 260; *Ingham v. Burnell*, 31 Kan. 333, 2 Pac. 804; *Gee v. Thralikill*, 45 Kan. 173, 25 Pac. 588; *Love v. Love*, 72 Kan. 658, 83 Pac. 201; *Blackwell v. Blackwell*, 88 Kan. 495, 129 Pac. 173.

[2] He insists that he is entitled to an interest in the land on the theory that a partnership relation was formed by the agreement, and he cites as an authority *Tenney v. Simpson*, 37 Kan. 353, 15 Pac. 187. That relation does not exist between the parties because the agreement did not provide for a community of profits and losses in the business enterprise. Persons may enter a partnership relation by uniting to place their money, effects, labor, or skill, or some of them, in a business enterprise, but it is essential that each member shall subject himself to partnership duties and liabilities, and that there shall be a community of interests in the profits and losses. *Jones v. Davies*, 60 Kan. 309, 56 Pac. 484, 72 Am. St. Rep. 354; 30 Cyc. 349. Here there was no agreement that Grantham should bear any of the expenses or share in any of the losses that might result from the enterprise. According to the arrangement Cooper was to advance the purchase money and the cost of the option, and was to pay Grantham one-half of any increase there might be in the value of the land after the purchase was made. Grantham had the option, which might be regarded as a sufficient consideration for an agreement otherwise valid, but he did not agree to pay any part of the taxes or other expenses incident to the holding or disposing of the land, nor did he agree to share in any of the losses that might result from a diminution in the value of the land. An agreement that one party is to give and the other receive a half interest in the proceeds of an investment of this kind, where there is no provision for sharing in the losses, is not a valid partnership agreement. 30 Cyc. 358.

It follows that the judgment overruling the demurrer to the petition must be reversed, and the cause remanded for further proceedings. All the Justices concurring.

(97 Kan. 51)

MOLLOHAN v. ATCHISON, T. & S. F. RY. CO. (No. 19800).*

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***1. CARRIERS — 13 — SHIPMENT CONTRACT — DISCRIMINATION — STOPPAGE IN TRANSIT.**

Where cattle were billed and shipped from Belvidere to Peabody at the regular rates, which had been published and filed with the Public Utilities Commission, a special contract, granting to the shipper the privilege of stopping the cattle at Wichita to test the market, and to terminate the journey at that point if the market was satisfactory, and to continue the transportation to original destination if the market was unsatisfactory, was preferential and discriminatory, and violated the railroad and utilities acts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 21-24; Dec. Dig. —13.]

2. CARRIERS — 207 — SHIPMENT OF LIVE STOCK — STOPPAGE IN TRANSIT — VALIDITY OF SPECIAL CONTRACT.

Where the tariffs of the carriers filed with the Public Utilities Commission specify the points at which live stock may be stopped in transit to test the market, any special contract, enlarging that privilege which is not specified in such tariffs, is void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. —207.]

3. CARRIERS — 12 — SHIPMENT CONTRACT — STOPPAGE IN TRANSIT — TARIFFS.

Before a special privilege to stop cattle in transit to test a market en route can be granted by a railroad company, it is necessary that the tariffs and schedules pertaining thereto must be filed with the Public Utilities Commission, and be open to all shippers on equal terms.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. —12.]

Appeal from District Court, Marion County.

Action by A. B. Mollohan against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, defendant appeals. Reversed, with directions.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and W. L. Huggins and Humbert Riddle, both of Emporia, for appellant. C. M. Clark, of Peabody, for appellee.

DAWSON, J. On March 1, 1913, A. B. Mollohan shipped 80 steers in three carloads from Belvidere to Peabody over the defendant's railroad under the usual shipper's contract, on which was noted in writing the words "Wichita privilege." These words meant that the shipper would have the privilege of stopping the cattle in Wichita for the purpose of testing the market and of terminating their journey at that point if he decided to sell the cattle there, and if the market was unsatisfactory the shipment should continue to the final destination set down in the shipper's contract. In addition to this notation on the billing, the plaintiff notified the conductor of the train in which the cattle were shipped that he desired the cattle unloaded at Wichita, and he went to Wichita on a passenger train to arrange feed and water for their reception. The cattle were

not unloaded at Wichita, but dispatched directly through to Peabody, arriving at a late hour on Saturday night where plaintiff, expecting to receive them at Wichita, had made no provision to receive them or provide feed. The cattle were negligently unloaded, being jammed in the chute and piled up and bruised. By long-distance telephone from Wichita, the plaintiff managed to get his cattle taken to a nearby lot; but as there was no opportunity to have them returned to Wichita in time for market before the following Tuesday, the plaintiff gave up that purpose, and kept the cattle and brought this action for damages.

The damages which occurred in the unloading of the cattle at Peabody were eliminated by the district court because the plaintiff had neglected to give notice to the railroad company in writing before the cattle were removed from Peabody Station. Such was one of the stipulations of the shipper's contract. The appellee complains of this, but brings no cross-appeal. Moreover, the decision of the district court on that point was correct. *Railway Co. v. Theis*, 96 Kan. 494, 152 Pac. 619.

This left as the sole ground of damages the failure of the railroad company to stop the cattle at Wichita in accordance with the special arrangement for the Wichita privilege, and in accordance with plaintiff's request to the conductor of the freight train. To meet this issue, the defendant answered:

"That at the time the live stock mentioned and described in plaintiff's petition was shipped over the line of defendant's railway, the said defendant railway had on file with the Public Utilities Commission of the State of Kansas certain rules governing live stock contracts, and also general instructions concerning the privilege of markets, said circular having also been filed with the Interstate Commerce Commission and known as I. C. C. No. 6084, same being indorsed as Santa Fé System Circular No. 2213A. That said circular was and is a part of Santa Fé Railway tariffs, both state and interstate, and contains all the rules in force at the time the shipment involved moved, concerning the privilege of markets and rules governing same; said circular and tariffs having been duly published by the defendant and placed on file, not only with said Public Utilities Commission of the State of Kansas, with its consent and approval, but also posted in defendant's several stations in said state.

"With respect to stoppage of live stock at Wichita, the said circular reads:

"Wichita, Kan.

"Where through rates are published on live stock to Chicago, Ill., St. Louis, Mo., East St. Louis, Ill., East Ft. Madison, Ill., Rock Island, Ill., Kansas City, Mo., St. Joseph, Mo., Omaha and South Omaha, Neb., and where Wichita, Kan. (see note), is in a direct line of transit between initial point of shipment and the above destinations, the privilege of stopping in transit at Wichita, Kan., for the purpose of permitting shippers to avail themselves of the market at that point may be allowed, subject to the following rules:

"Note.—Wichita, Kan., will be considered in direct line of transit where Hutchinson or Little River, Kan., are in direct line of transit. * * *

"Defendant further avers that said rule and regulation above set out was in full force and effect at the time plaintiff's shipment of cattle moved over the defendant's line, and that the defendant had no authority to permit said live stock to have the privilege of the market at Wichita, and to have done so would have been in violation of the public utilities law of the state of Kansas, making the defendant railway company subject to prosecution for penalties under the Public Utilities Act of this state."

From a judgment for plaintiff, the defendant appeals, and its assignment of error is chiefly directed to questions pertaining to the defense just recited.

[1-3] The tariffs filed with the Public Utilities Commission were excluded from the evidence, and the following instruction asked by the defendant was refused:

"The jury is further instructed that under and by virtue of chapter 238 of the Session Laws of Kansas for 1911, commonly known as the 'Public Utilities Act,' a railroad company operating in this state is required to file with the board of public utilities schedules of its rates on freight, live stock, etc., with all privileges, such as unloading in transit, stop-overs, etc., and that to deviate from said schedule is discriminatory and is contrary to law.

"If you shall find from the evidence, therefore, that said schedules were duly and properly filed with said Interstate Commerce Commission and said board of public utilities of the state of Kansas, and that said schedules did not permit cattle shipments originating at Belvidere, Kan., and terminating at Peabody, Kan., to be unloaded at Wichita, Kan., while in transit, then I instruct you that the failure of said defendant to so unload said cattle at Wichita would not be an act of negligence or violation of contract on the part of said defendant, but that said contract in that regard would not be enforceable against said defendant, and said plaintiff cannot recover anything for said failure to so unload said cattle."

The district court gave an instruction which in effect recognized the validity of the Wichita privilege and its incidents. Upon the correctness of this, the judgment depends.

In recent years the whole drift of state and federal legislation has been directed to stamp out all manner of special privileges heretofore extended by railroads to favored shippers. By acts of our own Legislature all such practices are forbidden under drastic penalties. Among the provisions of our statutes to prevent this vice, it is required that all tariffs pertaining to intrastate railway carriage shall be filed with the Public Utilities Commission, and the manifest purpose of this is that all shippers shall enjoy the same rates for the same services under similar conditions, and that no special service or privilege shall be extended to one shipper which is not open to all; and to that end, wherever unusual privileges are extended, the details and tariff charges pertaining thereto must be filed with the Public Utilities Commission, and all these rates, services, privileges, etc., are subject to amendment, modification, approval or disapproval, of the Commission. A full discussion of this subject and of the pertinent statutes will be found in *Railroad Co. v. Utilities Commission*, 95 Kan. 604, 148

Pac. 667; *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544.

While the rates between Belvidere and Wichita, Belvidere and Peabody, and Wichita and Peabody, are not before us, we are bound to presume that the rate under which the plaintiff's cattle were shipped to Peabody was the rate lawfully published and filed with the Public Utilities Commission. No rate was filed with the Commission covering cattle transportation between Belvidere and Peabody with the Wichita privilege. The rates on file covered both state and interstate transportation, but that is of no consequence here, although this is a common and commendable practice, since it tends to simplify the inherently complex subject of railroad rates and tariffs. The tariffs specified the conditions under which the Wichita privilege would be accorded. By logic as well as law, shipments which did not move along the routes to the well-known markets named in the officially approved tariffs could not lawfully be given this privilege. Nor can there be any doubt that the right to stop a shipment of cattle in transit to test an intermediate market is a valuable privilege, and does not amount to an advantage which ordinary shippers of cattle from Belvidere to Peabody do not enjoy. It might be urged that such privilege is open to all shippers from Belvidere to Peabody. That cannot be, since no tariffs to that effect are on file with the Utilities Commission.

Some federal decisions are in point. The case of *Chicago & Alton Railroad Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501, is instructive. The Supreme Court of Illinois had upheld a judgment in favor of a shipper, who had sustained damages from the railroad's breach of a special contract to transport a carload of high-grade horses from Springfield, Ill., to New York City. The special contract stipulated that the carrier would deliver the car at Joliet, Ill., in time to connect with a "horse special" over the Michigan Central and connecting lines to New York. The Supreme Court of the United States reversed the Illinois court, holding that, since the horses had been shipped at the regularly published rates, which did not provide for special privileges nor for expedited service or transportation on a particular train, and since Kirby was not required to pay any higher rate for the promised special service, the special contract and the privilege were violative of the Interstate Commerce Act.

An analogous case was *Engemoen v. Chicago, St. P., M. & O. Ry. Co.*, 210 Fed. 896, 127 C. C. A. 426, where a contract by an interstate carrier to transport live stock to their destination within a limited time was void, unless authorized or provided by its published tariffs.

Section 7174 of the General Statutes of 1909 requires that all schedules of rates be

filed with the Public Utilities Commission. Sections 7178 and 7181, Id., forbid any departure from the regular rates, and make it unlawful for any railroad company—

“to grant any special privileges to any person, firm, or corporation, either in the way of a preference in furnishing cars, side-track facilities, sites for elevators, mills, or warehouses, or any other form of preference, privilege, or discrimination.”

Section 7214, Id., provides that:

“All concession of rates, drawbacks and contracts for special rates shall be open to and allowed all persons, companies and corporations alike.”

Section 7223, Id., subjects the carrier to a possible fine of \$5,000 for each violation of the foregoing provisions of the Railroad Act.

To the foregoing has been added the Public Utilities Act of 1911 (chapter 238), in which the Legislature descended to great particularity touching the necessity that all rates be published and filed, and that the established rates for like services be observed, and all preferential or discriminatory rates, services, and the like are forbidden, under appropriate penalties. This abridgment of the Railroad and Utilities Acts closely paraphrases sections 2, 3, and 6 of the Interstate Commerce Act. 24 U. S. Stat. at Large, 379, and amendments; 4 U. S. Compiled Stats. of 1913, tit. 56A, 3812; 3 Fed. Stats. Ann. 813; Id., Supplement of 1914, 639; 1 Drinker's The Interstate Commerce Act, 6; Fuller, Interstate Commerce, 178. See, also, note on right of carriers to discriminate with respect to special or unusual service in 12 L. R. A. (N. S.) 506.

In view of this, it seems imperative to hold that the Wichita privilege was a special privilege which had been promised the plaintiff, and as such it was illegal; and the failure to accord the promised privilege at Wichita cannot be the basis of an action for damages. This necessitates a reversal of this case, with instructions to set aside the judgment and to enter judgment for defendant.

It is so ordered.

(97 Kan. 1)

KANSAS NAT. DRILL & MFG. CO. v.
REDD, Sheriff. (No. 18741.)*

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. REPLEVIN \S 135—ACTION ON BOND—EVIDENCE—PEREMPTORY INSTRUCTION.

Findings of fact relating to a tender of property examined, and found to justify the refusal of a peremptory instruction that no tender had been made.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 532-540; Dec. Dig. \S 135.]

2. REPLEVIN \S 134 — REDELIVERY BOND — TENDER OF PROPERTY—EVIDENCE.

Evidence examined, and found sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 527-531; Dec. Dig. \S 134.]

3. REPLEVIN \S 135 — REDELIVERY BOND — TENDER OF PROPERTY—SUFFICIENCY—INSTRUCTIONS.

Instructions pertaining to the sufficiency of a tender of property used in well drilling examined, and held to be a fair statement of the law so far as concerns the appellant.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 532-540; Dec. Dig. \S 135.]

4. REPLEVIN \S 130 — REDELIVERY BOND — TENDER OF PROPERTY—SUFFICIENCY.

Some well-drilling property, on part of which the plaintiff held a mortgage and on part of which it held a bill of sale, was attached by the sheriff at the instance of a lumber company, to satisfy a debt of the operators of the drilling machinery. The plaintiff brought replevin, and a redelivery bond was given. The well-drilling property, being large and unwieldy, was being kept out of doors at the time these proceedings began, and it was not physically disturbed by the sheriff in the service of the attachment process. A few days after the redelivery bond was given, the plaintiff's agent was tendered a return of the property by the manager of the lumber company, who was also the sheriff's representative, who said, "If they are your machines, take them." Held, a sufficient tender of the return of the property.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 514-517; Dec. Dig. \S 130.]

5. REPLEVIN \S 130 — REDELIVERY BOND — TENDER OF PROPERTY—SUFFICIENCY.

The foregoing was a sufficient tender, although the sheriff's representative and attaching creditor also declared that he would only pay such damages as a judge and jury might determine.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 514-517; Dec. Dig. \S 130.]

Appeal from District Court, Miami County.

Action by the Kansas National Drill & Manufacturing Company, a corporation, against Thomas M. Redd, Sheriff of Miami County. From a judgment for defendant, plaintiff appeals. Affirmed.

W. L. Joyce, of Paola, and L. O. Boyle, of Kansas City, Mo., for appellant. Sheridan & Sheridan and Charles T. Meuser, all of Paola, for appellee.

DAWSON, J. This case arises from an attachment suit, followed by replevin, a redelivery bond, and the usual incidents thereto. In 1905 a partnership engaged in the business of drilling oil and gas wells in Miami county became indebted to a lumber company for coal, lumber, and other materials. The lumber company brought suit against the partnership, and attached certain drilling machines and equipment, on the assumption that they were the property of the partnership. The Kansas National Drill & Manufacturing Company, the plaintiff, held a chattel mortgage on the drilling machines, and some days before the attachment suit was begun, it had procured a bill of sale for the property, or part of it, and was in possession of it at the commencement of the attachment proceedings. The plaintiff brought replevin against the sheriff to recover the property. A redelivery bond was executed by the sheriff at the instance of the lumber company, and the

property thereby remained in the sheriff's possession under the attachment proceedings, unless the sheriff made a sufficient tender in law for the return of the property, and that is the principal question involved in this appeal. In answer to special questions the jury found that, shortly after the giving of the redelivery bond, the defendant tendered back the property to plaintiff, and that it had not depreciated in value from the time the redelivery bond was executed until the time of the tender. The general verdict was for the defendant.

Plaintiff assigns error: (1) that the evidence showed no legal tender, and that a peremptory instruction to that effect should have been given; (2) that the verdict was against the weight of the evidence; (3) and (4) error in the court's instructions.

[1] 1. The record and the briefs leave us to infer that the drilling machinery in question, on account of its character and the custom of the country, was kept out of doors somewhere "out in the country," and when it was taken charge of by the sheriff in the attachment proceeding, the assumption of possession was formal rather than actual. That is to say, it was not removed or physically disturbed by the sheriff. He merely took legal possession of it. So, too, when the plaintiff brought replevin and the redelivery bond was given, the physical situation of the property remained as before. The legal right of possession, for the time being, remained in the sheriff. The physical situation of the property thus continued, except as deteriorated by weather and nonusance, until the time of the trial. Since the taking possession of the property was formal rather than actual, the tender of its return should be viewed in the same light. The possession continued in the defendant unless a sufficient tender for its return was made. *Turner v. Reese*, 22 Kan. 319. The plaintiff says there was no tender. Since the jury found otherwise, it is only necessary to determine whether there was evidence on that point. The witness McLachlin, who with this son and son-in-law constituted the lumber company which had attached the property, and who furnished the redelivery bond for the sheriff, and who was authorized by him to tender back the property, testified:

"Mr. Morey (agent of the plaintiff) said, 'Can you come down to Chanute to-night?' I said, 'No, sir; not unless it is absolutely necessary.' He says then, 'I have sold those rigs.' I said, 'I don't see how I enter into that in any way.' He said, 'Yes; you are to furnish the money.' I said, 'No, Mr. Morey; I am not in the promoting business.' He said, 'Then we will have to litigate.' I said, 'There is nothing to litigate, only a little bit of damages, if you have sustained any.' I said, 'If they are your machines, take them; I am not going to furnish you any money;' and he said, 'No,' and hung up the receiver; that is the last talk I had. * * * Q. If I understand you, Mr. McLachlin, the effect of your testimony is as follows: You had a talk with Mr. Morey over the long-distance phone, wherein he wanted you to do

something in reference to these machines, and upon that condition he would take the machines back, and you refused to comply with that condition—is that the idea? A. That was it, I suppose; that is the proper construction. * * * Q. Now, he said that unless you would furnish the money that you would have to litigate over this question? A. Yes, sir. Q. Now after this redelivery bond was given and you commenced to look into the matter, you was willing to give up the property if you would be released of any damages; that is the idea wasn't it? A. Yes; we didn't want to be damaged and didn't want to damage anybody else. Q. But you was willing to give it up if you was relieved of damages? A. That is part of the truth. Q. What is there else about it? A. We was not wanting to damage anybody else. Q. And you didn't propose to pay any damages? A. If they had anything that they could use their machines for, we wanted them to take them. Q. And you kept the machines? A. No, sir. Q. What did you do with them? A. I don't know. * * * Q. Although you knew that he hadn't accepted your proposition? A. I didn't consider that we had anything to do with them. I had made the tender; I could not force him to accept. * * * Q. Gen. Boyle said if you complied with their terms; was there any terms in your tender to them of this property? A. The terms that I would have to furnish the money to pay for these machines. Q. You didn't catch the point. The proposition was this: Mr. Boyle suggested that the theory of the tender was that, if you was to relieve them from damages, you would tender the machines, to relieve the company of damages; was there any such a proposition as that mentioned? A. No, sir; no proposition of that kind. Q. What did you tell them about the damages? A. I told them the damages—that they had not sustained any. The machinery was lying idle over there, and it was not but a few days. I said, 'It is bad enough for us to lose our debt; if you can convince a judge and jury that you have sustained damages, we are ready and able to pay for them.' Q. There was not any terms to that tender to them? A. Not a bit of it."

This is not all the evidence on the subject of tender, but it is enough to show that it was not error to refuse a peremptory instruction that defendant had made no legal tender of the property.

[2] 2. The foregoing disposes also of plaintiff's second assignment of error. The evidence was sufficient to permit its submission to the jury; and, following the usual rule, the jury's finding and the trial court's approval end that phase of the controversy.

[3-5] 3 and 4. In the court's instructions were the following:

"(4) One of the defenses offered by the defendant in this case is that a tender of the property involved in the action was made to the plaintiff before the beginning and after the beginning of this action. You are instructed that to constitute a legal tender of the property in question, it was necessary that an offer of all the property involved in this action be made to the plaintiff, or to some one duly authorized to act for the plaintiff, and without any conditions attached thereto. It is not a sufficient tender to say to the agent, 'Go out and get this property that your company owns, but while you are getting it, don't take any that don't belong to you, and if you do take any that don't belong to us.' Neither is it sufficient that an offer be made to the plaintiff of the property, coupled with a proposition to release the defendant from

any liability. In other words, in order to constitute a sufficient tender, there must have been an unconditional offer of all of the property involved in this action to the plaintiff, or some one legally authorized by it to accept such an offer."

"(7) You are instructed that if you find from the evidence that the defendant tendered to the plaintiff, as above explained, the property involved in this suit, but that the plaintiff did not accept such property, the defendant then would not be justified in abandoning said property, unless such tender was made under such circumstances that the defendant had a right to expect the plaintiff to take charge of said property. Having taken possession of such property under the writ of attachment and having executed to the plaintiff a redelivery bond for the same, in this case it was the defendant's duty to use reasonable care in preserving said property and protecting it from loss or damage, unless the plaintiff either took possession of the property under the tender, or that such tender was made under such circumstances that the defendant would have reason to believe that the plaintiff would take charge of said property."

The chief objection to each of these instructions is said to be "that there was no evidence upon which to base such an instruction." If that were the only fault with the instructions, it would not constitute prejudicial error. It would be necessary to go further and show that the injection of irrelevant instructions had affected the plaintiff's substantial rights, and that a wrong judgment had been secured which was traceable to such irrelevant instructions.

"Under the command of the Codes, Civil and Criminal, and the authority of precedent for over half a century, we are prohibited from reversing judgments for mere technical errors or irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, when it appears upon the whole record that substantial justice has been done." *Root v. Packing Co.*, 94 Kan. 339, 345, 147 Pac. 69, 71.

But there was evidence on which to base the criticized instructions. Moreover, the fourth instruction is strongly favorable to appellant, perhaps too much so; for we do not see that a tender of the property in dispute, coupled with a warning against taking other property, would detract from the validity or sufficiency of the tender. The seventh instruction is a precise summary of the law relative to this case. *Hunt on Tender*, §§ 273, 276, 391, 392, 449; 38 Cyc. 143, 144, 151. In 38 Cyc. 151, it is said:

"If the article is ponderous, the tenderer before the day of tender must ascertain from the tenderer where he will receive it; and, if the creditor cannot be found, or if he refuses to appoint any place, or to appoint a reasonable place, the debtor may himself select any suitable and reasonable place and make a delivery there, with notice to the creditor, if he can be found."

In this case, the location of the property had never been changed. Wherever it was placed by the owner was presumably an appropriate place, and there the owner was free to recover it on defendant's tender as found by the jury. While it remained in possession of

the sheriff and under his responsibility, he kept it exactly as it had been kept by the owner; and, after a sufficient tender, the possession, actual and constructive, again vested in the owner, and a right result appears to have been attained in this lawsuit.

There is a suggestion that the evidence of McLachlin, touching his conversation with Morey, the plaintiff's agent, was inadmissible, since Morey had died before the trial. No formal assignment of error is based on this, but its admission was not error. *Bank v. Sams*, 96 Kan. 437, 441, 152 Pac. 28.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 89)

ANSCHUTZ v. STEINWAND et al.

(No. 19842.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

JUDICIAL SALES \Leftarrow 38—SETTING ASIDE—MISTAKE IN OFFER.

Evidence that a client authorized his attorney to bid for him at a sheriff's sale \$300 for a tract of land, subject to a mortgage of \$1,100, and that the attorney telegraphed an offer of \$300 "over" the mortgage, warrants a district court, in the exercise of a sound discretion and to promote substantial justice, in setting aside a sale returned as having been made for \$1,400.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 76; Dec. Dig. \Leftarrow 38.]

Appeal from District Court, Logan County.

Action by Christian Anschutz against Frederick Steinwand and others. From an order setting aside sale and confirmation thereof, the defendant named and another appeal. Affirmed.

C. A. Spencer, of Oakley, for appellants.
George W. Holland, of Russell, for appellee.

MASON, J. In October, 1912, Henry Ebel obtained in the district court of Logan county personal judgments, for \$2,237.20 and \$803.06, against Frederick and Margaret Steinwand, which were decreed to constitute a first lien against the northwest quarter of one section of land, and a second lien against the southwest quarter of another. An order of sale was issued on which a sale was made on October 24, 1913. The sheriff's return showed the sale of both tracts to Ebel, the northwest quarter for \$2,100, and the southwest for \$1,400. On April 30, 1914, on Ebel's motion an order was made confirming the sale. On July 6, 1914, Ebel filed a motion, asking that the order of confirmation and the sale be set aside. This motion was heard on the same day, and allowed. From this order the Steinwands appeal.

The terms of court in Logan county begin on the fourth Tuesdays of April and October. Laws 1913, c. 174, p. 266, § 1. The decree of confirmation was therefore set aside at the same term at which it was rendered. The court consequently had a wide discretion in

determining whether the matter should be reopened. *Hemme v. School District*, 30 Kan. 377, 1 Pac. 104. Its decision that there should be a further inquiry is not open to review, and the question before us is whether error was committed in the final refusal to confirm the sale.

Evidence was given to this effect: Ebel's attorney had instructions from his client to bid \$300 for the southwest quarter, subject to a prior mortgage for \$1,100; he telegraphed to the sheriff, authorizing a bid of \$300 "over" the first mortgage, using the quoted word erroneously for "subject to." The appellants contend that the evidence was not admissible to impeach the return of the sheriff. The rule that the return of a sheriff is conclusive upon the parties does not prevent its being amended upon a proper showing (*Stetson v. Freeman*, 35 Kan. 523, 11 Pac. 431), and the proceedings had in the district court may, perhaps, be regarded as having substantially that effect. But apart from that, under the present statute a sale may be set aside, although regularly made in accordance with law, upon equitable grounds. *Bank v. Murray*, 84 Kan. 524, 114 Pac. 847. The court, having found that the appellee's bid, even if it must be regarded as having been made as shown by the return, was the result of inadvertence or mistake, was authorized, in the exercise of a sound discretion and to promote substantial justice, to set the sale aside. 24 Cyc. 31; 25 A. & E. Encycl. of L. 785.

Ebel asked to have the sale set aside as to the southwest quarter, expressing his willingness that as to the other quarter, it should stand or be set aside as the court should prefer. Doubtless the whole sale was set aside on the theory that if one tract was to be again offered, both should be. We do not understand that the appellant objects to this feature of the order.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 56)

HENSLEY et al. v. SCHOOL DIST. NO. 87
OF ANDERSON COUNTY et al.
(No. 19816.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY — BUILDING CONTRACTOR'S BOND — DEBTS COVERED — "FAITHFUL PERFORMANCE."

A contractor's bond, conditioned in general terms for his faithful performance of a building contract, will not be interpreted as guaranteeing merely his payment of debts incurred for labor and material, although that was the only guaranty required by the statute, and the original agreement called for the giving of a bond according to the law of the state.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 127; Dec. Dig. § 82.]

2. PRINCIPAL AND SURETY — § 57 — BUILDING CONTRACTOR'S BOND — LIABILITY OF SURETY COMPANY — CONSIDERATION FOR GUARANTY.

A surety company is liable upon a contractor's bond executed by it after the signing of the original contract, although not provided for therein; the compensation it receives being a sufficient consideration for its guaranty.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 101; Dec. Dig. § 57.]

Appeal from District Court, Anderson County.

Action by E. S. Hensley and another, as partners, etc., against School District No. 87 of Anderson County and others. From judgment for plaintiffs, the defendant Equitable Surety Company appeals. Affirmed.

W. N. Smelser, of Emporia, for appellant.
C. W. Garrison and N. L. Bowman, both of Garnett, for appellees.

MASON, J. A school district entered into a written contract with J. T. Allen for the building of a schoolhouse. Allen gave a bond executed by the Equitable Surety Company conditioned for his faithful performance thereof. He failed to complete the building, and a number of mechanics' liens were filed against it. The district sued the surety company and obtained a judgment against it for \$1,919.98 on account of the mechanics' liens, and for an additional \$500 for damages by reason of the failure to complete the building. The company appeals, contesting only the \$500 item, on the ground that it was not covered by the bond.

The contract between the school district and Allen was entered into and signed on March 26, 1913. The contract required Allen to "give bond according to the state law of the state of Kansas," but made no other reference to the matter. The bond was executed on April 29, 1913. The condition upon which liability depended was stated in these words:

"If the said principal shall faithfully perform such contract according to the terms, covenants, and conditions thereof."

The only statute relating to a bond in such cases requires a public officer upon entering into a contract for constructing a public building to take a bond "conditioned that such contractor or contractors shall pay all indebtedness incurred for labor or material furnished in the construction of said public building." Gen. Stat. 1909, § 6256; Code Civ. Proc. § 661.

[1] 1. In behalf of the surety company it is argued that, inasmuch as the bond was given in pursuance of the contract, which required merely a bond according to the state law, it should be interpreted as intended to carry out the statutory purpose, and that the words binding the principal to the faithful performance of his contract should be construed as referring only to his payment of indebtedness for labor and material, thereby protecting the district against mechanics' liens. We think the language of the bond too explicit

to admit of a meaning so far from that naturally to be placed upon it. The surety company undertook that Allen should faithfully perform his contract according to its terms. This is the usual scope of a bond of this general character. A failure to pay materialmen and laborers is only one of a variety of ways in which a building contractor may violate his agreement. The bond here given must be held broad enough in its terms to cover the loss resulting from Allen's abandonment of the building before its completion.

[2] 2. Whether the bond is enforceable, construed as covering other defaults than those relating to liens, depends upon the sufficiency of the consideration for that part of the guaranty. After a contract has been signed by the parties, an agreement of a third person, guaranteeing that one of them will carry out his part of it, can only be enforced where it is made pursuant to some prior understanding, or is supported by some new consideration. 27 Cyc. 306; 5 Elliott on Contracts, § 3936; 1 Brandt on Suretyship and Guaranty (2d Ed.) § 26.

Where a contract provides for security being given with respect to certain specified matters, and a bond which contains additional engagements is signed by a surety who receives no consideration, a question may well be raised whether his liability extends beyond the items covered by the original agreement. But here the surety is a corporation engaged in assuming such obligations for pay. It is practically an insurance company. *State v. Construction Co.*, 91 Kan. 74, 81, 136 Pac. 905, Ann. Cas. 1915C, 192. It receives compensation for its guaranty, and therefore is not within the protection of the rule suggested.

The judgment is affirmed. All the Justices concurring.

ROCK MILLING & ELEVATOR CO. v. ATCHISON, T. & S. F. RY. CO.*
(No. 19768.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. COURTS — 489 — INTERSTATE SHIPMENTS — ACTION FOR REPAIRING CARS — JURISDICTION.

State courts have jurisdiction, in actions to recover the amounts due shippers of interstate freight for repairing cars, to put them in condition for holding the shipment, where the maximum charge for such repairs is fixed by the tariff on file with the Interstate Commerce Commission.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324-1330, 1333-1341, 1372-1374; Dec. Dig. — 489.]

2. LIMITATION OF ACTIONS — 51 — ACCRUAL OF CAUSE — COST OF REPAIRING CARS.

The three-year statute of limitations applies to actions to recover the cost of repairing

cars to put them in condition to receive the property to be shipped therein, and the statute begins to run on each item when the shipment is made.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 280-284; Dec. Dig. — 51.]

3. CARRIERS — 40 — TARIFF — REPAIR OF CARS — "ACTUAL COST OF THE SAME."

The words "actual cost of the same" in the following tariff provision: "When cars furnished by carriers named below for grain or other loading require repairing in order to insure against leakage in transit, and material necessary for this repair is furnished by the shipper, the carrier will pay the actual cost of the same, but not to exceed 80 cents per car," include the cost of the material and labor necessary to repair, but do not include the cost of inspecting or cleaning cars or the cost of attaching grain doors.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120-122; Dec. Dig. — 40.]

4. APPEAL AND ERROR — 1050 — HARMLESS ERROR — ADMISSION OF EVIDENCE.

The admission in evidence of "*Santa Fé* Coöperage Circular No. 1" did not prejudice any substantial right of the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. — 1050.]

Appeal from District Court, Reno County.

Action by the Rock Milling & Elevator Company against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, J. S. Simmons, of Hutchinson, and William Osmond, of Great Bend, for appellant. F. Dumont Smith, of Hutchinson, for appellee.

MARSHALL, J. In this action the plaintiff recovered judgment against the defendant in the sum of \$3,976.20 for repairing cars furnished the plaintiff by the defendant in which to ship grain. The defendant appeals.

The action was begun February 25, 1913. Between December 7, 1908, and May 15, 1911, the plaintiff received from the defendant 5,127 cars in which to ship bulk grain. All these cars were used in the interstate shipment of grain. Before loading the cars, it was necessary for the plaintiff to repair them to prevent grain leaking therefrom. The petition asked for 80 cents for repairing each car. The jury allowed 60 cents for material and labor. From December 3, 1908, to December 28, 1910, the defendant's tariff contained the following provision:

"When cars furnished by carriers named below for grain or other loading require repairing in order to insure against leakage in transit, and material necessary for this repair is furnished by the shipper, the carrier will pay the actual cost of the same, but not to exceed 80 cents per car."

On December 28, 1910, the tariff was amended so as to read:

"When cars furnished for bulk grain or other bulk freight loading require repairing in order to insure against leakage in transit, and the ma-

terial necessary for repairing is furnished by the shipper, the line furnishing the car will pay for the cost of the repairs, but not to exceed 80 cents per car."

During all of the times of the transactions involved in this action the tariff contained this provision:

"When cars furnished for grain or other loading requiring interior doors are not so equipped by the railroad company, and such doors are furnished by the shipper, the actual cost thereof, but not to exceed \$1.20 per car, will be paid by the carrier."

During all of this time rule 78 of the Interstate Commerce Commission was in effect. This rule is:

"A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in the tariff."

[1] 1. The first contention is that the court did not have jurisdiction of the matters involved in this controversy. The defendant's argument is that every matter where there is a rate concerned or a tariff to be construed or a rate founded on a tariff to be adjudicated, must come before the Interstate Commerce Commission. This statement of the rule is too broad. The rule is:

"Relief from excessive freight charges upon interstate shipments, where the charges are made according to established rates fixed and promulgated as required by the Interstate Commerce Act, must be sought through the Interstate Commerce Commission." *Railway Co. v. Refining Co.*, 83 Kan. 732, 112 Pac. 604.

Actions by carriers to recover the freight rate fixed by the tariff have been maintained in the courts of this state where a rate less than that fixed had been collected. *Railroad Co. v. Thisler*, 90 Kan. 5, 133 Pac. 539; *Railway Co. v. Theis*, 96 Kan. 494, 152 Pac. 619. If a carrier can recover what is due it under a tariff, it follows that a shipper can recover from the carrier what is due the shipper under the same tariff. The state courts have jurisdiction in actions to recover such amounts. *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *Illinois C. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306.

[2] 2. The defendant contends that all items set out in the petition and accruing more than three years before the commencement of the action are barred by the three-year statute of limitations. The plaintiff to meet this argues that all the cars were furnished under one hiring and under one continuous contract. If the 5,127 cars were ordered at one time, this argument of the plaintiff would be correct, but there is nothing to indicate that this was done. It is not so alleged in the petition nor established by the evidence. Each order for cars and shipment thereunder constituted a separate transaction on which an action might have been maintained, and the statute of limitations began to run when that cause of ac-

tion accrued. It was not in any way connected with any other order for cars. Ordering cars and shipping freight therein under the rates, rules, and regulations named in a tariff filed with the Interstate Commerce Commission, do not constitute a contract in writing, and the five-year statute of limitations does not apply. We hold that the three-year statute of limitations bars all transactions set out in the petition where the shipments were made more than three years prior to the commencement of the action.

[3] 3. Complaint is made of the construction placed by the trial court on the provision of the tariff providing for the repair of cars. The phrase "actual cost of the same" in the tariff effective from December 3, 1908, to December 28, 1910, includes the cost of material and the labor of making the repairs. Nothing else is included in the tariff provision just mentioned or in the one effective December 28, 1910. Neither inspecting nor cleaning cars is included. Reimbursement of shippers for the expense incurred in attaching grain doors is prohibited by rule 78 of the Interstate Commerce Commission when not expressly provided for, and for that reason that expense cannot be recovered. This means the work of putting in the door and securing it against leakage.

[4] 4. Complaint is made of the admission in evidence of "Santa Fé Cooperage Circular No. 1." We do not see how the admission of this document in any way prejudiced the defendant, although it may not have proved anything in the case.

The judgment is reversed, and the cause is remanded for a new trial. All the Justices concurring.

(97 Kan. 64)

DROVERS' STATE BANK v. ELLIOTT.
(No. 19825.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS ~~§~~41—CROSS-DEMAND—ACTION ON NOTES.

Where a customer does business with a bank for a period of years, depositing notes, checks, accounts, and his own promissory notes, and checking against the same as his business needs require, and the bank keeps the only record of this series of transactions, and the customer makes new notes from time to time as requested by the bank cashier, who made false and fraudulent representations to the customer, upon which he relied, and where the bank charged items against the customer which he had not drawn and failed to credit him with deposits made, the defendant customer, in an action by the bank to recover on notes so given, may set up a cross-demand and counterclaim and have it used to compensate the bank's demand "so far as they equal each other," and the bar of the statute of limitations to such counterclaim is specifically removed by section 102 of the Civil Code (Gen. St. 1902, § 5695).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 214, 215; Dec. Dig. ~~§~~41.]

(Additional Syllabus by Editorial Staff.)

2. SET-OFF AND COUNTERCLAIM §§ 8, 9, 10—
"SET-OFF" — "COUNTERCLAIM" — "CROSS-
DEMAND."

A "cross-demand" is a demand which is preferred by one party to an action in opposition to a demand already preferred against him by his adversary. A "set-off" is a demand which a defendant makes against the plaintiff in a suit for the purpose of liquidating the whole or a part of his claim. A "counterclaim" is the claim of a defendant to recover from a plaintiff by setting up and establishing any cross-demand which may exist in his favor as against plaintiff.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 9-13; Dec. Dig. §§ 8, 9, 10.

For other definitions, see Words and Phrases, First and Second Series, Counterclaim; Cross-Demand; Set-Off.]

Appeal from District Court, Cloud County.

Action by the Drovers State Bank against O. B. Elliott. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Kennett & Hunter, of Concordia, for appellant. Pulsifer & Hunt, of Concordia, for appellee.

DAWSON, J. The plaintiff brought an action to recover on two promissory notes executed by O. B. Elliott in May, 1907, and due in May, 1908. The action was filed in April, 1913. Elliott pleaded that the notes were given without consideration, and that the plaintiff owed the defendant a large sum of money. On motion of plaintiff, the defendant was repeatedly required to amend his answer so as to set out his counterclaim, if he had one, and that such counterclaim be fully stated and pleaded. The second amended answer set up a counterclaim alleging that O. B. Elliott had been doing business with the plaintiff bank and had trusted to the plaintiff's cashier, and his business accounts of notes, checks, and accounts had been kept by the plaintiff and its cashier, and that he had signed notes from time to time as requested by the plaintiff, and that the notes in controversy were thus signed at the request of the plaintiff and without any knowledge as to the true condition of the account between plaintiff and Elliott, and that no such indebtedness existed between the parties. It was also alleged that the plaintiff kept all the records of the transactions between it and the defendant, O. B. Elliott, and had refused access to them. Then followed such statement of account as Elliott could give, covering items on dates from July 15, 1905, to August, 1906, and alleging that the defendant had never given him credit for certain items, and had wrongfully and fraudulently charged him with certain amounts, the net result being that the bank owed O. B. Elliott \$3,222.44.

[1] To defendant's cross-petition and counterclaim the plaintiff demurred (1) on the ground that no cause of action was stated therein, and (2) that the counterclaim was barred by the statute of limitations. This

demurrer was sustained, and this brings the case here.

The appellant relies on section 102 of the Civil Code (Gen. St. 1909, § 5695). It reads:

"When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other or by reason of the statute of limitations; but the two demands must be deemed compensated so far as they equal each other."

[2] A cross-demand is defined as a demand which is preferred by one party to an action in opposition to a demand already preferred against him by his adversary. 1 Bouvier, 481. A set-off is a demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim. 2 Bouvier, 988. Under our Code (section 100) a set-off is limited to cross-demands for the recovery of money. This court has defined a counterclaim thus:

"The ordinary meaning of counterclaim is a demand of something which of right belongs to the defendant in opposition to the right of the plaintiff. It is also defined as a claim, which, if established, will defeat or in some way qualify a judgment to which plaintiff is otherwise entitled; it is the claim of a defendant to recover from a plaintiff by setting up and establishing any cross-demand which may exist in his favor as against plaintiff." Venable v. Dutch, 37 Kan. 515, 517, 15 Pac. 520, 521, 1 Am. St. Rep. 260.

In the case at bar, the facts pleaded by the answer, and for present purposes admitted by the demurrer, show that O. B. Elliott had been doing business with the bank for several years. He made deposits of cash, checks, cattle returns, and his own promissory notes and the like, from time to time, covering the years 1905, 1906, and 1907; and as his business dealings required, he checked against his bank account. As was his wont, he signed the notes in controversy, relying upon the representations of the bank's cashier, and the bank kept and still keeps the record of this series of transactions, and Elliott was denied access to the books. The bank cashier deceived him. At the time he gave these notes, he not only did not owe the bank, but the bank had erroneously and, as he says, fraudulently charged him with items which he never drew, and failed to credit him with certain amounts. He had pleaded these with such certainty as he could under the circumstances. He may have difficulty in proving all this, but that is immaterial here. Why should this counterclaim not be admitted? Measured by the definitions, and by the requirements of the Code (sections 97, 98, 100, and 102 [Gen. St. 1909, §§ 5690, 5691, 5693, 5695]), his counterclaim would have been sufficiently stated as an independent cause of action, and the Code section relied upon by the appellant (section 102) puts the statute of limitations entirely out of consideration.

In Railroad Co. v. Thisler, 90 Kan. 5, 133

Pac. 539, where the carrier sued a shipper for a balance of freight charges, a counterclaim for damages to the property shipped was upheld.

In *Miller v. Thayer*, 96 Kan. 278, 150 Pac. 537, the plaintiff brought replevin for possession of goods and upon which plaintiff held a mortgage to secure defendant's note for \$4,942. The defendant admitted the execution of the note and mortgage, and alleged that defendant had been induced to purchase the goods from plaintiff, and to give the note and mortgage by reason of false and fraudulent representations made to him by the plaintiff upon which defendant had relied, and prayed judgment on his counterclaim for damages in the sum of \$12,477.11. In that case the district court overruled the demurrer, and this court affirmed the judgment. The authorities there cited are pertinent here. See, also, *Decennial Digest*, 1906, p. 100.

Appellee's argument is largely directed to the bar of the statute of limitations, but section 102 of the Code specifically declares that cross-demands and counterclaims shall be availing to the defendant under the circumstances of a case like this, notwithstanding the statute of limitations. Granted that as a separate action for relief on the ground of fraud the defendant's cross-demand would be too late, we must hold that not only the bar of the statute of limitations to such relief is removed, but the broad language of section 102 of the Code takes down every bar; and if this counterclaim is established by the evidence, it must be used as compensation against plaintiff's claim "so far as they equal each other."

It follows that the decision of the district court must be reversed, and the cause remanded for further proceedings. All the Justices concurring.

(97 Kan. 68)

CAMPBELL v. BOARD OF COUNTY COM'RS OF RENO COUNTY

et al. (No. 19826.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. BAIL §73—DEPOSIT IN LIEU OF BAIL—SURRENDER OF ACCUSED—RETURN OF MONEY.

The money deposited in lieu of bail by a third person to secure the release of one arrested and required to appear to answer a criminal charge is not conclusively regarded as the defendant's money, and when the purpose for which the deposit has been made is accomplished and the obligation discharged, or there has been a surrender of the defendant, the money is to be returned to the owner.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 254-256; *Dec. Dig.* §73.]

2. BAIL §80—SURRENDER OF ACCUSED—VALIDITY.

A surrender of the defendant may be made to a general deputy of the sheriff, and the mere fact that a defendant has been placed under

arrest by another officer because of the commission of another offense, shortly before an attempt to surrender was made, did not of itself render the attempted surrender invalid.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 328-334; *Dec. Dig.* §80.]

3. BAIL §80—SURRENDER OF ACCUSED—VALIDITY.

Shortly after the defendant had been released from custody by the giving of a deposit, he was arrested for another offense, and the officer who made the arrest, at the request of the surety who made the deposit, went with the defendant to the courthouse, and, in the presence of a deputy sheriff and the clerk of the district court, made a formal offer of surrender which was accepted by the deputy sheriff who then took the defendant into his custody, and thereupon the clerk of the district court issued a check to the surety for the amount of the deposit, and the surety in turn signed and delivered a receipt to the clerk for the money so returned. Shortly afterward, payment on the check was stopped. *Held*, in an action brought by the surety to recover the money he had deposited instead of bail, that the deputy sheriff had authority to accept the surrender of the defendant, and that the surrender was effective although neither the sheriff nor his deputy acknowledged the surrender in writing.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 328-334; *Dec. Dig.* §80.]

4. BAIL §73—DEPOSIT IN LIEU OF BAIL—RECOVERY—ESTOPPEL—DECLARATION OF FORFEITURE.

A subsequent declaration of forfeiture because of the nonappearance of the defendant, made by the district court, to which proceeding the owner of the deposit was not a party and of which he had no notice, did not affect such owner or estop him from maintaining an action to recover the deposit.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 254-256; *Dec. Dig.* §73.]

Johnston, C. J., dissenting.

Appeal from District Court, Reno County.

Action by Mrs. D. E. Campbell against the Board of County Commissioners of the County of Reno and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Lee Monroe and W. S. Roark, both of Topeka, for appellant. E. T. Foote, of Hutchinson, for appellees.

JOHNSTON, C. J. Mrs. D. E. Campbell brought this action to recover \$2,000, which was deposited in lieu of bail to secure the appearance of John Sanders for trial in the district court of Reno county. It seems that in March, 1910, Sanders had been bound over to the district court by a justice of the peace of Reno county, and his bail fixed at \$2,000, and O. H. Dorr, in order to secure his release, made a deposit of \$2,000 in lieu of bail by giving to the clerk of the district court a certified check payable to his order, and thereupon Sanders was released. Sanders had been extradited from Colorado on a charge of larceny. At the time set for his appearance in the district court his case was continued until the September term, and the cash bond of \$2,000 was allowed to stand. A day or so after this, Sanders, while walk-

ing along the street in Hutchinson with Dorr, was arrested by a constable of Cowley county, and Dorr, Sanders, and the constable went to the courthouse, and in the presence of Dorr's attorney, Sanders, the clerk, Amy Alexander, and a deputy sheriff named Carl Duckworth he turned Sanders over to said deputy sheriff, telling him that he thereby surrendered him, and demanded a return of the deposit of \$2,000, which was done by the clerk drawing her check for that amount. And thereupon Dorr himself formally signed a receipt of the return of the deposit upon the clerk's appearance docket. However, before Dorr cashed the check, the clerk notified the bank upon which it was drawn to stop payment thereon, she having been advised by the undersheriff and the deputy county attorney to do so. Sanders was taken to Cowley county, where he was afterwards released upon a writ of habeas corpus, the process upon which he was arrested having been held void. At the time for Sanders' appearance at the September term of the court he made default, and the court entered an order declaring said sum of \$2,000 to be forfeited to the state of Kansas. No process or notice was served upon Dorr before the making of the order. A demurrer to the petition was overruled, and defendants filed their answer, and at the trial an objection to the introduction of any evidence under the petition was overruled. The court, after argument, sustained a demurrer to plaintiff's evidence, and rendered judgment in favor of the defendant for costs. Plaintiff appeals.

[1] On behalf of the defendant it is contended that no recovery can be had by plaintiff to whom the claim was assigned by Dorr, because the deposit made in lieu of bail must be regarded as the money of Sanders. The deposit was made by Dorr, and was not in fact the money of Sanders. It was made pursuant to the statute, and stood in place of a recognizance, the obligation being that Sanders would appear at the appointed time. Under this statute the deposit is to be returned in case bail is subsequently given for defendant, or if he surrenders himself in open court or to the sheriff in the prescribed way. Crim. Code, § 146 (Gen. St. 1909, § 6722). The statute does not provide that the deposit, by whomsoever furnished, shall be presumed to be the defendant's, or that the ownership of the money shall be changed by the mere fact that it has been deposited to secure the release of the defendant. It is deposited for a specific purpose, and when that purpose is accomplished the deposit should be returned to its owner. The ownership is not transferred to another, nor can it be devoted to other purposes in the absence of an express statute providing for such transfer or diversion. A number of cases are cited that money deposited in lieu of bail by a third party should be regarded as having been deposited by the defendant and to be-

long to him. *State of Iowa v. Owens*, 112 Iowa, 403, 84 N. W. 529; *People ex rel. Gilbert v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910; *Whiteaker v. State*, 31 Okl. 65, 119 Pac. 1003; *State v. Ross*, 100 Tenn. 303, 45 S. W. 673. These cases appear to rest on statutes differing materially from our own, and some of which at least require that the deposits shall be applied to fine, or costs, or both, that may thereafter be assessed against the defendant. Under our statute the deposit is not to be used except as bail to secure the appearance of the defendant, and the state has no right to hold the money as against the claim of the real owner when the purpose of the deposit has been subserved and the obligation discharged, or there has been an effective surrender of the defendant. *Wright & Taylor v. Dougherty*, 138 Iowa, 195, 115 N. W. 908; *Doty v. Braska*, 138 Iowa, 396, 116 N. W. 141; *Way v. Day*, 187 Mass. 476, 73 N. E. 543; *People ex rel. Meyer v. Gould*, 75 App. Div. 524, 78 N. Y. Supp. 270.

[2] It is next contended that there was a legal and effective surrender of the defendant, and hence plaintiff was entitled to the return of the money deposited. It appears that the defendant and Dorr came into the presence of the clerk of the district court and deputy sheriff and undertook to make a formal surrender. The attempt to surrender was made after the defendant had been arrested by the constable of Cowley county, and it is argued that Sanders being in the custody of the constable, an effectual surrender could not be made. Sanders was placed under arrest by the Cowley county officer, and that officer, on the request of the parties, went with Sanders to the courthouse and there permitted him to appear before the deputy sheriff and the clerk of the district court and make a formal surrender. With the view of effecting a surrender, the constable appears to have given Sanders his liberty and allowed him to pass into the custody of the deputy sheriff. After the steps towards a surrender had been taken, the check for \$2,000 was issued and delivered to Dorr, and a receipt for the deposit was given by him. It is said that the sheriff only took Sanders into custody and placed him in jail for the convenience of the Cowley county officer, but in view of the offer of surrender and the acceptance of the same by the deputy sheriff and the issuance of the check, all apparently with the consent of the constable, it would seem that the custody of Sanders was taken by the deputy sheriff because of the surrender, and not because of the request of the constable. The mere fact that the constable previously placed Sanders under arrest did not prevent the surrender from being effective if it is sufficient in other respects.

[3] Some contention is made to the effect that the surrender could not be made to the deputy sheriff because he was a very young man, and was not intrusted with the more

important duties of the sheriff's office. He was, however, appointed a general deputy, and under his appointment he was authorized to perform any of the duties incumbent upon the sheriff, including the care and custody of prisoners. Gen. Stat. 1909, §§ 2195, 2196; Robinson v. Hall, 33 Kan. 139, 5 Pac. 763; 35 Cyc. 1516. We think the deputy sheriff has authority to accept the surrender of one for whose appearance a recognizance has been given or a deposit made. Nor can it be held that the surrender is ineffectual because the statutory method was not strictly followed. It is provided that:

"The bail must deliver a certified copy of the recognizance to the sheriff, with the principal; and the sheriff must accept the surrender of the principal and acknowledge it in writing." Crim. Code, § 150 (Gen. St. 1909, § 6726).

The sheriff did not make a formal acknowledgment in writing, but the court does not regard the surrender as invalid merely because of the omission of this step where it was in fact accepted, as was done here, and where the custody of the surrendered party was in fact taken by the deputy sheriff.

[4] It is next contended that as a forfeiture of the deposit was declared and that as this order has not been set aside, nor any appeal taken from it, it is conclusive on Dorr, the owner of the money, as well as upon the defendant. It appears that a forfeiture was declared when Sanders did not appear for trial, and this was done upon the theory that a valid surrender of the defendant had not been made. The money was a substitute for the recognizance, and the liability upon a recognizance can only be enforced against those who have become sureties for the defendant's appearance by a proceeding against them. The declaration of forfeiture was evidence of defendant's failure to appear in court, and a right of action then accrued in favor of the state, but an action on the recognizance based on proper service was still necessary before a judgment could be entered against those who gave bond to secure the appearance of the defendant. In like manner, third persons who have made a deposit in lieu of bail must be legally brought into court, and a judgment rendered against them before the money is finally appropriated by the state. Dorr, the owner of the money, was not served with process, nor was notice of any kind served upon him or his assignee prior to the declaration of forfeiture by the court. Without legal notice to a third party who is the owner of the money deposited, a valid judgment forfeiting the money to the state cannot be rendered against him.

It follows that the judgment of the district court must be reversed, and the cause remanded for further proceedings.

BURCH, MASON, PORTER, WEST, MARSHALL, and DAWSON, JJ., concurring.

JOHNSTON, C. J. (dissenting). To accomplish the surrender of one bound by a recognizance or deposit to appear and answer a criminal charge, the statutory requirements must be followed with considerable strictness. One of the essential steps required to be taken where the bail undertakes to surrender his principal is that the sheriff must not only accept the surrender of the defendant, but that such officer must acknowledge it in writing. This was not done by the sheriff or by any of his deputies. The requirement that the acknowledgment shall be in writing is imperative in form, and in my view, it is necessary in order to make an effective surrender.

(7 Kan. 33)

STOUT v. BOWERS et al. (No. 19789.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. EVIDENCE \S 558—EXPERT TESTIMONY—CROSS-EXAMINATION—MEDICAL EXPERT.

Where an expert witness testifies and founds his opinion on standard medical authorities, it is competent for the opposing party, in cross-examining him, to read from the authorities on the subject in question, and to ask him if he agrees or disagrees with the opinions expressed by the authors.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500-1508; Dec. Dig. \S 558.]

2. APPEAL AND ERROR \S 302—PRESENTATION BELOW—EXCLUSION OF EVIDENCE—MOTION FOR NEW TRIAL.

In order to obtain a review of a ruling excluding evidence, the excluded evidence must be produced at the hearing of the motion for a new trial by affidavits or other competent testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. \S 302.]

3. PHYSICIANS AND SURGEONS \S 18—ACTION FOR MALPRACTICE—NEGLIGENCE—QUESTION FOR JURY.

In this case, where the defendants who are physicians and surgeons, are charged with negligence in the diagnosis, operation, and treatment of the plaintiff for certain ailments, it is held that the testimony produced by plaintiff was sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. \S 18.]

Appeal from District Court, Sedgwick County.

Action by Nellie Stout against Charles E. Bowers and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Keith & Potts, of Wichita, for appellant. Dale, Amidon & Madelene, of Wichita, for appellees.

JOHNSTON, C. J. Nellie Stout brought this action against Charles E. Bowers and Thor Jager, who are physicians and surgeons, to recover \$5,000 damages for their alleged negligence in diagnosing her ailment

and in performing a surgical operation upon her. She alleged that she was brought to them for an examination, and that they kept her under observation for about seven days, but that they did not apply the customary and approved tests and methods in the diagnosis of her case; that later, upon a superficial examination they negligently advised her that her illness was appendicitis, and that the removal of the appendix would restore her to normal health. She alleged that the operation was performed, and the appendix was removed when it was not diseased and was not the cause of her illness. She further stated that it was apparent at the operation that other abdominal organs were deranged, that there was a condition of ptosis or falling of part of the intestines, which should have been tacked up and otherwise remedied, but that defendants closed the incision without attaching the intestines, which were too freely mobile, as they were in duty bound to do. She further alleged that the operation did not cure her ailment, and that an operation was subsequently performed by other surgeons, who found the same conditions as existed when the defendants operated; that the state of ptosis existed; and that when the intestines were attached to the walls of the abdomen, the plaintiff was relieved of her ailment and soon recovered her health. The defendants in their answer alleged that the operation was skillfully done, and that an operation for ptosis was unwarranted. When the evidence of plaintiff had been introduced, the defendant challenged its sufficiency, but their demurrer to her evidence was overruled. The defendants introduced their testimony, much of which was expert in character, and when they had concluded, the court on their motion took the case from the jury and directed a verdict in favor of the defendants.

[1, 2] The first complaint is that plaintiff was not allowed to show the conditions developed by the subsequent operation and the fact that it resulted in effecting a cure. While the plaintiff might have given testimony as to some of the palpable facts, she was not qualified to testify as to the skill exercised in that operation, no more than in the one performed by the defendants. It was competent for her to state any manifest conditions observable by any one, but only witnesses who have special skill and knowledge are competent to testify as to her ailment, or as to what was required in the way of surgery or treatment. *Sly v. Powell*, 87 Kan. 142, 123 Pac. 881. It would seem that one having special skill and training might give testimony as to the conditions existing at the time of the different operations upon the plaintiff, the treatment required, and the effects resulting from the operations. The testimony of Dr. Welsh, who is an expert, upon some of these matters was offered and excluded. However, the excluded evidence was not produced on the mo-

tion for a new trial as the Code requires, and hence the rulings excluding it are not open to review. Civ. Code, § 307 (Gen. St. 1909, § 5901).

There is a complaint that appellee was permitted to read medical books to the jury in the course of the trial. It has been held that medical books are not admissible in evidence to establish the declarations or opinions which they contain. *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318. However, experts are permitted to give opinions based in part on the information obtained from medical works prepared by experts of acknowledged ability and which are recognized as authorities. So witnesses are permitted to state what they have found laid down in such works and upon which they found their opinion. In this case the medical works were not introduced as affirmative evidence, but were only used in the cross-examination of the witnesses to test their knowledge and credibility. One of the recognized methods of testing the knowledge of an expert witness who founds his opinions on standard medical authorities is to read from those authorities upon the subject in question and interrogate him as to whether his opinions coincide with those expressed in the books, and whether there is not a conflict between the opinions he then gives and the views expressed by the authorities upon which he relies for information. *Conn. M. L. Ins. Co. v. Ellis, Adm'r*, 89 Ill. 516; *Louisville, New Albany & Chicago Railway Company v. Howell*, 147 Ind. 266, 45 N. E. 584; *Egan v. Dry Dock, E. B. & B. R. Co.*, 12 App. Div. 556, 42 N. Y. Supp. 188.

[3] The remaining question is whether the testimony offered in behalf of plaintiff was sufficient to take the case to the jury. It is true, as defendants contend, that they cannot be held liable if it appears that they possessed a reasonable degree of skill and learning in medicine and surgery, and that they used ordinary skill and care in the diagnosis, operation, and treatment of the plaintiff. *Erastus Tefft v. Hardin H. Wilcox*, 6 Kan. 46; *Sly v. Powell*, 87 Kan. 142, 123 Pac. 881. Much testimony of an expert character was produced as to the professional skill of the defendants, and which tended to prove that the operation was properly performed, and further, that an operation for ptosis of the bowels was not approved surgery, and was not warranted in plaintiff's case. On the other hand, if testimony was produced by plaintiff which fairly tended to prove the essential facts stated in the petition as to defendants' negligence, although it may have been weak and inconclusive as compared with that produced by the defendants, the ruling directing a verdict in favor of defendants cannot be upheld. If the demurrer to plaintiff's evidence could not be sustained, a verdict against her could not be directed, because of conflicting evidence sub-

(97 Kan. 147)

STATE v. MARKS. (No. 20326.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

INDICTMENT AND INFORMATION \S 114—PERSISTENT VIOLATION OF PROHIBITORY LAW—INFORMATION — ALLEGATION OF "FORMER CONVICTION."

The former conviction for a violation of the prohibitory law, which must be pleaded in an information charging a felony for the persistent violation of the prohibitory law, relates to a conviction under the state law, and not to a conviction under a city ordinance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. $\S\S$ 301-307; Dec. Dig. \S 114.

For other definitions, see Words and Phrases, First and Second Series, Former Conviction.]

Appeal from District Court, Bourbon County.

A motion to quash an information charging W. M. Marks with being a persistent violator of the prohibitory law was sustained, and the state appeals. Affirmed.

S. M. Brewster, Atty. Gen., and James G. Sheppard, of Ft. Scott, for the State. Hubert Lardner and J. B. Connolly, both of Ft. Scott, for appellee.

DAWSON, J. This is an appeal by the state from a judgment of the district court of Bourbon county which sustained a motion to quash an information in which the defendant was charged with being a persistent violator of the prohibitory law under chapter 165 of the Session Laws of 1911. It was alleged that the defendant had been convicted in the police court of the city of Ft. Scott of unlawfully selling intoxicating liquors—

"within said county and state, and since the date of said conviction, to wit, on or about April 29, 1915, the said W. M. Marks then and there being, did then and there unlawfully sell and barter malt, vinous, fermented, spirituous, and other intoxicating liquors within said county and state, and did then and there persistently and unlawfully violate the prohibitory liquor law of said state, contrary to the form of the statute," etc.

The state seeks an interpretation of chapter 165 of the session laws of 1911. The statute reads:

"Section 1. Any person or persons who having once been duly convicted of the violations of the prohibitory liquor law and who shall thereafter directly or indirectly violate the provisions of the prohibitory liquor law shall be considered a persistent violator of the prohibitory liquor law and shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the state penitentiary at hard labor for not more than one year."

The police court of the city of Ft. Scott only has jurisdiction of breaches of the city ordinances. It does not have jurisdiction of offenses against the state law. The courts which have jurisdiction over breaches of the penal laws of the state are those of the justices of the peace, the city courts, where

sequently produced in behalf of the defendants. Her case might have been strengthened by the testimony offered in their behalf, but on the motion to direct a verdict the prima facie case made by her testimony could not be weakened or destroyed by theirs. In behalf of the plaintiff Dr. Welsh testified that the operation demonstrated that plaintiff was suffering from complicated ptosis, that the cæcum was very much distended, and that it was so mobile that it dragged on the wall of the pelvis. He further stated that there was a bend or kink in the small bowel which empties into that portion of the colon called the ileum, and caused an intestinal obstruction. He stated that the appendix was properly removed, but that it was not the real cause of plaintiff's illness, that it was the abnormal condition of the bowels, and that the defect was apparent and should have been remedied when the operation for appendicitis was performed. He testified that the operation for appendicitis did not afford the plaintiff relief, but that when the obstruction was subsequently removed she was relieved from pain and began to improve at once. His testimony was to the effect that simple ptosis does not require an operation, but that in a case of complicated ptosis, from which plaintiff was suffering, an operation is necessary, and that the defendants were negligent in failing to make a more complete examination of plaintiff's conditions and to have operated for ptosis. According to his testimony, the defendants did not make a thorough examination for defects or obstructions of the bowels when the incision was made, although they did examine and observe the condition of the cæcum, the stomach, gall bladder, ovaries, and uterus, and were advised by the witness that the condition of the bowels would cause plaintiff trouble, and should be corrected. In view of his testimony, it cannot be said that the plaintiff did not make a prima facie case of negligence on the part of the defendants, and the fact that her testimony was opposed by much that was given by doctors of larger experience was no reason for taking the case from the jury. The testimony raised a substantial question of fact whether the defendants exercised ordinary care and skill in the premises, which was for the determination of the jury, and not the court. The mere fact that the witness was led to say, in answer to one question on cross-examination, that the defendants made a mistake of judgment, and may have acted according to their best judgment, did not destroy the testimony tending to show that the defendants failed to use reasonable and ordinary care in the case.

The judgment will be reversed, and the cause remanded for a new trial. All the Justices concurring.

such courts have been created in the larger cities of the state, and the district courts. Cities are given authority to make ordinances for the suppression of the liquor traffic, and wherever such ordinances are enacted they must be in harmony with the state law. But offenders in police court are punished, not for breach of the state law, but for violation of the city ordinance.

Penal statutes must be construed strictly, not out of consideration for offenders but for the protection of well-meaning and law-abiding citizens. This rule of interpretation is never questioned. It will be noted that the statute makes a class of all persons who have once been duly convicted of violations of the prohibitory law. This means the state law, and not the city ordinance. The violation of a city ordinance, no matter if the ordinance is designed to correct and suppress the same evil, is not strictly a violation of the state law. A prosecution charging the same facts might be followed by a conviction under the state law, nor is this anywhere uncommon. *State ex rel. v. City of Topeka*, 36 Kan. 76, 87, 88, 12 Pac. 310, 59 Am. Rep. 529. Indeed, section 4368 of the General Statutes of 1909 makes it the duty of the judges of police courts to notify the county attorney of all facts pertaining to violations of the prohibitory law of which they may have notice or knowledge, and to furnish the names of all witnesses by whom these facts can be proven. The obvious purpose of this is that prosecutions for violations of city ordinances may be followed by prosecutions under the state law, and the state's policy of suppressing the liquor traffic be thus rendered more effective. In *State v. Keener*, 78 Kan. 649, 97 Pac. 860, 19 L. R. A. (N. S.) 615, this court approved the prosecution of a police judge who had neglected this duty.

Some light as to the legislative intent may be gleaned from the statutes relating to paroles. Gen. Stat. 1909, §§ 2460, 2464. Section 2464 in part reads:

"Any person confined in jail under judgment of conviction before a justice of the peace, city court, but not police court, or other inferior courts, may be paroled, etc."

It will also be noted that the second section of the act of 1911, which provides how the former conviction may be proven, omits all mention of proceedings in a police court. The section reads:

"Sec. 2. A true copy of the journal entry of judgment, or of the docket or other proper court record, showing the former conviction of the defendant from any district court, justice court, or city court, within the state of Kansas, supported by a certificate or affidavit of its authenticity, shall be prima facie evidence of a former conviction of the defendant." See, also, *State v. Volmer*, 6 Kan. 379.

It is clear that in this section the Legislature took cognizance of the courts in this state in which violators of the prohibitory

law can be prosecuted; and the motion to quash was properly sustained.

It does not appear that the want of the adverb "feloniously" in the accusatory part of the information to indicate the grade of the offense was raised or considered in the district court. There have been many statutory modifications of common law pleading even as affecting criminal law, and it is not necessary to determine that question now. But see *In re Stevens*, Petitioner, 52 Kan. 56, 34 Pac. 459; 22 Cyc. 330, 331; *Marshall's Kansas Intoxicating Liquor Law*, § 282, p. 135.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 136)

EMPORIA TELEPHONE CO. v. PUBLIC UTILITIES COMMISSION OF KANSAS: (No. 20111.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES — RATES — REGULATION.

Findings of fact made by the district court in an action against the Public Utilities Commission, respecting the cost of service, examined, and held to be supported by the evidence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. ¶ 33.]

2. LICENSES — EXCESSIVE CHARGE — TELEPHONES.

Under the statute relating to cities of the second class, providing that the grantee of a franchise shall pay to the city such fixed charge as may be prescribed, a requirement that \$100 a month shall be paid by a telephone company is not so excessive as to warrant the interference of a court.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. ¶ 7.]

3. TELEGRAPHS AND TELEPHONES — RATES — REGULATION — INJUNCTION.

A court, having no power to fix a rate to be charged by a public utility for services to be rendered in the future, cannot accomplish that result indirectly by enjoining interference with a rate which it finds to have been unassailable in the past.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. ¶ 33.]

4. INJUNCTION — TELEPHONES — CONFISCATORY RATES — ENFORCEMENT OF PENALTIES.

Where a statute fixes the rate to be charged by a public utility, and forbids its increase except with the consent of the Utilities Commission, in an action brought to set aside an order of the Commission denying an application for an increase, the court may, if the existing rate is found to be confiscatory because insufficient to pay the costs of service, adjudge the part of the statute fixing such rate to be inoperative, and enjoin the enforcement of the penalties provided for its violation.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 155, 156; Dec. Dig. ¶ 85.]

5. TELEGRAPHS AND TELEPHONES — RATES — CONFISCATORY RATES — RIGHTS OF PUBLIC UTILITY.

Where a court having jurisdiction determines that a rate fixed by the statute and ap-

proved by the Utilities Commission is confiscatory, the utility is left free to operate under such rate as it may establish until a new one has been fixed by the Commission.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. 83.]

Appeal from District Court, Shawnee County.

Action by the Emporia Telephone Company against the Public Utilities Commission of the State of Kansas. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

H. O. Caster, of Hoxie, for appellant. J. L. Hunt, of Topeka, and Hamer & Ganse, of Emporia, for appellee.

MASON, J. The Public Utilities Act provides that whenever any utility desires to make a change in any rate it shall file with the Commission a schedule showing the change desired, and that no change shall be made without the consent of the Commission (Laws 1911, c. 238, § 20), and also that, unless the Commission shall otherwise order, no utility shall collect a greater compensation than the charge fixed in the lowest schedule of rates for the same services on January 1, 1911 (section 30). On the date named the Emporia Telephone Company had in force a rate of \$1 a month for four-party selective residence telephones. Later the company filed with the Commission an application for permission to change this rate to \$1.25 a month. The application was heard in April, 1914, and an order denying it was made on July 2, 1914. On September 9, 1914, the company brought an action asking an injunction against the enforcement of the order, or other interference with the collection of the charge of \$1.25. The district court found that the actual cost of the service referred to was \$1.25 a month, and that the loss from uncollectible accounts amounted to nearly two cents—in effect making an additional expense of that amount. Judgment was rendered setting aside the order of the board refusing to allow the increase, and enjoining interference with the company in charging and collecting the advanced rate, the injunction to remain in force until the commission should establish a reasonable rate. The Commission appeals.

[1] 1. The findings of fact of the trial court are attacked as not justified by the evidence. It is not thought necessary to review the record in detail. We are of the opinion that there was some substantial testimony in support of each finding. If it were necessary to weigh the decision of the district court upon questions of fact against that of the Commission with regard to the same facts, considered in the same light, the difficulty of the problem before us would be increased, but the conclusion of the Commission was in part based upon two matters involving only questions of law. The Commission acted upon the

theory, which at the time was regarded as a settled principle of rate-making, that the sufficiency of a rate charged by a public utility should be governed by the amount of its total operating revenues and total legitimate expenditures, and that the vital question is not whether the rate on any one given class of service is compensatory. Recent decisions of the federal Supreme Court, however, have determined that the question whether a rate is to be regarded as compensatory depends upon its relation to the cost of the particular service rendered, and not upon the effect of the entire schedule of which it is a part, as applied to the business as a whole. *Railroad Co. v. Utilities Commission*, 95 Kan. 604, 148 Pac. 687. If in any circumstances a non-compensatory rate may be enforced as to a specific service, by reason of some controlling consideration of public policy, the furnishing of a party line telephone is not of such a peculiar character as to place it in the exceptional list.

[2] 2. The Commission also was influenced in its decision by the fact that by its franchise or contract with the city the telephone company was required to pay \$100 a month to the municipality. This amount the Commission regarded as unfair, unreasonable, and exorbitant. The statute authorized a requirement that the company should pay some fixed charge to the city (Gen. Stat. 1909, § 1502), and we think the amount named cannot be said to be so high as to warrant interference by the courts. The operation of the utility involves some additional responsibility and expense on the part of the municipality, and the determination of the compensation to be exacted must rest largely in the discretion of the officers charged with the administration of its affairs. *Dresser v. City of Wichita*, 153 Pac. 1194, decided December 11, 1915. The findings of the trial court will be accepted, and treated as the established facts of the case.

[3] 3. A court has no jurisdiction to fix the rate to be charged by a utility for services to be rendered in the future, that being a legislative and not a judicial function. There is, of course, no dispute about this principle, which the trial court recognized by an explicit statement to that effect in its conclusions of law. The injunction granted against interference with the rate of \$1.25, until the establishment of a new rate by the Commission, in its practical operation is hardly more than an affirmation of the right of the company to charge that rate at the time of the judgment, inasmuch as the Commission is the body charged with fixing a rate, and no obstacle is interposed to its doing so at any time. But the decree, protecting the rate of \$1.25 until action by the Commission, is open to interpretation as the fixing of a rate for the future, and its language should be so modified as to prevent the possibility of such a construction. The con-

siderations that prevent a tribunal from fixing a rate to be charged in the future also forbid its accomplishing the same result by enjoining interference with a rate which it finds to have been unassailable in the past. *Interstate Comm. Commission v. Railway Co.*, 167 U. S. 479, 511, 17 Sup. Ct. 896, 42 L. Ed. 243.

[4] 4. But while a court is powerless to fix a rate for the future, it is authorized to prevent the enforcement of any order of a board, or of any statute, attempting to establish a noncompensatory rate. The statute gives a right to review the rulings of the Commission by a suit to set aside its order on the ground that it is unlawful or unreasonable (*Laws 1911, c. 238, § 21*), which must be brought within 30 days (section 16). This proceeding has much the effect of an appeal, and authorizes a judicial determination of the facts as well as the law. Here an essential inquiry in the matter presented to the court was the question of the cost of the service. The finding that it amounted to \$1.25 was a decision that so much of the statute as undertook to limit the charge therefor to \$1 was inoperative as to this company because in conflict with the due process of law and the equal protection clauses of the Fourteenth Amendment. The order of the Commission was properly set aside by the court upon this finding, which also justified a decree declaring the provision of the statute fixing the rate at \$1 to be inoperative, and enjoining the enforcement by the Commission of the penalties for its violation.

"While it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399, 14 Sup. Ct. 1047, 1055 (38 L. Ed. 1014).

With the modification indicated, the company is entitled to the relief granted. If after a decision by the court that the existing rate is noncompensatory, the utility were required to begin proceedings anew for the allowance of an increase, the old rate to remain in force in the meantime, the Commission, while acting in entire good faith and in accordance with its best judgment, might reach the same conclusion as before. The process might be kept up indefinitely, and there would be no way in which a change in the rate could ever be compelled, or by which the courts could give relief against confiscation. At some stage of the proceedings the plaintiff is entitled to the judicial examination of the question of the adequacy of an established rate. *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970. The fact having been judicially determined that the \$1 rate was noncompensatory, it followed that no legal obligation

rested on the company to accept it. The judgment as modified merely declares and protects its right in this regard. Without the injunction the company might have undertaken to charge a compensatory rate, relying upon its ability to defend itself in any proceedings brought against it on that account, by proving anew that the amount named by the statute was confiscatory. But that course would have involved the risk of fines amounting to \$1,000 a day (*Laws 1911, c. 238*), and a proper case was presented for equitable relief. It has been held by the United States Circuit Court of Appeals for this circuit that the federal Constitution forbids the enforcement of a noncompensatory rate, even during the process of rate making. *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 107 C. C. A. 408. The Legislature may require an application for relief against an existing rate to be made in the first instance to the body charged with the control of that matter. *Osborne v. San Diego Company*, 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961; *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544. As a matter of comity, the federal courts will ordinarily refuse to investigate the validity of a rate fixed by a state tribunal until the remedies afforded by the statute are exhausted; but, if the time for invoking such a remedy has been allowed to pass, this is not a barrier to relief through the courts against confiscatory rates: *Pren-tis v. Atlantic Coast Line*, 211 U. S. 210, 232, 29 Sup. Ct. 67, 53 L. Ed. 150. Here the plaintiff has followed to the end the course laid down for it by the statute.

The portion of the judgment setting aside the order of the Commission will be affirmed. The remainder will be modified by eliminating the injunction against the rate of \$1.25, and substituting therefor one against the enforcement of the statute fixing the rate at \$1—a duty laid upon the Commission. *Laws 1911, ch. 238, § 39*.

[5] 5. This leaves the situation much the same as though a new utility had been created since the 1st of January, 1911. The statute continuing the rate that was then in force could not apply, and the company would necessarily fix its own rate. So when the only rate that has been named is finally determined to be confiscatory, the utility must decide for itself, in the first instance, what rate shall be charged. Where no rate is fixed by the Legislature, either directly or through the intervention of a commission, the carrier or utility names a rate, which controls unless it is found by a court to be unreasonable. *Validity of Rate Regulation*, Reeder, p. 55, note 14; 4 R. C. L. 627, note 7. "But for this act [creating the Interstate Commerce Commission] it would be unquestioned that the carrier had the right to prescribe its tariff of rates and charges, subject to the limitation that such rates and charges should be reasonable." *Interstate Comm. Commission v. Railway Co.*, 167 U. S. 479, 504, 17

Sup. Ct. 896, 902 (42 L. Ed. 243). Here there were only two obstacles that prevented the telephone company from establishing a rate for itself. One was the statute fixing a rate of \$1; the other was the order of the Commission refusing to authorize a change in this rate—in effect adopting or establishing it. These having been removed, the company was left free to take the initiative. The modified judgment will leave the telephone company without any rate. It must then fix the rate it will charge. This rate will be, in effect, until the Public Utilities Commission fixes a different rate. The rate fixed by the Commission will then be subject to examination by the courts, and may be set aside. This rule will confine the courts to the exercise of their proper functions. It will leave the Public Utilities Commission free to act under the law, and it will prevent the public utility from being compelled to render service at less than a compensatory rate. After the courts have held invalid the act of the Legislature and the order of the Public Utilities Commission establishing a rate, there is no rate, and the utility, upon fixing a rate, cannot be convicted of having established or changed the rate without the consent of the Commission. No conviction can be had until the Legislature or Commission establishes another rate, and the act of the Legislature or order of the Public Utilities Commission has been violated. The Public Utilities Commission is left as free to act in any matter concerning rates as the Legislature would be after an act passed by it has been declared invalid. It is under no restriction in that regard. If it should name a rate of even a less amount than that previously established, its action would control unless duly set aside by the action of a court.

The judgment is modified as already indicated, and, as so modified, affirmed. All the Justices concurring.

(97 Kan. 129)

HARTZLER v. CITY OF GOODLAND et al.*
(No. 19870.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — 993 — ISSUANCE OF BONDS — INJUNCTION — TAXPAYER — RIGHT OF ACTION.

A private citizen whose burdens as a taxpayer will be affected by a proposed bond issue is authorized to maintain a suit to enjoin such issue as illegal under section 285 of the Civil Code (Gen. St. 1909, § 5859).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2158-2161; Dec. Dig. — 993.]

2. INJUNCTION — 120 — PETITION — VERIFICATION.

A petition which prays for a permanent injunction is not demurrable merely because it is unverified or insufficiently verified.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 251, 252; Dec. Dig. — 120.]

3. INJUNCTION — 122 — PETITION — VERIFICATION — NECESSITY.

Where no restraining order or temporary injunction is sought, a petition praying for a permanent injunction to prevent an illegal bond issue may state a cause of action, although it is unverified.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 262-268; Dec. Dig. — 122.]

4. MUNICIPAL CORPORATIONS — 993 — ISSUANCE OF BONDS — INJUNCTION — GROUNDS.

A proposed issue of bonds to enlarge, repair, and improve the waterworks of a city will not be enjoined on the sole ground that a vacancy existed in the city council at the time the bond issue was determined and authorized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2158-2161; Dec. Dig. — 993.]

5. MUNICIPAL CORPORATIONS — 917 — ENACTMENT OF BOND ORDINANCE — NOTICE — PUBLICATION — "THREE CONSECUTIVE WEEKS."

The notice "for three consecutive weeks" required by section 4 of chapter 124, Laws 1913, and which must precede the enactment of a bond ordinance, is satisfied by one publication in each of three separate and consecutive weeks, following *Pierce v. Butters*, 21 Kan. 125, 129; *Tidd v. Grimes*, 68 Kan. 401, 71 Pac. 844.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1913-1918, 1941; Dec. Dig. — 917.]

For other definitions, see Words and Phrases, Second Series, Three Consecutive Weeks.]

6. STATUTES — 16, 74, 120 — MUNICIPAL CORPORATIONS — WATERWORKS BOND ISSUE — TITLE AND SUBJECT-MATTER OF STATUTES — ENACTMENT BY BILL — UNIFORMITY OF OPERATION.

Objections to the constitutionality of chapter 124 of the Laws of 1913 considered and overruled.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 14-16, 76, 168-172; Dec. Dig. — 16, 74, 120.]

Appeal from District Court, Sherman County.

Action by John Hartzler against the City of Goodland and others. From judgment for defendants, plaintiff appeals. Affirmed.

C. C. Perdieu and John Hartzler, both of Goodland, for appellant. E. F. Murphy, of Goodland, for appellees.

DAWSON, J. This is an appeal from a decision of the district court of Sherman county sustaining a demurrer to a petition which prayed for a permanent injunction restraining the city of Goodland and its officials from issuing bonds to pay for repairing, extending, enlarging, and improving the city waterworks.

The plaintiff's petition alleged that he was a resident taxpayer of the city; that he brought his action on his own behalf and for numerous other resident taxpayers; that the city and its officers were about to issue and sell city bonds in the sum of \$30,000, thereby creating an indebtedness against the city, and were about to levy taxes upon the property of the plaintiff and other taxpayers to pay these bonds, and that the proposed bond issue was illegal for various reasons; that

Goodland had been a city of the second class for more than 20 years, and for more than 2 years had owned and operated its waterworks; that it is a city of three wards, governed by a mayor and council, having two councilmen in each ward; that in August, 1913, there was a vacancy in the council occasioned by the permanent removal of Councilman Carmichael from the city; and that the mayor and city clerk knew of the vacancy, but made no provision to fill the vacancy, but continued to transact the city business for many months with a council of only five members. It was further alleged that on January 15, 1914, this council of only five members passed a resolution, and on March 13, 1914, passed an amendatory resolution, declaring it necessary to extend, enlarge, repair, and improve the city waterworks. The first resolution was published on January 16, 1914, and the second on March 13, 1914. On the latter date a notice was published advising the residents of Goodland that on March 28, 1914, an ordinance would be passed by the mayor and councilmen providing for such improvements, in accordance with a resolution which had been passed and approved on January 6, 1914, and on March 3, 1914, and that the ordinance would provide for the issuance of \$30,000 bonds to pay for the same. The notice also recited that any person objecting might be heard at the time specified. This notice was published on March 13, 20, and 27, 1914, "for only 15 days, and not for 3 consecutive weeks, as required by law."

The petition further alleged that chapter 124 of the Laws of 1913 was unconstitutional, in that it violated section 20 of article 2 of the Constitution of this state, because the act was passed by the Legislature without an enacting clause. The act was further alleged to be in conflict with section 16 of article 2 of the Constitution, because the subject-matter of the act was not clearly expressed in the title, that the acts repealed by the statute were not clearly expressed in the title, and that the act violated section 17 of article 2 of the Constitution, because it applied only to cities already owning waterworks, and was therefore lacking in uniformity in its application to all municipal corporations in the same class.

Following the prayer for an injunction and costs was the following verification, no other affidavit being filed:

"State of Kansas, Sherman County—ss.:

"I, John Hartzler, of lawful age, being first duly sworn, depose and say that I am the plaintiff in the above-entitled cause, and that I have read such petition, and the statement of facts therein contained are true, as I verily believe, so help me God. John Hartzler.

"Subscribed and sworn to," etc.

To this petition a demurrer was lodged:

"First. Plaintiff has no legal capacity to sue in said cause.

"Second. That the petition does not state facts sufficient to constitute a cause of action against the said defendants or either of them."

This demurrer was sustained, and the case is here. No specification of errors is assigned. Appellant's brief covers many points. Counsel for the appellees contents himself with one, which is the want of a positive affidavit to support the application for an injunction.

[1] 1. This action was brought by the plaintiff, a private citizen, under section 5859 of the General Statutes of 1909 (section 265 of the Civil Code), which provides:

"An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceeding to enforce the same, or to enjoin any public officer, board or body from entering into any contract or doing any act not authorized by law that may result in the creation of any public burden or the levy of any illegal tax, charge, or assessment; and any number of persons whose property is or may be affected by a tax or assessment so levied, or whose burdens as taxpayers may be increased by the threatened unauthorized contract or act, may unite in the petition filed to obtain such injunction. * * *"

The statute just quoted wholly disposes of the first point raised by the demurrer. The plaintiff clearly had the right to bring the action, and such actions have frequently been upheld by this court. *Gilmore v. Norton*, 10 Kan. 491; *Gas Co. v. Railway Co.*, 74 Kan. 661, 665, 87 Pac. 883; *Bunker v. Hutchinson*, 74 Kan. 651, 87 Pac. 884.

[2, 3] 2. Touching the verification, it may be conceded that it is defective. But it must be observed that no preliminary injunction or restraining order was sought by the plaintiff. No such interlocutory order could lawfully issue except upon positively sworn testimony, and, to have such testimony in convenient and available shape for presentation to a court or judge to support an application for an interlocutory order, it is common and good practice to verify the petition. Gen. Stat. 1909, § 5845 (Civ. Code, § 251). But, where no injunctive order is sought, except upon full and final consideration, before which time the pertinent facts will have been fully attested by the formal introduction of sworn evidence, or by agreement as to the facts, the want of a preliminary affidavit when the petition is filed is immaterial; in other words, it is the injunction, and not the petition, which needs the support of sworn testimony to justify it. 10 Encyc. Pl. & Pr. 966; 22 Cyc. 931; *Black v. Allen*, 42 Fed. 618, 9 L. R. A. 433.

[4] 3. Since the decision of the trial court cannot be sustained upon the ground on which counsel for the appellee seeks to justify it, let us see if other demurrable grounds do not appear on the face of the petition sufficient to sustain the judgment. How does the vacancy in the city council affect the validity of the proposed bond issue? Appellant invokes the well-known rule that, where power is vested in an official body, all its members must have a reasonable opportunity to be present and participate in its deliberations, although a majority may law-

fully control its official action. *Railway Co. v. Meyer*, 58 Kan. 305, 49 Pac. 89; Gen. Stat. 1909, § 9037.

It may readily be conceded that, where a statutory board is created for the discharge of a special duty, the rule in *Railway Co. v. Meyer*, 58 Kan. 305, 49 Pac. 89, should be strictly adhered to. But the public business of municipal corporations arises from day to day, and should be attended to as it arises. It is imperative that the functions of local municipal government be not suspended in case of a vacancy in the city council. If there are sufficient members of the council remaining in office who vote for and sanction the work to be done or the project to be undertaken to constitute a majority of the entire constituent membership, and not merely a majority of a quorum, it seems that their official action is valid. Tending to support this view are *Satterlee v. San Francisco*, 23 Cal. 314; *State ex rel. Harty v. Kirk*, 46 Conn. 395; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; 2 Dillon, *Municipal Corporations* (5th Ed.) § 534; 2 McQuillan, *Municipal Corporations*, §§ 593, 594.

An examination of section 1357 of the General Statutes of 1909 is helpful. It is there provided that permanent removal from the city causes a vacancy in any city office. Then it proceeds thus:

"Vacancies in the offices of mayor and councilmen shall be filled for the unexpired term at a special election to be called and held for that purpose, as may be provided by ordinance."

Now it cannot be the law that the public business of Goodland should be suspended until an ordinance is passed regulating the calling of an election to fill a vacancy in the office of city councilman, and until an election is called thereunder, the result canvassed and declared, and the person elected and seated.

[5] 4. Turning next to the question of notice, the statute (chapter 124, Laws 1913, § 4) provides that, before the bond ordinance is enacted, a notice shall be published to advise the citizen taxpayers of the projected bond issue. It reads:

"Such notice shall be published for at least three consecutive weeks * * * prior to the date fixed therein for the passage of such ordinance."

The notice was published on March 13th, March 20th, and March 27th. Apparently the city proceeded on the theory that a notice published each week for three successive weeks was a sufficient compliance with this provision. The gist of appellant's contention is that, since three weeks are twenty-one days, notice should have been given for that period. It is not an easy matter to harmonize all the decisions touching the computation of time for notice, interpreting as they do the vast multitude of statutes which in one way or another prescribe notice as a condition precedent to official action. In

Pierce v. Butters, 21 Kan. 125, 129, however, we find a precedent almost identical with the case at bar. There the question was whether a notice first published on April 13th and last published on April 27th was a sufficient compliance with a statute requiring notice for three consecutive weeks. Mr. Justice Valentine said:

"They amended the other affidavit by filing a new and amended affidavit, showing that said notice was published in said weekly newspaper 'for three consecutive weeks, to wit, April 13 to April 27, 1877'; that is, we construe the affidavit to mean that there were three insertions of the notice in the said newspaper, to wit, one on April 13, one on April 20, and one on April 27, 1877, and, with this construction, we think the affidavit as thus amended was sufficient."

Again, in *Tidd v. Grimes*, 66 Kan. 401, 71 Pac. 844, it was held that a statute requiring the county treasurer, antecedent to sale of property for delinquent taxes, to cause a notice to be published "once a week for four consecutive weeks," was sufficiently complied with by four publications, one each separate and successive week, the dates of publication being August 6th, August 13th, August 20th, and August 27th—covering only twenty-two days.

It will be observed that this section under scrutiny (section 4) also provides that:

"The last publication [of the three consecutive weeks] shall not be more than ten days prior to the date fixed therein for the passage of such ordinance."

This provision was strictly observed. The last publication was on the day preceding the passage of the ordinance. The two prior publications were made in the two preceding weeks. In view of the precedents quoted and this definite language of the statute touching the proper time for the last publication, we must hold that the notice published first on March 13th and last on March 27th, covering dates included in three separate and successive weeks, was sufficient.

[6] 5. It is next urged that the statute (chapter 124, Laws of 1913) violates sections 16, 17, and 20, art. 2, of the state Constitution. These objections do not call for much discussion. The act in question cannot be said to cover more than one subject, which is a grant of power to certain cities to enlarge, repair, extend, and improve their waterworks systems. The details of the act are all pertinent to the main subject. We think also that the classification of the cities, those second and third class cities which own their waterworks and whose indebtedness does not exceed 15 per cent. of their assessed valuation, is not unreasonable nor violative of the uniformity clause of the Constitution.

To raise a suspicion or presumption against the regularity of this statute's legislative history, the appellant directs our attention to Senate Joint Resolution No. 16, which immediately follows the act in question (page 201), and which orders the insertion of an enacting clause in the act. This joint res-

olution does not, as contended by appellant, amend the statute. It merely voiced the determination of the Legislature to amend the bill before it became a statute. The enrolled bill on file with the secretary of state shows the enacting clause duly inserted. The joint resolution was regularly adopted by a constitutional majority of each house while the bill itself (Senate Bill No. 491; chapter 124, Laws of 1913) was still within legislative control, and one day before it was approved by the Governor (Senate Journal, 789; House Journal, 1123). The Legislature always has the right to make corrections or germane amendments to a bill until the Governor has acted upon it. 36 Cyc. 951. It may recall a bill from the Governor unless he has signed it. 36 Cyc. 959. In this case we think the Legislature was needlessly formal in its procedure to perfect the bill. The joint resolution correcting the error has no more pertinency in the published book of session laws than would the roll call on the bill, or the motions and speeches directed toward it in the course of its consideration by the Legislature. 36 Cyc. 951. The objections to the act are without merit.

From the foregoing it will be seen that no prejudicial error arose in the district court in sustaining the demurrer to plaintiff's petition.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 38)

RORSCHACH v. DIVEN. (No. 19790.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1064 — **MALICIOUS PROSECUTION** \S 22 — **ADVICE OF COUNSEL** — **HARMLESS ERROR** — **INSTRUCTION** — **TYPGRAPHICAL ERROR.**

Instructions to the jury considered, and held not to be prejudicially defective. The evidence considered, and held to sustain the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. \S 1064; Malicious Prosecution, Cent. Dig. §§ 45-48; Dec. Dig. \S 22.]

Appeal from District Court, Franklin County.

Action by Carl E. Rorschach against C. A. Diven. From judgment for plaintiff, defendant appeals. Affirmed.

Ralph E. Page, of Ottawa, for appellant. W. S. Jenks, of Ottawa, for appellee.

BURCH, J. The action was one for damages for malicious prosecution. The plaintiff recovered, and the defendant appeals.

The defendant contends that probable cause for the prosecution was established by the evidence. No special findings of fact were requested. The only index to the jury's view of the facts is the general verdict. This verdict brings to the plaintiff's aid every fact and every inference of fact favorable to him which the testimony sustains. The defendant's narrative of the things relied on as constituting probable cause was not conceded to be true. On the other hand, the plaintiff's account of what happened leading up to the prosecution was quite incompatible with that of the defendant, and the explanation of the verdict is that the jury believed the plaintiff.

It is said that the defense of advice of the county attorney was established. Here again it is to be assumed that the jury disbelieved the story which the defendant told the county attorney. The advice of the county attorney on a state of facts intentionally magnified or fabricated would not be a defense. Besides this, accepting the story which the defendant told the county attorney, he omitted to inform the county attorney of a number of material facts which, if mentioned, would have changed the course of subsequent events.

There was abundant evidence to sustain the finding of malice included in the general verdict.

The instructions to the jury contained the following:

"I pass now to the defense in this case. There are several items set up by way of defense. The defendant Diven claims, first, that there was probable cause, and has given you his version of the facts. I have undertaken to group these facts as given by the plaintiff when instructing you touching probable cause, and I think I can say no more."

Through a typographical error the word "plaintiff" was inserted in the instruction instead of the word "defendant." This is perfectly manifest, and was perfectly manifest to the jury, because the court had not grouped the facts given by the plaintiff when instructing on the subject of probable cause, but had grouped the facts given by the defendant. Another criticism of the court's instructions is unwarranted because a single expression is seized upon dissociated from the context which made the subject under discussion plain.

The instructions of the court were full, clear, correct, and phrased in a way to enable the jury to apply them to the evidence. The evidence was abundant to support the verdict, and the judgment is affirmed. All the Justices concurring.

(97 Kan. 61)

TUCKER v. TUCKER (EAGLE, Intervener).
(No. 19822.)

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR §345—NOTICE OF APPEAL—TIME FOR SERVING—DISMISSAL.

A judgment was rendered April 17, 1914. A motion for new trial was filed in time, but was not decided until November 14, 1914. The notice of appeal, served November 19, 1914, recited that the intervener appealed "from the judgment and decision of this court entered herein about April 17, 1914." Held, that such notice was too late, and the appeal must be dismissed for want of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1895, 1896; Dec. Dig. § 345.]

Appeal from District Court, Shawnee County.

Action by W. H. Tucker against Arthur Tucker, wherein Charles S. Eagle intervened. From the judgment, intervener appeals. Appeal dismissed.

Garver & Garver, of Topeka, for appellant. Hamilton & Hamilton, W. E. Atchison, and W. B. Lowrance, all of Topeka, for appellee.

WEST, J. This appeal involves the validity of a chattel mortgage, a question ably briefed and presented, but the pleasant duty of considering and determining this question is obviated by the somewhat unpleasant obligation resting upon us to dismiss the appeal. The journal entry recites that the judgment was rendered April 17, 1914. A motion for new trial was filed within three days, but was not passed upon until November 14, 1914. November 19, 1914, the notice of appeal was served and aside from caption and signature was in the following language:

"Notice is hereby given that Charles S. Eagle appeals to the Supreme Court from the judgment and decision of this court, entered herein about April 17, 1914, on the interplea of Charles S. Eagle, in so far as said judgment and decision holds the chattel mortgage of said Charles S. Eagle to be invalid."

It will be observed that this notice was served more than seven months after the date of the rendition of the judgment. When the motion for a new trial was decided, the time for appeal from the original judgment had already expired. Hence it was necessary in order to present a matter of which we would have jurisdiction to appeal from the order denying the motion for a new trial. This was not done. The notice limited the appeal to the original judgment, or to such part thereof as upheld the validity of the mortgage.

It is urged that the plaintiff should not be heard on his motion or suggestion in his brief that the appeal be dismissed for the reason that he should have called attention of the court to the matter in proper time and by

proper motion under rule 10, but the statute leaves this court without jurisdiction unless the appeal be taken within six months from the rendition of the judgment or order appealed from. Laws 1913, c. 241, § 1.

This jurisdiction is vested by statute only, and no estoppel, laches or informality of a party can confer it. Neither does failure to raise the question relieve us of the duty to decline, even of our own motion, the exercise of jurisdiction which we do not possess. *Cohen v. Trowbridge*, 6 Kan. *335; *Hodgden v. Com'rs*, 10 Kan. *638; *Toof v. Cragun*, 53 Kan. 139, 35 Pac. 1103; *Zinkelsen v. Lewis*, 71 Kan. 837, 80 Pac. 44, 83 Pac. 28; *Kansas City v. Dore*, 75 Kan. 23, 88 Pac. 539; *Hawkins v. Brown*, 78 Kan. 284, Syl. 1, 97 Pac. 479; *Trader v. School District*, 86 Kan. 878, 122 Pac. 895; *Nuhfer v. Flanagan*, 87 Kan. 420, 124 Pac. 418.

The appeal is dismissed. All the Justices concurring.

(97 Kan. 21)

TANNER v. CHEROKEE & PITTSBURG
COAL & MINING CO.

(No. 19783.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)*MASTER AND SERVANT §278, 286—INJURY TO
SERVANT — NEGLIGENCE — PLEADING AND
PROOF.

A demurrer to the plaintiff's evidence was properly sustained on the ground that the specific negligence charged was not proved, and on the further ground that no actionable negligence on the part of the defendant was established.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977, 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 278, 286.]

Appeal from District Court, Crawford County.

Action by W. E. Tanner against the Cherokee & Pittsburg Coal & Mining Company. From a judgment for defendant, plaintiff appeals. Affirmed.

L. H. Phillips, of Pittsburg, for appellant. W. R. Smith, of Topeka, and B. S. Galtskill and D. H. Woolley, both of Girard, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained through the neglect of the defendant to inspect and make secure the traveling ways of its coal mine. A demurrer was sustained to the plaintiff's evidence, and he appeals.

The proof was that the plaintiff, who was an air man, was injured in a hauling crosscut which had been closed some months before the accident. The crosscut was no longer used and could not be used as a traveling way. The only occasion any one had to use it after the manner of a traveling way was to step into it twice a month to inspect the stopping, and the place was perfectly safe

for that purpose. As will shortly appear, when the plaintiff was injured the place was no more a traveling way or in use as a traveling way than a miner's room would have been. Consequently the negligence charged was not established.

The stopping was not air tight, and the plaintiff was directed to make it so. To do this it was necessary to build a wall on one side of the defective stopping and fill the space between the wall and the defective stopping with fine dirt. Dirt for the purpose was taken from the bottom of the crosscut. In doing this the plaintiff dug a hole about two feet deep which loosened a rock which fell and injured him. The plaintiff and his principal witness, his brother, who was assisting him when the accident occurred, testified that digging in the bottom of the crosscut loosened the rock and caused it to fall. The plaintiff further testified that digging in the ground there was bound to be dangerous, that he was "leery" all the time, and that the more he dug the more dangerous he made the place. The case, therefore, is one in which the plaintiff with knowledge of the conditions made the place unsafe by the very repair work he was doing. The duty of the employer to provide a reasonably safe place to work does not extend to such situations.

The defendant had elected not to be governed by the Workmen's Compensation Act, and the plaintiff argues that the defenses of contributory negligence and assumption of risk were not available. The defendant does not seek to avail itself of those defenses. The defense is want of actionable negligence. Want of actionable negligence appeared from the plaintiff's proof, and the demurrer to the evidence was properly sustained.

The judgment of the district court is affirmed. All the Justices concurring.

(97 Kan. 68)

FREEMAN v. PETER et al. (No. 19824.)*
(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

ESTOPPEL ¶78—**CLAIM FOR INHERITANCE.**

The heirs of a deceased person are estopped from claiming any part of the estate by inheritance where by their conduct they have induced the widow, to whom all the property was devised, not to probate the will, and the will is not probated for more than three years after the death of the testator, although in the power and control of the devisee during all that time.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 204-210; Dec Dig. ¶78.]

Appeal from District Court, Wyandotte County.

Action by Evert E. Freeman against Johanette Peter and others. From judgment for defendants, plaintiff appeals. Affirmed.

W. H. McCamish, of Kansas City, for appellant. John D. Myers, of Kansas City, Mo., for appellees.

MARSHALL, J. Reinhardt Peter died in 1904, leaving a widow, Johanette Peter, three daughters, Bertha, Lucy, and Carrie, and a son, Herman. The daughters were all married. Carrie, who afterwards died, left as her heirs her husband, the plaintiff, and two daughters, Nellie and Eva. Upon returning from the funeral of Reinhardt Peter, Johanette produced the will before the assembled children, and informed them the father had told her before his death that he had left all the property to her; that if they were not satisfied and did not want to take her word for it, the will should be opened and they could see for themselves. To this the children said they were satisfied, and told her it was all right, and not to file the will on account of the expense. The plaintiff was present and said he was satisfied to leave it that way. From that time the will remained in the Peter home in the possession of Johanette Peter until September 15, 1913, when it was probated. There was no exception taken to the order of the probate court; no appeal was taken, and no contest of the will has been instituted in the district court. The will was always in the house, and any one interested could get it if they wanted it. All the estate of the testator, consisting of about 43 acres of land in Wyandotte county, Kan., was devised to Johanette Peter in fee simple. She has occupied the land, collected the rents, and paid the taxes thereon continuously since the death of her husband. The plaintiff, as heir of his wife, Carrie, claimed an undivided one-sixteenth interest in the land, and brought this action to recover the same. On the trial the court rendered judgment for the defendants. The plaintiff appeals.

The plaintiff contends that because the will was not offered for probate within three years after the death of the testator, the devisee Johanette Peter received nothing under the will, and that the land descended to the heirs of Reinhardt Peter. This would be correct but for the conduct of the heirs. They with the plaintiff led defendant Johanette Peter to believe that it was not necessary to do anything with the will. She relied on their statements and acted on them. The plaintiff seeks to take advantage of the failure to have the will probated in proper time. He, personally and as heir of his deceased wife, is estopped from so doing. The conversation between the widow, the plaintiff, and the children of the testator partakes somewhat of the nature of a family settlement of the rights of the heirs in the property left by Reinhardt Peter, and under the circumstances surrounding this case that settlement should not be disturbed.

The judgment is affirmed. All the Justices concurring.

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied February 13, 1916.

(97 Kan. 73)

STATE SAV. BANK OF IOLA v. MICHAEL et al. (No. 19828.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***NEW TRIAL \S 39—GROUNDS—DIRECTED VERDICT.**

A new trial is properly granted when the court, disregarding pleaded defenses sustained by evidence, has instructed a verdict for the plaintiff.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 57-61; Dec. Dig. \S 39.]

Appeal from District Court, Allen County.

Action by the State Savings Bank of Iola against Charles Michael and others. From judgment for defendants, plaintiff appeals. Affirmed.

Apt & Apt, of Iola, for appellant. Baxter D. McClain, of Iola, and J. T. Cooper, of Fredonia, for appellees.

BURCH, J. The action was one to recover on a promissory note. The court instructed the jury to return a verdict for the plaintiff. Afterwards the court granted a new trial. The plaintiff appeals.

Michael, Fowler, and Farmer gave their note to the plaintiff and secured it by a chattel mortgage on property contained in a laundry. They sold the laundry to Brunner, who assumed and agreed to pay the chattel mortgage debt. Afterwards Brunner gave possession to the plaintiff, who sold and bid in the property. There was evidence that the property was more than sufficient to pay the plaintiff's lien. Only a small sum was credited on the note as the net proceeds of the sale. The plaintiff then sued the makers of the note. Their answer contained two defenses upon which evidence was introduced, but which the court ignored when directing a verdict. One defense was that the plaintiff agreed with Brunner to take the property covered by the chattel mortgage in full satisfaction of the debt. The other defense was that the sale was so conducted as to amount to a conversion of the property so that the plaintiff should be charged with its full value. Both defenses were clearly available to the defendants, there was evidence to sustain each one, the court erred in not submitting them to the jury, and the new trial was properly awarded.

The judgment of the district court is affirmed. All the Justices concurring.

(97 Kan. 46)

CHRISTIAN v. UNION TRACTION CO.* (No. 19796.)

(Supreme Court of Kansas. Jan. 8, 1916.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR \S 1003—TRIAL \S 143—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.**

Rules followed that a verdict supported and approved must stand, and that, when the evi-

dence is conflicting, a refusal to direct a verdict is not error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. \S 1003; Trial, Cent. Dig. §§ 342, 343; Dec. Dig. \S 143.]

2. APPEAL AND ERROR \S 1067 — HARMLESS ERROR—INSTRUCTIONS.

One allegation of negligence on which some evidence was introduced was ignored in the instructions given; the jury being charged that, to recover, the plaintiff must sustain the other allegation. Held that, under these circumstances, it was not material error to refuse instructions requested by the defendant on the allegations thus ignored.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. \S 1067; Trial, Cent. Dig. § 475.]

3. APPEAL AND ERROR \S 1062 — HARMLESS ERROR—REFUSAL TO SUBMIT SPECIAL QUESTIONS.

The refusal to submit two of ten special questions requested by a party is not materially prejudicial when substantial repetitions and when the answers to those submitted clearly indicate that answers to those refused would not have benefited the party complaining.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4212-4218; Dec. Dig. \S 1062.]

4. CARRIERS \S 333 — INJURY TO STREET CAR PASSENGER—CONTRIBUTORY NEGLIGENCE.

It was not necessarily negligent for the plaintiff to attempt to alight from the car a short distance from the usual stopping place if she believed it had come to a stop in response to her signal or request.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386, 1388-1397; Dec. Dig. \S 333.]

5. APPEAL AND ERROR \S 1006 — SPECIAL FINDING—CONFLICTING EVIDENCE.

A special finding, although against much of the evidence, if supported by some competent evidence, not attempted to be set aside by motion of the complaining party, and approved by the trial court on overruling a motion for new trial involving such finding, will not be disturbed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3880-3876, 3948-3950; Dec. Dig. \S 1006.]

Appeal from District Court, Montgomery County.

Action by May W. Christian against the Union Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John J. Jones, of Chanute, W. E. Ziegler, of Coffeyville, and Chester Stevens, of Independence, for appellant. Thomas E. Wagstaff, of Independence, for appellee.

WEST, J. This is an appeal from a judgment for damages recovered by the plaintiff for injuries sustained by being thrown from one of the defendant's street cars. It was alleged that the car gradually came to a stop at or near the west curb line of Eleventh street, and that as the plaintiff attempted to descend the steps when the car had become stationary the car, without warning, suddenly started, throwing her to the pavement and injuring her. It was contended by the defendant that the plaintiff negligently at-

tempted to alight while the car was in motion, and thus by her own fault received whatever injury she suffered. There was competent evidence to support both theories. The jury returned a general verdict in favor of the plaintiff.

[1] The first assignment of error, the refusal to direct a verdict for the defendant, is, in face of the conflicting evidence, without merit.

Certain complaints touching the giving and refusing of instructions are made, but a careful examination of the entire matter leads to the conclusion that the jury were properly charged.

[2] There was an allegation that the conductor negligently failed to assist the plaintiff to alight, but not only was this feature of the case ignored in the instructions and but little attention paid to it in the evidence, but the counsel for appellant in their brief say that there is but one question involved—the negligence in starting the car and the alleged contributory negligence of the plaintiff in attempting to alight while the car was in motion. Hence the refusal of certain instructions as to the duty of a conductor to help passengers to alight becomes immaterial.

[3, 4] The defendant submitted ten questions, seven of which were answered and three of which were stricken out by the court. The seven had reference to the usual stopping place of the cars, to the slowing up of one on which the plaintiff was riding, to the nonaccidental nature of plaintiff's fall and the place where it occurred. In answer to question 10, the jury found that the plaintiff fell from the car about 23 feet east of the usual and customary stopping place at Eleventh street. Question 6, refused, was substantially covered by this.

Question 5 and the answer were:

"Do you find from the testimony that the car was slowing up for the Eleventh street stop when the plaintiff stepped or fell off the car?
Answer: It slowed up and stopped."

Questions 3 and 4 were whether, when the plaintiff fell from the car, it was moving about 2 miles an hour, and, if not, at what

speed was it moving when she attempted to alight. While these questions were of themselves proper, and should have been given, the answer to question 5 was so nearly an essential answer to all three that no prejudicial error appears to have resulted from the rejection.

Counsel severely criticize the answer to question 2 that the plaintiff did not know that the usual and customary place of stopping was opposite the sidewalk on the west side of Eleventh street, and assert that it is directly contradictory to the testimony of the plaintiff herself that she knew the usual stopping place was "at a point where the rear steps of the car would be practically opposite the sidewalk." It seems to have been generally understood that the rule was to stop on the farther side of the street, and this the plaintiff, in effect, admitted, but had the question been answered the other way, and had the plaintiff, in fact, known that the usual and customary place for stopping was opposite the sidewalk on the west side of Eleventh street, such knowledge would not have precluded her from attempting to alight when she thought the car, in obedience to her signal or request, had come to a stop, although a few feet this side of the usual stopping place.

[5] It is contended that the finding that the car slowed up and stopped is against the overwhelming weight of the evidence, but there was some competent evidence to support such finding, there was no motion to set it aside, and it was approved by the trial court, and we cannot disturb it.

Some complaint is made that excessive damages were allowed, but an examination of the record discloses nothing requiring reversal or modification on that ground. The plaintiff was injured. Somebody was careless. The jury and the trial court have, from competent evidence, concluded that it was the defendant. No error materially prejudicial appears and this conclusion must stand.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 82)

BRICE v. HAWK. (No. 19836).*

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** §525—**HOLDER IN DUE COURSE—SUFFICIENCY OF EVIDENCE.**

Where a firm of real estate dealers received a promissory note as their commission for services in negotiating a land trade, and the maker became dissatisfied with the trade, and the real estate dealers and their attorney held a conference with the attorney for the maker to consider a cancellation of the contract and the surrender of the note, and the maker's attorney apprised them of the defenses to the enforcement of the contract, among which were want of consideration and fraud on the part of the payees, the question whether the attorney for the payees, who afterwards acquired the note before maturity, was a holder in due course and without notice of its infirmities, was properly submitted to the jury, and a general verdict and judgment against him will be sustained.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.]

2. **EVIDENCE** §471—**RESPONSES TO LEADING QUESTIONS—CONCLUSIONS OF LAW.**

The affirmative responses of a witness to two conclusions of law couched in the form of leading questions examined, and held to have been properly stricken from the record.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.]

Appeal from District Court, Finney County.

Action by Harry Brice against Emma Hawk. From judgment for defendant, plaintiff appeals. Affirmed.

C. M. Williams, of Hutchinson, Harry Brice, of Cimarron, H. O. Trinkle, of Garden City, and L. A. Madison, of Dodge City, for appellant. W. E. Covert, Edgar Foster, and Hoskinson & Hoskinson, all of Garden City, for appellee.

DAWSON, J. Some time in 1912, Gonder and McDonald, a real estate firm in Cimarron, arranged a real estate deal between Benewell Cline and Emma Hawk and her husband. For this service, Emma Hawk, the appellee, gave Gonder and McDonald her promissory note for \$1,280, dated August 7, 1912, and due October 1, 1912. Not long afterwards, Emma Hawk became dissatisfied with the deal and employed a Garden City lawyer to protect her interests. About September 7, 1912, the appellant, Harry Brice, a lawyer and abstractor of Cimarron, called on Mrs. Hawk's lawyer in Garden City, on behalf of Gonder and McDonald, seeking to effect a settlement of the trouble about the land deal between Hawk and Cline. Gonder and McDonald were also present at the conference. There was some discussion of a settlement whereby the note and land contract should be canceled. Mrs. Hawk's attorney contended that they could not enforce the contract; that Mrs. Hawk "had been taken advantage of, and on account of her age and inexperience in such matters and

the condition of Mrs. Hawk's health as well as her mind."

Mrs. Hawk's attorney testified:

"There was nothing said as to the enforcement or the collection of the note for the same reason. We discussed both the note and the contract, the discussion was with reference to a settlement by the delivery of the note and the cancellation of this contract. Of course, I couldn't say at that time that there was any defense to the note outside of what would be the contract, because that is the first time I knew there was a note. I first heard of the note from Mr. Brice. I heard his testimony in which he said that I stated at that time that I did not know anything about the note, and that I said if she had given a note she would probably have to pay it. My theory was that the payment of this note was by way of compromise to secure the cancellation of that contract."

The appellant's testimony, in part, reads:

"Well, all that was said about the note, Mr. Hoskinson didn't know there was a note given at that time, and he said the contract could be set aside, but he didn't know about the note, and I said 'What are you going to do about this note given by Mrs. Hawk?' and he said, 'Of course, if there is a note, they will have to pay it.'"

No settlement was effected. A lawsuit followed between Benewell Cline and Emma Hawk over the land contract, in which the appellant, Harry Brice, was attorney for Cline. About two weeks after the conference in Garden City, between Mrs. Hawk's attorney and Gonder, McDonald, and Brice, the note was indorsed by the payees to Brice, and he brought this action on it. The record shows that Mrs. Hawk prevailed in the action brought by Cline, and Brice, as his attorney; but whether that suit was commenced or whether Brice had been employed by Cline to prepare and file that suit before Brice acquired the note from Gonder and McDonald is not shown.

Among the several defenses to the note were want of consideration, fraud on the part of the payees, and plaintiff's notice of the note's infirmities before he acquired it.

The appellant testified that the note was transferred to him in consideration of services as a lawyer and also for an equity in a quarter section of land. Then he testified:

"Q. And you bought this note for a valuable consideration, before maturity? A. Yes, sir. Q. And without knowledge of any defense against it? A. Yes, sir. Whereupon the defendant moved the court to strike from the record that part of the testimony of the witness in regard to buying this note for a valuable consideration, same being a question of law. Motion sustained, and that part of testimony stricken out and withdrawn from the consideration of the jury, by the court. To which ruling of the court, the plaintiff, at the time, duly excepted."

The jury returned a general verdict for the defendant, and this appeal seeks a review of the ruling of the district court recited above.

[1, 2] The time when the note was acquired by Brice, the consideration, the facts pertinent to show the good faith of Brice, his

knowledge of the Cline-Hawk land trade for which the note was given to his clients, his employment and efforts to settle the controversy about the land trade—every pertinent fact necessary to determine the question of notice to plaintiff was in evidence. The two questions which brought the affirmative responses from the witness added no additional facts to what had been already developed. They were objectionable as merely calling for the affirmative assent of the witness to mere conclusions couched in the form of leading questions by plaintiff's counsel.

No question is raised touching the sufficiency of defendant's proof to show want of consideration on the part of Gonder and McDonald, so that phase of the case need not be reviewed.

It is urged that appellant relied upon the statement of Mrs. Hawk's counsel: "If she has given a note, she will have to pay it." Mrs. Hawk's attorney heard of the note for the first time in that conversation, and his answer was based upon the theory, as he testified, "that the payment of the note was by way of compromise to secure the cancellation of the contract." The facts were submitted to the jury under careful and appropriate instructions to which no exceptions were taken, and the result cannot be disturbed.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 87)

**WILLIAM SMALL MEMORIAL HOME
FOR AGED WOMEN v. COLLINS'
ESTATE. (No. 19841.)**

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

**EXECUTORS AND ADMINISTRATORS §314 —
PAYMENT OF BEQUEST—FINDINGS OF FACT—
INTENT OF TESTATOR.**

Findings of fact examined, and held to sustain the judgment rendered.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. §314.]

Appeal from District Court, Anderson County.

Action by the William Small Memorial Home for Aged Women against the estate of T. J. Collins. From judgment for defendant, plaintiff appeals. Affirmed.

Chas. W. Garrison and Manford Schooner, both of Garnett, and W. W. Hooper, of Leavenworth, for appellant. Noah L. Bowman, of Garnett, for appellee.

BURCH, J. The will of T. J. Collins, deceased, contained the following bequest:

"Eleventh. I give, devise, and bequeath to the Old Ladies' Home of Leavenworth, Kansas, the sum of eight thousand (\$8,000.00) dollars."

Claiming to be the beneficiary intended, the plaintiff made application to the probate court for an order for payment of the amount of the

bequest to the plaintiff. The application was denied, and the plaintiff appealed to the district court. After a trial the district court sustained the action of the probate court, and the plaintiff appeals.

The district court made very full findings of fact. The last finding reads as follows:

"From the evidence I find as a fact that by the eleventh paragraph of said will Mr. T. J. Collins did not intend to give to the William Small Memorial Home for Aged Women at Leavenworth, Kan., \$8,000, or any other sum."

It is argued that this finding is merely a conclusion of fact derived from specific facts previously found. The finding is a finding of the ultimate fact in issue, the intention of the testator. Conceding that the validity of the finding might be affected by other findings, there is none which is inconsistent with it. The plaintiff argues that the will must be interpreted to prevent intestacy if possible, and then argues from other provisions of the will and the facts and circumstances stated in the findings that the plaintiff sufficiently identified itself as the beneficiary named in the will. No useful purpose would be subserved by debating the facts with the plaintiff.

This court is satisfied with the conclusion reached by the district court, and its judgment is affirmed. All the Justices concurring.

(97 Kan. 126)

**VAN HORN v. WETTERHOLD.
(No. 19862.)**

(Supreme Court of Kansas. Jan. 8, 1916.)

(Syllabus by the Court.)

**BROKERS §54, 65 — RIGHT TO COMMISSION
—PERFORMANCE—FRAUD.**

One who as agent undertakes to procure for a landowner a contract with another for the exchange of certain properties cannot recover his commission when the person he produces is not able, ready, and willing to perform, and when it also appears that such contract was fraudulently altered by such agent.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 48-50, 75-81; Dec. Dig. §54, 65.]

Appeal from District Court, Sedgwick County.

Action by W. L. Van Horn against George Wetterhold. From judgment for defendant, plaintiff appeals. Affirmed.

Fred K. Hammers, of Wichita, for appellant. P. D. Gardiner, of Wichita, for appellee.

WEST, J. The plaintiff sued to recover a commission for procuring a contract of exchange between the defendant and G. A. Rucker for certain real properties. He averred that under the contract Rucker was to convey a certain tract of land free and clear of all incumbrances, except a mortgage of \$6,000, all water rights to be paid and all taxes up to date.

The defendant answered that G. A. Rucker

was not able to carry out the terms of the contract, and charged fraud in its procurement and alteration. The testimony showed that the land in question had been sold at foreclosure, and the only conveyances offered to the defendant consisted of a general warranty deed from the fee owner to Glen A. Rucker conveying the land subject to a mortgage of \$7,063, with interest thereon from October 2, 1911, back taxes \$207.63, and water tax \$298.07, and a general warranty deed from Glen A. Rucker to the defendant conveying the land subject to an incumbrance of \$6,000, which, by the terms of the deed, the grantee was to assume and agree to pay. It appeared that the incumbrances above the \$6,000 could not be taken care of until Rucker procured the money for that purpose, and that he desired to use the property to be conveyed by the defendant as a basis for a loan to raise such money.

The jury found for the defendant generally, and also in answer to special questions that the defendant did not agree to pay the plaintiff for procuring the contract, that the contract had by the plaintiff been materially altered since its execution by changing a name and inserting approval, and that G. A. Rucker was not ready, willing, and able to carry out his part of the agreement for the exchange of properties. Findings were made in relation to other matters which need not be considered.

Various questions are argued, but the findings referred to, sufficiently supported by the evidence, preclude recovery by the plaintiff.

The judgment is affirmed. All the Justices concurring.

KELLER v. STATE (two cases).
(Nos. A-2472, A-2473.)

(Criminal Court of Appeals of Oklahoma.
March 11, 1916.)

Appeals from County Court, Coal County;
P. E. Wilhelm, Judge.

M. E. Keller was convicted of violations of the prohibition law in two cases, and appeals. Appeals dismissed.

Trice & Moore, of Coalgate, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. M. E. Keller, plaintiff in error, was tried and convicted in the county court of Coal county on two separate informations, each charging the unlawful sale of intoxicating liquor. In case No. A-2472, he was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. In case No. A-2473, he was sentenced to be confined in the county jail for 30 days and

to pay a fine of \$100. From the judgments, appeals were taken.

No brief had been filed in either case, and no appearance made on behalf of the plaintiff in error, when the cases were called for final submission. The Attorney General has filed motions to dismiss the appeals, on the ground that the same have been abandoned.

The motions to dismiss the appeals are apparently well taken. The appeals herein are therefore dismissed, and the causes remanded to the county court of Coal county, with directions to cause its judgments therein to be carried into execution.

Mandates forthwith.

LINDSEY et al. v. GOODMAN. (No. 6091.)
(Supreme Court of Oklahoma. Feb. 8, 1916.)

Commissioners' Opinion, Division No. 4. Error from Superior Court, Tulsa County; M. A. Breckenridge, Judge.

Action between L. W. Lindsey and another and Elizabeth Goodman, administrator of the estate of Charles D. Goodman, deceased. From the judgment, the parties first mentioned bring error. Motion to dismiss overruled, and time allowed to prepare and file briefs.

Chas. L. Fildes, of Tulsa, for plaintiffs in error. John Y. Murry, Jr., of Tulsa, for defendant in error.

WATTS, C. It is hereby recommended that the motion of defendant in error to dismiss the appeal be overruled, and defendant in error allowed 30 days in which to prepare and file briefs in this court.

PER CURIAM. Adopted in whole.

EMPORIA FEEDING & ELEVATOR CO. v. MANBY. (No. 8724.)

(Supreme Court of Colorado. Feb. 7, 1916.)

Department 3. Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action between the Emporia Feeding & Elevator Company and J. B. Manby. Judgment for Manby, and the Elevator Company brings error. Application for supersedeas denied, and judgment affirmed.

George P. Steele, of Denver, for plaintiff in error. H. A. Hicks and Charles Roach, both of Denver, for defendant in error.

PER CURIAM. Application for supersedeas denied, and judgment affirmed.

BOLEN v. STATE. (No. A-2475.)

(Criminal Court of Appeals of Oklahoma.
March 11, 1916.)

Appeal from County Court, Nowata County; F. A. Calvert, Judge.

Harve Bolen was convicted of a violation of the prohibitory law, and appeals. Affirmed.

H. O. Bland, of Nowata, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. On information filed in the county court of Nowata county, charging that in said county on the 11th day of November, 1914, the plaintiff in error, Harve Bolen, did unlawfully have in his possession intoxicating liquors, to wit, one-half pint of whisky and six one-half pints of alcohol, with the intent to sell the same, he was tried, convicted, and sentenced to be confined in the county jail for 60 days and to pay a fine of \$100. From the judgment, he appeals.

No brief has been filed and the case was submitted on the merits. From a careful examination of this case, both as to the law and the evidence, we have failed to discover anything whereof the plaintiff in error has just right to complain.

The judgment is therefore affirmed. Mandate forthwith.

BOLEN v. STATE. (No. A-2476.)

(Criminal Court of Appeals of Oklahoma.
March 11, 1916.)

Appeal from County Court, Nowata County; F. A. Calvert, Judge.

Harve Bolen was convicted of a violation of the prohibitory law, and appeals. Affirmed.

H. O. Bland, of Nowata, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. On information filed in the county court of Nowata county, charging that in said county on the 7th day of December, 1914, the plaintiff in error, Harve Bolen, did unlawfully have in his possession intoxicating liquors, to wit, six one-half pints of whisky, with the intent to sell the same, he was tried, convicted, and sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. From the judgment, he appeals.

No brief has been filed, and the case was submitted on the merits. From a careful examination of this case, both as to the law and the evidence, we have failed to discover anything whereof the plaintiff in error has just right to complain.

The judgment is therefore affirmed.

HOY v. GORST.

(Supreme Court of Oregon. March 7, 1916.)
APPEAL AND ERROR \S 1170—**REVERSAL**—**ERRORS.**

Under Const. art. 7, \S 3, requiring affirmation of judgments in law actions notwithstanding errors if the judgment is such as should have been rendered, a judgment in replevin will be affirmed in spite of unsubstantial errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4034; Dec. Dig. \S 1170.]

Department 2. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by Harry G. Hoy against V. G. Gorst. Judgment for defendant, and plaintiff appeals. Affirmed.

Harry G. Hoy, of Marshfield (Hoy & Miller, of Marshfield, on the brief), for appellant. John D. Goss, of Marshfield (John C. Kendall, of Marshfield, on the brief), for respondent.

PER CURIAM. This is an action in replevin to recover a Ford machine, called in the complaint an automobile. The evidence shows that plaintiff paid \$35 for it, and that it was probably worth \$90. There was a verdict for defendant, and plaintiff appeals.

There are some unsubstantial errors, but from the whole testimony we are satisfied that the verdict and judgment are such as should have been rendered, and under the provisions of section 3, art. 7, of the Constitution, are affirmed.

(60 Colo. 477)

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN v. McHENRY.
(No. 8442.)

(Supreme Court of Colorado. Jan. 3, 1916.)

1. INSURANCE \S 825 — **FRATERNAL BENEFIT INSURANCE — EVIDENCE — QUESTION FOR JURY.**

In an action to recover on a policy of fraternal benefit insurance, on the issue whether the insured had been expelled from the lodge, it was a question for the jury whether entry in the minutes indicating such expulsion had been made subsequent to the meeting at which it purported to have been made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 2009; Dec. Dig. \S 825.]

2. APPEAL AND ERROR \S 1002—**SCOPE OF REVIEW — CONCLUSIVENESS OF FINDING BELOW.**

Where the proper issues are submitted to the jury under instructions to which no complaint is made, the evidence upon those issues being conflicting, the court on appeal cannot disturb the finding below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3935-3937; Dec. Dig. \S 1002.]

Error to District Court, Las Animas County; A. W. McHendrie, Judge.

Action by Florence McHenry against the Brotherhood of Locomotive Firemen and Engine-men. To review a judgment for plaintiff, defendant brings error. Affirmed.

A. C. McCheaney, of Trinidad, for plaintiff in error. J. C. Bell, of Trinidad, for defendant in error.

HILL, J. This writ is to review a judgment for \$1,500 in favor of the defendant in error upon an insurance policy issued by the plaintiff in error upon the life of Walter McHenry, a son of the defendant in error, who died January 21, 1913. The assignment urged is that the verdict of the jury was manifestly against the weight of the evidence. The contention is over whether McHenry paid his assessment for the month of December, 1912. It stands admitted that, if this payment was made, his mother is entitled to recover; otherwise not. The evidence is conflicting. To establish this payment the mother produced in evidence receipts for the months of November and December, 1912. It was proven and is admitted that they are upon the regular blanks of the association sent to the local office by the general officer; that they were signed by the proper officer, whose signature is admitted; that the receipts upon their face purport to be receipts for the assessments for these two months. There is no dispute concerning these matters. Counsel in his reply brief says:

"We admit that Plaintiff's Exhibits A and B, unexplained, would be prima facie evidence that the deceased, Walter McHenry, had paid his assessments for the months of November and December, 1912."

On cross-examination, by deposition, Mr. Hawley (the general secretary and treasurer of the association) was requested to take two blank receipts, such as were used in November and December, 1912, and punch them to show the payment made for assessments during these months and attach them to his deposition. The copies thus furnished are in the same amounts and otherwise similar to those which it is conceded were delivered to the deceased by the proper officials of his local lodge.

There was also testimony by others familiar with such receipts that they were furnished by the Grand Lodge to the financial secretary of the local lodge, who delivered them to the deceased; also that a member could not obtain them except upon the payment of his assessments; that the password of the lodge changes quarterly, and that a member expelled for nonpayment of dues could not attend lodge thereafter; that expelled or suspended members and the public generally cannot attend the meetings of the lodge when the ceremony of initiating a member is being conducted; that during the month of November, 1912, the deceased attended a meeting of his local lodge and participated in initiating other members; that he lived with his mother at Trinidad and received his mail at a boarding house conducted by her; that his mother looked after his mail, and that at no time during several months preceding his death did he receive any letters from the officials of the local lodge calling for the pay-

ment of dues or otherwise, as the secretary testified he had mailed to him there; that at the time deceased brought these receipts home, which was in November, 1912, he told his mother that that made him good until January 14th.

There is also testimony showing a payment of \$10 for him by the mother January 15, 1912, and \$25 by the deceased November 11, 1912, when the receipts were issued. There was also a letter bearing date October 2, 1911, written by the father of the deceased to Stewart (the financial secretary of the local lodge), inclosing \$10 to apply upon the son's assessments. October 3, 1911, Stewart replied as follows:

"Find herein receipts to the amount of \$9.25. There being a deposit of 75c. to apply on next time."

The plaintiff claims this meant that he was then paid up to that date with 75 cents to apply on next time, as the letter states. If this is correct, then the amount admitted to have been paid thereafter was more than sufficient to pay all the assessments up to the time of his death. There is also testimony that soon after the payment of October 3, 1911, Stewart returned to McHenry 75 cents, which the plaintiff claims is another fact tending to prove that he was then paid up to date. Upon cross-examination, when it was pointed out to Stewart that his books showed this return, he admitted it, and in explanation says:

"10/14/11. Returned 75c. What does that entry mean? It means I returned him 75c. I notice here on 10/3/11 he paid some months, and then this one he paid 75 cents too much, and next day I gave him back his 75 cents."

The plaintiff claims that this explanation does not explain. There is also testimony that soon after the \$25 payment of November 11, 1912, to wit, on November 19th following (when the deceased attended a meeting of the lodge), Stewart, the financial secretary, returned to him 50 cents, presumably upon account of another overpayment. It is conceded that, if Stewart's letter of October 3, 1911, meant that the deceased was then paid up to that date with 75 cents to apply on next time, as the letter states, the amount admitted to have been paid thereafter was more than sufficient to pay all assessments up to the time of his death, and the plaintiff claims this fact is established, not only by this letter and the receipts thereafter given, but by the return of the other 50 cents to the deceased during the month of November, 1912.

The testimony upon behalf of the defendant includes the deposition of the witness Hawley, general secretary and treasurer, as to what the records in his office show, which is to the effect that the last remittance received at the general office, account assessments of McHenry, was for the month of July, 1912, received July 19th; that in the month of August he received notice from Stewart, the financial secretary of the local lodge, that McHenry had made default in the

payment of the assessment against him, and that McHenry was expelled from the association August 2, 1912, for the nonpayment of assessment for that month, and that he was never reinstated. This testimony is accompanied by copies of the by-laws relating to subordinate lodges, which gave to it this right upon the nonpayment of assessments, etc.

Arthur Stewart, the financial secretary of the local lodge, testified that McHenry had been a member of the local lodge; that he was usually in arrears in paying his assessments; that, as a matter of accommodation, the lodge would advance his assessments and send them to the Grand Lodge; that the local lodge remitted for him for 12 months, August, 1911, to July, 1912; that he had paid no part of these assessments; that the local lodge refused to advance his assessment for the month of August, 1912, and that on August 2, 1912, he was expelled from the order; that on the 11th of November, 1912, after his expulsion, he paid to the lodge 11 months' back assessments, which it had advanced for him; that the receipts offered in evidence by the plaintiff were given for the amounts in arrears for the months of November and December, 1911, which the lodge had advanced for him; that other receipts, for which the witness produced stubs, had been issued showing payments on the same date and were for the months of August to December, 1911, and from January to June, 1912. He produced his monthly statements to confirm his testimony, duplicates of which were forwarded to the General Secretary, and also other books, to show that no assessments had been made against McHenry after his expulsion, August 2, 1912.

[1] The records of the local lodge were produced, which disclosed a meeting August 12, 1912. They were kept by a Mr. Tom Turner, and showed that at this meeting Stewart, the financial secretary, had reported the expulsion of McHenry; Stewart testifying that he had notified the lodge of the delinquency. The plaintiff contends that the original record shown to the jury discloses that the portion referring to McHenry had been written in thereafter; that it was crowded in just over the signature of Turner, and that Turner hunted his records in vain for another place therein where an entry of this sort had been made after the close of the entire business of the lodge, but was unable to find one. This, of course, was a question for the jury to consider. The witness Turner admitted that the deceased sat in the lodge about the 19th of November, 1912, but claims that he called the attention of the president to the fact that he had been expelled and had no right to sit in the lodge; that the president simply said, "Oh, well, he says that he is going to be reinstated again, and he says his brother is being initiated, and I will just leave him in;" and that they had

some further words over it. The president did not testify. The witness Miller, who was being initiated at the time, testified that Turner was not present and did not come up to the lodgeroom until after the ceremonies were over, or nearly so. Turner is also contradicted by Leslie McHenry, a brother of the deceased, who was present and being initiated at the time. His testimony is to the effect that Turner was not there. The witness Stewart admits that at this meeting he returned to the deceased 50 cents; that this was done in his official capacity. Stewart further testified that the deceased knew he was in arrears, asked him what it would cost to be reinstated, and was told; also that he had repeatedly mailed him letters to Trinidad demanding dues, etc. This was denied by the mother; that is, that any such letters were ever received. The receipts for the November and December, 1912, assessments, held by the deceased, were for \$2.25 each, and stated they were in full for these months. Stewart testified that the dues for the months of November and December, 1912, were \$2.50 per month, but for the same months during 1911 were only \$2.25 per month. This testimony is in apparent conflict with that of Mr. Hawley, the general secretary, who, in marking the receipts as to how they would read were they given for November and December, 1912, marked them for the sum of \$2.25 each, and not \$2.50, as testified to by the witness Stewart. Plaintiff claims that Stewart's books also show that the assessments for some other members for December, 1912, were \$2.25, and not \$2.50, as testified to by Stewart. We think this latter immaterial; for, if we understand Mr. Hawley's testimony, a member's assessments to the Grand Lodge depends upon the amount and classification of the insurance carried, and in this respect his testimony does not agree with the contention of his counsel, who claims that the \$2.25 marked by him was intended for the Grand Lodge assessment only, for the reason that he states the Grand Lodge assessment for a member carrying a policy of the class and the amount Mr. McHenry's was would be \$2 for the month of December, 1912, and, having marked his copy \$2.25, he must have intended to include therein something more than the Grand Lodge assessment.

There is also testimony of other witnesses, former officials and members of the lodge, that, in case the transaction was as testified to by Stewart, the receipt for the money paid to the local lodge by McHenry for advancements to him for Grand Lodge assessments would not have been the kind used at all, but would have been of another character; that the blanks for assessments are sent out for only one purpose, and are never to be used for any other, viz., to be given for the payment of assessments only, and not otherwise.

[2] Many reasons are presented by each side setting forth why and how the testimo-

ny sustains their respective contentions. We can in a way agree with both, which is one of the vital reasons why we should not disturb the verdict of the jury, even though we might have found otherwise in the first instance. This is specially true when applied to the receipts admitted to be genuine, which, in connection with the other evidence, made for the plaintiff more than a *prima facie* case. As stated by the Supreme Court of Illinois in *Ennis v. Pullman Palace Car Co.*, 165 Ill. at page 182, 46 N. E. 445:

"It is true that a written receipt may be explained by parol, but it is *prima facie* evidence of the facts recited in it; and, the evidence furnished by it being of the highest and most satisfactory character, its force can only be impaired by testimony which is convincing. The proof offered to explain it must be clear and unmistakable. It must be overcome, if overcome at all, by a clear preponderance of the evidence."

This line of reasoning is applicable here, and whether or not it was satisfactorily overcome was a question for the jury to determine. It was submitted to that body under instructions to which no complaint has been made. Under such circumstances, the evidence being conflicting, it is not the province of this court to disturb the findings. *Denver T. & I. Co. v. O. & S. Ry. Co.*, 58 Colo. 313, 145 Pac. 707; *D. & R. G. R. Co. v. Peterson Grocery Co.*, 147 Pac. 663; *Bank of Bromfield v. McKinley*, 53 Colo. 279, 125 Pac. 493; *Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 116 Pac. 1051.

The judgment is affirmed.

Affirmed.

GABBERT, C. J., and TELLER, J., concur.

(29 Cal. A. 8)

AMERICAN EXCHANGE NAT. BANK OF DULUTH v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY, et al. (Civ. 1848.)

(District Court of Appeal, Second District, California. Nov. 17, 1915.)

1. GARNISHMENT §123—RIGHTS OF PERSONS GARNISHED.

Where writs of garnishment to reach the property of a payee of a check were served both on the drawer of the check and the bank on which it was drawn, the reasons given by the bank for dishonoring the check are not available to the drawer.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 243, 248; Dec. Dig. §123.]

2. PAYMENT §21—CHECKS—LIABILITY OF DRAWER.

By agreement a check may be taken in absolute payment, in which case the drawer is liable only as an indorser, and not on the original debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 86; Dec. Dig. §21.]

3. GARNISHMENT §51—DEPOSIT IN BANK—CHECKS—EFFECT OF.

A check is so far a payment that until dishonored the drawer cannot be garnished as a

debtor of the payee in respect to the debt for which it is given.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 74, 97-101; Dec. Dig. §51.]

4. GARNISHMENT §232—EFFECT OF.

Defendant, after giving a check in payment of a debt, was garnished by creditors of a payee. The check had already been indorsed over to plaintiff. Both defendant and the bank on which the check was drawn refused payment on the theory that payment could not be enforced until the disposition of the prior suits. Held, that as the garnishee's liability in the case of a debt due from him is limited by his liability to the defendant in the principal action, whereby the latter has, at the time of the garnishment, a cause of action, payment of the check could not be denied until disposition of the garnishment proceedings, for the check, until dishonored, was a payment of defendant's debt, until which time the principal debtor in the garnishment proceeding had no right of action against defendant, and plaintiff could not recover unless it was the legal holder of the obligation.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 445-453; Dec. Dig. §232.]

Petition by the American Exchange National Bank of Duluth, a corporation, for a writ of mandate, against the Superior Court of California, in and for the County of Los Angeles, and John W. Shenk, Judge. Writ issued.

Davis, Kemp & Post, of Los Angeles, for petitioner. C. H. Brock and M. P. Frasier, both of Los Angeles, for respondent.

CONREY, P. J. On petition for writ of mandate. An action numbered B-16352 and entitled American Exchange National Bank of Duluth, Plaintiff, v. Title Insurance & Trust Company, Defendant, was filed in the superior court of Los Angeles county on September 11, 1914, and is now pending. In that action the plaintiff seeks to recover a sum of money due upon a check assigned to it by one J. H. Constantine. This check was issued by the Title Insurance & Trust Company to Constantine on May 12, 1914, and was thereafter indorsed and transferred by Constantine to the plaintiff. The action was brought against the defendant company after presentation of the check by the plaintiff to the bank against which it was drawn and refusal of payment by that bank. The action of plaintiff against the Title Insurance & Trust Company came on regularly for trial on June 3, 1915, counsel for the respective parties being present in court. Thereupon the defendant moved the court for a stay of proceedings in the action until final determination of another action pending in that court, numbered B-25383, and entitled Herbert Freston, Plaintiff, v. J. H. Constantine, Defendant. An order was made, granting said motion, and in accordance therewith the superior court refused to proceed with the trial of the case. The petitioner alleges that by reason of said order and action on the part of the respondent, petitioner is unable to proceed with its said action, and unless

relief be granted in this proceeding, the action cannot be tried until final judgment shall have been rendered in the Freston Case.

[1-4] The motion of the defendant Title Insurance & Trust Company for stay of proceedings in the action against it was made—"on the grounds that the defendant in this action has been served with notice of garnishment in said case of Herbert Freston, Plaintiff, against J. H. Constantine, Defendant, as aforesaid, as will more fully appear by the affidavit marked 'Exhibit A' attached hereto and made a part hereof."

The affidavit shows that the action of Freston v. Constantine was commenced on June 2, 1915; that a writ of attachment was issued in that action against the property of the defendant Constantine; that the writ, with notice of garnishment of the funds and property of Constantine and of any indebtedness due to Constantine from the Title Insurance & Trust Company, was served on the company on June 2, 1915; and that the Freston action is still pending. The affidavit, which is by the secretary of defendant company, closes by saying:

"That it was sought by said writ of attachment and notice of garnishment to attach all indebtedness, if any, of the defendant Title Insurance & Trust Company to J. H. Constantine, under and by virtue of the identical check sued upon in this action."

The notice of garnishment as served by the sheriff upon the defendant company is attached to the answer of respondent herein, and does not, in any way, pretend to describe or identify said check. It purports only to give notice of attachment of all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to defendant Constantine in the possession or under the control of the Title Insurance & Trust Company. If the obligation sued upon by the plaintiff in action No. B-16352 is not a debt owing by the defendant company to Constantine, the garnishment proceeding can furnish no reason for postponing the plaintiff bank in the enforcement of its demand. The subject-matter of the complaint in the Freston Case has no relation whatever to the check sued on in action No. B-16352. A judgment in favor of plaintiff bank in its action against the Title Insurance & Trust Company cannot possibly be rendered, except upon a finding that the plaintiff bank is the legal owner of the obligation, to wit, the check indorsed to it by Constantine. If it is such legal owner, we can find no reason or rule of law under which it should be compelled to postpone realization upon its demand until the settlement of a controversy between its assignor and some one claiming to be his creditor.

It is claimed by respondent that progress in the action against the Title Insurance & Trust Company should be stayed for the further reason that, as shown by the answer in that action, another attachment in the case of one Lovell against J. H. Constantine (No. B-12286 of said superior court) was issued

and garnishment notice therein served on the Title Insurance & Trust Company and also on the Farmers' & Merchants' National Bank, drawee of the check so assigned by Constantine to the petitioner herein, plaintiff in action No. B-16352; that the refusal of the bank to honor and pay the check was solely on account of said notice of garnishment served on it. This matter is probably extraneous to the case presented for our decision, since the motion for stay of proceedings in action No. B-16352 referred only to the attachment proceedings in the Freston Case. But even conceding that the garnishment in the Lovell Case is a proper subject for consideration here, we do not think that the respondent is in any better position on that account. We apprehend that the reason given by the Farmers' & Merchants' National Bank for not honoring the check and the notice of garnishment served upon that bank are not available to the defendant Title Insurance & Trust Company as a ground for abatement of proceedings in the action against it. So far as the notice of garnishment is concerned in the action of Lovell against Constantine, it is of no more importance with respect to the matters involved herein than is the garnishment notice in the Freston Case.

"By agreement a check may be taken as absolute payment, and the drawer will then be liable only as an indorser, and not on the original debt. And a check is always so far payment, until dishonored, that, after its delivery, the drawer cannot be garnished as debtor of the payee in respect to the debt for which the check is given." Morse on Banks and Banking (4th Ed.) § 543.

"A check given by a debtor in settlement of an account is so far payment as to discharge the drawer as trustee of the payee, service being made on him after giving the check but before presentment; the check is payment unless dishonored." *Id.* § 545; *Getchell v. Chase*, 124 Mass. 366.

A garnishee's liability in the case of a debt due from him is grounded upon and is limited by his liability to the defendant in the principal action whereby the latter has, at the time of the garnishment, a cause of action, present or future, against him. *Drake on Attachment* (7th Ed.) § 463. But Constantine had no right of action against the Title Insurance & Trust Company, for its check issued in his favor, either in payment or in conditional payment of its obligation to him, was not dishonored while in his hands.

Being of the opinion that the notices of garnishment relied upon by the respondent herein were not sufficient to impose upon the Title Insurance & Trust Company any liability affecting the check issued by it to Constantine, we think that the court erred in granting the motion for stay of proceedings in said action No. B-16352, and that the plaintiff therein is entitled to have the case proceed to trial and judgment the same as if neither of said garnishments had been issued.

Let peremptory writ issue.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 41)

KEISER v. LEVERING. (Civ. 1390.)

(District Court of Appeal, Second District, California. Nov. 22, 1915. Rehearing Denied Dec. 21, 1915.)

1. PLEADING — §310 — COMPLAINT — SUFFICIENCY.

Recitals in a chattel mortgage incorporated in the complaint in an action to recover possession as to the value of the property will not supply the want of averments as to value in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 345, 944, 946, 947; Dec. Dig. § 310.]

2. REPLEVIN — §107 — ACTIONS — JUDGMENT.

Under Code Civ. Proc. § 667, declaring that in an action to recover possession of personal property judgment shall be for possession of the property or the value thereof, a judgment not in the alternative is not necessarily void, and may, under particular circumstances, be upheld.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424-428; Dec. Dig. § 107.]

3. REPLEVIN — §107 — ACTIONS — JUDGMENT.

In an action to recover possession of personal property claimed under a chattel mortgage, the first count of the complaint averred the giving of a mortgage to secure a note and the amount due thereon, but did not aver the value of the property claimed. The second count averred the execution of another note and mortgage that the value of the property was \$1,200, while the sum alleged to be due on the second mortgage was \$359. It appeared that some of the property was subject to both mortgages. Code Civ. Proc. § 667, declares that in an action to recover the possession of personal property, judgment may be for the possession or value thereof in case delivery cannot be had. The judgment was for the property or its value, which was stated as \$970. *Held*, that as the first count of the complaint did not state the value of the property claimed, and as the value was in excess of the amount of the indebtedness set forth by the second count, the judgment could not stand.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 424-428; Dec. Dig. § 107.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by S. W. Keiser against J. H. Levering. From a judgment for plaintiff, and an order denying new trial, defendant appeals. Reversed.

Harry L. Dearing and T. C. Gould, both of Los Angeles, for appellant. A. C. Galloway, Wm. L. Jarrott, and James S. Jarrott, all of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover possession of personal property. From a judgment in favor of the plaintiff, and from an order denying defendant's motion for a new trial, the defendant appeals.

By the first count of the complaint it appears that the defendant made to the plaintiff a chattel mortgage securing a note on which there was due at the time of filing the complaint the sum of \$835. The mortgage contained the usual provision entitling plaintiff to possession of the property with right of sale to satisfy his claim whenever default should be made on the defendant's obligation.

The facts of such default and of demand for possession and of refusal by the defendant are alleged, which the plaintiff averred are to his damage in the sum of \$835. Defendant demurred separately to each count of the complaint on the general ground as to each count that it did not state facts sufficient to constitute a cause of action, and also on special grounds which we need not discuss. The demurrer was overruled, and an answer filed.

[1] In support of the general demurrer, defendant contends that the first count does not contain any allegations showing the value of the demanded property, and claims that an allegation of such value is essential to the cause of action. The plaintiff in this first count alleges the execution of the mortgage, a copy of which is attached to the complaint, "and made a part hereof to all intents and purposes the same as if recited at length herein." The schedule of mortgaged articles as set forth in the mortgage purports to give the value of some of those articles. Allowing this as an allegation of value, it would only specify the values at the date of the mortgage and not as of the time of filing the complaint, unless we could assume that such values continued unchanged. It is settled law that recitals in a contract incorporated in a complaint will not supply the want of essential averments in the pleading. Thus, where the complaint alleged the making of a note set forth by copy and the note recited that it was "secured by mortgage of even date herewith," it was held that this did not amount to an averment that the note was secured by mortgage. *Hibernia Savings & Loan Society v. Thornton*, 117 Cal. 481, 49 Pac. 573; *Hayt v. Bentel*, 164 Cal. 681, 686, 130 Pac. 432.

[2, 3] The contention that a statement of value of personal property in an action to recover possession thereof is essential to the cause of action seems to be based upon the fact that in such action judgment for the plaintiff may be for the possession, or the value thereof in case delivery cannot be had, and damages for the detention. Code Civ. Proc. § 667. In the earlier cases it was held to be imperative that the judgment be in the alternative form, and such judgments for possession only, without providing for a recovery of the value thereof in case delivery could not be had, were reversed even at the instance of the defendant. *Berson v. Nunan*, 63 Cal. 550; *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605, and other cases. But this rule was seriously questioned in *Claudius v. Aguirre*, 89 Cal. 506, 26 Pac. 1077, and *Erreca v. Meyer*, 142 Cal. 308, 310, 75 Pac. 826. The law seems to be that, while the judgment must ordinarily be in the alternative, yet "a judgment that is not in the alternative is not, however, void, and whether or not such a judgment is even erroneous must depend upon the facts of the particular case." These later decisions might be sufficient to support

a complaint and judgment for mere possession of property without regard to the value thereof, if the case as a whole appeared to be within the jurisdiction of the court; but could not possibly support a judgment for the value as specified by the court in its findings where no value was alleged in the complaint. This is important in the present case, as will appear in our further statement of it.

The second count of the complaint in this action alleges the execution of another note and chattel mortgage by the defendant to the plaintiff, upon which at the date of filing the complaint there was alleged to be due the sum of \$359.12. This count is similar to the other, except that the second count alleges the value of the property sought to be recovered therein to be the sum of \$1,200. The property described in the second mortgage is in part identical with that described in the first mortgage, but some of the original items are omitted and others are added. The defendant in his answer did not deny the allegation of value set forth in the second count, and the court found—as the defendant also admitted—the amount of indebtedness on each mortgage note to be substantially as stated in the complaint. The court found as a fact the total value of the property in the possession of the defendant to be the sum of \$970. The judgment is for possession of all of the mortgaged property described in the findings and judgment, or if delivery thereof could not be had, that plaintiff recover from defendant the sum of \$970 and specified costs.

Manifestly the judgment is for an excessive amount. For the reasons heretofore stated, no part of the \$970 can be charged against the cause of action stated or attempted to be stated in the first count of the complaint; and as to the second count, although it may be that the property involved therein is worth as much as \$970, the debt for security of which it was mortgaged by the second mortgage did not amount to half that sum, as stated in the complaint. In *Pico v. Martinez*, 55 Cal. 143, which was an action of claim and delivery of personal property, it was held that, where the goods had been taken from the defendant and the judgment was that the defendant was entitled to possession of them, and it further appeared that the defendant had only a special and limited interest in the property, the amount of his recovery under the alternative provision in the judgment must be limited to the value of his special and limited property in the goods, and was not to be measured by the entire value thereof. If this is the rule applicable in the instance of a judgment in favor of the defendant, under section 667, Code of Civil Procedure, it is equally applicable in the case of a judgment in favor of the plaintiff. Since in the present case the plaintiff's right to have possession of the described property is only

claimed for the purpose of satisfying his claims for an indebtedness unpaid to him, and since no special damages are either alleged or proved, it is clear that the value of the property to him cannot exceed the amount of the indebtedness unpaid; and this amount in the present state of the pleadings is limited to the indebtedness shown in the second count of the complaint.

The judgment and the order denying defendant's motion for a new trial are reversed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 5)

STROUD v. FAIRBANKS. (Civ. 1767.)
(District Court of Appeal, Second District,
California. Nov. 17, 1915.)

APPEAL AND ERROR §1011 — FINDINGS —
CONCLUSIVENESS.

The trial court's findings of fact made on conflicting evidence cannot be questioned on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. §1011.]

Appeal from Superior Court, Kern County;
John C. Covert, Judge.

Action by B. K. Stroud against H. W. Fairbanks. Judgment for defendant, motion for new trial denied, and plaintiff appeals. Judgment and order affirmed.

E. L. Foster, of Bakersfield, and Frank H. Short, of Fresno, for appellant. Kemp, Mitchell & Silberberg, of Los Angeles, and George E. Whitaker, of Bakersfield, for respondent.

JAMES, J. This case is brought into this court on an appeal taken by the plaintiff from an adverse judgment, and also from an order denying his motion for a new trial.

Appellant brought this action to recover profits alleged to have accrued on account of a joint enterprise entered into between himself and the respondent with respect to the purchase and sale of certain oil-producing lands in the county of Kern. We are asked only to consider one point, to wit, as to whether the evidence sustains the findings made by the trial judge. A careful examination of the testimony as it is set out in the bill of exceptions leads us to the conclusion that as to the main issues in controversy there was testimony before the court from which the conclusions of fact as set forth in the findings might naturally and legally follow. From this testimony it appears that in the year 1908 appellant was employed by the Fairbanks Oil Company, which was operating in Kern county, as superintendent of its field plant; that respondent was connected with that corporation; that upon the occasion of a visit made by respondent to the oil fields respondent and appellant made a short trip for the purpose of viewing certain undeveloped land lying in that neigh-

borhood of which a certain section 14 was a part; that as to the north half of this section 14 some conversation took place between the two; that this ground was held by several individuals under placer locations; that appellant and respondent had some talk with one McReynolds, who represented himself and other of the locators on section 14. Following this a contract was made by respondent and McReynolds which provided for the acquiring by respondent of a certain interest in the north half of section 14 upon consideration that Fairbanks should develop the property within a certain period of time in that contract mentioned. The terms of this agreement were not complied with on the part of respondent, and shortly after default had been made of some of the conditions therein set forth, respondent and associates other than appellant entered into a contract with McReynolds and others whereby a large body of land, including several sections, and including the north half of section 14, which was the subject of the first contract, was provided to be taken over by respondent and his associates and developed. Later the contract rights so acquired were negotiated to other interests, and respondent received a considerable sum of money in exchange for his interest. It was the claim of appellant that respondent and he held a partnership interest as to the rights acquired by the first contract affecting the north half of section 14, and that, when the sale was made of the total interests involved in the second contract, some accounting should have been made to him for his interest in the first contract. Respondent denied positively that there was any partnership interest agreed to be given to the appellant under the first agreement. His statement, as shown in his testimony, was that the understanding expressed between himself and appellant was that, if a corporation could be organized to handle the placer rights on the north half of section 14, and if the appellant would assist in the forming thereof, that he (respondent) would see that appellant was given employment as superintendent of the proposed company and receive some shares of stock therein as additional compensation. So it first appears that there was a conflict in the testimony as to what the agreement between the parties really amounted to. The further fact appears without dispute that appellant did nothing at all in the direction of assisting in the organization of a company to promote and develop the north half of section 14. It is also clear that the rights of respondent in the first contract made with McReynolds had become subject to forfeiture at the time the second contract was made, which included many times the acreage of ground described in the first contract. McReynolds testified as to the termination of the first contract as follows:

"After the contract was signed Dr. Fairbanks arranged for some material and, as I recollect it, arranged to have it hauled to the ground, and about the 15th of December advised me that he was unable to go ahead with the contract—unable to fulfill its terms. Nothing was done after that; no other development or work was done under the conditions and terms of that contract. Dr. Fairbanks and I agreed that the contract was at an end. This contract of November 30th was not performed."

Appellant admits that there was testimony in contradiction of his own as to the principal circumstances relied upon as tending to establish his case. He claims, however, that certain letters written by respondent constitute admissions conclusive in their nature against the respondent, and which statements were not refuted. In view of the testimony introduced on behalf of the respondent and denial of the principal occurrences as testified to by appellant, we do not think that the letters constitute admissions conclusive in their nature as to appellant being possessed of any legal claim for the compensation asserted by his complaint. Without reciting in detail the contents of these letters, it is enough to say that such contents may properly be resolved in accordance with the oral testimony of the respondent and against the contention of appellant. In one of the letters respondent refers to arranging to give the appellant something on account of that first contract, but expresses it as being such "an amount which might be held as morally due you for your interest." Resolving the case briefly, the record presents a state of conflicting evidence upon which the findings of fact as made by the trial court cannot be questioned on appeal.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(29 Cal. A. 1)

PEOPLE v. ANDRADE. (Cr. 427.)

(District Court of Appeal, Second District, California. Nov. 17, 1915.)

1. CRIMINAL LAW § 763, 764—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In the absence of direct testimony or other overwhelmingly convincing evidence connecting defendant with a homicide charged, other than the circumstances of an alleged confession and his failure to testify in his own behalf, an instruction that defendant does not deny the killing, but claims that it was done in self-defense, is erroneous, as usurping the functions of the jury, and is in violation of Const. art. 6, § 19, which provides that judges shall not charge juries on matters of fact, but may state the testimony and declare the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. § 763, 764.]

2. WITNESSES § 300 — INSTRUCTIONS — COMPELLING ACCUSED TO BE A WITNESS AGAINST HIMSELF.

Such an instruction is a violation of Const. art. 1, § 13, and Pen. Code, § 1323, which se-

cure a defendant from being a witness against him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1042, 1042½; Dec. Dig. ¶300.]

8. CRIMINAL LAW ¶778 — INSTRUCTIONS — BURDEN OF PROOF.

Such an instruction throws upon defendant, without the verdict of a jury in the matter, the burden of proving circumstances of mitigation or of justification or excuse, contrary to Pen. Code, § 1105, which imposes this burden, except when the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. ¶778.]

4. CRIMINAL LAW ¶1169 — CURE OF EVIDENCE—ERROR IN ADMISSION.

When evidence of a custom of deceased in carrying considerable sums of money with him is received to prove a motive for his murder, and is subsequently stricken, such striking cures the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 764, 3088, 3130, 3137-3143; Dec. Dig. ¶1169.]

5. HOMICIDE ¶166 — ADMISSION OF EVIDENCE.

In a trial for murder, testimony as to a specific sum of money which deceased had upon his person two days before his death was received upon the assurance of the district attorney that knowledge of the possession of this sum by the deceased would be brought home to the defendant, and other evidence was received showing the possession of money by the deceased the day previous to his death, and exhibited by him in the presence of defendant. *Held*, that such evidence was properly received, notwithstanding the fact that it was also shown that a certain sum of money was found in the pockets of the deceased after his death, as such a circumstance, while favorable to the defendant on the question of motive, was properly subject to the consideration of the jury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320-331; Dec. Dig. ¶166.]

6. CRIMINAL LAW ¶519 — EVIDENCE — CONFESSION—ADMISSIBILITY.

A confession made by a defendant to a sheriff, which is shown, and properly determined by the court, to have been made voluntarily and without any of those promises, threats, or other means of coercion which would require exclusion of a so-called confession, is admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. ¶519.]

7. HOMICIDE ¶142—INFORMATION—PROOF.

Where the information charges that defendant "did willfully, unlawfully, feloniously, and with malice aforethought kill and murder," etc., the fact that the people attempted to prove that the motive was robbery does not confine the charge to one of murder committed in the perpetration or attempt to perpetrate robbery, and a requested instruction to the contrary is properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. ¶142.]

8. HOMICIDE ¶142—INFORMATION—PROOF.

Under an information charging that defendant "did willfully, unlawfully, feloniously, and with malice aforethought kill and murder," etc., any kind of willful killing is sufficient, under

Pen. Code, § 189, defining murder and its degrees, to constitute the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 250-259; Dec. Dig. ¶142.]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Jose Andrade was convicted of murder, and he appeals. Reversed.

Edwards & Smith, of Dinuba, and Ralph H. Walker, of Visalia, for appellant. U. S. Webb, Atty. Gen., and Robert M. Clarke, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of murder and sentenced to imprisonment for life. He appeals from the judgment and from an order denying his motion for a new trial.

On the morning of January 10, 1915, the dead body of one Ina P. Cook was found on a public road in the county of Tulare, and from the evidence it clearly appears that his death had been caused by a bullet wound in the head. The evidence further shows that on the previous afternoon and evening he had been traveling along that road in an open buggy and in company with the defendant. When the deceased was last seen alive, so far as the evidence shows, he was in company with the defendant. There are no eyewitnesses to the attack which caused the death of deceased, and in that respect the defendant has been convicted entirely upon circumstantial evidence, with the single exception of an alleged confession by the defendant. The sheriff of Tulare county gave testimony concerning an interview between himself and the defendant after defendant's arrest and that in that interview the defendant admitted that he had shot Mr. Cook. The precise words covering this point, as stated by the sheriff, were that:

Defendant "said that he did not remember whether he shot him as he was getting up or after he got up. After he shot him he ran away. He did not know where he threw the gun."

[1, 2] The defendant did not testify in his own behalf, but stood silent under his plea of not guilty. On this state of the record the court charged the jury as follows:

"You are instructed that the defendant does not deny that he killed one Ina P. Cook on the 9th day of January, 1915, but claims that such killing was done in self-defense."

The defendant claims that the giving of this instruction constitutes prejudicial error; and with this contention we are constrained to agree.

"No person shall * * * be compelled in any criminal case to be a witness against himself. * * * Const. Cal. art. 1, § 13.

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself. * * * His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding." Pen. Code, § 1323.

"Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const. Cal. art. 6, § 19.

[3] In giving the foregoing instruction the court usurped the functions of the jury. It withdrew from the jury the determination of the essential question whether or not the deceased came to his death at the hands of defendant, and, without a verdict of the jury upon this fact, threw upon the defendant the burden of proving circumstances of mitigation or of justification or excuse. Pen. Code, § 1105. Thereby the failure of the defendant to give testimony in his own behalf was used against him at the trial, notwithstanding his plea of not guilty addressed to the entire issues of the case. In the absence of direct testimony or other overwhelmingly convincing evidence connecting the defendant with this homicide, other than the circumstances of the alleged confession, we are unable to say that the giving of such instruction was nonprejudicial error, or that the jury necessarily would have convicted the defendant if such instruction had not been given. The substantial effect of the record is that the judge set up the unsworn statement of the defendant that he did kill the deceased against the unsworn statement implied in his plea of not guilty, and made a finding of fact thereon which could lawfully be made by the jury only. *People v. Strong*, 30 Cal. 151.

[4, 5] Appellant claims that the court erred in permitting the introduction of certain testimony of the witness Jarrad with respect to the amount of money which deceased had on his person on the 8th day of January, and as to the custom of the deceased as to carrying considerable sums of money with him. The second specific part of this testimony, that relating to the deceased being accustomed to carry money with him, was afterwards stricken out by the court, and we think the error was thereby sufficiently corrected. The testimony as to the specific sum was received upon the district attorney's assurance that knowledge of the fact would be brought home to the defendant. Other evidence was introduced showing the possession of money by the deceased on the 9th day of January and exhibited by him in the presence of the defendant. We think that this evidence was properly received. It is true that the evidence further showed that about \$20 was found in the pockets of the deceased after his death, but this circumstance, so far favorable to the defendant on the question of motive, was properly subject to the consideration of the jury.

[6] The objection that the alleged confession as detailed by the sheriff in his testimony should have been rejected because not proved to be a voluntary statement by the defendant cannot be sustained. It was sufficiently shown and the court was authorized to determine that the statement was made freely and voluntarily and without any of those promises, threats, or other means of coercion which would require exclusion of a

so-called confession. *People v. Miller*, 135 Cal. 69, 67 Pac. 12.

The other contentions made in the brief with respect to the reception of evidence are of minor importance, and do not disclose any errors requiring discussion here, if indeed any there were.

[7, 8] It is further claimed that the court erred in refusing to give to the jury the following instruction:

"Before you can convict the defendant of the crime charged, you must be satisfied beyond a reasonable doubt and to a moral certainty that he did commit such a crime with the intent and motive of robbery, and, if you do not so find from the evidence herein, you must acquit him."

The fact that the people introduced testimony for the purpose of showing the intent and motive of robbery did not have the effect to confine the charge to one of murder perpetrated in the perpetration or attempt to perpetrate robbery. The information charged that the defendant committed the crime of murder in that he "did willfully, unlawfully, feloniously, and with malice aforethought kill and murder one Ina P. Cook, a human being," etc. The particular motive above mentioned was not necessary to a successful prosecution in this case. Any kind of willful and premeditated killing would be sufficient to constitute the crime. Pen. Code, § 189.

The judgment and the order denying defendant's motion for a new trial are reversed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 37)

BENSON v. BENSON. (Civ. 1429.)

(District Court of Appeal, Third District, California. Nov. 20, 1915.)

1. DIVORCE §172—JUDGMENT—CONCLUSIVE—PLEADING AS DEFENSE—NECESSITY.

In a husband's suit for divorce, where, answering the wife's cross-complaint charging cruelty and desertion, he did not plead a former judgment for himself in an action for divorce by the wife against him, and no proof of such former judgment was offered under the plea of estoppel set up by the wife in her answer to the complaint, the judgment roll in the former action not being introduced in evidence by either party, and defendant wife merely pleading in her answer the cross-complaint, in the former action, of the then defendant husband and the judgment in such action, there was nothing in the record disclosing the grounds upon which defendant wife, as plaintiff in the former action, relied for a divorce, to render the former judgment conclusive in the suit upon her right to maintain her cross-complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 559-561; Dec. Dig. §172.]

2. DIVORCE §171—CONCLUSIVENESS OF ADJUDICATION—SUBSEQUENT MATTERS.

Where a wife sued for divorce, charging cruelty and desertion, and judgment was for the husband, who thereafter committed acts of cruelty and desertion, the judgment was not conclusive upon the wife's right to maintain a cross-

bill, based on such acts, in a subsequent action for divorce by the husband.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 554-558; Dec. Dig. § 171.]

3. DIVORCE § 184—PROCEEDINGS—APPEAL—HARMLESS ERROR—EVIDENCE.

In a husband's action for divorce, where both parties had, on sufficient grounds, persistently been engaged in an effort to get rid of each other as husband and wife, and the wife brought a cross-bill charging cruelty and desertion, the ruling sustaining defendant's objection to plaintiff's question to her on cross-examination as to whether she was willing to go back to plaintiff and live with him was harmless, if erroneous, and not ground for reversal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. § 184.]

4. DIVORCE § 308—ALLOWANCE FOR SUPPORT OF CHILDREN—PROPERTY.

Where the husband, against whom a divorce was awarded, was a carpenter and building contractor, making good wages and usually employed, an allowance to the wife, solely for the support and maintenance of three minor children, of \$15 a month each, was proper as not unreasonable.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. § 308.]

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action for divorce by Carl Benson against Gerda Benson. From an interlocutory decree adjudging defendant to be entitled to a divorce on her cross-complaint, and awarding her a one-half interest in the community property, the custody of the children, and making an allowance for their support, plaintiff appeals. Affirmed.

Austin Lewis, of San Francisco, and R. M. Royce, of Oakland, for appellant. Willard & Ferrell, of San Francisco, for respondent.

HART, J. The court below rendered and entered its interlocutory decree, adjudging the defendant to be entitled to a divorce upon her cross-complaint, and awarding her a one-half interest in the community property and the custody of three minor children, issue of the marriage of the parties, and making an allowance of \$15 per month to each of said children for their support and maintenance. This appeal is by the plaintiff from the judgment so rendered and entered.

The complaint is in two counts, the one in due form charging the defendant with willfully deserting the plaintiff in the month of October, 1908, and the second alleging extreme cruelty on the part of the defendant toward the plaintiff. Certain specific acts of cruelty are set forth in the latter count, and, in substance, they are: That the defendant had been in the habit of bestowing unbecoming attention on men other than her husband, and that in the month of July, 1908, the plaintiff discovered "that she had a man other than her husband in her bedroom"; that defendant on numerous occasions expressed to the plaintiff a preference for other

men over him; that the defendant abused their children, being in the habit of addressing them in harsh and abusive language, and had threatened to kill said children on many occasions; that she refused to prepare meals for said children, and refused to "dress them" or give them other necessary attentions due from a mother to her minor children, with the result that the plaintiff was required to prepare their meals for them and otherwise minister to the necessities of said minors; that on the 8th day of December, 1912, the defendant said to the plaintiff that she desired to have nothing more to do with either their minor children or him; and that she "refuses to have anything to do with the said children, and that plaintiff provides for them in every respect," etc.

The defendant answered the complaint by specific denials of the allegations of each of the counts thereof, and, furthermore, pleaded in bar of the plaintiff's action a former judgment in an action for a divorce, wherein the defendant here was plaintiff and cross-defendant and the plaintiff here defendant and cross-complainant. The defendant also filed a cross-complaint herein, in which she charges, separately and in different counts, that the plaintiff had willfully deserted her, had neglected and failed to provide for her the common necessities of life for and during the year immediately preceding the filing herein of her cross-complaint, and that the plaintiff had been guilty of extreme cruelty towards her in divers ways and on numerous occasions; such acts of cruelty being specifically set out. The plaintiff made answer to the cross-complaint. No evidence was offered in support of the defendant's plea of res adjudicata.

The court made no findings upon the causes of action for desertion and failure to provide set up in the defendant's cross-complaint. It did, however, in substance, find as to the cause of action therein stated, involving the charge of extreme cruelty, that the plaintiff for and during the course of a number of years prior to the date of the institution of this action by the plaintiff and cross-defendant, on numerous occasions, and often in the presence of other persons, had called the defendant and cross-complainant vile and, indeed, unprintable names; that he during that time told other people, in her absence, that she was an immoral woman, and that the persons to whom he so spoke of her had communicated to her the fact of his denunciation of her in the manner indicated; that, without cause or provocation therefor, he attempted to strike her on one occasion, and but for the interference and protection she received at the hands of a Mr. Ellis, who was then present, he would have struck and inflicted upon her serious bodily injury; that on said occasion he, in the presence of strangers, called her a liar, a thief,

and a fool, and said she was not a moral or respectable or virtuous woman, and asseverated "that he would not live with said Gerda Benson again, even if she begged him to allow her to live with him"; that for many years he had kept up a continuous abuse of the defendant and cross-complainant of a character which made it impossible for her to live in peace or happiness with him.

There is no claim here that the evidence does not support the allegations of cruelty of the cross-complaint or the findings upon which the judgment is planted. It is contended, however: (1) That each and all of the matters set up by the defendant in the several counts of her cross-complaint were made issues by the respective pleadings in the former divorce action between the parties and were adjudicated by the judgment therein, whereby the court denied to both of the parties the relief prayed for in their complaint and cross-complaint, respectively, filed in said action, and dismissed the said action and all the proceedings therein; (2) that the court erred to the serious detriment of the rights of the plaintiff by refusing to allow certain testimony to be received; (3) that the allowance for the support of the minor children is too large and not justified.

[1, 2] There are two conclusive answers to the first of the propositions above stated: (1) That the plaintiff, in his answer to the cross-complaint of the defendant, did not plead the former judgment, nor was there proof thereof offered or received under the plea of estoppel based upon said judgment set up by the defendant in her answer to the complaint. The judgment roll in said former action was not introduced in evidence by either party, and, the defendant having merely pleaded in her answer the cross-complaint of the plaintiff here (defendant there) and the judgment in said action, there is nothing in the record disclosing the grounds upon which the defendant here, as plaintiff in the former action, relied for a divorce. (2) It appears that the acts of cruelty charged in the cross-complaint of the defendant in the present action occurred after the judgment in the former action was rendered and entered, and in such case, of course, the plea of res adjudicata cannot be maintained. There is nothing said in *Civille v. Civile*, 22 Cal. App. 707, 136 Pac. 503, cited by appellant, in conflict with this declaration.

[3] Counsel for the plaintiff asked the defendant on cross-examination the following question, to which objection was made by the defendant and sustained by the court: "Are you willing to go back to Mr. Benson and live with him?" It is here urged that the ruling was error and prejudicial. Of course, if a reply to the question had been allowed, and the defendant had answered in the affirmative, it might have had some tendency to weaken her testimony as to the na-

ture and extent of the acts of cruelty of which she said her husband had been guilty. But, having given testimony in the most emphatic manner of outrageous acts of cruelty habitually inflicted upon her by the plaintiff for many years prior to the filing of her cross-complaint in this action, it is more than probable that the defendant would not have answered the question in the affirmative, as evidently counsel desired might be the answer. But, however that may be, we do not think that the ruling, even if not strictly correct, should be held to afford a sufficient reason for sending the cause back for retrial, particularly since it appears to be true that both parties have persistently been engaged in an effort to get rid of each other as husband and wife upon what appears to be sufficient reason. As to the last of the propositions above stated, it is said that "the allowance to the wife is out of all proportion to the financial status of the parties."

[4] The allowance was not made to the wife, but solely to and for the support and maintenance of the minor children of the parties. The amount allowed for that purpose to each of said children is \$15, or a total of \$45, per month. The evidence showed that the plaintiff is a carpenter and building contractor, earns good wages, and is usually employed. We cannot say that the allowance is unreasonable as to the plaintiff or beyond what may be reasonably required to support and maintain the children in a manner consistent with the plaintiff's circumstances and earning ability.

No other points are raised.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(29 Cal. A. 24)

ANDERSON v. LEWIS, County Auditor.
(Civ. 1730.)

(District Court of Appeal, Second District, California. Nov. 20, 1915.)

1. OFFICERS \S 104—DE FACTO OFFICER—VALIDITY OF ACTS.

The acts of a person performing assumed duties as an officer de facto are ordinarily regular and valid.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. \S 173; Dec. Dig. \S 104.]

2. OFFICERS \S 95—COMPENSATION—DE FACTO OFFICER.

The collection of the salary or compensation of an office is an incident to the title to such office, and not to its occupation and exercise by a de facto officer.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. \S 134, 139; Dec. Dig. \S 95.]

3. COUNTIES \S 63 — ASSISTANT PROBATION OFFICER—VALIDITY OF APPOINTMENT—SALARY.

Const. art. 11, \S 7½, par. 5, as amended October, 1911, authorizes freeholders' charters for counties to provide that boards of super-

visors shall, by ordinance, regulate the appointment and number of assistants, etc., in the county offices, their compensation and the manner of their appointment and a county board, by ordinance, allowed the probation officer, assistant probation officers, to be appointed by him. Pol. Code, § 4024, provides that every county officer may appoint deputies by appointment in writing filed in the office of the county clerk; section 910 requires deputies, etc., within ten days after notice of their appointment, to take and file an oath; and section 894 provides that the appointment of deputies, etc., not otherwise provided for, shall be in writing, filed in the office of the appointing power. Petitioner, by appointment in writing filed in the office of the county clerk, was appointed an assistant probation officer by the judge of the superior court, and the probation officer thereafter recognized her as one of his assistants. *Held*, that as the board of supervisors had not provided the manner of appointing subordinate officers, the general laws of the state governed, and that petitioner was not legally appointed, and could not collect salary as an assistant probation officer.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 87-90; Dec. Dig. ¶63.]

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Mandamus by Mrs. P. T. Anderson against Walter A. Lewis, Auditor of the County of Los Angeles. Writ issued, and defendant appeals. Reversed.

A. J. Hill, County Counsel, and Roy V. Reppy, Asst. County Counsel, both of Los Angeles, for appellant. Ford & Hammon and Tyrrell, Abrahams & Brown, all of Los Angeles, for respondent.

JAMES, J. Respondent herein petitioned the superior court to issue a writ of mandate compelling appellant, as the auditor of the county of Los Angeles, to issue to her a warrant on the county treasurer for the sum of \$100 as salary to which she claimed to be entitled. It was alleged that during the month of December, 1914, respondent occupied the position of assistant probation officer of the county of Los Angeles. The writ was issued, and the auditor appealed.

It is urged that the judgment was unwarranted because of the insufficiency of the evidence as to several material matters embraced within the findings of the court. The trial judge, in brief, determined the facts to be that: Petitioner, on the 12th day of December, 1913, was on the civil service list as an eligible for appointment as assistant probation officer, and that on or about said 12th day of December, 1913, she was nominated, and appointed to the position by the chief probation officer and assigned to duty, and that she entered upon her duties as such officer and ever since that time, to and including the month of December, 1914, continued to so act under the direction of the chief probation officer; that the salary attached to the position had been duly fixed by ordinance of the board of supervisors of Los Angeles county at the sum of \$100 per month; that petitioner had presented her

demand to appellant auditor, which he had refused to comply with, and that there was sufficient funds in the treasury of the county of Los Angeles available to pay the claim. The facts as they were presented to the trial judge are set out in abstract in a bill of exceptions. It appears that Hugh C. Gibson, the probation officer, testified that on the 12th day of December, 1913, there were vacancies in several of the positions designated as assistant probation officer, and that the petitioner was at that time nominated by the probation committee of the juvenile court as a candidate to fill one of such positions, and that thereafter she was "appointed to said vacant position by Fred H. Taft, judge of the juvenile court of said county." Further, that the appointment was made in writing, filed in the office of the county clerk, and that petitioner thereupon took the oath of office. This witness further testified that on the 15th day of December, 1913, he assigned petitioner to duty in her office, and that she had since that time continued to act. Further, the bill of exceptions also contains this clause:

"The witness testified further that on the 12th day of December, 1913, he consented to and was willing that said Mrs. P. T. Anderson be appointed to the said position, and that he did not at any time discharge her."

Gibson testified that he had recognized and considered petitioner as the duly qualified and appointed assistant probation officer of Los Angeles county during all the times material to the controversy. Three letters were introduced in evidence, the first of which was written to Gibson as chief probation officer by the county civil service commission, requesting Gibson to give the names of persons added to his department. This letter bore date of the 19th day of December, 1913. The second letter was one written by Gibson in answer to the letter just referred to, wherein he (Gibson) stated the names of persons added to his department, which included the name of this petitioner as assistant probation officer. The third letter was written later by Gibson to the probation committee of the county wherein again was given a list of all employes in the probation office, which list included the name of petitioner as assistant probation officer. An ordinance of the board of supervisors was introduced in evidence, which provided for officers in the probation department as follows:

"Section 23. Probation officer, one hundred and fifty dollars per month: Provided it shall be and there is hereby allowed to the probation officer the following assistants, clerks, deputies and employes, who shall be appointed by the probation officer from the eligible civil service list, and shall be paid as follows: * * * Sixteen assistant probation officers at a salary of one hundred dollars per month."

This ordinance was shown to have been adopted in June, prior to the date of the alleged appointment of petitioner. It will be noted that the evidence showed that the formal appointment of petitioner as assistant

probation officer was attempted to be made by the judge of the superior court. This procedure no doubt was adopted because of the view held by the judge of the juvenile department that under the state juvenile law the power to appoint the probation officers rested with him. In the case of *Gibson v. Civil Service Commission of the County of Los Angeles*, 150 Pac. 78, this court decided that, under the provisions of the county charter, the board of supervisors was authorized to make provision for the appointment of these officers, and that where such appointment had been so provided for the state law ceased to operate as to that matter.

[1-3] Appellant's claim is that the petitioner herein was not shown to ever have been legally appointed and that because of such fact she was not entitled to collect salary. It is admitted that at all times material to matters in issue she was at least a de facto officer. The acts of a person performing assumed duties as an officer de facto ordinarily are regular and valid. However, it does not follow that such de facto officer may claim the compensation attached to the office for the performance of such duties. It is held that the collection of the salary or compensation is an incident to the title of the office, and not to its occupation and exercise. *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488. There is then squarely presented the question as to whether petitioner herein, during the time covered by her claim for compensation, was acting under a valid appointment. The amendment to the state Constitution adopted in October, 1911, authorized for the first time the framing of freeholders' charters for counties. Const. art. 11, § 7½. By the terms of this amendment the several things which it is competent for such charters to provide for are set forth in a number of paragraphs. It is therein stated to be competent for charters to provide, and the phrase is used, "and the same shall provide," among other things:

"5. For the fixing and regulation by boards of supervisors, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches and other persons to be employed, from time to time, in the several offices of the county, and for the prescribing and regulating by such boards of the powers, duties, qualifications, and compensation of such persons, the times at which, and terms for which they shall be appointed, and the manner of their appointment and removal. * * *

The italics have been indicated by us to give emphasis to the clause to be particularly considered in determining the question stated. The ordinance passed by the board of supervisors in June, 1913, which has been referred to and wherein the offices of probation officer and assistant probation officer were provided for, makes no mention of the manner in which said appointments shall be made. It is respondent's argument that, as the question of the "particular manner of the appointment" was left to the board of supervisors, in the absence of any action by or-

dinance taken to that end, no particular form of appointment was requisite, and that such appointment might be made orally. This argument assumes also that because of the charter provisions and the constitutional permission authorizing the adoption of charters, the effect of all general laws touching the matter of the appointment of deputies or assistants is completely nullified. It is admitted that by section 4024, Political Code, appointments of deputies are required to be in writing and filed with the county clerk. Our opinion is that, where the board of supervisors has failed or declined to exercise a right to legislate as to the manner of appointment of subordinate officers, the general laws of the state touching such matters should govern. The constitutional amendment referred to seems not to restrict the operation of general laws in that regard by any express terms or definite suggestion. There are other sections of the Political Code than the one cited which declare that appointments of deputies must be in writing and that an oath of office must be taken by the persons appointed. We may refer to Political Code, sections 894 and 910. Section 910 particularly refers to the matter of the oath, and provides that deputies, clerks, and subordinate officers must, "within ten days after receiving notice of their appointment, take and file an oath in the manner required of their principals."

The position of respondent that no written appointment was required to be made, would have found some authority in precedent were there an entire absence of statutory law upon the subject. *Bonds v. State*, Mart. & Y. (8 Tenn.) 143, 17 Am. Dec. 795. Respondent urges, nevertheless, as further ground for sustaining the regularity of petitioner's appointment, that the letters introduced in evidence expressed sufficient to show an appointment in writing made by the probation officer. The case of *People v. Fitzsimmons*, 68 N. Y. 514, is cited as an authority. In that case the mayor, who legally had the right to appoint certain excise commissioners, but thinking that he only had the right to recommend to a city council for confirmation such appointments, did transmit to the latter body in writing his recommendation containing the names of three persons whom he designated as nominees. It was held that such a writing constituted a sufficient appointment. It is well to note that in the opinion the court there says that the mayor "selected the men; he appointed them, and they were no less his appointments after confirmation by the common council." It was clear enough in that case that the persons who assumed office were persons actually selected and nominated in writing by the mayor. But the same court in a later decision entitled *Babcock et al. v. Murray et al.*, 70 N. Y. 521, declared that the decision in the *Fitzsimmons* Case, supra, had

been made with "considerable hesitation and not without great doubts." As we understand the attitude of counsel, as impressed in the argument in briefs, it is not contended that if section 4024 of the Political Code is of effect as governing the manner of appointment of assistant probation officers, the letters would be sufficient evidence of compliance with the requisite formalities. That section provides as follows:

"Every county, township, or district officer except a supervisor or judicial officer, may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. Such appointment must be made in writing, and filed in the office of the county clerk; and until such appointment is so made and filed, and until such deputy shall have taken the oath of office, no one shall be or act as such deputy."

While it is not argued, we have taken notice of the fact that the provisions of section 4024 might be construed as applicable only to deputies or assistants appointed in excess of those specifically provided for by law. In that event the section would not apply to the assistant probation officers. For that reason we have called attention to section 394, Political Code, which provides:

"The appointment of deputies, clerks, and subordinate officers, when not otherwise provided for, must be made in writing, filed in the office of the appointing power or the office of its clerk."

If we are to say that the last provision was the one under which the appointment should have been made, then it would have been the duty of the chief probation officer to make a record of the appointment in his office in some substantial form and for the person so appointed to take the oath of office. The question is not raised, but, parenthetically, we may suggest that nowhere in the findings of fact does it appear to have been determined that the petitioner ever took an oath of office at all. That point, however, not having been suggested, no reason for this decision is in any particular to be ascribed to the lack of such finding. The evidence, to our minds, in no wise shows that Gibson, the probation officer, ever selected as his appointee, directly or impliedly, this petitioner. It appears expressly by the evidence that such selection was made by the judge of the juvenile court who, as we have heretofore determined, had no power to appoint. By every reasonable inference to be drawn from the testimony, it seems clear beyond any doubt whatsoever that the chief probation officer assumed that the judge had the right to make the appointment and accepted the appointment of the petitioner because of that fact and that fact alone. We attach no weight as determinative of this matter to the statement contained in the evidence that the probation officer consented to and was willing that the petitioner be appointed to the position. He did

not so appoint her, and the letters written by him were apparently merely by way of compliance with the regulations of the civil service commission, under the control of whom, as to the making of the reports of his office, he seemed to be.

Having reached the conclusion that the evidence was insufficient to justify the material finding made by the court that petitioner was regularly appointed to her position, we do not think it necessary to pass upon the question suggested in conclusion by the appellant. In the petitioner's complaint it did not appear that the auditor, before demand for the salary warrant was made upon him, had received a certificate from the civil service commission certifying to the correctness of the demand, as section 38 of the Los Angeles county charter provides. Appellant has contended that the auditor could not be compelled by mandate to act until such certificate had been furnished him. In answer to this proposition, respondent contends that the general duties of the auditor, as set forth in section 4001 of the Political Code, do not admit of this certificate being insisted upon as a prerequisite to the issuance of a warrant for a salary amount which is fixed by law. There is no doubt at all but that in defining the duties of the civil service commission it was competent for the charter to provide that such commission should furnish to the auditor evidence that the officers had performed their duties. As to whether, however, the presence of this certificate was a necessary prerequisite to the issuing of the warrant to an officer whose salary is fixed by law, we do not decide.

Under the conclusions expressed it must follow that the petitioner is not entitled to the relief.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(29 Cal. A. 12)

PEOPLE v. SIDWELL (Cr. 316.)

(District Court of Appeal, Third District, California. Nov. 18, 1915.)

1. HOMICIDE \S 339, 340—APPEAL—HARMLESS ERROR—INVOLUNTARY MANSLAUGHTER.

Defendant, a special officer, who shot and killed another while endeavoring to force his way into a room where he suspected gambling was going on, was denied the right to introduce evidence showing his duty to force his way into the room. The court also erroneously charged that defendant's act in forcing his way into the room was unlawful. *Held*, that the error was harmless, for the jury in convicting accused of involuntary manslaughter must have found that he was guilty of culpable negligence, and that is the gravamen of the offense under Pen. Code, \S 192, regardless of whether the negligence occurred in the commission of a lawful or unlawful act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. $\S\S$ 714-717, 720; Dec. Dig. $\S\S$ 339, 340.]

2. CRIMINAL LAW §1159—APPEAL—REVIEW.

A conviction cannot be reversed unless the appellate court can, as a matter of law, say that the verdict was not justified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.]

3. HOMICIDE §255—EVIDENCE—SUFFICIENCY.

Evidence held to warrant a conviction of involuntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 539-541; Dec. Dig. § 255.]

4. CRIMINAL LAW §957 — VERDICT — IMPEACHMENT.

As a verdict cannot be impeached by the affidavits of the jurors themselves, accused was properly denied a new trial, notwithstanding affidavits by jurors that they deemed he was entitled to an acquittal, and that none of the jurors understood the offense of which they convicted him was a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.]

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

W. P. Sidwell was convicted of involuntary manslaughter, and, from the judgment and an order denying new trial, he appeals. Affirmed.

Pardee & Pardee, of Susanville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was charged by information duly filed in the superior court of Lassen county with the crime of murder, and, upon his trial on said charge, was convicted of the crime of involuntary manslaughter, and thereafter sentenced by the court to serve a period of one year in the state penitentiary. He appeals from the judgment of conviction and the order denying his motion for a new trial.

The homicide occurred at the town of Westwood, in said county of Lassen, on the 14th day of March, 1915. It appears to be conceded, although we have been unable to find the facts to have been shown by the evidence, that the town of Westwood has been brought into existence within the last three years by the Red River Lumber Company, a corporation, maintaining an extensive lumber manufacturing plant there; that said company owns all the real estate within said town or upon which it stands; and that the town has a population of approximately 2,500, all of whom are employes, or members of the families of employes, of said company. It appears from the record that the company maintains a number of boarding, lodging, and bunk houses, in which many of its employes are housed and boarded, and also a number of private residences for use by employes having families. One of the places so established and maintained by the company is the "Hotel Seville," in which a number of employes, principally those of the Spanish and Mexican races, occupied apart-

ments. It seems that the company, from the beginning of the time at which it established its enterprise at Westwood, laudably attempted to maintain the town as a peaceful and law-abiding community, and to encourage and promote habits of sobriety and industry among its employes, and to that end adopted and promulgated a rule prohibiting gambling and the use of intoxicating liquors within the town limits among and by such employes. To enforce said rule, it was, quite naturally, deemed essential to police the town, and to some extent this was done, and thus a necessary and reasonable surveillance over the employes maintained. The defendant had been commissioned by the company to discharge the duties of a special police officer and, to vest him with authority to make arrests and otherwise enforce the law and the rules and regulations of the company within the limits of the town of Westwood, he was appointed a deputy sheriff by the sheriff of Lassen county. He had been given instructions by the officers of the lumber company to report to them any gambling among the employes of the company within the town which he might discover, and, furthermore, was instructed that, in the event he had reason to believe that gambling was being carried on in any room of any of the lodging and bunk houses, to break open the door of such room, if necessary, so that he might be able to identify and report to the company the names of the employes thus engaged in violating the rule against that practice.

The immediate facts and circumstances of the shooting are correctly told in the brief of counsel for the defendant as follows:

"About midnight, between the 13th and 14th of March, 1915, defendant, being on duty, took with him one Robert Weber, who was in the employ of the company and acting as night watch at the time, and started out to see if any of the men were gambling in any of the company's lodging or bunk houses. At about half an hour after midnight in the morning of March 14th, they came to a lodging house known as the Hotel Seville, and, seeing from the outside that there was light in one of the rooms on the first floor of the building, they went inside and by listening at the door of room No. 8, they heard what they believed to be the noise of gambling from within, and, finding the door locked, defendant determined to break it open. With this in view, according to his statement, he took his pistol—a Colt army special, double action revolver of 38 caliber—from his hip pocket and placed it in his left hand, so that he might take the door knob in his right hand and put his right shoulder against the door. The gun was not cocked—of this he is very positive—but the very instant the door was broken open the gun was discharged. This is shown by the evidence of five witnesses for the prosecution who were in the room at the time.

"By the evidence of the prosecution it is shown that there were, at the time, in the room, nine persons, all of them being Spaniards. They were sitting around a table gambling. One sat in a chair behind the table facing the door. Three sat on a bed on the left-hand side of the room and two on a chair, which was turned down, between the table and the door, so that the

one man could sit on the legs of the chair, and the other on the back of the chair; the top of the chair back resting on the bed which was on the right-hand side of the room as you go in.

"The man sitting on the legs of the chair, with his back to the door, was Francisco Escrivano, the one who was killed. The evidence shows that he was shot through the body, the bullet having entered a few inches above the crest of the hip and about half an inch to the left of the spine, the point of exit being about $1\frac{1}{2}$ inches above the navel and half an inch to the left of the middle line of the front of the body, the bullet having taken a horizontal course through the body, perforating the stomach and the bowels in several places.

"Defendant testified that he first thought, when he heard the discharge of the gun, that some one in the room had shot him, but he soon realized that he was not hit and that Escrivano was wounded. In any case, it is clear from the evidence that Escrivano immediately made an outcry in Spanish, and got up and moved about in such a way as to lead the witnesses to think at first that he was wounded in his leg. Almost immediately upon discovering that the man was wounded, and believing the wound to be in the leg, and therefore not necessarily serious, Sidwell gave his gun to Weber, told him to keep all the men in the room, and ran upstairs in the building to the clerk's room where there was a telephone, and called up a nurse at the hospital, to have the doctor come at once to the Seville, that a man was shot in the leg. He then went back downstairs, by which time the man's friends had opened his clothing and discovered that he was shot through the body. When the defendant returned to the room and found this state of facts and found the man on, or partly on, his feet, he told the men to lay him on one of the beds; that he was too badly hurt to be allowed to stand up and walk around; and then immediately ran upstairs again and called up the stable to have a conveyance sent at once, to use as an ambulance, to take the man to the hospital. After coming downstairs the second time, Sidwell became impatient because the doctor did not arrive promptly and, after a few minutes, started to the hospital to see what was delaying him. He met the doctor near the hospital and returned with him to the Seville. Escrivano was placed in a wagon—on a cot—but, the road being rough and causing him much pain, the cot was taken from the wagon and he was carried to the hospital by hand; the defendant assisting him. The doctor gave such attention to the case as was possible, but Escrivano died about 8 o'clock on Monday evening, March 15th."

The above embraces a synoptical statement of all the facts brought to the attention of the jury.

The defendant complains: (1) That the evidence is insufficient to support the verdict; (2) that the court erred to his prejudice by its rulings excluding certain testimony; (3) that it likewise erred in its refusal to adopt and read to the jury certain instructions proposed by him; (4) that prejudicial error was committed in the order denying him a new trial on the ground of the alleged misconduct of the jury whereby a fair and due consideration of the case was prevented.

[1] While it instructed the jury that the Red River Lumber Company, being the owner of the Hotel Seville, had the right to make a rule that no gambling would be permitted in any room or part of said hotel and the further right to "direct and instruct the defendant to use all lawful means for the purpose of detecting persons engaged in gam-

bling" in any of the rooms of said hotel, the court refused to instruct, as requested by the defendant, that the said company had the right to direct and authorize the accused to break into such rooms or houses, if necessary, for the purpose of ascertaining whether the rule of the company against gambling was being violated, and that the defendant, when breaking into the room of the deceased on the occasion of the shooting, "was actually within his legal rights." To the contrary, the court told the jury that the breaking into the room of the deceased by the defendant "was a wrong."

The court refused to permit the defendant to show that the penalty of violating the rule against gambling would be the discharge of those found engaged therein from the employment of the company, and, furthermore, disallowed testimony offered by the defense which would have shown or tended to show that the employes of the company expressed dissatisfaction with the company's inhibition against gambling and that certain of them, not named and perhaps not individually known, had threatened to resist by violent means any attempt of the defendant or any special officer of the company to enter their rooms for the purpose of detecting them in the act of violating said rule.

"Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds: (1) Voluntary—upon a sudden quarrel or heat of passion. (2) Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Pen. Code, § 192.

Thus it will be observed that, while involuntary manslaughter may be committed in two different ways, the Legislature has not recognized, as between those two ways, any distinction in the degree of turpitude characterizing that crime. In other words, the crime is that of involuntary manslaughter whether the killing be committed in the execution of an unlawful act, etc., or in the execution of a lawful act, etc., or where death, not willfully or intentionally produced, is, nevertheless, caused by the gross or culpable negligence of the defendant—negligence which, in degree, goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable.

Now, conceding that the court erred in instructing the jury that the defendant committed a wrong by breaking open the door of the room in which the deceased and others were supposed to be gambling, or, in other words, that the defendant had no legal right to break into a room or house of the company for the purpose of apprehending its employes in the act of violating the rule against gambling; conceding further that the court should have allowed the defendant

to prove that the employ  s were dissatisfied with said rule and had threatened to do violent injury to the defendant or any other employ   who might undertake to detect them in the act of gambling in the houses or rooms of the company, and further assuming that the court erred in not permitting the defendant to show what would be the result to the employ  s if found in the act of gambling contrary to said rule; conceding, furthermore, what is true as a legal proposition, that the defendant had the right to carry a deadly weapon upon his person and the right, in view of the threats above referred to and which had previously been communicated to him, to carry such weapon in his hand at the time he attempted to ascertain whether gambling was going on in the room in which the fatal shooting occurred—conceding, we say, the legal integrity of all the foregoing propositions, still one of the issues involved in the charge against the defendant was whether, in the handling of the weapon, at the time of the fatal shooting, he was culpably negligent, and, if so, whether such negligence was the cause of the death of the deceased, and, in view of the conclusion of the jury that the accused was guilty of involuntary manslaughter, which crime involves no element of intent but proceeds solely from a degree of negligence which makes the act of killing unlawful, it cannot be conceived or justly be declared that he suffered any prejudice by reason of the alleged errors complained of, for, by the verdict, he was given the full benefit of whatever force there might have been in the excluded testimony and the instructions proposed by him but disallowed by the court. Whether the killing was the result of “the commission of an unlawful act, not amounting to a felony,” or occurred “in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection,” the defendant could obviously have been convicted of no less a crime than that of which he was found guilty, even if the testimony and the instructions whose disallowance by the court constitutes the ground of the objections under consideration had been admitted and given. In other words, it being true, as the Code section declares, that involuntary manslaughter may be committed while the party responsible for the killing is doing a lawful act, and, assuming that the rejected testimony and instructions would have conveyed to the jury certain facts and principles of law in all respects sound and pertinent to the charge as laid in the information, yet if the evidence was sufficient to convince the jury that the discharge of the weapon was directly due to the gross or culpable negligence of the defendant in the handling of the weapon at the time of its discharge and that such negligence was the cause of the death of Escrivano, then, since he was found guilty of the

lowest crime of which he could be convicted under the information, the rulings excluding the proffered testimony and disallowing the proposed instructions could not have had a harmful or prejudicial effect upon the substantial rights of the accused.

As we conceive it, the principle thus applied is the same as where an erroneous instruction peculiarly applicable to a charge of murder of the first degree has been given and the verdict is one of guilty of murder of the second degree or of manslaughter. Repeatedly it has been held that in such case, even though the instruction might be prejudicially erroneous where the verdict was of the first degree, a verdict of guilty of the lesser degree of murder or of manslaughter would render the instruction innocuous in its effect upon the rights of the accused.

[2, 3] We now come to a consideration of the proposition, urged with much vigor by the defendant, that the jury were not justified by the evidence in finding him guilty of any crime or degree thereof embraced within the crime charged.

The question, however, with respect to the evidence which this court is alone authorized to determine, is whether we can say, from the record, as a matter of law, that the jury were not justified in finding the verdict they returned; and it may just as well here be stated that, after a careful review of the whole record, we are constrained to the conclusion that we would not be justified in so declaring. In other words, the evidence as it is brought before us is such that whether the defendant was culpably negligent in the handling of the weapon at the time the fatal shot was discharged therefrom and, if so, whether such negligence was the cause of the death of Escrivano, are questions which it was for the jury to determine and not within the legal competence of this court to review.

The general facts of this most unfortunate affair are given above. But precisely how or in what manner the pistol was discharged, the evidence does not disclose, nor, indeed, under the circumstances, is it to be supposed that any one would know, unless it was the defendant himself. He, however, declared that he could not, except by mere conjecture, explain the direct cause of the discharge of the weapon, although the theory advanced by the defense is that he must have had his finger upon the trigger of the weapon when he was in the act of forcing the door open and have unconsciously pulled the trigger as the door gave way under the force he put upon it.

The weapon, according to the evidence and the testimony of the defendant himself, was what is known as a “self-cocker” and operates automatically; that is, it is one of those revolvers that are discharged by means of pressure upon or the pulling of the trigger. As seen, at the time the defendant attempted

to and did shove the door in, he held the weapon uncocked in his left hand, using his right hand and shoulder to break open the door. The instant the door gave in from the force applied to it by the defendant, the weapon exploded. In other words, the giving way of the door and the discharge of the pistol were approximately simultaneous. The only plausible explanation of the cause of the discharge is that either the trigger came in contact with some part of the door when it was forced open in such manner as to throw the lock back or, as the defense suggests, the defendant had his finger upon the trigger at the moment he exerted the force necessary to shove the door in and at the same instant of time involuntarily pulled the trigger—a movement which could be influenced or caused by the exertion employed in breaking open the door by means of the force required to be exerted for that purpose. This latter theory is the more plausible of the two and, as seen, coincides with the view of the defendant as to the cause of the discharge of the weapon. It, however, only emphasizes the fact of the recklessness in handling a loaded firearm near the presence of others when the party handling it is at the same time attempting some other act which must necessarily distract his attention from the weapon. But whatever might have been the direct cause of the discharge of the weapon, the fact remains that it was discharged through some cause while in the hand of the defendant and while he was engaged in forcibly effecting an entrance into a room where there was gathered a number of persons sitting about a table in close proximity to the door broken open by him and of whose presence there he was aware.

The handling of a loaded firearm in a public street or in a building or other place where a number of people are assembled or are passing to and fro is always attended with more or less danger, even where some degree of care is exercised in the handling of such weapon; but how much more danger must there be in the handling of such weapon by a person at a time when his mind is occupied by another matter of paramount concern to him. His mind could not at that time be upon the weapon to such a degree as to enable him to handle it with the care and caution with which ordinarily he would probably handle it. That the defendant's mind was not upon his weapon as he was forcing the door open is very clear from the fact that he did not know precisely how it came to be discharged. It would seem to be true that the act of the defendant in holding in his hand a loaded weapon at the time he was engaged in forcing an entrance into the room, thus bringing into play much, if not all, of his physical power, and with his mind centered upon getting into the room, itself constituted gross or culpable negligence. At all events, the jury could reason-

ably have so viewed that act, and their verdict implies that they did thus view it, and, as before stated, we are unprepared to say, as a matter of law, that they reached an erroneous conclusion, or that the result of their consideration of the evidence is not justified.

[4] The next and last point to be considered involves the question of the alleged misconduct of the jury.

It appears that, after the case had been submitted to the jury and the latter had retired to the jury room for deliberation and had thus been out for some time, they caused to be conveyed to the judge information that they desired further instruction as to the amount of punishment to which the defendant would be amenable in the event of the return of a certain verdict. The court thereupon ordered the jury to be brought before it, and, this being done, the foreman, after stating that they had not agreed upon a verdict, remarked:

"The jury would like to ascertain the degree of punishment that would follow conviction of either one of the degrees of murder charged in the complaint."

To which the court replied that, except as to the crime of murder of the first degree, the matter of punishment was wholly a province of the court, and, consequently, one with which the jury had no concern, and declined to give them any information upon the subject. The jury were thereupon returned to the jury room for further consideration of the case.

In support of his motion for a new trial upon the ground of the asserted "misconduct of the jury by which a fair and due consideration of the case has been prevented" (section 1181, subd. 3, Pen. Code), the defendant filed and introduced affidavits by two of the jurymen in which they alleged that they were at all times during the deliberations of the jury of the opinion that the defendant was entitled to an acquittal at their hands and so voted up to the time that they were led to believe that the crime of involuntary manslaughter "was and is not a felony under the laws of the state of California; and affiants further say that to the best of their knowledge and recollection each and every member of said jury, while deliberating upon said case, expressed himself as believing that the crime of involuntary manslaughter is and was not a felony under the laws of the state of California"; that, had they known or believed that the crime of involuntary manslaughter was a felony under the laws of the state of California, they "never would have consented or agreed to a verdict of guilty of such crime in said action."

The reply to the contention that the showing thus made entitled the defendant to a new trial is that the affidavits of jurors cannot be received or considered for the purpose of impeaching their verdict. *People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Soap*, 127

Cal. 408, 411, 59 Pac. 771; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032. In the *Soap Case*, supra, the ground of the alleged misconduct of the jury was precisely the same as that upon which the defendant in the case at bar based his affidavits alleging misconduct. The court in that case said:

"It has been definitely settled that the affidavit of a juror cannot be received to impeach the verdict except where it is the result of a resort to the determination of chance."

We have now considered and disposed of all the points urged for a reversal.

The judgment and the order appealed from are affirmed.

CHIPMAN, P. J. I concur.

BURNETT, J. I concur in the judgment and the foregoing opinion, but I desire to add that, in my judgment, if the defendant had shown the facts that he sought in vain to introduce in evidence, it would have afforded no justification nor excuse for his conduct in needlessly imperiling the lives of the men in the room. The mere circumstance that gambling was being carried on was not sufficient, as I view it, to warrant the defendant in breaking down the door, with a loaded pistol in his hand. Especially would this be true when he had reason to believe that a fatal affray might ensue. His desire and that of the company to suppress gambling was, of course, commendable; but the method resorted to was too drastic. Human life is too precious to be jeopardized for the purpose of ascertaining whether parties are engaged in a peaceful game of poker. Defendant should have directed the inmates to open the door before resorting to such violence, and I think he should have gone away rather than plunge into the room with his loaded revolver in his hand. Our aversion to vice should not blind us to the more vital consideration of life itself.

(29 Cal. A. 31)

LUND et al. v. LACHMAN. (Civ. 1562.)
(District Court of Appeal, First District. California. Nov. 20, 1915. On Petition for Rehearing, Dec. 20, 1915.)

1. SALES \S 369—REMEDIES OF SELLER—SUIT FOR BREACH OF CONTRACT.

Where the buyer of wine bottles refused to accept them, and title thereto had not passed from the sellers, who thereupon resold the bottles at private sale, their only remedy was to sue for damages for breach of the contract of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1063, 1064; Dec. Dig. \S 369.]

2. SALES \S 384—REMEDIES OF SELLER—SUIT FOR BREACH OF CONTRACT—DAMAGES—STATUTE.

In a suit for damages by the sellers of wine bottles against the buyer, who refused to accept, the measure of damages was regulated by Civ. Code, \S 3353, providing that in estimating damages the value of property to a seller is deemed to be the price which he could have obtained

therefor in the market nearest the place at which the property should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1066-1107; Dec. Dig. \S 384.]

3. SALES \S 384—REMEDIES OF SELLER—ACTION FOR BREACH—DAMAGES—STATUTE—"MARKET VALUE."

Under said section, where the sellers of wine bottles, upon the buyer's refusal to accept, commissioned their agent to resell, who, being ignorant of the condition of the market, did so at private sale below market price, which, at the time, was over the contract price, the sellers could not recover the difference between the price at which their agent sold and the contract price, since the statute does not provide that the value of property to the seller is the price which he, personally, or his agent, can obtain for it, regardless of the market price, while "market value" is the highest price of a commodity in the market where it is offered for sale which those having the means and inclination will pay, a value controlled by the condition of the market with reference to supply and demand, rather than by the selling ability of the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1066-1107; Dec. Dig. \S 384.]

For other definitions, see Words and Phrases, First and Second Series, Market Value.]

4. SALES \S 334—REMEDIES OF SELLER—RE-SALE—TIME.

While a seller of goods need not resell immediately after repudiation of the contract of sale by the buyer and his refusal to accept, nevertheless he must exercise reasonable diligence in locating the nearest market and ascertaining the prevailing market price for the rejected goods to sell thereat.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 920; Dec. Dig. \S 334.]

5. SALES \S 383—REMEDIES OF BUYER—ACTION FOR BREACH—MARKET VALUE—SUFFICIENCY OF EVIDENCE.

In an action by the sellers of wine bottles, who, upon the buyer's refusal to accept, resold at private sale through their agent, who, through his ignorance of the market, secured less than market price, evidence held sufficient to justify a finding that the market price for bottles prevailing on the day and for many days after their tender and rejection by the buyer was at a substantial advance over the contract price which would have covered the expense of drayage, storage, and insurance for a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1097; Dec. Dig. \S 383.]

6. SALES \S 384—REMEDIES OF SELLER—ACTION FOR BREACH—DAMAGES.

Where the sellers of wine bottles failed, after rejection by the buyer, to take advantage of prevailing market prices so much greater than the contract price that a sale in the market would have made them whole, they could not predicate a claim for damages on account of interest upon damages accruing from the breach, or for compensation for making a resale at less than market price in the form of a commission upon the price obtained.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1066-1107; Dec. Dig. \S 384.]

On Petition for Rehearing.

7. APPEAL AND ERROR \S 1073—DISPOSITION—REVERSAL—FAILURE TO GRANT "NOMINAL DAMAGES."

Where a judgment is erroneous only in that it fails to include "nominal damages," an inconsiderable, trifling sum, it will not be reversed,

unless it be made to appear that such damages, if allowed, would have carried costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. ☞ 1073.]

For other definitions, see Words and Phrases, First and Second Series, Nominal Damages.]

8. NEW TRIAL ☞74—GROUNDS—FAILURE TO INCLUDE NOMINAL DAMAGES.

Where a judgment is erroneous only for failing to include nominal damages, new trial will not be granted unless such damages would have carried costs.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 150; Dec. Dig. ☞74.]

9. COSTS ☞22—COSTS IN SUPERIOR COURT—AMOUNT OF JUDGMENT.

Under Code Civ. Proc. §§ 1022, 1025, regulating the matter, to carry costs a judgment of the superior court must amount to \$300, so that a judgment for nominal damages will not do so.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 47-73; Dec. Dig. ☞22.]

10. SALES ☞384—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—NOMINAL DAMAGES.

Where the contracted sellers of wine bottles, upon the buyer's refusal thereof, failed to resell at a prevailing market price that would have more than made them whole, they were entitled only to nominal damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. ☞384.]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by Henry Lund and Henry Lund, Jr., copartners, etc., against Arthur Lachman. From a judgment for defendant and an order denying them a new trial, plaintiffs appeal. Judgment and order affirmed.

H. W. Glensor, of San Francisco, for appellants. Jesse H. Steinhart, of San Francisco, for respondent.

LENNON, P. J. This is an action for damages for the alleged breach of a contract to purchase personal property. The appeal is from the judgment in favor of the defendant and from the order denying a new trial.

The facts of the case as revealed by the pleadings and proof are substantially these: On November 30 and December 1, 1910, the defendant entered into two contracts with the plaintiffs for the purchase of certain specified quantities of claret quart bottles, to be shipped from Sweden during the months of February or March, 1911. The contract price was \$5.85 per gross, and delivery was to be made from the ship's side at San Francisco. The bottles arrived at San Francisco on the steamship Strathbeg on June 15, 1911. They were tendered to the defendant on June 16, 1911, and refused by him. The bottles were thereupon removed to a warehouse by the plaintiffs, where they were stored and insured, and from time to time sold at private sale at varying prices for the aggregate sum of \$2,912.85, which was \$12.15 less than

the sum total of the purchase price specified in both contracts.

The trial court in its findings of fact found that the plaintiffs did not use due or any diligence in making sales of the bottles; that the several sums obtained therefor at the several sales were not separately or in toto the highest obtainable market price; and that plaintiffs were not compelled to have such bottles removed to a warehouse because of the defendant's breach of the contracts.

[1, 2] The bottles having been sold at private sale, and it being an admitted fact in the case that title to the bottles had not passed from the plaintiffs, it is conceded, as it must be, that plaintiffs' only remedy was damages for the breach of the contracts (Cuthill v. Peabody, 19 Cal. App. 304, 125 Pac. 926), and that the measure of the damages alleged to have been thereby sustained is to be found in section 3353 of the Civil Code, which provides that:

"In estimating damages, the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale."

In addition to claiming that the findings are contrary to the evidence concerning the market value of the bottles and the necessity for their removal to a warehouse as a result of the defendant's breach of the contracts, it is insisted that the plaintiffs should have been allowed 5 per cent. commission as compensation for the cost of making the several resales of the bottles.

[3] The evidence adduced on behalf of the plaintiffs shows that the bottles were sold at a series of sales made during a period of time extending from July 6, 1911, to March 20, 1912, at approximately \$5.75 per gross, and there was some evidence, competent and uncontradicted, adduced upon behalf of the defendant to the effect that during the month of June, 1911, there was in the city and county of San Francisco, the place where the bottles should have been accepted by the defendant, a well-established and active market price for bottles similar to those contracted for by the defendant, which ranged from \$6.25 to \$7.25 per gross. The evidence also shows that the business of the plaintiffs was that of steamship freighters, importers, and exporters, and that the sale of the bottles in question was intrusted to a salesman of the plaintiffs, whose specialty was that of selling iron, coke, and pig iron; and Carl Bundschu, manager of the Gundlach-Bundschu Wine Company, as a witness for the defendant, testified that:

"About in the month of July, 1911, there was sold to us by Henry Lund & Co. a gross of claret bottles at \$5.85 a bale. That was below the

market price, cheaper than I could buy elsewhere."

The salesman of the plaintiffs, in explanation and justification of the price procured for 387 bales of the bottles in question, which he had sold in or about the month of March, 1912, to one Rosenberg, testified that at that time he was unaware of the fact that there was a scarcity of bottles in the local market resulting from a scarcity of bottles in Germany and Sweden, and that it was this fact known to Rosenberg at the time of the sale which prompted the latter to make the purchase.

Counsel for the plaintiffs, in effect, concede that such evidence was sufficient to warrant and support the finding of the trial court that the plaintiffs had failed and neglected to procure the highest obtainable market price for the bottles, if section 3353 of the Civil Code is to be construed "as requiring the seller, regardless of his business capacity or ability along the particular line of goods forming the subject-matter of the broken contracts, to go into the open market and obtain for the rejected goods a price as high or higher than any other firm or individual is getting. * * ." In other words, it is the contention of the counsel for the plaintiffs that it was the intent and purpose of section 3353 of the Civil Code to provide that the value of the property to the seller is the price which he personally could obtain for it, regardless of what the market price thereof may have been. That this contention is utterly without merit is, we think, manifest upon a casual consideration of the language employed in the Code section under discussion; but, even if that were not so, the section has, in effect, been held to mean that the seller of rejected property who seeks to recoup his loss, if any, by a private sale, must resort to such resale in the open market and at market values. *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406; *Wilson v. Gregory*, 2 Cal. App. 312, 84 Pac. 356; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89. Obviously the market value of a commodity is the highest price in the market where it is offered for sale which those having the means and inclination to buy are willing to pay for it; and it is equally obvious, we think, that market values are created and controlled by the condition of the market with reference to supply and demand, rather than by the particular or peculiar selling ability of the seller.

[4, 5] This view of the law compels the conclusion that the evidence sustains the finding of the trial court concerning the failure of the plaintiffs to procure the highest market price obtainable for the bottles in question; and, inasmuch as there is some evidence tending to show that at the very time the contract was breached, and subsequently, there was at San Francisco an active market for bottles of the character and quantity called for in the contracts in controversy, with a market price therefor ranging from \$6.25 to \$7.50 per gross, which was far in excess of

the contract price, it cannot be said that the evidence does not support the finding of the trial court to the effect that the plaintiffs were not compelled to store the bottles because of the defendant's failure to accept them. While it was not incumbent upon the plaintiffs to make the resale immediately after the repudiation of the contract by the defendant, nevertheless the plaintiffs were required to exercise reasonable diligence in locating the nearest market, and ascertaining the prevailing market price for the rejected bottles; and there can be no doubt that there was sufficient evidence to justify the trial court in finding that, if the plaintiffs had seen fit to seek and take the market price for the bottles which prevailed on the day and for many days following their arrival and tender and rejection at San Francisco, they could have sold them at a substantial advance over the contract price which would have more than covered the expense of drayage, storage, and insurance for a reasonable time had such expense been found to be necessary, and therefore in no event would the plaintiffs have been entitled to recover such expense from the defendant.

[6] What we have said thus far in effect disposes of the point that the plaintiffs were entitled to interest upon the amount of damage accruing from the defendant's breach of the contracts, and to compensation for making the resale in the form of a commission upon the price obtained. Assuming that the plaintiffs ordinarily would have been entitled to recover such items as a part of their damage, nevertheless it is obvious that, if the plaintiffs failed—as the court upon sufficient evidence found—to take advantage of prevailing market prices which would have more than made them whole, they cannot now predicate a claim for damage upon such items any more than upon the other elements of damage already considered.

The view which we have taken of the meaning and intent of section 3353 of the Civil Code compels the conclusion that the trial court did not err in its rulings permitting evidence of the prevailing market value during the period following the tender and rejection of the bottles.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

On Petition for Rehearing.

PER CURIAM. [7-10] On petition for rehearing the only point urged is that the original opinion failed to take cognizance of the point presented and discussed in the briefs of counsel for the plaintiffs that the judgment should be reversed because the trial court refused to allow the plaintiffs at least nominal damages. While this point did not escape the attention of this court upon the original consideration of this case, a discussion of it was inadvertently omitted from the opinion. It will suffice to say at this time that it is the

settled rule that, where a judgment is erroneous only in the particular that it did not include nominal damages, it will not be reversed nor a new trial granted unless it be made to appear that such damages, if they had been allowed, would have carried costs. *Sutherland on Damages*, § 11; *Kenyon v. Western Union, etc., Co.*, 100 Cal. 454, 35 Pac. 75. Nominal damages have been defined to mean merely an inconsiderable, trifling sum, such as "a penny, one cent, six cents" (*Davidson v. Devine*, 70 Cal. 519, 11 Pac. 664; *Maheer v. Wilson*, 139 Cal. 514, 73 Pac. 418); and to carry costs a judgment of the superior court must amount to the sum of \$300 (*Code Civ. Proc.* §§ 1022, 1025). Such a judgment obviously could not be considered to be one for nominal damages as above defined (*Broads v. Mead et al.*, 159 Cal. 765, 116 Pac. 46, Ann. Cas. 1912C, 1125); and, as the judgment in the present case would have to amount to \$300 before it could carry costs, it follows that a judgment for nominal damages would not carry costs. We are satisfied that in no event could the plaintiffs, under the pleaded and proven facts of the present case, have been allowed more than nominal damages; consequently the error, if any, in the particular stated will not suffice under the authorities above cited to warrant the reversal of the judgment or the granting of a new trial.

The petition for a rehearing is denied.

(29 Cal. A. 45)

MARTHA WASHINGTON COUNCIL NO. 2, DAUGHTERS OF LIBERTY OF CALIFORNIA et al., v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, et al. (Civ. 1768.)

(District Court of Appeal, First District, California. Nov. 23, 1915. Rehearing Denied Dec. 23, 1915. Denied by Supreme Court Jan. 20, 1916.)

1. JUSTICES OF THE PEACE §159—APPEAL—UNDERTAKINGS—DISMISSAL—STATUTE.

Code Civ. Proc. § 974, gives an appeal from the judgment of a justice's court at any time within 30 days after its rendition, and section 978A provides that the undertaking on appeal shall be filed within 5 days after the filing of the notice of appeal, and that notice of its filing shall be given to the respondent, who may except to the sufficiency of the sureties within 5 days thereafter, and that unless they or other sureties justify within 5 days thereafter, the appeal shall be regarded as if no undertaking had been given. Petitioner suffered judgment in justice's court, and duly filed and served a notice of appeal and an undertaking on appeal, with notice to plaintiff therein of the filing, and plaintiff duly excepted to the sufficiency of the sureties named in the undertaking, and petitioners without attempting to have such sureties justify, on the next day filed a new undertaking, with notice thereof to plaintiff, and on plaintiff's motion the appeal was dismissed on the ground that the sureties on the first undertaking or other sureties in their stead had failed to justify after exception to their sufficiency. *Held*, that the dismissal was proper.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 544, 550-578; Dec. Dig. §159.]

2. JUSTICES OF THE PEACE §159 — APPEAL—UNDERTAKING—VALIDITY.

An appeal undertaking was not invalid by reason of the inadvertent omission of the word "house," in the expression "is a householder," in that part referring to the qualifications of the sureties.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 544, 550-578; Dec. Dig. §159.]

Petition for mandamus by Martha Washington Council No. 2, Daughters of Liberty of the State of California, and others against the Superior Court of the State of California, in and for the City and County of San Francisco, and George E. Crothers, one of the judges thereof. Writ denied.

Clarence A. Henning, of San Francisco, for petitioners. T. C. Van Ness, Jr., of San Francisco, for respondents.

KERRIGAN, J. In this proceeding the petitioners seek the issuance of a writ of mandate to compel the respondent to vacate a certain order made by it, dismissing an appeal taken by the petitioners from a judgment rendered in an action tried in the justices' court. Such judgment was entered on the 31st day of December, 1914, in favor of one E. F. Trimble, the plaintiff therein, against the petitioners here who were the defendants in that action. Thereafter, and on the 30th day of January, 1915, the petitioners filed and served a notice of appeal from the judgment of the justices' court, and on the same day filed an undertaking on appeal, and served notice on the plaintiff therein of the filing thereof. Subsequently, to wit, on February 3, 1915, the plaintiff excepted to the sufficiency of the sureties named in the undertaking. Fearing that said undertaking was defective because of the omission of the word "house," in the expression "is a householder," in that part of the bond referring to the qualifications of the sureties, the petitioners made no attempt to have the sureties on that bond justify, but on February 4th filed a second undertaking on appeal, in which the omission was inserted, and on the same day served the plaintiff with notice of the filing of the new undertaking. Upon motion of the plaintiff the superior court, after a hearing had thereon, dismissed the appeal upon the ground that the sureties upon the undertaking of January 30, 1915, or other sureties in their stead, had failed to justify after written exception to their sufficiency had been served as provided by law. It is to compel the vacating of such order of dismissal that the writ of mandate in this proceeding is sought.

[1] We think the order of the superior court must be sustained. An appeal from the judgment of a justices' court may be taken at any time within 30 days after the rendition of the judgment, and the appeal is taken by filing a notice with the justice and

serving a copy thereof on the adverse party. Code Civ. Proc. § 974.

"The undertaking on appeal must be filed within five days after the filing of the notice of appeal, and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice of the adverse party, to the amounts stated in the affidavits, the appeal must be regarded as if no such undertaking had been given."

[2] According to the wording of the latter part of section 978A, Code of Civil Procedure, we do not doubt that it was the duty of the appellants, after the exception to the sufficiency of the sureties was duly taken, to cause those sureties—or others in their place—to justify after notice and within the time specified in the statute, and that, in failing to do so, the appeal was unavailing. It may be that the course of action adopted by the appellants in filing the second bond would have been correct if the first bond, as they seem to suppose, was absolutely void because of the failure to declare in the affidavit accompanying it that the sureties were freeholders or householders. In that event the bond might perhaps have been regarded as almost a blank piece of paper, but the first undertaking in fact filed was not invalid by reason of the inadvertent omission of the word "house." *Rauer's Law & Collection Co. v. Sup. Court*, decided Feb. 11, 1915 (Sup.) 146 Pac. 866.

That part of section 978A of the Code of Civil Procedure relating to the justification of sureties is but a re-enactment of the same matter which theretofore was a part of section 978 (*Jeffries v. Sup. Ct.*, 13 Cal. App. 193, 196, 109 Pac. 147), and hence the early cases construing that language, of course, are unaffected by the amendment. In the case of *Wood v. Superior Court*, 67 Cal. 115, 7 Pac. 200, the appellant in perfecting his appeal from a judgment in the justices' court, gave an undertaking, and upon exception having been taken to the sufficiency of the sureties the appellant, instead of having those sureties—or others in their stead—justify, filed a new bond with new sureties, and in so doing, says the court—

"he gave no notice as required by the last clause of section 978 of the Code of Civil Procedure. Such being the case, the appeal must be regarded as if no such undertaking had been given." The statute is peremptory. Without the justification of the sureties named in the undertaking, or other sureties in their stead, upon notice to the adverse party, the appeal was not perfected, and the superior court had no jurisdiction of the case."

That case was followed by the Supreme Court in *Herting v. Sup. Ct.*, 10 Pac. 514. There, after notice had been filed and served on appellant, excepting to the sufficiency of

the sureties in an undertaking on appeal from a judgment of the justices' court to the superior court, a new undertaking was filed, with new sureties, but no notice of the justification of the sureties in that undertaking was given to the adverse party; and it was held that the appellant had lost the benefit of his appeal.

In *Allen v. Napton*, 24 Mont. 450, 455, 62 Pac. 686, the court passed upon the point here involved, and construed the same language. There, too, exception to the sufficiency of the sureties upon an appeal bond had been taken. Within the 5 days allowed for the justification of the sureties the appellant filed and gave notice of the filing of a new undertaking, executed by sureties other than those who had signed the first undertaking. None of the sureties justified, nor was notice that they would justify ever given. The court held that the section was mandatory; that, unless the original sureties, or other sureties, justified within 5 days after the exception taken, upon notice to the adverse party, the appeal must be regarded as if no such undertaking had been given; the appellate court in such a case had no jurisdiction of the action upon the appeal—citing *Wood v. Sup. Ct.*, supra; *McCracken v. Sup. Ct.*, 86 Cal. 74, 24 Pac. 845; *Moffat v. Greenwalt*, 90 Cal. 368, 27 Pac. 296.

For the reasons stated, we think the appeal was not effectual for any purpose, and that the superior court acquired no jurisdiction of the case.

Counsel for the petitioner in his brief has, for some reason not apparent to the court, seen fit to indulge in a flood of abuse directed against his opponent. Especially is this court surprised at the conduct of counsel in this respect, inasmuch as respondent's counsel presented his argument with courtesy, dignity, and ability. Such a brief is of no assistance to this court, nor in our opinion should its files be marred by a document of the character in question. It is therefore ordered that the said brief of petitioner be stricken from the files.

For the reasons heretofore stated the writ is denied.

We concur: LENNON, P. J.; RICHARDS, J.

(23 Cal. A. 371)

HUGHES v. CHUNG SUN TUNG CO.
(Civ. 1536.)

(District Court of Appeal, First District, California. Sept. 18, 1915.)

1. APPEAL AND ERROR § 935—PRESUMPTIONS FAVORING COURT BELOW—STATUTE.

Where the order of the trial court setting aside its first judgment was made within the time prescribed by Code Civ. Proc. § 473, providing that on application made within six months the court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, in the absence of

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 69 Cal. xv.

a record showing the basis of the court's action, such order will be presumed to be regular.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3783-3786; Dec. Dig. ¶ 935.]

2. APPEAL AND ERROR ¶82—FINALITY OF DETERMINATION—ORDER AFTER JUDGMENT.

An order of the court vacating and setting aside a judgment, being an order made after final judgment, was appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 379-385, 414, 416, 478, 479, 482, 483, 517-522; Dec. Dig. ¶82.]

3. APPEAL AND ERROR ¶871—DECISIONS REVIEWABLE—ORDER ON APPEAL FROM JUDGMENT—STATUTE.

Under Code Civ. Proc. § 956, providing that on appeal from a judgment the court may review the verdict or decision and any intermediate order or decision excepted to involving the merits or necessarily affecting the judgment, except a decision or order from which an appeal might have been taken, where defendant took no direct appeal from an appealable order of the court vacating and setting aside its judgment for defendant, the insertion, in defendant's notice of appeal from a second judgment recovered by plaintiff on his second amended complaint, of the language that the appeal was taken from "every interlocutory and intermediate order made in said case adverse to defendant," did not bring up for review the order of the court vacating the former judgment, the time for an appeal from which had expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3526-3529; Dec. Dig. ¶871.]

4. PLEADING ¶248—AMENDMENT.

In an action by a loan broker for a commission, where the original complaint sued for commissions for the procurement of a loan which defendant was alleged to have received and accepted under an express contract with the plaintiff allowing the latter a certain percentage for the procurement of such loan, allowance of the filing of the amended complaint, averring that plaintiff had performed his contract to procure the loan in the required amount, but that defendant had refused to accept it, was not improper as introducing a new cause of action, since the gravamen of the action was the breach of the contract, and its averment in one form or other would not amount to a change in the nature of the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. ¶248.]

5. BROKERS ¶63—CONTRACT WITH LOAN BROKER—BREACH.

Where defendant agreed to take a loan of \$26,000 from any party, if negotiated, and to pay plaintiff loan broker a commission of 7½ per cent. on the amount, and defendant either accepted and received the loan and then refused to pay the commission, or refused to accept and receive the loan when procured by plaintiff broker, defendant broke its contract.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. ¶63.]

6. APPEAL AND ERROR ¶1011—REVIEW—FINDINGS BELOW.

A finding of the trial court on substantial conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ¶1011.]

Appeal from Superior Court, City and County of San Francisco; A. E. Graupner, Judge.

Action by Jessie J. Hughes, administratrix, substituted in place of Jesse Hughes, deceased, against Chung Sun Tung Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hearing denied by Supreme Court, 154 Pac. 301.

Wm. Hoff Cook, of San Francisco, for appellant. Wm. F. Herron, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from a judgment in favor of plaintiff for the recovery of commissions claimed to be due under a contract to procure a loan, and it is also an appeal expressly taken from "every interlocutory and intermediate order made in said case adverse to defendant."

[1-3] The facts of the case requisite to a review of the questions presented upon this appeal are substantially as follows: The plaintiff brought this action to recover his commissions, alleging the procurement of the loan in question in his original and first amended complaints. Issue being joined, the case went to trial. At the close of plaintiff's case a motion for nonsuit was made on behalf of the defendant, and was granted by the court, and a minute record of judgment in favor of defendant was thereupon entered on September 19, 1912. On February 11, 1913, the court made an order vacating and setting aside said judgment, and also appears to have made an order permitting the plaintiff to file a second amended complaint. The moving papers and proofs upon which these two orders were predicated are not before the court, but the order of the court setting aside its first judgment having been made within the time permitted by section 473 of the Code of Civil Procedure, was within the power and jurisdiction of the court, and, in the absence of a record showing the basis of the court's action, will be presumed to be regular. Besides, this order of the court, being an order made after final judgment, was an appealable order, from which the defendant took no direct appeal. The insertion in defendant's notice of appeal of the language above quoted would not have the effect of bringing up to this court for a review the order of the court vacating the former judgment, since the time for an appeal from that order had long since expired. It cannot therefore be reviewed upon this appeal under the express exception of section 956 of the Code of Civil Procedure.

The plaintiff having filed his second amended complaint, and issue being joined thereon, the cause again proceeded to trial, at the conclusion of which the plaintiff recovered judgment against the defendant for the sum of \$1,950, with interest and costs. It is from this judgment that the defendant prosecutes this appeal.

[4, 5] It is the contention of the appellant that the court erred in permitting the plaintiff to file his second amended complaint for the reason that a new cause of action is therein attempted to be set forth. In his original and first amended complaints the plaintiff sued for commissions for the procurement of a loan of a certain sum of money, which the defendant was alleged to have received and accepted, under an express contract with the plaintiff allowing him a certain percentage for the procurement of such loan. In the second amended complaint the plaintiff averred that he had performed the terms of his contract by the procurement of the loan in the required amount, but that the defendant had refused to accept or receive the same. We do not perceive that this change in the form of the plaintiff's averment of the defendant's breach of his contract introduces a new cause of action. The contract between plaintiff and defendant is in the form of an application by the latter to the former, who was a loan broker, for a loan of \$28,000, wherein the applicant agrees "to take the above loan from any party if negotiated, and will pay C. U. Barlow & Co. a commission of seven and one-half per cent. on the amount loaned." Under such a contract, the defendant's breach would consist in either accepting and receiving the loan and then refusing to pay the commission, or in refusing to accept and receive the loan when the brokers had procured it by the production of a person ready and willing to make the loan in the amount and according to the terms of the defendant's obligation; in which case the brokers would be entitled to their commissions. *Maxon v. Jones*, 128 Cal. 77, 60 Pac. 516. The gravamen of the action is the breach of the contract, and the averment of such breach in one form or the other would not amount to a change in the nature of the action. With the discretion of the court in permitting the plaintiff to file his second amended complaint we are not concerned upon this appeal, for there is no record before us showing the reason or lack of reason which led the court to make the order.

[6] The final contention of the appellant is that the findings of the court are not justified by the evidence, but upon a careful reading of the record we find that the testimony of the witness Stidger, if believed by the court, was sufficient to show that the plaintiff did actually produce a person ready and able and willing to make the loan in question. This being so, a substantial conflict in the evidence was presented to the court, and its finding thereon will not be disturbed upon this appeal.

Judgment affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(28 Cal. A. 371)

HUGHES v. CHUNG SUN TUNG CO.
(S. F. 7611.)

(Supreme Court of California. Nov. 15, 1915.)

Action by Jessie J. Hughes, administratrix, substituted in place of Jesse Hughes, deceased, against the Chung Sun Tung Company. On petition to have the cause determined by the Supreme Court after judgment in the Appellate Court (154 Pac. 299). Petition denied.

PER CURIAM. The petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal for the First Appellate District, 154 Pac. 299, is denied. See *Burke v. Maze*, 10 Cal. App. 206, 211, 101 Pac. 438, 440; *People v. Vaughn*, 25 Cal. App. 736, 740, 147 Pac. 116, 117. See, also, *Prince v. Hill*, 149 Pac. 578, 580.

(171 Cal. 610)

MANNING v. APP CONSOL. GOLD MINING CO. et al. (S. F. 6741.)

(Supreme Court of California. Dec. 23, 1915.
Rehearing Denied Jan. 22, 1916.)

1. CORPORATIONS — 542 — FRAUDULENT CONVEYANCES — WHAT ARE — ASSUMPTION OF DEBTS.

A conveyance of the property of a corporation whereby the grantee company assumed the debts of the grantor is based on a valuable consideration, and is not fraudulent within Civ. Code, § 3442, declaring that a voluntary conveyance by an insolvent shall be fraudulent as to existing creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. — 542.]

2. CORPORATIONS — 542 — FRAUDULENT CONVEYANCE.

Where one corporation conveyed all of its property to a foreign corporation so that threatened litigation might be conducted in the federal courts, instead of the courts of the residence of the grantor corporation, such fact does not show that the conveyance was fraudulent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. — 542.]

3. CORPORATIONS — 318 — TRANSACTIONS — RATIFICATION.

Where the directors of two corporations were the same persons, and the majority of the shares were owned by the same person, a transaction between the two corporations is only voidable, and may be ratified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1363, 1364; Dec. Dig. — 318.]

4. CORPORATIONS — 123 — TRANSFERS OF SHARES — VALIDITY.

Where a pledge of corporate stock was not recorded on the books of a corporation, it is, under Civ. Code, § 324, valid as between the parties, and the act of the corporation in issuing a new certificate for the pledged stock cannot be questioned by a third person.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. — 123.]

5. CORPORATIONS — 548 — ACTION TO SET ASIDE CONVEYANCE — EVIDENCE — SUFFICIENCY.

In a suit by a judgment creditor of a corporation to set aside a conveyance of its property to another corporation, which assumed the debts, evidence held insufficient to show that the conveyance was fraudulent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2182-2186; Dec. Dig. — 548.]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Daniel Manning against the App Consolidated Gold Mining Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. M. Cannon, F. J. Solinsky, and Paul T. Morf, all of San Francisco, for appellant. Samuel M. Shortridge, of San Francisco, F. M. Cook, of Fresno, and Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondents.

MELVIN, J. Appeal by plaintiff from the judgment. Plaintiff sued as a judgment creditor of the App Consolidated Gold Mining Company (which hereafter we shall designate as the "App Company"). The complaint charged that certain conveyances and other transactions upon the part of the App Company and the other defendants were fraudulent, and that the property and assets of that corporation were transferred for the purpose of preventing him from securing anything in satisfaction of his judgment. We shall abbreviate the names of the other corporate defendants, the Rawhide Gold Mining Company and the Central Land & Trust Company to "Rawhide Company" and "Trust Company," respectively.

According to the allegations of the complaint the corporate defendants Rawhide and App Companies were engaged in gold mining in Tuolumne county. William A. Nevills owned a majority of the stock of each corporation. In February, 1902, the plaintiff, who was employed in a mine belonging to the App Company, was seriously injured by a falling timber. In April, 1902, the said corporation conveyed all of the property of which it was then the owner to the Rawhide Company in consideration of the issuance to it of \$14,975 of the stock of the latter company; that consideration being named in the instruments of conveyance. In the month of May, 1902, plaintiff sued the App Company for damages on account of the injuries received in its mine, and in November of that year obtained judgment for \$5,000. The order of court denying a new trial in that case was reversed by this court in March, 1906. On November 12, 1906, William A. Nevills (so it is alleged), owning a majority of the shares of stock of the App and the Rawhide Companies, and being indebted to the Trust Company for \$100,000 loaned and advanced to him personally for his own use, procured the execution by the Rawhide Company of a promissory note in the sum of \$100,000. On the same day, it is alleged, the Rawhide Company executed a trust deed conveying to F. H. Short and J. P. Bernhard in trust as security for the payment of the said note all of the mining property described in the complaint and other valuable property belonging to Nevills or to him and his wife, Della

F. Nevills, who is also a defendant in this action. In February, 1910, Manning's action against the App Company was again tried, resulting in a judgment in his favor for \$17,500. An appeal was taken by the defendant, but it was not perfected, and the judgment became final in July, 1912.

It is also averred in the complaint that prior to the commencement of this action proceedings were pending in Tuolumne county to foreclose under the deed of trust; the amount then due on the promissory note being more than \$120,000. It is alleged that the property conveyed by the App Company to the Rawhide Company was worth \$500,000, and that after the said conveyance no assets of any sort out of which Manning could satisfy his judgment remained in the possession of the App Company.

The complaint also contains averments to the effect that Nevills dominated both mining corporations, and that all of the transactions were done according to his wishes and commands; that he owned 146,080 of the 150,000 shares of the stock in the App Company, and 14,980 of the 15,000 shares of the Rawhide; that the deed of conveyance from the former to the latter was without consideration, and that Nevills caused said conveyance to be made for the purpose of defrauding the creditors of the App Company, particularly the plaintiff. Upon information and belief it is pleaded that the indebtedness evidenced by the promissory note to the Trust Company has been paid by the proceeds from the pledged property; that Nevills and the officers of the Trust Company have conspired to pretend that no portion of the principal sum of the note has been paid and to cause the sale of said property under the terms of the deed of trust; that said property is to be purchased for them at such sales and to be conveyed at some future time to Nevills, and that such course has been and is to be pursued for the purpose of defrauding plaintiff and other judgment creditors; that in pursuance of said conspiracy the trustees have been notified of the alleged default in payment of the note, and have been directed to sell the property in accordance with the terms of the trust deed; and that the trustees have prepared to foreclose and unless they be restrained will sell the property, thereby impairing plaintiff's lien. The prayer is for judgment for the amount of plaintiff's claim, and, besides, the plaintiff asks for an accounting by the Trust Company for all moneys received by it from the Rawhide Company, from Nevills, and from the operation of the mining property described in the conveyances. Plaintiff also prays for restraining orders which will prevent further activities by any of the defendants looking to the disposition of the property, and especially does he ask that the trustees be restrained from any further proceedings under the deed of trust.

The substantial averments of the complaint are denied by the defendants in their answer. They deny any conspiracy to defraud creditors either in the transactions between the App and the Rawhide Companies, resulting in the purchase of the property of one by the other, and allege that the deed of trust was made in good faith and received by the Trust Company without any knowledge of any matters alleged in the complaint. The payment of the indebtedness evidenced by the promissory note is also denied, and they plead a judgment of the superior court given on July 8, 1912, whereby it was found that the Rawhide Company was indebted to the Trust Company in a sum in excess of \$120,000, and, while admitting that the proceeds of the pledged properties have been applied to the indebtedness evidenced by the note, they assert that no accounting is necessary to determine the balance due, for the reason that such accounting has been ordered by the court in another action and has been accomplished.

The findings are to the effect that all of the transactions denounced in the complaint as fraudulent were in good faith, and that the trust company had no knowledge or notice of the alleged fraudulent practices in the dealings between the App and the Rawhide Companies. The court also found that the Trust Company knew of no claim or demand of the plaintiff against the App Company or of the suit for damages.

An attack is made by appellant upon the findings on the theory that the evidence does not support them. The plaintiff insists, moreover, that the evidence shows without contradiction a state of facts leading, as matter of law, to the conclusions for which he contends. These propositions are, in brief: (1) That the conveyance by the App Company to the Rawhide Company was made without consideration, with intent to hinder, delay, and defraud creditors of the App Company; (2) that the deed of trust was executed as security for the personal debt of Nevills and in pursuance of his intention to create a large indebtedness against the property so fraudulently transferred, ostensibly in the name of the Rawhide Company, with intent to hinder, delay, and defraud the plaintiff; (3) that the Trust Company at all times had full knowledge of all of the alleged frauds; and (4) that the indebtedness evidenced by the promissory note has been paid, but that Nevills and the Trust Company fraudulently conspired to pretend that no such payment had been made. Appellant seems to pin his faith upon the first and third propositions; therefore we will consider: (1) Whether or not there is any evidence to sustain the finding of the superior court that the conveyance of the App Company to the Rawhide Company was made for a consideration and without intent to hinder, delay, or defraud plaintiff; and (2)

if it be determined that the finding was unsupported, and that said conveyance was made with the intent alleged, whether or not the Trust Company had knowledge of the fraud when the deed of trust was executed. If neither of these problems must be solved in favor of defendants, the judgment must be affirmed.

[1] Respondents insist that the question of fraudulent intent is one of fact to be determined by the trial court, and not one of law arising from the proven or admitted facts. It is the contention of respondents that there is no presumption of fraud arising out of the transfer of all of the property of the App Company to the Rawhide Company because there was not lacking a valuable consideration, and because the transfer was not made in contemplation of insolvency. Section 3442, Civ. Code. Mr. Ricketts, who was attorney for the App Company at the time of the said transfer, testified that the corporation did receive 14,975 shares of the Rawhide stock. Mr. Lang's testimony was to the same effect. It is true that the 14,975 shares were subject to a prior pledge to J. S. Doe, who held as collateral security for a loan to Nevills substantially all of the stock of the original issue of the Rawhide Company. The amount of the stock was reduced in accordance with the laws of West Virginia, in which state the Rawhide Company was chartered. It is stoutly asserted by appellant that there was obvious fraud in thus reducing the number of shares of capital stock while the original issue was outstanding and in Mr. Doe's hands, and that in any event the new issue was of no value because all of its equivalent was held by the pledgee. Respondents are of the opinion that the facts shown would only subject the new shares of the Rawhide to Mr. Doe's prior lien, and, as there were, according to the testimony of Mrs. Nevills, about \$3,000,000 worth of securities in Mr. Doe's hands to protect a debt of something like \$200,000, it could not be said that the shares transferred by the Rawhide to the App were without value because, under the doctrine of marshaling of securities, resort must first be had to other personalty held by the pledgee before he would be justified in applying the Rawhide stock to the payment of the debt of Nevills. There is much force in this position, but we are not compelled to consider the legality of the change in the amount of capital stock nor the value of the new stock when issued to support the finding that there was a valuable consideration for the transfer of the App Company's property. The Rawhide Company assumed the current indebtedness of the App Company in consideration of the deed, and debts were paid by it. The promise of a grantee to pay a grantor's indebtedness is a valuable consideration. *Saunderson v. Broadwell*, 82 Cal. 133, 23 Pac. 36; *Gladwin v. Garrison*, 13 Cal. 332; *Carty v.*

Connolly, 91 Cal. 19, 27 Pac. 599; Greenwalt v. Mueller, 128 Cal. 639, 59 Pac. 137. Such assumption removes the transaction from the operation of section 3442, Civil Code. The same principle was announced by the Supreme Court of Nevada in Ivancovich v. Stern, 14 Nev. 341.

[2-5] Mr. Ricketts testified that long before Manning was hurt a plan was discussed for transferring the property of the App (a Californian corporation) to the Rawhide; the primary purpose being to vest the property in the West Virginian corporation in order that certain threatened litigation might be conducted in the courts of the United States, rather than in those of this state. There was nothing essentially fraudulent, or even improper, in such a purpose. Nor did the fact that Nevills was the owner of practically all of the stock of both companies render the transaction fraudulent. Indeed, so far as Nevills was concerned, he was liable as a stockholder of either company, and was personally liable as a stockholder of the Californian corporation. At the time when the first judgment was given in favor of Manning, Nevills was evidently solvent because he and his wife offered themselves and were accepted as sureties on the appeal bond. It is argued that such a course was entirely inconsistent with any idea of trying to defeat the collection of Manning's claim, and that, if Nevills had sought fraudulently to prevent such collection, he would have made some apparent disposition of his individual property for the same purpose. There is force in this position, and doubtless the argument received due weight in the mind of the trial court. Nor is the fact that the directors of the App and the Rawhide Companies were all or most of them holding like positions in both corporations conclusive as to the bad faith of the transaction between them. Such dealings are not void, but voidable only, and may be ratified by either party by conduct having that legal effect. *Sausalito Bay Land Co. v. Sausalito Improvement Co.*, 166 Cal. 306, 136 Pac. 57. It needs no argument to demonstrate that the stockholders of both companies by their subsequent actions ratified the transfer. For example, the Rawhide defended and compromised a suit which had been commenced in a federal court on a liability which was originally that of the App Company.

Doubtless it was an irregularity as against Doe for the Rawhide Company to issue the certificate for the reduced stock without naming Doe therein as pledgee. *Spreckels v. Nevada Bank*, 113 Cal. 274, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348. Notwithstanding the pledge to Doe, Nevills continued to own the stock, and the transfer of it to Doe, not having been entered on the corporation's books, was good only as between the parties. Section 324, Civ. Code.

Doe was paid eventually, and the 14,975 shares of stock transferred by Nevills to the App Company was in essence the same stock which he had pledged to Doe. Nor does fraud inhere in the fact that Nevills furnished the consideration which passed between the corporations. He was virtually the sole stockholder of each company. If he transferred shares in the Rawhide, which he personally owned, to the App (of which he was the holder of practically all of the stock), it would not alter his financial interest.

We conclude, therefore, that to the trial court was given the duty of determining the question of alleged fraud as a matter of fact, and not as a matter of law arising from the undisputed or admitted facts; that there is a substantial basis for the court's conclusion that the transaction attacked by plaintiff was not fraudulent and void; that the findings in this regard are supported by evidence; and that we cannot, therefore, disturb the judgment.

The conclusion which we have reached makes it unnecessary to examine the other contentions of appellant relating to the transactions between the Trust Company, the Rawhide Company, Nevills, his wife, and others, because there is no alleged fraud connected with that branch of the case which is not charged as having its origin in the asserted original bad faith and alleged sinister practice by which the properties of the App Company were transferred to the Rawhide.

From the foregoing it follows that the judgment must be affirmed; and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.; SLOSS, J.

(71 Cal. 633)

In re SCHWARTZ et al. (S. F. 6892.)

(Supreme Court of California. Dec. 27, 1915.)

1. PARENT AND CHILD ⇨2—ABANDONMENT OF CHILD—CONDUCT OF PARENT.

Petitioner, on the birth of his daughter in 1906 and on the death of her mother a few days later, having then no home, asked his aunt, living with his father-in-law, to bring the child up, and left the child with her, and during the next four years visited relatives in Europe, worked in various places, and remarried in 1910, and in January, 1911, sued out a writ of habeas corpus to obtain custody of the child. In October, 1912, he obtained the vacation of an order of adoption consented to by the aunt as guardian, and in September, 1913, applied for revocation of her letters of guardianship, which had been granted in 1911 without notice to him. *Held*, in the absence of evidence that it was not for the child's best interest to be left with the aunt and of any demand on him for its support, not to show abandonment of the child by him.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. ⇨2.]

2. PARENT AND CHILD ⇨2—CUSTODY—RIGHT OF FATHER—FITNESS.

In view of Civ. Code, § 197, declaring the father of a minor child entitled to its custody, the father, who was an industrious man of good habits having a comfortable home and whose

wife was willing to care for it, was competent and fit to have its custody, and was entitled thereto, as against a guardian who had been appointed without his consent.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 4-32; Dec. Dig. ¶2.]

Angellotti, C. J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Bradley V. Sargent, Judge.

Petition by Adolph Schwartz for the revocation of letters of guardianship of Rosa Gertrude Schwartz, his minor child, issued to Amalia Schwartz, and for the termination of said guardianship. Petition denied, and petitioner appeals. Order reversed.

Olin L. Berry, of San Francisco, for appellant. George Appell and C. H. McConaughy, both of San Francisco, for respondent.

SHAW, J. Adolph Schwartz appeals from an order denying his petition for the revocation of letters of guardianship of Rosa Gertrude Schwartz, his minor child, issued to Amalia Schwartz on March 16, 1911, and for the termination of said guardianship.

The child has no property of any description. The said guardian was appointed solely upon the ground that the father had abandoned the child and that it needed the care and attention of some fit and proper person. In denying the petition of the father for revocation the court made findings to the effect that the father had abandoned the child prior to the appointment of Amalia Schwartz as guardian, and that he was not a fit or proper person to have its custody. We are of the opinion that the evidence does not justify either finding. The following is a statement of the facts shown by the evidence, relating to abandonment:

[1] Amalia Schwartz is the aunt of the child's father and mother, who were cousins. She was the sister of the father of Adolph Schwartz and of the mother of Sophie Schwartz, his wife, who was the daughter of Adam Stern. The wife of Stern was for many years in delicate health, and Amalia Schwartz lived as a member of the family of Stern and was the housekeeper. She had raised Sophie Schwartz, the wife of the appellant. Schwartz and his wife, at the time of her confinement, were living at the house of Adam Stern in Los Angeles. The child was born on December 4, 1906. Its mother died on December 18, 1906. Schwartz and Stern were both barbers by occupation. Upon the death of the child's mother, Schwartz, having no home or place to keep it, asked his aunt, Amalia Schwartz, to take the child and raise it, which she then agreed to do. Thereupon he left the child with her. Shortly after making this arrangement Schwartz left the house of his father-in-law and never afterwards lived there as a member of the family, although he visited the family several times a year. From 1906 to 1911 Schwartz

lived in various places. He went first to Jamestown, Va., and then to Europe on a visit to his relatives. He also worked in Los Angeles and in Nevada, and in the beginning of 1910 he settled in Seattle and there married his present wife, by whom he has a child which was about two years old at the time of the making of the order appealed from. About the first of January, 1911, Mrs. Stern, Schwartz's mother-in-law, died. Upon learning of her death, Schwartz wrote to Adam Stern suggesting that he would take the child to his own home and away from the home of Stern. Up to that period the relations between the parties appear to have been entirely harmonious. His suggestion that he wanted to take the child himself was met with objections, and from that time forward all of his relatives manifested a disposition to resist his purpose. Stern wrote to Schwartz advising him not to attempt to take the child away, that it would make trouble. Thereupon Schwartz went to Los Angeles to get the child, and, failing to find it, caused a writ of habeas corpus to issue for its custody. This writ was served upon Stern, but not upon Amalia Schwartz. The child had been taken to San Francisco by Amalia Schwartz, and was at that time in the home of Calvin C. Eib, its uncle by marriage. Failing in this proceeding, Schwartz returned to Seattle. In March, 1911, without notice to Schwartz, Amalia Schwartz obtained the appointment as guardian in the superior court of San Francisco, as above stated, for the purpose of retaining custody of the child. In November, 1911, Calvin C. Eib and his wife, without the consent of Schwartz, obtained an order of the superior court of San Francisco whereby they adopted the said child, Amalia Schwartz consenting thereto as its guardian. In May, 1912, Schwartz moved to San Francisco and then discovered that the child was in the custody of Eib and wife. He then again resorted to a writ of habeas corpus to get the child and was defeated by the order of adoption and the guardianship, of both of which he then heard for the first time. In October, 1912, he applied to the superior court to set aside the order of adoption aforesaid, and in May, 1913, the said order was vacated accordingly. In September, 1913, he filed the present application for the revocation of the letters and termination of guardianship.

It is clear from this conduct of Schwartz that he never intended to abandon the child. Having arranged with his aunt for its care, it cannot be said that his conduct in allowing her to keep it was an abandonment. From all that appears in the evidence it was for the best interests of the child that it should be left with the aunt, at least until Schwartz married. There is some conflict in the evidence as to whether he contributed anything to the child's support. On the other

hand it does not appear that any demand was ever made upon him for assistance of that kind. Under the circumstances, his failure to pay for its maintenance did not constitute an abandonment. The evidence is insufficient to justify the finding that the child was abandoned by the father.

[2] With respect to the father's fitness to have the custody and care of the child, the evidence to sustain the finding is equally deficient. He appears to be an industrious person of good habits. He has a comfortable home into which he can take the child. His present wife is desirous of having the child and is willing to care for it. The finding that he is unfit to care for the child seems to be based entirely upon the fact of his making divers demands upon Stern and Elb for money as a condition of his consent that the child might be kept away from him. These occurred after the controversy arose, and in the course of his negotiations and efforts to get possession of his child. In February, 1911, he said to Charles Stern that he had had bad luck that year, and had been in the hospital, and that if he could get \$500 he would consent to allow the child to remain where it was, and made a like proposal to Adam Stern, asking for \$1,000. He was referred by Adam Stern to Mr. Elb. Thereupon he began the proceeding in habeas corpus, which, as before stated, failed of its object. In May, 1912, in a conversation with Elb in San Francisco, he again intimated that if \$1,000 were paid he would not press his claims for the child. No other conduct of his was proven tending to show unfitness for the care of the child. The appellant himself denies that he made these requests as a condition of giving up the child. Whatever may have been the reason for his conduct in this particular, we do not think it is sufficient to justify the finding that he is not a fit and proper person to have the care and custody of his child. The court below appears to have made its decision as it did because of its belief that the financial interests of the child would be promoted if it were left with its relatives, rather than given over to its father. The law does not recognize this as a cause for depriving the father of the custody of his own child. No sufficient reason appears why the father should not be allowed to take care of and rear his child, as he apparently desires to do. The father is competent and fit to have its custody, and, being willing and able to care for it, he is entitled thereto. Civ. Code, § 197. The guardianship is no longer necessary and should be terminated. We think the court below erred in refusing the relief asked by the father.

The order is reversed.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; LAWLOR, J.

ANGELLOTTI, C. J. I dissent, being of the opinion, after full consideration of the record, that the evidence sufficiently supports the finding of abandonment.

(171 Cal. 637)

GRAY v. UNION TRUST CO. OF SAN FRANCISCO. (S. F. 6761.)

(Supreme Court of California. Dec. 31, 1915. Rehearing Denied Jan. 28, 1916.)

1. APPEAL AND ERROR ⇨150 — RIGHT OF TRUSTEE—BENEFIT OF OTHERS.

In an action to terminate a trust to manage the property and to pay the net income to the trustor during her lifetime, and providing that on her death the property should go as provided in her last will, or, if she left no will, to her heirs at law, the defendant trustee had a right to appeal from a decree for plaintiff if it believed that the rights of other persons than the trustor would be impaired or destroyed by its termination, as it owed precisely the same duty to protect the rights of the indeterminable class of beneficiaries as to protect the rights of the trustor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934-946; Dec. Dig. ⇨150.]

2. TRUSTS ⇨135 — CONSTRUCTION — "DRY TRUST"—STATUTE.

Such trust was not a "dry trust," since active duties were imposed on the trustee during the life of the trustor, and after her death in ascertaining the persons entitled to take the property; and, under the express provision of Civ. Code, § 863, the trustee of such express trust took the whole legal title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 178; Dec. Dig. ⇨135.]

For other definitions, see Words and Phrases, First and Second Series, Dry Trust.]

3. TRUSTS ⇨59—REVOCATION—STATUTE.

Such trust instrument, reserving no power of revocation, created a trust irrevocable by any act of the trustor, as, under the express provision of Civ. Code, § 2280, a trust cannot be revoked by the trustor, after its acceptance by the trustee and beneficiaries, unless the declaration of trust reserves a power of revocation in the trustor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78-81; Dec. Dig. ⇨59.]

4. TRUSTS ⇨61—TERMINATION—POWERS OF EQUITY—PARTIES.

It is only when all the parties interested in a trust are before a court, when each is sui generis and all join in the application that a court of equity ever terminates a valid trust, and, even in such circumstances, it does not do so by force of the application but only when such a decree is proper, and even then the court is not required to terminate the trust, but may do so in its discretion; and, conversely, equity has no power to terminate the trust if all the parties in interest are not before the court, as Civ. Code, § 2280, declares that a trust shall not be revocable except by the consent of all the beneficiaries.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83-87; Dec. Dig. ⇨61.]

5. TRUSTS ⇨140—ESTATE OF BENEFICIARIES —VESTED "REMAINDER"—STATUTE.

A trust in real and personal property was created to manage and invest and to pay the income to the trustor for life, irrevocable during her lifetime, and under which on her death the property should go as provided in her last will, and, if she left no will, to her heirs at law

according to the succession laws of California existing at its creation. Civ. Code, § 769, declares that when a future estate other than a reversion depends on a precedent estate, it may be called a "remainder," and be created and transferred by that name. Section 773 provides that a remainder may be created to commence at a future day and be limited upon a life estate, and section 781 provides that a general or special power of appointment shall not prevent the vesting of a future estate limited to take effect in case such power is not vested. *Held*, that the trust created vested remainders in the trustor's heirs, subject to divestiture only upon her exercise of the power of nomination by will.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 183-187; Dec. Dig. ¶140.]

For other definitions, see Words and Phrases, First and Second Series, Remainder.]

6. REMAINDERS ¶14—ALIENATION.

Such remainders in trust, whether regarded as vested or contingent, were alienable.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. ¶14.]

7. DEEDS ¶128—RULE IN SHELLEY'S CASE—EFFECT OF ABOLITION.

The effect of Civ. Code, § 779, repealing the rule in Shelley's Case, was to restore to courts of equity their right to construe apt words to create a remainder as a limitation, in accordance with its plain import and intent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415, 419-421, 427; Dec. Dig. ¶128.]

Department 2. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Helen D. Gray against the Union Trust Company of San Francisco, to terminate a trust. Decree for plaintiff, and defendant appeals. Reversed, with directions to deny plaintiff the relief sought.

Heller, Powers & Ehrman, of San Francisco (Devlin & Devlin, of Sacramento, of counsel), for appellant. Edwin L. Forster and Robert R. Moody, both of San Francisco, for respondent.

HENSHAW, J. Plaintiff, by two instruments of the same date and forming "parts of the same transaction," made by one of them a transfer to defendant, absolute in form, of certain property, real and personal. By the second, contemporaneous therewith, she declared the trusts upon which the defendant, as trustee, was to hold this property. At the time when plaintiff executed the transfer and trust agreement she was and still is an unmarried woman over the age of 21 years, having no child nor other lineal descendant. Plaintiff's mother, however, is living, and her mother would be entitled to inherit, and succeed to all the property, real and personal, of plaintiff if she should die intestate and unmarried, leaving her mother surviving. Plaintiff also has other relatives now living who would be entitled to succeed to and inherit her property if she should survive her mother and thereafter die intestate unmarried, leaving no child surviving her and leaving surviving her

the other relatives referred to or any of them. Helen D. Gray subsequently brought this action to terminate the trust, her contention being that, notwithstanding she did not reserve in the instruments creating it any power of revocation, nevertheless by virtue of the terms of the trust itself it is determinable at her pleasure. The terms of the trust itself therefore demand presentation.

The conveyance was made to defendant "to manage said trust property as herein-after provided." The property subject to the trust came to plaintiff through the will of one Mary E. Bithell. The "original investment" of funds received from the estate of Mary Bithell could be made only with the concurrence of the trustor. After this original investment, made with the concurrence of the trustor, the trustee is empowered "thereafter from time to time to make investments and reinvestments as in its discretion may seem necessary and proper without consulting the trustor." Certain limitations upon the power of the trustee to make these investments are declared, but they have no bearing upon the question presented on this appeal. "The net income and revenue and profit, less the charge for services of the trustee, shall be paid by said trustee to said trustor," and an accurate account is to be kept. The trustee is entitled to receive for its services 2 per cent. of the gross income of the trust property, and finally the trust instrument declares:

"This trust shall be irrevocable and shall last during the lifetime of said trustor, and upon her death the trust property shall go to and vest as she shall provide in her last will and testament, and leaving no last will and testament, said property shall go to and vest in her heirs at law, according to the laws of succession of the state of California as such laws now exist."

The facts were stipulated, the stipulation embracing the matters of fact above set forth. Drawn from these facts the court made additional findings of fact which are in reality misplaced conclusions of law. The most important of these is as follows:

"That plaintiff is the only person having any interest in any of the real or personal property mentioned in the said assignment or in the said agreement, except said defendant, Union Trust Company of San Francisco, for the compensation which it is entitled to receive for its services as trustee, under the terms of the said trust agreement."

[1] It was under this finding, which manifestly is a conclusion of law embodying the court's construction of the trust and its determination that defendant held but the naked fee, while every beneficial interest in all of the property was vested in plaintiff, that the court concluded that the trust was one which should be dissolved and terminated by its decree, and gave judgment accordingly. From that judgment defendant appeals, and no serious objection can be raised to its right to appeal. Indeed, it is its duty to

do so if it believes that there be other persons than Helen Gray whose rights would be impaired or destroyed by the dissolution of this trust. Those persons, if they exist, would be Helen Gray's "heirs at law according to the laws of succession of the state of California as such laws now exist." But those persons, in the contingency provided for by the trust, would not take as inheritors from Helen D. Gray. The laws of succession as they existed at the time of the creation of the trust would fix the class entitled to take, and that class would take, not as heirs of Helen Gray by virtue of her intestacy, but as a class designated in the trust instrument in the event that Helen Gray failed to exercise her power to nominate others. In other words, by a change in the laws of succession conceivably it could happen that those who would be entitled to take under the trust instrument in the event of the death intestate of Helen Gray, would no one of them be an heir at law of Helen Gray at the time of her death. And, finally, upon this proposition it should be pointed out that upon the death of Helen Gray intestate, it would not be the court in probate which would determine to whom the trust property should go. The class entitled to take would be determined by a court of equity in an action brought by the trustee to determine that precise question. The trustee, therefore, owes precisely the same duty to protect the rights of this indeterminate class of beneficiaries as it does to protect the right of the named beneficiary, Helen D. Gray.

[2, 3] The ultimate question then is the power of the court of equity to terminate such a trust as this. The primary questions first to be determined, and in whose determination the answer to the ultimate question will be found, go to the nature and scope of the trust itself. What then are the nature and scope of the trust? First there is conveyed to the trustee the whole legal title, since so much is plainly necessary for the purposes of the trust (Civ. Code, 863), which general purposes are to give to plaintiff the usufructuary benefit of the property during her lifetime and upon her death to see that the property goes to her nominees under her will, or, failing of such nomination, to those who are her heirs at law at the time of her death under the laws of succession as they existed at the time of the making of the trust. Plaintiff's usufructuary interest in the whole estate during her life is her equitable life estate, to which is added the power of nominating those who shall take the legal and equitable fee at her death and thus terminate the trust. The trust itself is not a dry, naked trust, since active duties are imposed upon the trustee during the life of the plaintiff, and a no less active duty upon her death in causing to be determined, should she fail to nominate, those entitled to take the property. The settlor

or trustor reserved no power of revocation, and the trust is therefore irrevocable by any act of plaintiff. Civ. Code, § 2280; *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659; *Scrivner v. Dietz*, 84 Cal. 297, 24 Pac. 171; *Kopp v. Gunther*, 95 Cal. 63, 30 Pac. 301; *Salisbury v. Bigelow*, 20 Pick. (Mass.) 174; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Viney v. Abbott*, 109 Mass. 300.

We have so far refrained from using the word "remainder" or "remaindermen" in connection with this trust, for the creation by the trust of such remainders and remaindermen is the very heart of the controversy between these litigants. By appellant it is contended that such remainders are created and with them estates in the remaindermen, which it is beyond the just exercise of the powers of equity to destroy. Upon the other hand, it is contended that no such remainders are created; that the whole equitable estate is in the trustor, plaintiff herein, and that she is entitled to address herself to equity for the relief here obtained—the relief which will terminate a dry and naked trust, establishing the legal estate in the person who possesses the full equitable estate.

[4-6] It is only when all the parties in interest are before a court, when each is *sui generis*, and all join in the application, that a court of equity ever terminates a valid trust. And even when all these circumstances exist, equity does not do so by force of the application, but only when a decree so doing is meet and proper. When such circumstances exist power is in the court of equity to terminate the trust, but with that power is not necessarily imposed the duty so to do. It is still discretionary. *Perry on Trusts*, § 920; 39 Cyc. 99; *Eagle v. Ingram*, 142 Cal. 15, 75 Pac. 568, 100 Am. St. Rep. 99; *Hildreth v. Elliot*, 8 Pick. (Mass.) 293; *Wenzel v. Powder*, 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 380; *Godfrey v. Roberts*, 65 N. J. Eq. 323, 55 Atl. 353; *May v. Walter's Executors*, 97 S. W. 423, 30 Ky. Law Rep. 59; *In re Lewis' Estate*, 231 Pa. 60, 79 Atl. 921; *Estate of Yates*, 149 Pac. 555. The converse of this proposition follows as matter of course. If all the parties in interest are not before the court, equity has no power to terminate the trust. Civ. Code, 2280; 2 *Perry on Trusts* (6th Ed.) § 920; *Brown v. Brown*, 97 Ga. 531, 25 S. E. 353, 33 L. R. A. 816; 39 Cyc. 99. The importance of this consideration arises from the fact that if remainders and remaindermen were created, admittedly the latter were not before the court and its decree must fail. And thus by this different method of approach we are brought to the vital consideration in the case: Were such remainders created? Our Civil Code, § 769, declares that:

"When a future estate, other than a reversion, is dependent on the precedent estate, it may be called a remainder, and may be created and transferred by that name."

We have in this trust apt language to create such a future estate, dependent for its enjoyment upon the termination of a precedent life estate. We have therefore apt language to create a remainder, and it is quite permissible that it should be created to commence at a future day and be limited upon a life estate. Civ. Code, § 773. There is in this trust a power of appointment or nomination reserved to the trustor. It can be exercised in but one way, and that is by her will. But such power of appointment does not prevent the vesting of the future estate in remainder. Civ. Code, § 781. Everything then which the law contemplates shall exist for the creation of equitable remainders or remainders in trust is found in this trust. Whether they be regarded as vested or contingent is immaterial, for in either case the estate and interest are alienable. *Davis v. Willson*, 115 Ky. 639, 74 S. W. 696; *McDonald v. Bayard Sav. Bank*, 123 Iowa, 413, 98 N. W. 1025; *Sikemeler v. Galvin*, 124 Mo. 367.¹ But in truth these remainders are to be regarded as vested remainders, subject to divestiture only upon the exercise of the power of nomination by will reserved to the trustor. A case substantially identical with this was presented by *Crackanthorpe v. Sickles*, 156 App. Div. 753, 141 N. Y. Supp. 370. There, as here, the plaintiff, an unmarried woman, conveyed property to a trustee to invest and manage and pay the net income thereof to her during her life, and at her death to distribute it to such persons as she might designate by her will, or, should she die intestate, then to divide the property among her lawful issue, which she might leave surviving. In that case, as in this, plaintiff sought a dissolution of the trust, claiming to be the only person beneficially interested therein. The court in disposing of these contentions said:

"It must therefore be determined just what the interest of these children is. The effect of the deed was to vest in the plaintiff an equitable life estate in the property, with a general power of appointment by will to any person or persons whom she might designate. In default of an appointment of successors to the property pursuant to the power, the deed created a remainder to the lawful issue of the plaintiff who should survive her. It is a well-established rule, both of the common law and by statute, in this state that estates in remainder which are limited to take effect upon default in the exercise of a power of appointment are not prevented from vesting by the existence of the power, but take effect in the same manner as if no power existed, subject, however, to be divested by an exercise of the power. . . . By virtue of this clause of the deed there sprung into being upon the birth of each child of the plaintiff a vested remainder, subject to open up and let in after-born children, and to be divested either by the death of such child without issue before the death of the plaintiff or by the plaintiff's exercising her power of appointment by will. It is needless to add that such an interest is alienable. *Moore v. Littel*, 41 N. Y. 66; *Campbell v. Stokes*, 142 N. Y. 23, 36 N. E. 811; *Matter of Chapman*, 133 App. Div. 337, 117 N. Y. Supp. 679; *Shindler v. Robinson*, 150 App. Div. 875, at page 881, 135 N. Y. Supp. 1056; *New York*

Real Property Law, § 40. It follows, therefore, that the children of the plaintiff are persons beneficially interested in the deed of trust, and it cannot be revoked without their consent. They are also necessary parties defendant."

[7] Respondent places reliance upon certain cases as supporting the decree of the court terminating this trust. Those cases, however, deal with a dry, naked trust, or with a trust where every party in interest is before the court in joining in the application or rest expressly or by necessary implication upon the rule in *Shelley's Case*. But this ancient rule was of feudal origin and policy, and did deliberate and designed violence to the deed of the grantor or the will of the testator, to the end that the laws of inheritance should prevail over the wish of the grantor or testator. It arbitrarily declared that apt words which indisputably created a remainder in the heirs should be held as a "limitation." In other words, as a definition of the estate which the grantee or devisee took, and that that estate was the fee simple, the remaindermen being thus cut off and taking nothing. So obnoxious was this rule to justice that it was always subjected to rigidly strict construction, till finally in many states, as in this state, it was absolutely repealed. Civ. Code, § 779; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049. The effect of the repeal of this arbitrary rule is to restore to courts of equity their right to construe this language, in whatever instrument it may be found, in accordance with its plain import and intent.

A brief review of the cases relied on by plaintiff should follow the general statement concerning them which has been given above. The first of these is *Eakle v. Ingram*, 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99. Mrs. Hammack had conveyed certain property to her daughter, Mrs. Eakle, in trust, to pay over the rents and profits of the property to the mother during her lifetime and after her death to pay them to her son, Henry Hammack. There was no remainder over after the termination of these equitable interests for life. Mrs. Hammack died, leaving as her heirs four children, Mrs. Eakle, Mrs. Bean, George and Henry Hammack. Mrs. Eakle resigned as trustee, and Ingram, defendant in the action, was appointed in her place. Mrs. Hammack's four children who had thus inherited the trust property, and one of whom was beneficially interested in the rents and profits of the property during his life, all joined in their petition to the court to have the trust annulled. Every party in interest was before the court. The only person whose rights could be injuriously affected by the termination of the trust was Henry Hammack, who joined in the request that it be terminated. Under this condition the court in equity terminated the trust, not under the compulsion of any rules or principles of equity, but because all the parties in interest being before it, all assenting and

¹ 27 S. W. 551.

indeed requesting that the court do this thing, it was within its power so to do in a proper case, and it considered that to be a proper case. Manifestly this decision has no bearing upon the questions involved in the case at bar, where the gravamen of the complaint is that all of the parties in interest are not before the court and are not consenting. It is perfectly plain, for example, that if Henry Hammack had objected, the court in equity could not have destroyed his equitable life estate.

In *Dodson v. Ball*, 60 Pa. 492, 100 Am. Dec. 586, the rule in *Shelley's Case*, prevailing in Pennsylvania, is the unquestioned foundation of the construction of the trust and of the decree given. The discussion is too long to quote, but the holding is that the words employed bring the trust within the rule in *Shelley's Case*; that remainders therefore are not created; that all the equitable interest is in Mrs. Dodson; and that the legal estate should therefore be executed in her. And a sufficient exemplification of this may be found in the following single sentence, where that court, after reviewing many of its own authorities, said:

"Those cases decide that a devise for life, with remainder to children and their heirs, and in some of the cases with superadded words of distribution, gave an estate of inheritance to the life tenant."

In *Raffel v. Safe Deposit & Trust Co.*, 100 Md. 141, 59 Atl. 702, the plaintiff had executed a deed of trust to pay the net income of the property conveyed to her, "reserving, however, the right by a last will and testament to bequeath and devise all the property that may be a part of the trust estate" and upon failure to execute such last will the part undisposed of at the time of her death "to vest in her next of kin or heirs according to law." The case is not a simple one in its facts. The equitable questions touching the construction of the instrument are complicated by the contention of the trustor that she did not understand what she was doing; that she believed she had retained a power of revocation; that she was inexperienced in business matters and did not at all understand the effect of her deed. Discussing these considerations, sufficient in themselves to work an avoidance of the trust, the court said:

"According to the facts and preponderance of proof in the case the appellant did not intend by the deed to surrender control of her property, and that it was executed by her under a mistaken belief as to her power to revoke it. It also appears that she was misadvised as to the legal effect of the deed and her rights under it."

So far as the construction of plaintiff's deed is concerned, the rule in *Shelley's Case* prevailing in the state of Maryland, the court's discussion is addressed to the application of that rule, to a review of its cases based on that rule, and the determination is reached that plaintiff is the sole party in interest since—

"there are no vested rights in remainder created by the deed, nor are the rights of third parties or creditors in any way involved."

The court's conclusion upon the whole matter is that:

"A deed executed under such circumstances, * * * cannot be upheld, nor 'treated as the free, voluntary, and unbiased act of the grantor.'"

Cornwell v. Orton, 126 Mo. 360, 27 S. W. 537, was not an action to terminate a trust, but an action in ejectment brought by the heirs at law. The grantor conveyed property to a trustee on the trust that he would allow Mrs. Cornwell to occupy the property conveyed and have all the rents and profits thereof, and that the trustee would, at any and all times thereafter, at the request and direction of said Catherine Cornwell, expressed in writing, signed by her, or by her authority, bargain, sell, mortgage, convey, lease, rent, or thereupon dispose of said premises or any part thereof, and that he would at her death convey and dispose of the premises and all profits and proceeds thereof in such manner, to such person or persons, and at such time or times, as Catherine Cornwell by her last will and testament, or by any other writing signed by her or her authority, direct or appoint, and in default of such appointment then he would convey said property to James Cornwell, his heirs and assigns, James Cornwell being the husband of Catherine. The contention upon the one hand was that the deed vested a fee-simple estate in Mrs. Cornwell, and that the direction of the trustee to convey to James Cornwell, his heirs and assigns, in the event that Catherine Cornwell failed to nominate, was a nugatory provision, as it was an attempt to create a remainder upon an absolute fee. The opposing contention was that under the true construction of the deed it conveyed a life estate only to Mrs. Cornwell, with power in the trustee to convey the fee in remainder to her husband or his heirs, in the event that she failed to exercise her right to appoint. The court considered at length the terms of the trust, the absolute power of disposition given to Mrs. Cornwell over all of the property during her lifetime, the compulsion upon the trustee to do any and all things concerning the property which Mrs. Cornwell might direct, declared that the language was inadequate to create a mere life estate, and was fully adequate to the creation of a fee simple absolute, and determined that the trust was a naked trust, and that the fee simple absolute did vest in Mrs. Cornwell; wherefore the remainder attempted to be erected upon it was void. It needs no argument to show that such a conclusion could not and would not be arrived at in construing a trust such as this, where the beneficiary of the equitable life estate not only has no power of disposition of the corpus of the trust property, but no power to control its investments, no power even to dispose of the property except by a disposition taking effect upon her death un-

der her will, which, to be a will, must of course be an instrument complying with all the terms of our statutes in regard thereto.

Sears v. Choate, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320, was an action brought by the plaintiff to terminate a trust created for his benefit by the will of his father. By this will the father devised his residuary estate to trustees, who were to pay to plaintiff at the age of 21 a certain sum of money; thereafter the sum of \$4,000 annually until he was 25 years of age; thereafter \$6,000 annually until he was 30 years of age; and thereafter \$10,000 annually. This son was his only child and sole heir at law. There was no limitation over to any person upon the death of this son. The court points out this fact, saying:

"There is in the will no limitation over of the estate in any contingency to any other person."

The son was the sole person in interest, and was before the court, and says the court further:

"Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and * * * should have the control and disposal of it, unless some good cause appears to the contrary."

Here was a plain case where equity, not under compulsion, but in the exercise of its wise discretion, deemed it advisable to terminate a trust and did so. It presents similar features of equitable consideration to those which appeared in *Estate of Yates*, 149 Pac. 555, where this court refused to terminate a trust.

In *Warner v. Sprigg*, 62 Md. 14, the testator devised his estate to three trustees to hold for his three children, and then provided:

"After the decease of my said sons, respectively, their shares to go to their several heirs at law, as also the share of my said daughter, should she die, having made no testamentary disposal thereof."

It is held that the trust in the real estate involved no powers or duties in the trustees. By virtue of the statute of uses of St. 27 Henry VIII, ch. 10, it was therefore executed in the children, who thereby took legal estates under the will, while as to the devises to their heirs at law after their decease, under the rule in *Shelley's Case*, remainders were not created, but the children took the fee. In this state neither the statute of uses nor the rule in *Shelley's Case* forms a part of the body of our law.

In *Angle v. Marshall*, 55 W. Va. 671, 47 S. E. 882, a life tenant, becoming physically infirm, conveyed his life estate to a trustee to manage the farm, but always under the control and advice of the life tenant. This was

all of the trust. The remaindermen—the children of the life tenant—subsequently conveyed their title, and the life tenant thereupon conveyed his interest to the same grantee. The trust deed of the life tenant declared that it was irrevocable. The court held that the trust deed was in fact nothing more than an agency or power of attorney, and that, notwithstanding that it was declared to be irrevocable, as the power was not coupled with an interest, it was always revocable. The inapplicability of this decision to the questions here calling for determination is, we think, most obvious.

This concludes the review of all the cases upon which respondent relies, and if it shall be thought that this review does not justify to the fullest extent the comments heretofore made as to their general inapplicability, it may be said in conclusion upon the matter that the question is satisfactorily and conclusively disposed of against respondent's contention by our own decision in *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049. There was a grant of lands to the "party of the second part, for and during his natural life, and to the issue and heirs of the body of the said party of the second part." This court, declaring that under the rule in *Shelley's Case* this language would vest the fee simple absolute in the party of the second part, held and declared that by force of section 779 of the Civil Code that rule was abrogated and remainders were created, saying:

"By section 779 of the Civil Code the term 'heirs' is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (Civ. Code, § 690), and therefore denominated a future interest, is nevertheless an estate in the property capable of being transferred in the same manner as a present interest (Civ. Code, § 699). Counsel for appellant states in his brief that the only question on this appeal is 'whether the deed in question conveyed an estate in fee simple to plaintiff, or a life estate to plaintiff, with remainder in fee to the issue and heirs of his body;' and we therefore limit our decision to this proposition, and hold that by the instrument in question a life estate only was conveyed to the plaintiff."

The conclusiveness of this determination, its immediate and direct bearing upon the language of this trust deed, are so plain as to relieve the question from the need of further discussion.

The decree appealed from is therefore reversed, with directions to the trial court to deny to plaintiff the relief sought.

We concur: MELVIN, J.; LORIGAN, J.

(171 Cal. 621)

WHITTEN et al. v. DABNEY et al. (MASON, Intervener; two cases).
(S. F. 6486, 6591.)

(Supreme Court of California. Dec. 27, 1915.
Rehearing Denied Jan. 26, 1916.)

1. CORPORATIONS ⇐99—SALES OF STOCK—ISSUANCE IN PAYMENT OF PROPERTY.

It was within the power of a corporation to issue all of its stock in payment of leaseholds upon oil lands transferred to it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. ⇐99.]

2. CORPORATIONS ⇐211—STOCKHOLDER'S ACTION ON BEHALF OF CORPORATION—PLEADING.

In a stockholder's action on behalf of the corporation against persons then or previously in control of the corporation, the issuance of all of the stock of the corporation to certain of the defendants in payment of leaseholds upon oil lands transferred to the corporation was not shown to be corrupt by alleging that it was the outcome of a conspiracy.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. ⇐211.]

3. CORPORATIONS ⇐204—STOCKHOLDER'S ACTION ON BEHALF OF CORPORATION—RELIEF OBTAINABLE.

A stockholder's action on behalf of the corporation may be maintained only for the purpose of redressing wrongs and impositions which the corporation itself has suffered, and individual wrongs of the stockholders are not subject to redress in such an action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783-790; Dec. Dig. ⇐204.]

4. CORPORATIONS ⇐204—STOCKHOLDER'S ACTION ON BEHALF OF CORPORATION—RELIEF OBTAINABLE.

Where persons, to whom all the stock in a corporation was issued in payment of property, falsely represented in selling such stock that it was treasury stock, and that the proceeds of sales would go into the treasury and be used in developing the corporation's business, such fraudulent representations did not constitute a wrong against the corporation, but merely gave the defrauded purchasers a right to proceed against the persons making the fraudulent representations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783-790; Dec. Dig. ⇐204.]

5. CORPORATIONS ⇐211—STOCKHOLDER'S ACTION IN BEHALF OF CORPORATION — COMPLAINT.

In a stockholder's action for an accounting the complaint showed that the corporation agreed to issue all of the stock to D. and M. in payment for leaseholds on oil lands, but that it was not issued; that D. and M. agreed to contribute 250,000 shares to be treated as treasury stock, which offer was accepted; that afterwards when this was a fully completed gift, the agreement was amended so that stock theretofore sold was to be considered as treasury stock and the proceeds of sales paid into the treasury and other stock sufficient to make up the 250,000 shares taken over by the corporation; that the proceeds of sales were not turned over to the corporation; that D. and M. agreed to sell the stock to B. and agreed that he should have the naming of the entire directory; that M. and D. would vote for such directors as he should designate, and that he would sell the treasury stock turning the proceeds into the treasury, less 60 per cent. to be retained as commission; that thereunder B. took and retained absolute dominion and control of the corporation; that to stimulate sales of stock false dividends were

declared out of proceeds of sales of stock; that D. and B. owed the corporation money and had falsified the corporation's books so that the indebtedness appeared to be paid, specific instances of this being given; that B. took commissions from sales of stock without authority from the corporation and with the knowledge of the other defendants, and that he falsely represented the financial condition and future prospects of the corporation as an aid to the plan of stock jobbing into which defendants had entered. *Held*, that this complaint charged sufficient facts to demand an investigation and inquiry by a court of equity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814-818, 820, 821, 823, 824; Dec. Dig. ⇐211.]

6. LIMITATION OF ACTIONS ⇐37 — LIMITATIONS APPLICABLE—STOCKHOLDER'S ACTION — "LIABILITY CREATED BY LAW."

Code Civ. Proc. § 338, subd. 4, requires actions for relief on the ground of fraud or mistake to be brought within 3 years, and provides that the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Section 359 provides that that title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture or to enforce a liability created by law, but that such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created. *Held*, that a stockholder's action to require an accounting by persons controlling the corporation whose fraudulent acts had caused loss to the corporation, was governed by section 338, and not by section 359, since while every liability is in a sense created by law, section 359 uses the phrase "liability created by law" as referring to liabilities in the nature of penalties or forfeitures.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186, 477; Dec. Dig. ⇐37.]

For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

7. LIMITATION OF ACTIONS ⇐100—COMPUTATION OF PERIOD OF LIMITATION—STOCKHOLDER'S ACTION.

Notice to stockholders in a corporation of the fraudulent acts of persons in control of the corporation for such a length of time as would bar an action by them on behalf of the corporation did not bar the rights of the corporation when prosecuted by another stockholder, as limitations will not run against the corporation while it remains in control of a board of directors accused of participation in the fraud, and a stockholder suing on behalf of the corporation sues purely as a trustee, and while he has an unquestioned right to sue it is in no sense his duty to sue.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. ⇐100.]

8. CORPORATIONS ⇐207½, New, vol. 10 Key- No. Series—STOCKHOLDER'S ACTION IN BEHALF OF CORPORATION — COMPROMISE AND SETTLEMENT.

In a stockholder's action for an accounting against a person in control of the corporation and persons who formerly owned all of the stock, a judgment was rendered for defendants on demurrer and an appeal taken, pending which an agreement was made between plaintiffs and certain of the defendants reciting that there had been a complete settlement and adjustment between plaintiffs and such defendants as to all claims of plaintiffs against such defendants; and that it was not deemed advisable to dismiss

the appeal as to such defendants at that time, but providing that if the appeal was sustained and the cause remanded the plaintiffs should amend so as to eliminate such defendants. *Held*, that a motion to dismiss the appeal as to such defendants based on such composition agreement was not properly before the appellate court, as a stockholder suing on behalf of the corporation sues as a trustee, and will not be permitted to take any act which has not first received the sanction of the court, and until the trial court, after scrutiny and examination, should determine that the composition agreement fully protected the corporation's rights, it could not be given the slightest efficacy.

9. ATTORNEY AND CLIENT — 75—MOTIONS FOR SUBSTITUTION OF ATTORNEYS.

In a stockholder's action on behalf of the corporation, a motion for the substitution of other attorneys in place of those appearing for the corporation could better be made and determined in the trial court than in an appellate court, and where the judgment must be reversed a motion for such substitution would be denied without prejudice to its renewal in the trial court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110-119; Dec. Dig. § 75.]

10. COSTS — 98—PERSONS LIABLE—INTERVENERS.

Where, in a stockholder's action on behalf of the corporation, a stockholder other than the original plaintiff petitioned for and obtained leave to intervene and filed a complaint in intervention, the trial court's discretionary power with respect to costs did not authorize it to award against him any costs which accrued before he connected himself with the litigation.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 383; Dec. Dig. § 98.]

Department 2. Appeals from Superior Court, Alameda County; William S. Wells, Judge.

Action by D. D. Whitten and others against Joseph B. Dabney and others, in which Frederick E. Mason intervened. From a judgment for defendants on demurrer, plaintiffs and intervener separately appeal. Reversed and remanded.

Kemp, Mitchell & Silberberg, of Los Angeles, and Gibson & Woolner, of Oakland, for appellants. W. B. Rinehart, of Oakland, and W. H. H. Hart, of San Francisco, for respondents. John Ralph Wilson, of San Francisco (Walter G. Bonta, of San Francisco, of counsel), for intervener.

HENSHAW, J. Plaintiffs, as stockholders of the Dabney Oil Company, sued defendants Dabney, Miley, and Butler, alleging certain fraudulent impositions practiced by them upon the Dabney Oil Company, resulting in great loss to that company. They asked for an accounting on behalf of the company against these defendants, and a recovery in to the treasury of the company of the amount of which it might be determined that the company had been defrauded. A conspiracy to commit these asserted fraudulent acts is charged against the three men. Their control of the corporation through its board of directors and the refusal of the corporation upon demand to prosecute this action is also

set forth. Frederick E. Mason, another stockholder, petitioned for leave to intervene, and permission was granted. His complaint in intervention set up the same wrongs pleaded by plaintiffs and joined with them in their prayer for relief.

A general demurrer was interposed to these complaints and was sustained. So also was a demurrer raising the bar of the statute of limitations to the prosecution of the action. From the judgment which followed, plaintiffs appeal in San Francisco No. 6486. From that same judgment the intervener appeals in San Francisco No. 6591. Both of these appeals present the same asserted error of the court in sustaining the general demurrer for absence of facts. Both, too, present a like question upon the bar of the statute of limitations. In both also is involved the question of the right of defendants Dabney and Miley to be dismissed from the action by virtue of a composition agreement entered into between them and the plaintiffs, to which composition agreement the intervener was not a party. And, finally, the intervener's appeal (San Francisco No. 6591) presents a minor question of the imposition upon him of certain costs growing out of the award of the judgment in favor of the defendants.

[1-3] Saving in the particulars which may be pointed out the complaints of plaintiffs and intervener may be treated as a single pleading and spoken of as the complaint. The complaint charged that in January, 1901, the defendants "entered into a conspiracy to defraud the future stockholders of the Dabney Oil Company." In furtherance of this conspiracy they caused the Dabney Oil Company to be incorporated, and Dabney and Butler conveyed to it certain leaseholds upon oil lands which they owned and which were of the value of \$50,000, the Dabney Oil Company issuing and transferring to Dabney and Miley for these leaseholds all of the stock of the corporation, the directors agreeing to issue to Dabney and Miley, or to such persons as they should direct, this stock as fully paid up and nonassessable stock of the corporation. It was quite within the power of the corporation for it to issue all of its stock in payment of the property which it received. *Turner v. Markham et al.*, 155 Cal. 562, 102 Pac. 272; *Garretson v. Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; *Lum v. A. W. & V. Co.*, 185 Cal. 657, 133 Pac. 803, Ann. Cas. 1915A, 816. Up to this point, therefore, no illegal or fraudulent conduct is shown, and the acts of these defendants, so far innocent in themselves, were not made corrupt by designating them as the outcome of a "conspiracy." And we here pause to point out that there seems to have been some confusion in the mind of the pleader as to the wrongs which he could right in this form of action. Thus he charges the creation of the conspiracy as being designed "to defraud the future stockholders of the Dabney Oil Company." But

no one of the individual wrongs of any of the stockholders is subject to redress in this action. Plaintiffs are allowed to prosecute this action by virtue of their stockholder's relationship to the corporation, but only for the purpose of redressing wrongs and impositions which the corporation itself had suffered. *Turner v. Markham et al.*, supra. These stockholders, as plaintiffs, therefore occupied a strict fiduciary relationship to the corporation whose interests they were representing. Their position may not inaptly be compared to that of a guardian ad litem, to which consideration we will later return.

[4, 5] Proceeding now with the complaint and summarizing its allegations of wrongdoing on the part of these defendants, those allegations amount to this: That Dabney and Miley, having thus acquired title to all the stock of the corporation, entered into a secret agreement with Butler, by which upon terms Butler should purchase from them this stock, and for the purpose of inducing the public to purchase this stock they represented to intending purchasers that the stock was treasury stock and that the proceeds from the sale of it would go into the treasury of the company and be used in developing the oil mining industry of the corporation. Again we must pause to say that these fraudulent representations, however injuriously they may have wronged the purchasers of stock, do not constitute a wrong against the corporation, which does not appear at this time to have had any treasury stock at all. The right of the individual stockholder thus defrauded would manifestly be simply the right to proceed against the wrongdoers who had made these fraudulent representations to his injury. However it does appear that in furtherance of the design of these defendants to unload their stock upon the market as treasury stock they did commit certain flagrant wrongs upon the corporation itself. Thus it is made to appear that the stock was not issued to Dabney and Miley, but remained in the corporation stock book subject to issue upon their demand. In August, 1901, they agreed in writing to contribute of their holdings 250,000 shares of the stock, to be designated and treated as treasury stock, and this offer was accepted by the corporation. In 1902 these defendants procured the corporation to accept an amendment to the terms of this gift, which at the time was a fully completed gift. By this amended agreement all of the stock sold prior to March, 1902, was to be considered treasury stock, and the proceeds thereof, amounting to \$76,000, accruing from the sale of 99,000 shares was to be paid into the treasury of the corporation, and additional stock of Dabney and Miley (in indicated proportions) was to be taken over by the corporation as treasury stock sufficient to make up the 250,000 shares. It is charged that this was but a colorable transaction, and that Dabney, Butler, and Miley failed and refused ever to turn over to

or credit the corporation with this \$76,000. In March, 1902, Dabney, Miley, and Butler entered into a secret agreement whereby Butler was to buy the stock of Dabney and Miley, making payments at specified times in specified amounts. It was agreed that Butler "shall have the naming of the entire directory of the company," and Miley and Dabney agreed that they would always vote their remaining stock "for such persons as directors as shall be designated by" Butler. And finally this agreement provided that Butler would from time to time sell the treasury stock and turn into the treasury of the company the proceeds thereof, "less 50 per cent. which he shall retain as commission." Under these agreements Butler took the active management and control of the corporation in 1902, and continued in such absolute possession, dominion, and control through dummy directors up to and including the date of the commencement of the action. To stimulate the sale of the stock false dividends were declared and paid, not out of the earnings of the corporation, but out of the proceeds of the sale of the stock. Further it is charged that Dabney and Butler owed the corporation large sums of money; that they never paid these indebtednesses, but caused false credits to be entered and appear on the books of the corporation, whereby these indebtednesses were made to appear to have been paid and canceled. Specific instances of this are given. Further, it charged that Butler took commissions to the amount of \$38,000 from the sale of the treasury stock of the corporation without authority from the corporation; that these acts of wrongdoing and misappropriation of funds were either known to the defendants, or were done by Butler in furtherance of the conspiracy to unload their stock, in which the three defendants had joined. Finally it is charged that from time to time Butler, for the purpose of stilling the alarms of the stockholders and lulling them into repose, put forth false representations as to the financial condition and future prospects of the corporation, and specifically in 1908, sent out a circular report to the stockholders in which he declared that he had never "received one cent in salary or one cent in cash or stock as dividends upon my holdings, or one cent of advantage from the company in any way, either directly or indirectly. * * * It is true I have sometimes been forced to sell stock, but I have never sold any except to procure money to loan to the company, or to use directly in the promotion of its interests." The falsity of these representations is asserted, and it is charged that they were made in aid of the iniquitous plan of stock jobbing into which the defendants had entered.

This sufficiently indicates the gravamen of the charges of wrongdoing as they affect the corporation, and it certainly needs no discussion to establish that they charge sufficient facts to demand an investigation and

inquiry by the court of equity, to which the appeal has been made. So true and so apparent do we think this is that we conclude that the court sustained the demurrer upon the ground that the statute of limitations was well pleaded, and to this proposition we next come.

Plaintiffs allege that in 1905 one Gilbane, a stockholder, "and a few other stockholders, all residents of Providence, Rhode Island," attempted to secure full knowledge of the condition of the affairs of the corporation. They employed an accountant to examine the books of the corporation. He was allowed to examine only the books which were turned over to him by Butler as the books of account. They were not the original books, but contained only rewritten portions of the books. In 1906 this accountant made an incomplete report to these stockholders and stated these facts, and, further, that it appeared from his investigation that Dabney and Butler were indebted to the corporation, but that Butler informed him that portions of the rewritten books were erroneous in this particular, and that the original books and a correct accounting would show the contrary, namely, that the corporation was indebted to Butler and Dabney. Butler told him the books were in California, and Gilbane made a trip to California to obtain them. Butler informed him that the books were in the possession of Dabney, and Gilbane was unable to find Dabney in California. On 1907 Gilbane again came to California to find the books, and was again unable to locate Dabney or the books. Returning to New York, where Butler was located, he learned that Butler was in Europe, and was unable to do anything further before 1908. In 1908 Dabney was in Europe and the books could not be located. Butler continued to represent that the original books would show the true state of the accounts of himself and Dabney with the corporation, and that the corporation was largely indebted to them. Throughout 1908 Gilbane's efforts to secure further information were fruitless. In 1909 he came again to California and then saw Miley and Dabney, and was told by them that none of the money obtained from the sale of any of the stock of the corporation belonged to the corporation, but that all of the stock of the corporation and all of the proceeds of the sales thereof were the property of Dabney, Miley, and Butler. The agreements hereinbefore referred to between Dabney, Miley, and Butler were then for the first time exhibited, and their existence for the first time made known to Gilbane. Up to this time the existence of these agreements had been sedulously concealed from Gilbane and all the other stockholders. Shortly after this, in 1910, Gilbane disclosed to these plaintiffs the information which he had thus acquired, including his knowledge that dividends had been paid out of the capital of the corpo-

ration. Prior to this information thus received in 1910, the plaintiffs had no knowledge or suspicion of the existence of any of these facts, or of any such wrongdoing upon the part of the defendants. These plaintiffs were not amongst nor of those stockholders who induced Gilbane to make these investigations, but promptly after receiving this information from Gilbane they instituted this action, after demand upon and the refusal of the corporation so to do.

[6] Touching the question of which provision of the statute of limitations is applicable to this action, discussion is indulged in. Unquestionably the right to prosecute this action is governed by the provisions of section 338, subdivision 4, of the Code of Civil Procedure. It is not the action contemplated by section 359 of the same Code "to enforce a liability created by law." True it is that, in a sense, every liability enforceable by action is one created by law. But section 359, when it uses that phrase, is dealing with liabilities in the nature of penalties or forfeitures (*noscitur a sociis*) as is clearly disclosed by a reading of the section. This same construction was put upon the language of a like statute by the court of New York in *Brinckerhoff v. Bostwick*, 99 N. Y. 190, 1 N. E. 663.

Respondents argue that from this pleading it is shown that the stockholders' alarms were excited; that they instituted inquiry and were thus put upon notice in 1906, and that this action not having been commenced until 1910 they have waited too long, and relief must be denied. This contention demands again a brief consideration of this peculiar character of action.

[7] A stockholder who institutes it sues purely as a trustee to redress corporate injuries. He has the unquestioned right to sue, but it is in no sense his duty to sue. An individual stockholder may be put upon notice that his corporation has been defrauded. Indeed, complete disclosure of these facts may be made to him. He gives consideration to the time, trouble, and expense of the litigation and the loss in which he would be involved if he failed to prevail, and decides that he will not begin the suit. Some years afterwards another stockholder for the first time gains knowledge of these same facts and institutes the action. It is susceptible of demonstration that the first stockholder knew of all these matters, and that as to him this right of action may be barred. Is this also a bar to the prosecution of the same action by another stockholder who has acted promptly upon learning of the fraud? Clearly this cannot be so. So long as the corporation itself remains under disability and is powerless to act by virtue of the fact that its control is in the hands of a board of directors accused of participation in the frauds, the statute of limitations does not run against it. It is like the minority of an

infant. His rights are not lost until he, after attaining majority, acquiesces for the prescribed time, and by acquiescence affirms the acts done against his interests. So that even if it be said (and in saying it we do not decide it) that such a complaint as this shows that the plaintiff stockholder has waited too long before commencing his action, and that therefore the plea of the statute of limitations must be sustained against his action, this does not operate as a bar to the corporate rights when prosecuted by another stockholder. Otherwise we would have the anomalous and absurd condition presented of a complacent stockholder waiting for three years, pleading facts showing that his right of action was thus barred and thus sweeping away every right of the corporation by the judgment which would have to follow. Whatever, therefore, may have been the rights of the Providence stockholders to prosecute this action after notice, the right of these plaintiffs is not barred under their allegation that they first acquired notice and knowledge of the efforts of the Providence stockholders in 1910.

[8] A motion is made by defendants Dabney and Miley to dismiss the appeals as to them. This motion is based upon an unusual agreement entered into between the plaintiffs and Dabney and Miley after the rendition of judgment in the trial court and appeal taken to this court. It is declared that under the circumstances it is deemed advisable that the appeals from the judgment in favor of Miley and Dabney should not be dismissed at the present time, but plaintiffs stipulate that if the appeal is sustained and the cause remanded to the trial court "that as soon as the said cause shall be so returned to said superior court the plaintiffs shall cause their said complaint to be so amended as to eliminate any cause of action against the said Dabney and said Miley, and that the said plaintiffs will not ask said court or any court for any judgment against the said Dabney and Miley or either of them." All this is based upon a recital that "there has been a complete settlement and adjustment between the plaintiffs and defendants Miley and Dabney as to all claims of the plaintiffs against said Miley and Dabney as set forth in the plaintiffs' complaint." Herein is the extraordinary misconception of the nature of this litigation and of the rights of the plaintiffs under it, to which we have heretofore had occasion to advert in discussing their complaint. And here again it becomes necessary to call attention to the fact that these plaintiffs have no personal wrongs for which they are entitled to seek redress in this action.

"The stockholder does not bring such a suit because his rights have been directly violated, or because the cause of action is his or because he is entitled to the relief sought. He is permitted to sue in this manner simply in order

to set in motion the judicial machinery of the court." 3 Pom. Eq. (3d Ed.) § 1095.

And yet we find in this agreement the plaintiffs declaring that there has been a complete settlement and adjustment "of all claims of the plaintiffs against Miley and Dabney as set forth in plaintiffs' complaint." What is the exact situation of a plaintiff in such an action? He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other. His position in the litigation is in every legal sense the precise equivalent of that of the guardian ad litem. The guardian ad litem stands as the representative of some person incompetent to sue or be sued directly. He is appointed by the court to represent that incompetent's interests; to prosecute or defend with the highest diligence and good faith. The stockholder beginning this action does not even occupy the position of a creditor suing on his own account and on account of his fellow creditors. In the latter case the creditor plaintiff has a direct personal interest in the litigation, and within limitations not here necessary to discuss, may deal with that litigation as his own. But the stockholder acts in purely a representative capacity. He is a guardian ad litem by virtue of statutory authority, empowered to do precisely what a guardian ad litem appointed by a court may do. He has gone into equity seeking redress for a corporation under disability to obtain relief itself, precisely as the guardian ad litem goes into court to obtain like redress for a client under disability by reason of incompetency or nonage. The principles governing the conduct of a guardian ad litem are in full strictness applicable to the conduct of such a plaintiff stockholder. Not only should a plaintiff in such a fiduciary capacity be willing to take no act that did not first receive the sanction of the court of equity to which he has appealed, but, more than this, he is not permitted to take any act without such sanction. *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212. Where an action is prosecuted by a guardian ad litem, the infant is the real party. *Bowers v. Kanaday*, 94 Ga. 209, 21 S. E. 458. And the guardian ad litem cannot even be considered a party to the cause. *Thomason v. Gray*, 84 Ala. 559, 4 South. 394; *Baltimore & Ohio R. Co. v. Fitzpatrick*, 36 Md. 619; *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176; *Duffy v. Pinard*, 41 Vt. 297; *Ingram v. Little*, 11 Queen's Bench Div. 251. And what are the principles governing the conduct of a guardian ad litem? It is the right and duty of the court to protect the interests of the incompetent represented by the guardian ad litem and to exercise supervision over the conduct of that guardian. *Hutchinson v. McLaughlin*, 15 Colo. 492, 25 Pac. 317, 11 L. R. A. 287; *Lloyd v. Kirkwood*, 112 Ill. 329; *Haully v. Crozier*, 14 La. Ann. 304; *Revely v. Skinner*, 33 Mo. 98; *Newland v. Gentry*, 18 B. Mon. (Ky.) 666;

Alling v. Alling, 52 N. J. Eq. 92, 27 Atl. 655; *Moore v. Moore*, 4 Sand. Ch. (N. Y.) 38; *Richards v. Tenn., etc.*, R. R. Co., 106 Ga. 614, 33 S. E. 193, 45 L. R. A. 712.

"The court must be satisfied that the incompetent has had a full opportunity to have his day in court by a proper and suitable guardian, and should see, notwithstanding any admission of facts even by such guardian that his rights are not sacrificed." 22 Cyc. 632; *Austin v. Charlestown Female Sem.*, 8 Metc. (Mass.) 198, 41 Am. Dec. 497; *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *U. S. Bank v. Ritchie*, 8 Pet. 128, 3 L. Ed. 890.

The court and not the guardian ad litem has the power to compromise the rights of minors under suitable circumstances. So far, therefore, as this motion to dismiss is concerned it is not even properly before this court for consideration. It is based upon the composition agreement above adverted to. That composition agreement is cognizable by the trial court alone, and will not be given the slightest efficacy until, after scrutiny and examination, it shall be determined by that court that the corporation's rights are fully protected.

It follows that the motions of defendants Dabney and Miley to dismiss the appeals so far as they are concerned should be and are denied, and they will address to the trial court whatever application for relief they may think they are entitled to under their agreement with plaintiffs.

[9] A motion has been made to substitute other attorneys for the attorney of record of the corporation. Opposing affidavits are filed upon the motion. It has already been said that the judgment of the trial court must be reversed. This reversal opens the case to the full equity jurisdiction of the trial court. The motion for substitution can the better be made and determined there, and is here denied without prejudice to its renewal in the trial court. The same disposition is made of the motion to substitute the corporation in the place of the plaintiffs and interveners. This motion may be renewed before the trial court, which will grant or decline to grant it, with due regard to the direct rights of the corporation itself and to the indirect rights of its stockholders.

[10] Finally, intervenor appellant complains of an award made against him for costs arising before he was connected with the litigation. It was unquestionably erroneous for the court to have awarded costs against the intervenor, which costs accrued before he connected himself with the litigation. *Rallsback v. Patton*, 34 Neb. 492, 52 N. W. 277. The discretionary power of the court in the matter of these costs does not go to the extent here exercised.

The judgments appealed from are therefore reversed, the motions denied, and the causes remanded.

We concur: LORIGAN, J.; MELVIN, J.

(171 Cal. 466)

PEOPLE v. ROBBINS. (Or. 1908.)

(Supreme Court of California. Dec. 14, 1915.)

1. CRIMINAL LAW — ACCOMPLICES — CORROBORATION.

Under Pen. Code, § 1111, as amended by St. 1911, p. 484, declaring a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence connecting the defendant with the commission of the offense, it is necessary that the evidence of corroboration shall tend to connect the defendant with the commission of the crime, and it is insufficient if it merely casts suspicion on accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.]

2. CRIMINAL LAW — OFFENSES — EVIDENCE — CORROBORATION.

In a prosecution for the crime against nature, evidence of corroboration of accused's accomplice held insufficient to warrant conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.]

3. CRIMINAL LAW — OFFENSES — "ACCOMPLICE."

Where a boy 16 years of age accompanied accused to a room without objection and made no protest to accused committing the crime against nature, making no complaint until questioned by others, the boy was an accomplice, and his testimony must be corroborated before conviction can be had.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.]

For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

4. CRIMINAL LAW — ACCOMPLICES — CORROBORATION — STATUTES.

Amendment of 1911 (St. 1911, p. 484), whereby Pen. Code, § 1111, formerly declaring that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself and "without the aid of the testimony of the accomplice" tends to connect defendant with the crime, and the corroboration is not sufficient if it merely shows the commission of the offense, was changed so as to omit the expression "which in itself and without the aid of the testimony of the accomplice" did not change the meaning of the statute, and will not allow a conviction upon accomplice testimony, where the accomplice is corroborated only as to statements concerning acts having no essential connection with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.]

5. CRIMINAL LAW — ACCOMPLICES — OFFENSES.

Proofs of mere suspicious circumstances and of an opportunity to commit the crime will not warrant conviction on the testimony of the accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137; Dec. Dig. § 511.]

Lawlor, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Samuel P. Robbins was convicted of the crime against nature, and from the judgment

and an order denying new trial, he appeals. Reversed.

George A. Knight, J. F. Sheehan, and Knight & Heggerty, all of San Francisco, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and C. M. Flickert and Alexander O'Grady, both of San Francisco, for the People.

MELVIN, J. The District Court of Appeal of the First Appellate District filed an opinion in this case, but this court ordered the transfer of the action, to the end that we might further consider the two questions: (1) Was the complaining witness an accomplice? and (2) If an accomplice was he sufficiently corroborated?

The opinion of the learned District Court of Appeal was as follows:

"The defendant in this case was informed against and convicted of the infamous crime against nature, and thereafter sentenced to 5 years in the state prison. The appeal is from the judgment and from an order denying a new trial.

"The only evidence adduced upon the entire case as to the actual commission of the offense is to be found in the testimony of the complaining witness, a boy of about the age of 16 years. His testimony reduced to narrative form is as follows: 'I live at 1638 Baker street and go to school at the Emerson primary school. On September 15, 1913, I was living there with my father, mother, grandmother, uncle, and the landlady of the house, Mrs. Nute, who is the housekeeper. I know and for 5 years past have known the defendant, Samuel P. Robbins. On September 15, 1913, he came to my house at about 3 o'clock in the afternoon. I heard from him before he came to the house. When I came home to lunch at about 12 o'clock he phoned and asked me if he could come up and see me at the house, and I said, "Yes," and he said he would be up about 3 o'clock. I saw him at 3 o'clock in the hall of my residence. I said, "How do you do?" He replied, saying, "How do you do?" We went into the dining room and played dominoes for 25 minutes. Then we went down into the yard and played a game of tennis ball for 25 minutes. After that we went upstairs to the bathroom because he wanted to wash his hands. We entered the bathroom together, as he had asked me to go there with him. He locked the bathroom door. It locks with a bolt and he put a handkerchief over the lock. He pulled down the shade on the window, not all the way but only about half-way down. The glass on the window is lumpy glass that you can't see through, that is, it is frosted. Robbins let the water run in the faucet in the washbasin.'

"Further details of the testimony of this witness as to what occurred need not be narrated here. It will suffice to say that his testimony was to the effect that the crime alleged was perpetrated upon him in the bathroom; and that while in the consummation of the act charged a noise was heard at the bathroom door, and the defendant thereupon said he must stop because he was afraid of being caught. Further testifying, the witness said in substance that after he heard the noise at the door Robbins, the defendant, washed his hands with the flowing water in the basin and rearranged his clothes, unlocked the door, and, after saying good-bye, left the house.

"Mrs. Nute, the landlady and housekeeper above referred to, was called as a witness for the prosecution, her testimony, reduced to narrative form, being as follows: 'I live with the

father and mother of the complaining witness. I have lived there 2 years and 4 months as a housekeeper. The boy is 16 years old. I was living with them on September 15, 1913. I do not know the defendant, Robbins, personally, but have seen him at the house of the father and mother of the boy. I saw him there on September 15, 1913. He was coming through the hall going to the dining room. He remained in the dining room 20 or 25 minutes with the boy; then he went down in the back yard with the boy and played ball with him about 20 or 25 minutes. The defendant, Robbins, then came up and went into the bathroom with the boy. They both entered and the door was closed. I was at my bedroom door and I saw Robbins and the boy enter the bathroom. I hear the door closed and bolt thrown back. I heard the bolt—a patent bolt—click. I went to my room, which looks out at the bathroom window in the light well right off of the hall the same as the bathroom. The bathroom window overlooks the light well, and so does mine. The bathroom window glass is frosted and cannot be looked through. I went into my room and looked through the lace curtains. It was kind of dark in my room. I looked over at the bathroom window. It was up about eight inches. It was open. I saw Robbins go up to the window and look over towards my room and pull the window down. I saw Robbins hauling on the window. My window is about eight feet from the bathroom window. I saw the window shade drawn down. I do not know who did it. Then I went out of my room to the bathroom door and heard the water running. It had been running quite a while before I got there. I was going to stand at the door and listen, but my hand accidentally knocked against it and made a noise. I heard Mr. Robbins talking to Sidney, but could not hear what he said. I stepped back to the kitchen, stayed there about five minutes, and saw Sidney and Mr. Robbins come out. I did not see Robbins after that. I went into my room and closed the door. There is no key-hole in the bathroom, simply a bolt. If there had been I would have peeked through it like any other woman.'

"The primary point presented upon this appeal is that the evidence shows that the complaining witness was an accomplice in the crime charged, and that the defendant was convicted upon the uncorroborated testimony of an accomplice.

[1, 2] "It is conceded, as indeed it must be, that the complaining witness was an accomplice; and that the verdict and judgment cannot be sustained, unless there is in the record evidence sufficient to corroborate the story told by the complaining witness. Section 1111 of the Penal Code explicitly declares that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. It will thus be seen that the statute imperatively makes corroboration of the testimony of an accomplice an essential prerequisite to the conviction of a defendant where the crime charged rests primarily and solely upon the testimony of an accomplice; and it is apparent, therefore, that the court has no control over the subject except to apply the statute. The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the state's case depends solely upon his uncorroborated testimony.

"We are of the opinion that the circumstances attending and preceding the entrance of the boy and the defendant into the bathroom, as narrated by the witness Mrs. Nute, are not sufficient singly or all together to constitute that corroboration which, in the eyes of the law,

will support a verdict founded primarily upon the testimony of an accomplice. The rule in this behalf is well and tersely stated in 12 Cyc., at page 456, where it is said: 'It is necessary that the evidence corroborating an accomplice shall connect or tend to connect the defendant with the commission of the crime. Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused. It must not only show the commission of the offense and the circumstances thereof, but must also implicate the accused in it.' * * * But where the circumstances, when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside.

"In the present case the entrance of the defendant and the boy into the bathroom after having played a game of tennis was neither unnatural nor suspicious; and the fact that the bathroom door was closed and locked, and the window pulled down and the shade partly drawn, would not ordinarily be considered as preparation for an evil purpose. The turning on of the water in the bathroom was but natural and to be expected under the circumstances; and the fact that the conversation of the boy and the defendant could not be heard outside the bathroom door is of no particular significance. Necessarily a conversation carried on behind a closed door is more or less muffled. None of these facts and circumstances is inconsistent with the innocence of the defendant. On the contrary, they are all consistent with an innocent purpose. People entering a bathroom for the usual and ordinary purposes of such a room as a matter of course lock the door and draw the blinds and use the water at hand. Surely if all of these circumstances be consistent with an innocent purpose, it cannot be said that any of them tended to connect and implicate the defendant with the commission of the offense charged. The fact that the defendant had an opportunity to commit it is of no particular significance as far as corroboration is concerned. Of course the opportunity of the defendant to commit the particular crime for which he is on trial may always be shown in connection with other facts to establish his guilt; but we know of no rule which holds that mere opportunity to commit a crime is an incriminating corroborating circumstance. Following the rule that evidence offered for the purpose of corroborating an accomplice must tend to connect the accused with the offense charged, it has been held that there must be corroborating testimony by some witness other than the accomplice as to some act or fact which is an element of the offense charged. *Cooper v. State*, 90 Ala. 641, 8 South. 821. Therefore the fact that the witness Mrs. Nute either intentionally or inadvertently struck the door of the bathroom while she was endeavoring to hear the conversation of the boy and the defendant, was a comparatively unimportant fact which, in our opinion, had no tendency to connect the defendant with the commission of the offense. At its best it did no more than confirm the boy's testimony that he heard a noise at the door, but it does not tend to show that the defendant was engaged in a criminal act. The fact that the suspicion of this witness was aroused because she saw the defendant and the boy enter the bathroom, is not in our judgment corroborative evidence in any sense of the term. The most that can be said in favor of the prosecution upon this phase of the case is that for some reason not explained or detailed the suspicions of the witness were aroused; but it is the rule, and the well-settled rule, in this state, that the corroborative evidence required to convict the defendant in addition to that of the accomplice is not sufficient if it merely tends to raise a suspicion of the guilt of the accused. This is all that the circumstances of the present

case did in the mind of the witness Mrs. Nute; and we are satisfied that those circumstances as narrated by her upon the witness stand could do no more than raise a suspicion in the minds of the jury as to the guilt of the defendant. Mere suspicion, as has been shown, will not suffice as corroborative evidence; and where the evidence relied upon as corroborative of the accomplice is, as in the present case, only such as to raise a suspicion of the guilt of the defendant, the verdict must be set aside."

[3] We are in accord with the foregoing discussion and with the conclusions reached. The learned Attorney General insists that he did not "concede" in the hearing before the District Court of Appeal that the boy was an accomplice. Be that as it may, he has made the point here that, so far as the testimony reported in the transcript shows, it does not necessarily appear that there was any consent to the defendant's acts, but merely passive submission. The obvious answer to this is the simple one that the burden of proof is upon the prosecution. If the alleged victim of defendant's depravity was not sui juris, that was something for the prosecution to prove. *People v. Dong Pok Yip*, 164 Cal. 143, 127 Pac. 1031, is cited as authority upon this question. In that case the child upon whom the assault was committed was a little fellow 9 years of age, and not of ordinary intelligence for his years, and it was held that his mere failure to repulse the assault of the defendant was not in law a consent. In this case the facts were different. The boy was 16 years of age, and while it appears that he had only attended school for a short time, there was nothing in the evidence to indicate that he was not possessed of the average mentality of lads of his age. According to his own testimony he submitted to a removal of a part of his clothing by the defendant, and even obeyed the suggestion of the latter that he assume a posture convenient for the perpetration of the crime. He made no outcry and no complaint until Mrs. Nute interrogated him, on the following day, with reference to the occurrences in the bathroom. His conduct as described by himself was within the meaning of the definition of an accomplice in *People v. Coffey*, 161 Cal. 448, 119 Pac. 907, 39 L. R. A. (N. S.) 704, where Mr. Justice Henshaw, delivering the opinion of the court, said:

"Where the act requires the co-operation of two persons, and their co-operation is criminally corrupt, the relationship of accomplice is at once established, as in adultery and fornication."

That this case was tried upon the theory that the boy was an accomplice there can be no doubt. The learned judge of the superior court properly instructed the jury upon the necessary corroboration of an accomplice which would justify a conviction. He gave no definition of the term "accomplice," and left to the jury the decision of no question of fact upon which, under the law, it would follow that the complaining witness was or was not an accomplice. We are convinced that this course was the proper one, because tak-

ing the testimony of the complaining witness as true, he was undoubtedly an accomplice.

[4] Was the boy sufficiently corroborated? Before discussing this question we will dispose of the contention of the learned Attorney General that the rule with reference to corroboration has been changed by the amendment of 1911 to section 1111 of the Penal Code. Before its amendment that statute was as follows:

"A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof."

In the year 1911 the section was amended and its language is now as quoted below:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Stats. 1911, p. 484.

It is argued that this section, as amended, may be paraphrased as follows:

"A conviction can now be had on the testimony of an accomplice if he is corroborated by other evidence, which not necessarily in itself, but with the aid of the testimony of an accomplice, tends to connect the defendant with the commission of the offense."

This is only another way of interpreting the section to mean that a conviction may be had upon the testimony of an accomplice if the prosecution can produce any corroboration of any of his statements even if the acts described by him and so corroborated have no essential connection with any crime and may be as consistent with innocence as with guilt. It is not our duty to speculate with reference to the intention of the Legislature in passing any given law, but if we should hazard a guess upon that subject we should say that probably the language contained in the section in its earlier form, but omitted from the later enactment, was thought by the legislators to have a tendency to mislead jurors into the false belief that a complete case for the prosecution must be established without reference to the testimony of the accomplice. Whatever may have been the purpose in modifying the phraseology of the section, we cannot see that its meaning has been changed at all. In discussing the reasons for the rule, Mr. Justice Henshaw, in the opinion in the case of *People v. Coffey*, supra, said (161 Cal. 438, 119 Pac. 901, 39 L. R. A. [N. S.] 704):

"In this state, the rule of positive law since the year 1861 is as has been declared in section 1111 of the Penal Code. Time has not changed the value of such evidence, and succeeding Legislatures have retained the rule, the amendment to the section in 1911 not materially affecting it."

It may be that the quoted language was not necessary to the decision as the old form of the law was under discussion, but the rea-

son for retaining the rule was before the court, and it was interesting as well as valuable to note that no material change had been made in the statute in so many years. Whether the language just quoted from the opinion in the *Coffey* Case was there obiter or not, it expressed the truth, and we adopt it in this opinion.

The counsel for the state specifies nine reasons and an incidental matter which, it is asserted, amount to corroboration of the lad's testimony. We quote them from one of the briefs as follows:

"(1) Defendant meeting the boy at the latter's house.

"(2) The preliminary games in the dining room and back yard.

"(3) Going into the bathroom with the boy.

"(4) Then the closing of the door.

"(5) Then the locking of the door.

"(6) Then the additional precaution of Robbins pulling the window down.

"(7) The further act of pulling down the curtain although the glass in the window was frosted.

"(8) The noise at the door made by Mrs. Nute as her hand accidentally struck the same while listening.

"(9) The parties emerging together, not immediately, but about five minutes after.

"Incidentally, and in addition to the above, the defendant testified he was 58 years of age, and Mrs. Nute testified that the boy was 16 years old, so the disparity of the ages of the defendant and the boy made this quite an unusual friendship, and therefore is a circumstance to be considered. It would not be so unusual were they related."

We have examined these alleged corroborations in detail, and we cannot see how, singly or in combination, they tend to corroborate the boy's testimony except that they show opportunity of the defendant to have committed such a crime as the boy described. That is not enough. It was in evidence, without contradiction, that the defendant was on terms of friendship with the boy's father and mother, and that he had frequently visited the house. He went there openly and played with the boy innocent games in the dining room and out of doors. What was more natural than the going of the man and the boy to the bathroom to wash their hands after their game in the yard? The closing and locking of the door were not indices of guilt, even if it be conceded that defendant and not the boy performed those acts. There was no corroboration on the part of any one of the boy's statements that Robbins did these things. Mrs. Nute simply "heard the lock click." But even if we regard that as corroboration of the boy's statement, there was nothing sinister in the closing and locking of the door. Nothing could be more natural than these simple precautions on the part of the man or the boy to prevent any one from entering the room while they were removing the dirt from their hands and faces. There was nothing more than enough, perhaps, to create a mere suspicion in the fact, if it were a fact, that Robbins made some adjustment of the window, but there is only

partial corroboration of the boy's testimony on that matter by Mrs. Nute. The complaining witness did not say a word about the lowering of the window. He said that defendant pulled the shade halfway down, although the glass was frosted. Mrs. Nute said that she saw Mr. Robbins go to the open window and pull the window down. This she observed from the window of her room across the light well. She said that she saw the shade pulled down. Of course, she could not tell by whom. It is true that the boy and Mrs. Nute agree about the noise at the door, but that corroboration is absolutely unimportant. If the two persons in the bathroom were engaged in perfectly innocent occupations, the noise made by the woman at the door would have been heard by them. The length of time occupied by the man and boy in the bathroom was not an unusual period for the washing of their hands and faces. It by no means indicated the commission of a crime. Nor was the friendship of the middle-aged man for the lad anything to cast suspicion upon the former. In these days of the "big brother movement" thousands of men throughout the country are systematically cultivating the friendship of boys, to the end that the influence of mature thought and association with men may aid in the development of the best qualities of the children. Viewed in the light most damaging to the defendant, the only thing which may be said of the corroborated circumstances related in the boy's testimony is that they might arouse suspicion of wrongdoing on the part of Mr. Robbins. But men are not and should not be convicted of degrading crimes upon mere suspicion plus the story of an accomplice. The useless pulling down of the shade over the frosted window is no more a suspicious circumstance against defendant than is the statement of the boy against the verity of his story when he says that Mr. Robbins covered with a handkerchief the lock of the door which Mrs. Nute says had no keyhole. On cross-examination the boy averred that there was a keyhole in the door. Mrs. Nute most emphatically testified that there was none, and added that if there had been she would have looked through it "like any other woman." We do not mean to insinuate that either the boy or the woman deliberately told an untruth about the keyhole. We simply seek to emphasize the danger of convicting a defendant on "suspicious circumstances."

[5] The proofs of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction upon the testimony of an accomplice. *People v. Thompson*, 50 Cal. 480; *People v. Smith*, 98 Cal. 218, 33 Pac. 58; *People v. Koenig*, 99 Cal. 576, 34 Pac. 238; *State v. Willis*, 9 Iowa, 582; *People v. Morton*, 139 Cal. 725, 73 Pac. 609.

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It follows that the judgment and order must be and they are reversed.

We concur: SLOSS, J.; HENSHAW, J.; LORIGAN, J.

LAWLOR, J. I dissent. Apart from the question of the legal characteristics of an accomplice, which I do not find necessary to discuss, I am satisfied that the judgment of the lower court should be upheld upon two grounds: First, that under the evidence the jury could have found that the minor was not an accomplice; and, second, assuming that he was an accomplice, his testimony was sufficiently corroborated.

I think it is clear that the jury could have found, as matter of fact, that the minor was not a willing or corrupt participant in the crime, in that he did not form the criminal intent to co-operate with appellant in its commission. A word about the evidence on this point. There is no suggestion in the record that the minor was consulted beforehand concerning the commission of the act, or that he, in any manner, affirmatively participated therein. The jury may have concluded from the evidence that he never acquiesced in the act. It does not appear that he protested against the criminal conduct of appellant, but, nevertheless, if he did not form the intention to join in the commission of the crime, it cannot be said that he consented. *Levering v. Commonwealth*, 132 Ky. 666, 117 S. W. 253, 136 Am. St. Rep. 192, 19 Ann. Cas. 140. On the subject of consent it was stated in *People v. Dong Pok Yip*, 164 Cal. 143, 147, 127 Pac. 1031, 1032:

"There is a decided difference in law between mere submission and actual consent. Consent, in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means mere passivity or submission, which does not include consent." (Citing authorities.)

It was said in *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329, that:

"Mere consent to a crime, when no act is given, and no encouragement rendered, does not amount to a participation." (Citing *Whar. Cr. § 211d*, and other authorities.)

To hold that the minor consented to the act, expressly or impliedly, is to declare that he acted "voluntarily." *Whar. Crim. Ev. § 440*. The jury was therefore called upon to decide whether the silence of the minor indicated that he performed a voluntary or involuntary part in the transaction. Whether the minor formed the intention to participate with appellant in the act was essentially a question for the jury, and he alone, could give direct testimony upon the point. The jury, however, could infer the state of his mind from the proven circumstances and find the fact either way. The silence or lack of

protest on the part of the minor would not be conclusive; it would only be evidence which it would be proper for the jury to consider in connection with other facts tending to solve the question whether he acted "voluntarily, and with common intent" united in the commission of the crime. *Whar. Crim. Ev.* § 440.

Under all the circumstances, the jury could well have found that the boy was not an accomplice upon any of the theories discussed, and, in my opinion, the judgment should be upheld on that ground alone. The question whether he participated corruptly in the crime should be determined strictly upon the evidence in this case and hence my views are not influenced by the facts in the case of *Dong Pok Yip*, *supra*. The minor in this case was only 16 years of age. He did not attend school until he reached the age of 11, notwithstanding that he lived with his parents and grandmother in apparently comfortable circumstances. The minor testified that he did not know, until Mrs. Nute, the housekeeper, informed him, that what appellant did was wrong. From the evidence the jury may have concluded that the minor did not possess the usual intelligence of one of his years, and that he was completely under the control of appellant, who was old enough to be his grandfather. In the eyes of the jury he probably appeared as a passive, undeveloped boy, subject to the will of the appellant and they judged the case accordingly. Furthermore in considering whether the boy consented it must be kept in mind that before the crime was committed appellant preliminarily performed another act upon the minor, which was probably intended to anticipate his resistance to the offense charged and at the same time stimulate appellant's own abnormal desires.

But if the minor was an accomplice his testimony was nevertheless sufficiently corroborated. I shall first consider the character of the corroborative testimony required. The amendment of section 1111 of the Penal Code (Stats. 1911, p. 484) repealed the clause therein—"which in itself, and without the aid of the testimony of the accomplice." The adjudications touching this clause are to the effect that the corroborative evidence must be independent of the testimony of the accomplice. In *People v. Compton*, 123 Cal. 403, 411, 56 Pac. 44, 48, the rule is thus expressed:

"It could * * * connect him with the crime by considering it with the testimony of the accomplice; yet, if it was necessary so to consider, it would not be legally sufficient. It is legally sufficient only if, standing alone, it tends so to connect him." *People v. Morton*, 139 Cal. 719, 73 Pac. 609; *People v. Lynch*, 122 Cal. 501, 55 Pac. 248; *People v. Creegan*, 121 Cal. 554, 53 Pac. 1082; *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198.

But the repealed clause was not a part of section 1111 when the case was tried, and it is therefore sufficient, on this appeal, if any

corroboration is shown—and it may either be entirely independent of the testimony of the accomplice or confirmatory thereof, provided that it tends to connect the appellant with the crime.

Now, as to the degree of proof required of the corroborative evidence: In *People v. Barker*, 114 Cal. 617, 46 Pac. 601, it was said:

"The strength or credibility of the corroborating evidence is for the jury. It need not be strong; it is sufficient if it tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to but little weight." *People v. McLean*, 84 Cal. 480 [24 Pac. 32]. Nor need it extend to every fact and detail covered by the statements of the accomplice. *People v. Kunz*, 73 Cal. 313 [14 Pac. 836]; *People v. Cloonan*, 50 Cal. 449."

But although more is required by way of corroboration than to raise a mere suspicion, yet the corroborating evidence is sufficient if it tends to connect the defendant with the commission of the offense, although it is slight and entitled, when standing by itself, to but little consideration. *People v. Clough*, 73 Cal. 348, 351, 15 Pac. 5; *People v. Melvane*, 39 Cal. 614; *Kent v. State*, 64 Ark. 247, 253; 41 S. W. 849; *State v. Hicks*, 6 S. D. 325, 60 N. W. 66. It is not necessary to corroborate the testimony of the accomplice by direct evidence. It is sufficient if the connection of the accuser with the alleged crime may be inferred from the corroborative evidence in the case.

These instructions were given to the jury:

"No one can be convicted upon the uncorroborative testimony of an accomplice. * * * If the proof in this case does not satisfy your minds to a moral certainty and beyond all reasonable doubt of the guilt of this defendant, it is your duty to find a verdict of not guilty. It is also the law, and I give it to you in this case in behalf of the defendant, that no one can be convicted upon the uncorroborated testimony of an accomplice. No matter how strong a suspicion of the guilt of the defendant may be established in the minds of the jury by the testimony of an accomplice, no conviction can be had upon such testimony, unless corroborated in some material point."

The testimony of the accomplice is sufficient to prove the actual commission of the offense. *People v. Leavens*, 12 Cal. App. 178, 106 Pac. 1103; *People v. Thompson*, 16 Cal. App. 748, 117 Pac. 1033; *People v. Barnovich*, 16 Cal. App. 427, 117 Pac. 572. Can it be maintained that, as matter of law, there was not sufficient corroborating evidence within the meaning of the rule to connect appellant with the commission of the crime? The testimony of the minor and Mrs. Nute is fairly stated in the majority opinion, and it will not be necessary to refer to it at length.

Mrs. Nute saw appellant and the boy enter the bathroom together and close the door, and then heard the click of the bolt in the door. She saw the appellant glance over toward where she was concealed behind a lace curtain in her own room and lower the window of the bathroom, and observed by the shadow on the frosted glass that the

shade was drawn, but, of course, she could not determine by whom. The boy testified that appellant drew the shade, and, from Mrs. Nute's statements, it is a fair inference, in support of his testimony, that appellant, who lowered the window, also drew the shade. While the fact that Mrs. Nute entertained suspicions of appellant's purpose is not in any sense proper evidence on the question, yet her vigilance throughout may be considered in testing the accuracy of her observations. From her position in her own room she heard the water running quite a while before she started for the bathroom door to listen. She heard the voice of appellant in a low key. It doubtless seemed significant to the jury that the pair were in the bathroom together such a length of time before she made the noise at the door; that they still remained for five minutes; and that appellant should leave the house as soon as he came out of the bathroom.

The inquiry naturally arises from these facts, Why did appellant and the boy go to the bathroom together; why bolt the door, glance over toward where Mrs. Nute was concealed behind the lace curtains, lower the window, and draw the shade? It is incomprehensible that all these precautions would have been taken if the sole object was "to wash their hands." The record is silent on the point whether the bathroom afforded the usual accessories, and this is important in view of the elaborate precautions to avoid observation. Moreover, if the quoted expression was intended to include another use of the bathroom, the indelicacy of such a suggestion would not help the position of appellant.

If the jury believed the testimony of Mrs. Nute, it could have found that the minor was corroborated on "a material point," which the trial court instructed the jury was required. But there was further evidence which may have influenced the jury and led them to reject the testimony of appellant. Does it not seem strange that after making an appointment with the boy at noon for 3 o'clock the domino and tennis games should be of such short duration? It was proper for the jury to consider the conduct of appellant when he was arrested and questioned in the presence of the boy, and thereupon made the incomplete answer: "I don't see why that boy should say that, I did not do." Nor when he said to the officer, on the way to the prison: "I do not know how you feel about it. * * * You are entitled to your opinion and I am entitled to mine. It is his word against my word." His replies were not indicative of one falsely accused, and hardly represented the attitude of an innocent man charged with an unspeakable crime.

His general reputation for the traits involved was put in issue. Code Civ. Proc. § 2053; Pen. Code, § 1102. Two of the five

witnesses called on his behalf were asked, on cross-examination, if they had ever heard that he was accused of similar acts upon two other boys of the age of 16 years, which questions were answered in the negative. In rebuttal, the prosecution called the two boys, both of whom gave testimony that his general reputation for the traits involved was very bad. The officer in the case gave similar testimony.

From a study of the entire evidentiary record it is clear that the conduct of appellant throughout was of an equivocal import, which the jury could have resolved either in favor of his guilt or his innocence. It has found against his innocence, and, if the evidence under any theory of fact is susceptible of such a finding, it should not be disturbed on appeal.

SPREKELSEN v. STATE. (No. 792.)

(Supreme Court of Wyoming. Jan. 25, 1916.)

Error to District Court, Laramie County; William C. Mentzer, Judge.

On petition for rehearing. Rehearing denied.

For former opinion, see 152 Pac. 791.

H. Donzelman, of Cheyenne, for plaintiff in error. D. A. Preston, Atty. Gen., and Samuel M. Thompson, of Cheyenne, Co. and Pros. Atty. for Laramie County, for the State.

BEARD, J. Counsel for plaintiff in error has filed a petition for rehearing in this case. The case was fully and ably presented on the hearing, both in briefs and oral argument, and received full and careful consideration by the several members of the court, and especially so as we were unable to agree. A consideration of the petition for a rehearing and the brief in support thereof has not created in the minds of the majority of the court any doubt as to the correctness of the conclusion announced in their opinion. A rehearing, therefore, is denied.

Rehearing denied.

SCOTT, J., concurs.

POTTER, C. J. My views of the case have not changed, but, being satisfied that a rehearing will not result in disposing of the case differently from that previously announced, and therefore will not subserve any useful purpose, I concur in the denial of the petition for rehearing.

(23 Wyo. 522)

HARDIN, County Treasurer, et al. v. ROCK SPRINGS LODGE NO. 12, A. F. & A. M. (No. 798.)

(Supreme Court of Wyoming. Jan. 25, 1916.)

TAXATION — § 241 — EXEMPTIONS — "PRIVATE PROFIT."

Under Comp. St. 1910, § 2322, providing that lands with buildings thereon used for lodge

rooms for the meetings of all secret, benevolent, and charitable societies or associations shall be exempt from taxation so long as said lands and buildings are not used for private profit, which means a use interfering with the ordinary use of the property by the society, where a lodge owned a building constructed solely for lodge purposes, which it, on occasion, rented only for an evening at a time for social gatherings but which rental did not interfere with its use of the premises, the property was exempt.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 389-393; Dec. Dig. § 241.]

Error to District Court, Sweetwater County; David H. Craig, Judge.

Action by Rock Springs Lodge No. 12, Ancient Free & Accepted Masons, a corporation, to enjoin G. H. Hardin, as County Treasurer, and others, from the collection of the taxes. From an order granting the injunction, the defendants bring error. Affirmed.

W. A. Muir, of Rock Springs, for plaintiffs in error. Walter B. Dunton, of Rock Springs, for defendant in error.

BEARD, J. This case was submitted to and decided by the district court upon an agreed statement of facts, from which it appears: That the defendant in error was and is a Masonic lodge incorporated as provided in chapter 278, Comp. Stat. 1910. That it owned a lot in the town of Rock Springs in Sweetwater county, upon which was situated a three-story building known as the Masonic Temple. That the value of said property was in the neighborhood of \$20,000. That the main portion of the second and third floors of the building consists of, and is and was during the year 1913, used by said society as lodge rooms for its meetings, a portion of the second floor being used as a billiard and pool and reading room for its members, and upon the first floor are ante-rooms, cloakrooms, and toilet rooms, used by those attending lodge meetings or dances in the building, and that the remaining portion of the first floor consists of a ballroom, and that the remaining portion of the third floor is used as a dining or banquet hall and kitchen. That the ballroom was on divers occasions, when not required for its own uses and purposes, rented by the night to dancing clubs and social organizations for a charge of \$20 per night, and when not required for its purposes did so rent it to any reputable club or organization for social dances, provided such persons desired its use for purely social purposes, and not for gain or profit to the club or organization so renting it. And under like circumstances it rented its dining room and kitchen by the night for a charge of \$5 to churches, charitable, fraternal, and social organizations for the purpose of serving suppers and banquets. That the money derived from such rentals was turned into its treasury and used toward defraying the expense of the maintenance of the building. The property was assessed for

the year 1913 at an assessed valuation of \$8,000, and taxes levied against it on that valuation. It was to enjoin the collection of that tax upon the ground that the property was exempt from taxation that this suit was instituted. The injunction was granted, and defendants below appeal.

It is the contention of plaintiffs in error that the portion of the building which, when not used by the lodge, was rented to others for which use the lodge charged such parties, it was not exempt from taxation. The question must be determined by the construction to be given to the statute, which is as follows:

"Lands with the buildings thereon, used for schools, orphan asylums or hospitals, and for lodge rooms for the meetings of all secret benevolent and charitable societies or associations shall be exempt from taxation so long as said lands and buildings are not used for private profit." Section 2322, Comp. Stat. 1910.

The statute is not as definite and explicit in its language as it might be; but we are of the opinion that a fair construction of it, and what was intended by the Legislature, is that property owned and used by such societies for the purposes of their organization and adapted for those purposes is exempt from taxation so long as so used; but property owned by them and not so used, but devoted and used for other purposes for revenue is not exempt. It is not claimed in this case that the lot with the building thereon would not be exempt from taxation but for the fact that when it was not required for use by the lodge for its purposes a part of it was let by the night for hire to others. Under similar circumstances it has been held that such use, when it did not interfere with the use by the owner when required by it, did not subject the property or any part thereof to taxation. *St. Paul's Church v. Concord*, 75 N. H. 420, 75 Atl. 531, 27 L. R. A. (N. S.) 910, Ann. Cas. 1912A, 350; *First Unitarian Society v. Hartford*, 66 Conn. 368, 34 Atl. 89. The cases in which it has been held that the use of the property was such as to subject it to taxation are those where the property or some part of it was rented or leased for business purposes, such as stores, offices, etc., and was so occupied. It was such use or occupation as would interfere with the use, by the society or organization, of the building for the purposes for which the society was organized, and not merely its occasional use for other purposes when not so required by it. It will be observed that in many of the states the exemption is limited to property exclusively used by the society or organization, while our statute does not use the word "exclusively," which would seem to indicate that it was not intended to subject such property to taxation or to take it out of the exemption by the occasional or temporary use of it by others, as shown by the statement of facts in this case. And we think the use for private profit which would

take it out of the exemption is something more than such occasional or temporary use, and is such use as would interfere with the ordinary, proper, and legitimate use of it when required or desired by the society for its purposes. If the entire right to use any part or all of the building had been surrendered, as by leasing for business or other purposes, so that the society could not use it if it desired to do so, would present a different question from that in this case. According to the facts in this case the building was constructed or its apartments arranged for the convenient and proper use of the society, and every part of it was so occupied and used by it at all times when required for its purposes. Our conclusion is, that a fair and proper construction of the statute under consideration does not subject the building or the parts thereof so occasionally and temporarily used by others for hire to taxation. If we are mistaken in so construing it, it will be an easy matter for the Legislature to make its meaning clear. The judgment of the district court is affirmed. Affirmed.

POTTER, C. J., and SCOTT, J., concur.

(23 Wyo. 528)

REYNOLDS v. MORTON. (No. 793.)

(Supreme Court of Wyoming. Jan. 25, 1918.)

1. PLEADING \S 34—DEMURRER — INTENTMENTS.

Where the sufficiency of the complaint is not attacked by demurrer, and is first presented by objection to the introduction of evidence, every intentment must be drawn in favor of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 5½, 86-74; Dec. Dig. \S 34.]

2. CHATTEL MORTGAGES \S 229—INJURIES TO REVERSIONARY INTEREST—RIGHT OF ACTION.

Where mortgaged chattels are taken and removed, the mortgagee, though not entitled to possession at that time, the debt not being due, may at once maintain an action for damages to his reversionary interest.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 479-483; Dec. Dig. \S 229.]

3. CHATTEL MORTGAGES \S 229—ACTIONS—COMPLAINT—SUFFICIENCY.

In an action to recover the value of cattle subject to plaintiff's chattel mortgage, and which defendant had purchased from the mortgagor, a copy of the mortgage, containing a provision that in the event of sale or removal, or attempt to sell and remove, any of the property, the mortgagee might take immediate possession, was attached to the complaint. Held that, where not questioned by demurrer, the complaint, though it did not specifically aver that the mortgagee was entitled to possession, was sufficient for that purpose.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 479-483; Dec. Dig. \S 229.]

4. CHATTEL MORTGAGES \S 229 — STIPULATIONS—EFFECT.

Where a chattel mortgage provided that the mortgagee should become entitled to possession in the event of a sale or removal, or attempt to sell or remove any of the property, the

mortgagee's right to possession is immediate upon sale or removal, in which case he can at once maintain an action against the purchaser.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 479-483; Dec. Dig. \S 229.]

5. CHATTEL MORTGAGES \S 177 — RIGHTS OF MORTGAGEE—ACTIONS.

A chattel mortgagee entitled to possession may maintain an action against one who deprives him of the property by which the debt is secured.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. \S 336, 340-357, 477; Dec. Dig. \S 177.]

6. CHATTEL MORTGAGES \S 157—REMOVAL OF PROPERTY—BURDEN OF PROOF.

In an action by a chattel mortgagee against defendant, whom he claimed had taken possession of mortgaged cattle, defendant has the burden of proving that the lien he asserted is superior.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. \S 157.]

7. TRIAL \S 48 — RECEPTION OF EVIDENCE — OFFERS OF PROOF.

Although the court may do so, it is not bound, where an offer contains admissible and inadmissible evidence, to separate the evidence and receive that which is admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 120; Dec. Dig. \S 48.]

8. EVIDENCE \S 441—PAROL EVIDENCE RULE.

Oral testimony of a previous understanding between the parties is incompetent to vary the terms of a chattel mortgage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. \S 441.]

Error to District Court, Moberla County; William C. Mentzer, Judge.

Action by John Morton against William Reynolds. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 22 Wyo. 478, 144 Pac. 18.

Allen G. Fisher and William P. Rooney, both of Chadron, Neb., for plaintiff in error. Norton & Hagens, of Casper, for defendant in error.

BEARD, J. In this case the defendant in error, John Morton, commenced the action to recover from the plaintiff in error, William Reynolds, the value of certain cattle upon which Morton held a chattel mortgage, and which cattle Reynolds had purchased from the mortgagor. The trial to a jury resulted in a verdict in favor of plaintiff below and against the defendant below for \$4,451.84. Judgment was entered upon the verdict, and defendant brings the case here on error.

The plaintiff's cause of action is based upon a chattel mortgage executed by one Rilmington and wife to plaintiff August 26, 1909, to secure a note of that date of said Rilmingtons to plaintiff for \$12,726.52, and due August 26, 1912, with interest; the property described in the mortgage being:

"All our herd of cattle, numbering five hundred and fifty (550) head, consisting of cows, calves, steers, heifers, and bulls, branded among other brands AC on any part of animal. All our herd of horses, mares, and colts, numbering ten (10) head, branded among other brands the

following, AC on left hip, together with the increase thereof."

The mortgage was duly filed and indexed August 30, 1909. Plaintiff, in the first count of his petition, after pleading the mortgage above referred to, and that there was still due thereon more than the amount claimed from the defendant, alleged, in substance, that in November, 1909, the mortgagors, at the request and instigation of defendant, in utter hostility to plaintiff's rights and mortgage, and in violation of and in utter disregard of plaintiff's rights in the premises, transferred, turned over, and delivered absolutely 47 head of calves included in said mortgage to defendant, who wrongfully took said calves and converted the same to his own use; that defendant had full knowledge of plaintiff's claim, and that he instigated said transfer and converted said calves to his own use fraudulently for the purpose of hindering, delaying, and defrauding the creditors of the mortgagors, and especially plaintiff, of their just debts; that plaintiff demanded the possession of said cattle from defendant, which was refused; that said calves had become scattered and unavailable and were lost as security in plaintiff's mortgage, to plaintiff's damage in the sum of \$1,175, with interest. The second count of the petition is substantially in the same language, except it alleges the taking and converting of 42 cows, 47 heifers, 14 yearling steers, and 33 calves, to plaintiff's damage in the sum of \$6,289.68. The answer denies the allegations of the petition, and avers that Rimingtons were indebted to defendant for the purchase price of registered Hereford cattle sold by defendant to one Fowler, the purchase price being secured by chattel mortgage thereon and the increase thereof; that Rimingtons had assumed the payment of said indebtedness and had paid a portion of the same in 1908, 1909, and 1910, by delivering to defendant pure blood Hereford calves, the offspring and increase of the cows mortgaged by Fowler, and that Rimington had given to defendant a mortgage on a part of said cattle in renewal of the Fowler mortgage; that during the years mentioned in the petition Rimington was openly and publicly, with the knowledge and consent of plaintiff, selling and dealing with as his own all the grade cattle owned by Rimingtons; and that defendant, with plaintiff's knowledge and consent, so dealt with Rimington in relation to grade cattle, and, if he did buy any grade cattle which were subject to any mortgage, he paid full value therefor to Rimington as agent for plaintiff, who received the same. The reply denies the new matter set up in the answer.

[1] It is contended by counsel for plaintiff in error that the petition does not state a cause of action. It was not demurred to, and the question was first presented after plaintiff had introduced a part of his evidence.

"The method of testing the sufficiency of the petition that was practiced in this case, by

making an oral objection to the introduction of any evidence after a lengthy answer had been filed and the complaint had been treated as sufficient is one that does not commend itself to the favorable consideration of the court. * * *

When such a mode of challenging the sufficiency of a complaint is adopted, the pleading in question should be construed liberally. Merely technical defects of averment should be overlooked, and objections thereto should be overruled, unless they are of a substantial or fundamental character; that is to say, unless there is a total failure to allege some matter which is essential to the relief sought." *George Adams & Frederick Co. v. South Omaha Nat. Bank*, 123 Fed. 641, 60 C. C. A. 579.

[2, 3] The statement quoted is particularly applicable to the case at bar; as the objection was not made until a part of the evidence had been introduced, and was upon the ground that the petition did not allege:

"That plaintiff was ever in possession of any of the chattels sued for; that it is not alleged that he had the right to the possession thereof at any time prior to the time of the filing of this petition."

Such averments were unnecessary in this case for the reason that a mortgagee could maintain an action for damages to his reversionary interest, although the debt secured by the mortgage was not due, and he had not the right to immediate possession at the time the cattle were taken by defendant. *Jones on Chat. Mort.* (5th Ed.) § 449. Moreover, a copy of the mortgage was attached to the petition, and which contained a provision that, in the event of any sale or removal or attempt to sell or remove any of said property by the mortgagor without the written consent of the mortgagee, then the mortgagee might take immediate possession of the property. Thus the facts appeared which entitled plaintiff to possession, although it was not specifically averred that he was so entitled. The case is quite similar in many respects to *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933, wherein the distinction between stating a cause of action in a defective manner and stating a defective cause of action is clearly pointed out. See, also, as bearing on the question, *Malcom v. O'Reilly et al.*, 89 N. Y. 156, and *Rodgers v. Graham*, 36 Neb. 730, 55 N. W. 243. It also appears that before the objection was made to the sufficiency of the petition the mortgage had been admitted in evidence without objection on that ground. We are of the opinion that the objection, coming at the time and in the manner it did, was properly overruled, and that the petition liberally construed, as it should be in such circumstances, stated a cause of action.

[4, 5] It is contended that, as the debt was not due when defendant converted the cattle, the evidence fails to show that defendant was entitled to possession, and that, to be entitled to recover, plaintiff must prove either possession or the right to possession. We think plaintiff did prove his right to possession. In a case involving that question the rule, we think, is correctly stated in the case of *El-*

lestad v. Elevator Co., 6 N. D. 88, 69 N. W. 44, as follows:

"A stipulation is contained in the mortgage whereby the mortgagee is empowered to take possession of the grain at once, in the event of a sale or other disposition of the grain being made. The condition upon which this right came into existence happened, and eo instanti the mortgagee's right to take possession became operative. The defendant bought the grain with constructive notice of the mortgage, and becomes chargeable with notice of the stipulation to which we have referred. True, defendant acquired title as against the mortgagor (see *Sanford v. Elevator Co.*, 2 N. D. 6, 48 N. W. 434), but took such title with the burden of the mortgage. The mortgagee lost no rights under his mortgage by reason of the sale. The sale entitled the mortgagee to demand and sue for the possession, if the property could be had, and where, as in this case, the property had been converted, the holder could sue for its value. The sale gave plaintiff the right to the immediate possession of the property for purposes of foreclosure. Having this, and failing to secure the actual possession, plaintiff is entitled to sue for its value."

That a mortgagee entitled to possession may maintain an action against one who deprives him of the property which is his security was held by this court in *Cone v. Iverson*, supra. See, also, *Wright v. Starks*, 77 Mich. 221, 43 N. W. 868; *Grove v. Wise*, 39 Mich. 161; *Rodgers v. Graham*, 38 Neb. 730, 55 N. W. 243; *Bailey v. Godfrey et al.*, 54 Ill. 507, 5 Am. Rep. 157; *Jorgensen v. Tait*, 26 Minn. 327, 4 N. W. 44; *Welch v. Whittemore*, 25 Me. 86; *Manning v. Monaghan*, 23 N. Y. 539; *Forbes v. Parker*, 33 Mass. 462.

[6] The answer does not state the dates of the mortgages defendant claimed to hold, when due, or when, if ever, filed. But it appears that the Fowler mortgage was dated July 13, 1907, and was filed the same day, the last note secured thereby falling due July 13, 1910, and covered 24 head of registered Hereford cows, unbranded, except on the horn, and were described in the mortgage by registry number and number on the horn; also one registered Hereford bull, unbranded, named Ben Armour; together with the increase of said cows. That mortgage was not renewed by affidavit. Fowler sold these mortgaged cattle to Rimington, probably in 1907; Rimington assuming the payment of the mortgage indebtedness, and in 1909 branded them "AC." And it appears that at the date of the mortgage to Morton all of the Rimington cattle bore that brand. Defendant offered to prove that after the Fowler mortgage became due it had been renewed or continued in force by the Rimingtons giving a new mortgage upon the same, or a part of the same cattle described in the Fowler mortgage; and his contention is that by the giving of such mortgage the lien was preserved as against Morton. But it will not be

necessary to determine that question for the reason that it was not shown that any of the cattle for the conversion of which plaintiff sought to recover in this action were covered by the Fowler mortgage. Morton's mortgage included all of Rimington's cattle, and the burden was upon defendant to prove that the cattle converted by him were cattle upon which he had a superior lien. That he failed to do.

[7] It is assigned as error that the court refused to permit defendant to show that the proceeds of the cattle were paid by Rimington to Morton. The record discloses that the court did not so refuse, but offered to admit evidence to that effect. But in each instance the offer included matters clearly inadmissible. In *Stickney v. Hughes*, 12 Wyo. 397-412, 75 Pac. 945, 949, this court said:

"Where an offer of proof is made as a whole, and some of the facts included in the tender are admissible, and others are inadmissible, the court is not bound to separate it, and admit such parts as are competent, although in its discretion it may do so. The refusal to do so, however, will not be error"—citing cases.

The argument is directed particularly to \$900 paid by Rimington to Morton in the fall of 1910. It appears that amount was credited on the note September 13, 1910, while defendant testified, from a memorandum, that he received the cattle on October 3, 1910, which would tend to show that the payment was not made from the proceeds of those cattle.

[8] It is further contended that Morton consented to the sales of the cattle. We do not so understand the evidence. It was attempted to be shown that prior to the execution of the mortgage Morton had said he would allow Rimington to dispose of sufficient proceeds of the ranch to pay running expenses and something on the debt. But the mortgage did not so provide, and Morton testified that no such permission was ever given. Moreover, Rimington testified as a witness for defendant and made no claim that Morton had given him any such permission. The mortgage was the written contract between the parties, and oral testimony of some previous understanding was incompetent to vary its terms.

Some other questions have been discussed in the brief of counsel for plaintiff in error, but they become immaterial by reason of the conclusions we have reached on the matters above considered.

Finding no prejudicial error in the record, the judgment of the district court is affirmed. Affirmed.

POTTER, C. J., and SCOTT, J., concur.

(23 Wyo. 539)

POOL v. BAKER.(Supreme Court of Wyoming. Jan. 25, 1916.
On Petition for Rehearing, March 11, 1916.)**1. PUBLIC LANDS §19—UNLAWFUL INCLOSURE.**

One who was lawfully entitled to the possession of a portion of the public domain, who erected a fence including a portion of the public land to which he was not entitled, acquired no rights in such portion inclosed; his entry being unauthorized and illegal.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. §19.]

2. PUBLIC LANDS §35—HOMESTEAD RIGHTS.

One who has a homestead entry upon public lands of the United States, on compliance with the laws and regulations of the Land Department, is entitled to possession thereof.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. §35.]

3. PUBLIC LANDS §19—UNLAWFUL INCLOSURE.

Where one unlawfully incloses a portion of the public domain with his own land, he cannot in equity enjoin a rightful holder thereof from maintaining his lawful possession.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. §19.]

4. APPEAL AND ERROR §695—REVIEW—QUESTIONS PRESENTED BY RECORD—BOUNDARY SURVEY.

Whether the establishment of a boundary line by the county surveyor was sufficient cannot be considered by the court on appeal, where the evidence was not brought up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. §695.]

5. BOUNDARIES §54—SURVEY BY COUNTY SURVEYOR—EVIDENCE.

Under Comp. St. 1910, § 1292, providing that the county surveyor's certificate is legal evidence in any court of the state, but that it may be explained or rebutted by other evidence, in the absence of rebutting evidence, the surveyor's certificate is sufficient to warrant a finding of the court in favor of one claiming under it.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 263, 268-277; Dec. Dig. §54.]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by W. H. Pool to restrain Fred M. Baker from removing a fence, in which the defendant sought by cross-petition to enjoin plaintiff from interfering with the removal of the fence. From a judgment for defendant, plaintiff brings error. Affirmed.

F. W. Byrd and S. P. Cadle, both of Sheridan, for plaintiff in error. D. L. Gogerty and R. E. McNally, both of Sheridan, for defendant in error.

BEARD, J. In this case the plaintiff in error, who was the lessee and in possession of section 36, township 56, range 79, in Sheridan county, sought to enjoin the defendant in error, whose homestead entry included the S. W. ¼ of section 25, same township and range, from removing a fence which plaintiff alleged was situated upon the line between their respective lands. The defendant denied that the fence was on the line, and alleged

that it was several hundred feet north thereof and upon his homestead entry, and that he had repeatedly requested the plaintiff to remove it which he neglected and refused to do, and that he was removing the same for the purpose of placing it on the line, and by cross-petition sought to enjoin plaintiff from interfering with his so doing. At the request of plaintiff the district court made in writing its finding of facts and conclusions of law. The case has been brought to this court upon the pleadings, findings of facts, and conclusions of law; the evidence not being brought up. The only questions, therefore, that can be considered, are whether the conclusions of law and the decree are sustained by the facts found.

The facts as found by the court, so far as necessary to an understanding of the questions presented, are, in substance: That plaintiff at the time of the commencement of the action (October 5, 1914) and for eight or ten years prior thereto was the lessee of said section 36 from the state and in undisputed possession thereof. That plaintiff at the time of going into possession of said section inclosed the same with a fence belonging to him, and that the same had been so inclosed for several years last past, and that up until the time hereinafter named and the connection of the defendant with the transaction the plaintiff's possessory right to the tract of land inclosed had not been disturbed or questioned. That the fence erected by the plaintiff along the north line of his inclosure for the purpose of inclosing the aforesaid section 36 was not at any time, and is not, upon the north boundary of said section, but is wholly upon section 25, in the above-named township and range, and several hundred feet north of the boundary line aforesaid. That the effect of the erection of such fence by the plaintiff was to include in his inclosure, not only section 36 aforesaid, but a strip of land off the southern part of section 25 running east and west from the east line to the west line of said section several hundred feet in width. That about the month of October, 1913, the defendant made a homestead entry in said section 25, which included the S. W. ¼ of said section. That said entry was made in good faith, and was followed up in the month of April, 1914, by actual settlement, residence, and occupation upon the same. That upon taking possession of his homestead entry defendant found the fence as above stated. "The testimony does not clearly establish whether or not the defendant gave notice to the plaintiff to remove the fence. A suggestion was made that such notice was given; and it was not denied by the plaintiff; but it can hardly be said to have been proven. It does appear, however, by the plaintiff's own testimony, that he knew of the defendant's claim as early as August, and that the defendant at that time threatened to tear down this fence if it was not removed."

That about June, 1914, the defendant applied to the county surveyor of said county to survey and establish the true line between said sections, and that about August 6, 1914, after notice to plaintiff, said surveyor did survey and establish said line and showed defendant the location thereof. That thereafter, about October, defendant commenced to remove said fence and to reset it on the line established by the county surveyor, and was so engaged when he was stopped on October 6, 1914, by the service of a temporary injunction or restraining order in this action.

From the foregoing finding of facts the court concluded as matters of law, briefly stated: That the portion of plaintiff's fence situated on section 25 was at all times unauthorized and illegal. That at least from the time of the actual settlement, occupation, and establishment of his residence upon said homestead, defendant succeeded to the rights of the United States in respect to the occupation of said land and the maintenance of any fence thereon. That plaintiff was entitled to a reasonable time within which to remove his fence after said defendant's filing. That a reasonable time had elapsed for that purpose before defendant attempted to remove the fence in October, 1914. That defendant at that time had a right to remove the fence. That the temporary injunction ought not to have been granted, and should be dissolved. That plaintiff is not entitled to a permanent injunction. That defendant is entitled to a permanent injunction enjoining plaintiff from interfering with the removal of said fence to the true boundary line between the S. W. $\frac{1}{4}$ of section 25 and the N. W. $\frac{1}{4}$ of section 36. Judgment and decree was accordingly entered.

[1-3] That plaintiff's inclosure of a part of the public domain with land to which he was lawfully entitled to the possession, by a fence erected and maintained on the public land, was unauthorized and illegal, is beyond dispute. It is equally true that one who has made a homestead entry upon the public lands of the United States, and has complied with the laws and the regulations of the Land Department, is entitled to possession. The court having found the fact to be that the fence was upon land embraced within defendant's homestead entry, and that plaintiff had failed to remove it within a reasonable time, and it being unlawfully there, he cannot invoke the powers of a court of equity to assist him in maintaining his unlawful possession or to restrain one lawfully entitled to possession from removing such fence.

[4, 5] The court found that defendant was removing the fence to the true boundary line between said sections. But it is here contended that the establishment of that line by the county surveyor was insufficient. That argument goes to the sufficiency of the evidence presented to the court upon which it found the fact as stated, and, the evidence

not being brought up, this court is foreclosed from considering that question and must take the findings of the trial court as conclusive. The survey and location of the line as made by the county surveyor was competent evidence of the true location of that line as established by the government survey, and the statute (section 1292, Comp. Stat. 1910) expressly provides that the county surveyor's certificate shall be admitted as legal evidence in any court of the state, but the same may be explained or rebutted by other evidence. If there was no evidence to rebut the correctness of the line so established, it was certainly sufficient to warrant the court's finding.

The conclusions of law and the decree as made and entered by the court are in accordance with and sustained by the findings. The judgment is therefore affirmed.

Affirmed.

POTTER, C. J., and SCOTT, J., concur.

On Rehearing.

PER CURIAM. A petition for a rehearing has been filed in this case. At the time the opinion was handed down the court was of the opinion that the conclusions of law and judgment of the district court were sufficiently supported by the facts found by that court. We are still of that opinion.

Rehearing denied.

(89 Wash. 149)

WASHINGTON WATER POWER CO. v.
CITY OF SPOKANE. (No. 12622.)

(Supreme Court of Washington. Jan. 8, 1916.)

1. MUNICIPAL CORPORATIONS \S 442 —
STREETS—"GRADING AND OPENING."

Where a city acquired land for a street under a contract with the grantor that it would refund to him any grade tax paid for opening, grading, or improving any part of said street, excepting sidewalks, and at the time of opening the street the city merely prepared it roughly for travel, and thereafter sought, on paving and establishing a permanent grade, to tax the costs against the grantor's successor in interest, the terms of the contract were not fulfilled by the first work, since the terms "grading" and "opening" used in conjunction mean the establishment of a permanent grade by embankments, cuts, fills, gutters, and curbs.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1063; Dec. Dig. \S 442.]

2. MUNICIPAL CORPORATIONS \S 442 —
STREETS—"IMPROVEMENT."

In such case, where the contract provided for reimbursement also for improvements, paving was not included in the word "improvements," there being at the time of the contract very little paving in the city, and, had it been contemplated, the word "paving" could have been used as well as the word "improvement," which is a relative term whose meaning must be ascertained from the context.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1063; Dec. Dig. \S 442. For other definitions, see Words and Phrases, First and Second Series, Improvement.]

3. MUNICIPAL CORPORATIONS \S 442 —
STREETS — SPECIAL ASSESSMENTS — EXEMPTION—REFUNDS.

In such case, the agreement of the city to refund the special assessments paid was not

invalid as an exemption from taxation, the agreement of the city being the consideration for the transfer of the land.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1062; Dec. Dig. ¶ 442.]

4. MUNICIPAL CORPORATIONS ¶ 224—POWERS—ACQUISITION OF LAND—PAYMENT.

Where a city had power to purchase private property for corporate purposes, an agreement by it to pay defendant for his land taken for a street upon a future contingency was valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 623-625; Dec. Dig. ¶ 224.]

5. ESTOPPEL ¶ 62 — MUNICIPAL CORPORATIONS—ACQUISITION OF LAND—PAYMENT.

Where the city acquired land under an agreement with the grantor to refund to him any special assessment paid for opening, grading, or improving the street, and the city accepted the land and constructed a street thereon, it was thereafter estopped to deny its power to make the refund.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 151-153; Dec. Dig. ¶ 62.]

6. ESTOPPEL ¶ 62 — MUNICIPAL CORPORATIONS—PROPERTY—ACQUISITION—PAYMENT.

Although a city cannot be estopped to deny its power to perform an act absolutely void because ultra vires, it may be estopped where the method of doing the act which it agreed to do was not specifically authorized, but the act itself was not ultra vires.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 151-153; Dec. Dig. ¶ 62.]

7. MUNICIPAL CORPORATIONS ¶ 442 — CONTRACTS—RIGHTS OF SUCCESSORS IN INTEREST.

Where a city agreed to refund certain special assessments to the grantor of the land used for a street, it could not defeat an action to recover assessments paid on the ground that the plaintiff was not the original grantor, since his successors in interest succeeded to his entire right.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1062; Dec. Dig. ¶ 442.]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by the Washington Water Power Company against the City of Spokane. From a judgment on verdict directed for defendant, the plaintiff appeals. Reversed and remanded, with directions.

Post, Avery & Higgins, of Spokane, for appellant. H. M. Stephens, of Spokane, for respondent.

MORRIS, O. J. For a number of years prior to and on September 8, 1891, the Spokane Falls Water Power Company owned a small island, known as Havermale Island, which lies between the channels of the Spokane river in the city of Spokane. On the date mentioned, the company granted to the city an easement for the construction of Howard street across the island, the grantors retaining the fee to the land and other rights which will be referred to as occasion arises. The particular covenant of the easement over which this controversy arises is as follows:

"And upon the further condition that the grantor herein shall be reimbursed by the city of Spokane, for any grade tax paid by it for opening, grading, or improving any part of said street, excepting sidewalks, and upon the fur-

ther condition that when said highway is graded through the premises of the grantor, and any cut or fill is made necessary by the grading of said street, that the city, at its own expense, shall cause the land of the grantor abutting on said highway on the island between the second and third channels of the river from the south to be graded on an incline for a space of not more than one hundred (100) feet on each side so that it will be practicable for vehicles of all kinds to drive on and off the said highway along its entire length across said island, and also to build an approach on each side of the said highway on the third island when the highway crosses it, wide enough for vehicles of all kinds to drive on and off said highway by said approach on each side."

Soon after the giving of this deed, Howard street was opened across the island, the channels of the river were bridged, and the street was thrown open for traffic. It does not appear that an assessment district was ever created for the construction of the street across the island. Arthur Jones, a member of the council at the time, testified that the cost of opening the street was probably included in the cost of building the bridges. Other members of the council at that time testified that the street was open for heavy traffic, but no one testified how much grading or other improvement had been done. This portion of Howard street apparently remained as originally opened until August 4, 1911, when the city passed Ordinance No. C262, providing for its grading, paving, and other improvement, and directing that the cost of the improvement be assessed against the abutting property. The abutting property had by this time, by various mesne conveyances, passed to the appellant, which made due exceptions to the confirmation of the assessment roll and demands that the assessment be canceled. All these exceptions and demands having been disallowed and refused, the appellant paid the assessment under protest, and after a proper demand brought this action to secure a reimbursement of the amount paid, basing its right on the covenant in the deed of 1891. The trial court was of the opinion that the testimony established that there had been, when the street was opened, such an improvement as the parties to the deed contemplated, and that the covenant should not be construed to prevent the city from levying an assessment on the property for subsequent improvements. The jury was accordingly directed to return a verdict for the city, and from the judgment of dismissal entered thereon the water power company has appealed.

[1] Before inquiring into the power of the city to accept the easement and act under its provisions, we must first determine whether the city made in 1891 all the improvements contemplated by the deed, or whether the covenant includes the improvement under consideration; for, if the city when it opened up the street made all the improvements covered by the deed, then manifestly the appellant may not recover

assessments subsequently paid for improvements not within the contemplation of the parties at that time. The controlling language of the deed is as follows:

"Any grade tax paid by it [the grantor] for opening, grading or improving any part of said street, excepting sidewalks."

The city contends that it fully complied with the terms of the deed by the work done on Howard street at the time it was opened in 1891, and that for any further improvement subsequently made it may assess and collect from the appellant without any liability to reimburse it therefor. We are of the opinion, however, that the improvement made in 1891 was not such as the deed contemplated. The term "grade" has been variously construed by the courts to include many forms of improvement, but we have found no instances where it has been held that a mere opening and preparation for travel, such as was apparently made in this case, fulfills an agreement to grade. In *Aldrich v. Board of Aldermen of Providence*, 12 R. I. 241, the court said:

"To grade a highway is to do more than simply prepare it for travel; for this may often be accomplished by slight superficial changes."

By the use of the two terms "opening" and "grading," the covenant in this deed evidently contemplated a permanent grade which would include everything necessary to establish the grade, such as embankments, cuts, and fills, and, on the authority of *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26, gutters and curbs.

[2] The deed also entitled the grantor to reimbursement for "improvements," which the appellant contends includes paving. While not strictly ambiguous, the term "improvement" has a wide range of meaning, and may or may not designate paving, depending on the sense in which it is used. As was said in *Wolff Chemical Co. v. Philadelphia*, 217 Pa. 215, 66 Atl. 344:

"The word 'improvement' is a relative term, and its meaning must be ascertained from the context and the subject-matter of the instrument or writing in which it is used."

The evidence discloses that, at the time this easement was given, there was very little, if any, paving in Spokane, and, construing the terms of the easement in the light of that condition and in conjunction with the terms "opening" and "grading," it is a fair interpretation that paving was not contemplated by the use of the word "improvement." Had the parties contemplated paving, they could have easily so stated, and the omission of the word "paving" must indicate that the improvements contemplated were those incidental to the opening and grading. We conclude therefore that, if the city is liable on the contract, it is bound to reimburse the appellant for the assessment levied for the grading but not for the paving proper.

[3] The next question is whether the city had power to enter into the contract with the

grantor to reimburse it for assessments, considering that the acceptance by the city of the deed subject to the covenant created a contract to reimburse the grantor as provided therein. The city contends that the agreement with the power company was an attempt to exempt the company from any assessment for improvement of the street, and cites the following cases in support of its contention that such exemptions are void: *Pittsburgh, C. & St. L. Ry. Co. v. Oglesby et al.*, 165 Ind. 542, 76 N. E. 185; *Leggett v. Detroit*, 137 Mich. 247, 100 N. W. 566; *Whitcomb v. Boston*, 192 Mass. 211, 78 N. E. 407; *Vrana v. St. Louis*, 164 Mo. 146, 64 S. W. 180; *Rackliffe v. Duncan*, 130 Mo. App. 695, 108 S. W. 1110; *Miners' Bank v. Clark*, 252 Mo. 20, 158 S. W. 597.

In the Indiana case the court said:

"Appellees maintain that the grant by the railroad company to the city of ground for use as a street was valid, but that the provision in the deed that the grantor and the remaining portions of the lot should not then or thereafter be charged with any expense connected with the extension or maintenance of that portion of such street was void. It has long been an established principle that private property may be appropriated for a highway when public necessity, convenience or utility requires it. It is quite as essential that such highway be improved and kept in repair as that it be established in the first instance. It has been, and is, the theory of our law that the opening and improvement of a public highway will benefit the abutting and adjacent property, and that such property should be primarily and proportionately liable for the costs and damages occasioned thereby to the extent of such resulting benefits. This was the law in the year 1882, when the deed in question was executed, and it has continued to be the law to the present time. Conceding that the city of Rushville might purchase the title or an easement in land for use as a street, and obligate itself to pay a fair and reasonable compensation therefor, it does not follow that as a part of the consideration it could make a covenant or accept a condition that would annul a provision of its charter, and bind the discretionary judgment of future councils and governing bodies of the municipality. If, in consideration of the grant of such right, the city might lawfully release one man and his property from future liability for street improvements abutting such property, by the same right it might release all property within its jurisdiction, and thus make street improvements impossible, or subject an entirely different fund to the payment of the costs of such improvements from that provided by law. This provision of the contract was not only contrary to public policy, but in contravention of positive law. So far as the contract attempted to release appellant's property from liability for future improvements upon the abutting street, it was ultra vires and void. *Leggett v. City of Detroit* (1904) 137 Mich. 247, 100 N. W. 566; *Vrana v. City of St. Louis* (1901) 164 Mo. 146, 64 S. W. 180; *City of Shreveport v. Shreveport City R. Co.* (1901) 104 La. 260, 29 South. 129; *Elliott, Roads & Sts.* (2d Ed.) § 148; *Richards v. City of Cincinnati* (1877) 81 Ohio St. 506; *City of Des Moines v. Hall* (1868) 24 Iowa, 234, 241."

The substance of the decision in *Leggett v. City of Detroit* is contained in the following extracts:

"In the present case the most that can be claimed is that, in anticipation of a possible extension of certain streets, the council accept-

ed a quitclaim deed of land contingently necessary upon a condition subsequent, to the effect that the land should revert if an assessment should be made against the grantors' land for the expense of any future opening of these streets to the north or south. * * * The case has been argued upon the theory that the city had attempted to make such an undertaking as the consideration for the deed. We have held that the right of eminent domain cannot be bartered away, and that contracts to do so by the Legislature or any agencies of the state are ineffectual and void, as being against public policy. * * *

In the present case the city has not agreed that it will not take any of this particular property by virtue of the power of eminent domain. It has, however, accepted a deed, upon condition that, should it do so, it will omit this property from assessment districts, and will relieve it from contribution to the expense thereof."

It is apparent that the Michigan court held the contract void, on the ground that the consideration sought to be paid for the deed was a waiver by the city of the power of eminent domain which could not be legally bartered away. In 1891, when the deed in this case was given, the city of Spokane did not have the power of eminent domain (*Tacoma v. State*, 4 Wash. 64, 29 Pac. 847), and the agreement to refund any assessment could not be construed as a waiver of that power. The Michigan case does not, therefore, appear to be applicable on the question here involved. Had the city of Spokane had the power of eminent domain in 1891, a different question would be presented, upon which we express no opinion.

In *Vrana v. St. Louis*, the court treated the contract as one exempting property from taxation, and relied upon *State v. Hannibal & St. J. R. Co.*, 75 Mo. 208, in holding the exemption beyond the power of the city to make. In that case the court said, in part:

"The city was without power to agree to exempt the lots in Allen's Western addition either from general taxes or special assessments, because no such power is vested in it by its charter, and unless this power is granted it does not exist. This must now be regarded as settled law in this state. It was so ruled in *State v. Hannibal & St. Joe R. Co.*, 75 Mo. 208, as to an attempted exemption by the city of Hannibal as to municipal taxes in order to prevent a removal of the general offices and machine shops of the railroad company. The reasoning of *Sherwood, O. J.*, in that case, leaves nothing to be added, and decides the principle involved in this case. The charter of St. Louis does not contain any such power of exemption. Beach, in his work on *Public Corporations*, referring to *State v. H. & St. Joseph R. R.*, supra, and many other authorities, states the result to be that 'a municipal corporation has no power to grant exemption from or a commutation of taxes, and a contract which undertakes to do so is void; nor can municipalities discriminate in favor of any property. The power to exempt is not included in the power to tax, but must be specifically conferred.' 2 Beach on Pub. Corp. § 1443.

"One of the prime governmental duties imposed upon the city of St. Louis is to provide reasonable highways for the public of said city; and as compensation for private property taken for public use is required to be made out of public funds only so far as the public generally is found benefited, and the remainder is required to be provided by local assessments against the private property especially benefited,

the city would put it out of its power to perform its obligations if it were allowed to exempt private property from such assessments. If it could exempt one man's property, it might exempt a dozen, and thus it might find itself unable to find property sufficient, and not exempted, out of which to pay for necessary improvements, or be driven to taxing a part of the property owners far in excess of any fair benefit to their property—a practice not to be countenanced. Judge Elliott, in his admirable treatise on *Roads and Streets*, lays it down that: 'Where a statute provides generally for the assessment of lands for the cost of improving a road or street, it authorizes an assessment upon all lands within the limits designated, although some of the property may be exempt from taxation. A statute exempting property from taxation does not exempt it from an assessment for a local improvement. It may, indeed, be doubted whether a statute exempting from local assessment property appropriated to specific uses would be valid, since the exemption of one or more parcels would increase the burdens of others owning property along the line of the state highway, and this would produce an inequality against which in many of the states constitutional provisions are directed.' Elliott on *Roads and Streets* (2d Ed.) § 549.

"So that, even if the city had made an express agreement with Thomas Allen to exempt the lots in said addition from future assessments for necessary public purposes, it would have been a void undertaking on its part, of which he was bound to have notice. In *St. Louis v. Meier*, 77 Mo. 13, this court said: 'Kingsland must be supposed to have known that he could not legally make, and that the city could not legally accept, a dedication made by him upon condition that when the city should condemn the land to the north and south of him he should not be assessed with benefits. Whether he would be liable to be assessed with benefits would depend upon the provisions of the city charter, and not upon the agreement of the parties. Besides, the owners of the land north and south of him could not, by any arrangement between him and the city, be made to bear any portion of the tax for benefits which would otherwise be chargeable against his property.'

Rackliffe & Gibson v. Duncan followed the *Vrana* Case on the same theory, but in *Bank v. Clark* the court decided squarely that, even as a purchase of the easement, the method adopted was void. The material portion of that opinion follows:

"Appellant contends that by reason of the condition contained in the quitclaim deed from Clark to the city, dated June 21, 1901, the city had no right to improve said street at the expense of Clark, and that said deed being of record, the contractor was charged with notice thereof, and the tax bills are therefore void. The determination of the proposition turns upon the answer to the following question: Did the city, by accepting the deed from Clark in 1901, contract away its right to later order said street improved at the expense of the abutting property owner, even though the grantor in said deed be the property owner when the improvement is later made? Unless the law constituting its charter gives such right, a city cannot contract away its right and power to levy special assessments for street improvements, and thereby create an exemption from such assessments. *Vrana v. City of St. Louis*, 164 Mo. 146 [64 S. W. 180], where the exemption was attempted in the dedication; *Rackliffe & Gibson v. Duncan*, 130 Mo. App. 695 [108 S. W. 1110], where the exemption was attempted in the deed conveying the street to the city. The charter of cities of the third class does not give such power. In fact, the legislative right to give such power might well be doubted—a point, however, which we do not decide.

"It is true, as asserted by appellant, that a city of the third class may acquire title to land for street purposes; but we know of no rule which authorizes the city to surrender, as the purchase price of a street, its right to order that street improved in any manner authorized by law."

The rule announced in *Missouri* has thus grown from the decision in *State v. Hannibal*, which was, as stated in *Vrana v. St. Louis*, an attempted exemption from municipal taxes. Prior to *Miners' Bank v. Clark*, the Missouri courts had considered the undertaking by the city only as an exemption and not as consideration for a purchase of the property. In *Miners' Bank v. Clark* the legality of the agreement as a purchase price was evidently not seriously considered. There appears to us to be a wide distinction between an exemption from taxes, such as was under consideration in the *Hannibal* Case, and an agreement to refund assessments as the purchase price of an easement, a distinction which the Missouri courts did not consider; and we cannot avoid the conclusion that the later Missouri cases are decided on the basis of a case differing radically in principle from the question then before the courts. The *Indiana* case, being founded on the *Michigan* and the *Missouri* cases, likewise failed to note the distinction.

We may concede that the city's contention that it was without authority to enter into this contract is supported by some show of authority. The cases are, however, as we have shown, decided on what appears to us to be an erroneous application of the fundamental principle that exemptions from taxes are void. The cases of *Perth Amboy Trust Co. v. Board of Aldermen*, 75 N. J. Law, 291, 68 Atl. 84, and *City of Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091, although apparently decided without notice of the contrary rule, establish what seems to us to be the more equitable doctrine. In the *Perth Amboy* Case the court says:

"The excuse of the city for levying the assessment in question in the face of the condition of dedication which it had accepted is that it had no power to accede to the condition upon which the land for Sheridan street was given by its owners to the public. The claim of the city is that the dedication should stand, but that the condition upon which it was made should be ignored. We cannot take this view of the legal situation. The condition, so far as it affected Sheridan street, being limited to a single expenditure for a specific purpose, was in effect the price the city was willing to pay for the land. If the city had power to buy the land at such sum, it had power to agree to expend such sum upon the land as the condition of its perpetual dedication to public uses. After the expenditure of the sum thus required, the public have no more standing to exact payment from the abutting owners than the owners have to exact damages from the public for taking the land. *Dillon, Mun. Corp.* (3d Ed.) § 632, and cases cited in the notes."

The substance of *City of Omaha v. Megeath* is well stated in the syllabus:

"Where a strip of ground surrounding a tract of land designed for a public park was conveyed by parties who owned other land outside of and abutting upon the said strip upon the express

conditions in the deed of conveyance, that the grantee should lay out and improve said strip as a street and forever after keep the same in good repair and order at its own expense, such city, for improving or keeping in repair such street, cannot require payment by its grantors because of their ownership of the aforesaid abutting property, and the same exemption from liability exists in favor of one who has since purchased a part of said abutting property."

[4-6] Under Laws 1889-90, p. 219, § 5, subd. 6, the city of Spokane had power to purchase private property for corporate purposes, and we see no evil in making the compensation to be paid dependent on a future contingency. The city has accepted the benefits from the deed and is seeking to escape the burdens. As stated by Mr. Justice Strong in *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659, the city "having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." At the time this deed was accepted, the city of Spokane had no power to condemn the property. *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847. The only power of acquisition besides an unrestricted dedication was that of purchase, and, having entered into a contract which it had power to make and received the benefits, the city should be now estopped to question the legality of the mode of payment. In reaching this conclusion we have not lost sight of our decisions in *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836; and *Turner Investment Co. v. Seattle*, 70 Wash. 208, 126 Pac. 426, 41 L. R. A. (N. S.) 781. In those cases the contracts were entirely ultra vires and void, whereas here the most that can be said is that the mode of payment provided for was not specifically authorized.

[7] The only remaining objection to a reimbursement by the city is the contention that the covenant was enforceable, if at all, only by the grantor, and not by its successors. In *City of Omaha v. Megeath*, supra, the court allowed the successor of the grantor the benefits of the covenant as a matter of course. In this case there is an added reason found in the deed itself for holding that the right to reimbursement passed to the successors of the grantor. The grantor covenants that it would build all structures in the river of fireproof material, and this covenant was expressly extended to its assignee. The city also covenanted that it would make certain approaches from the abutting land to the street. This latter covenant clearly could benefit only the owner of the land when the street was graded, and it would be unconscionable to hold the grantor to the covenant on its part and allow the city to escape liability because the title to the land had passed from the grantor to other persons.

The judgment is reversed, and the cause remanded, with directions to the trial court to enter judgment for the appellant for that

portion of the assessment paid by it for the embankment, retaining wall, curbs and curb armor, catch-basins, and drainpipe, together with such portion of the cost of incidentals, engineering, and superintendency as entered into the grading complete with curbs and gutters.

FULLERTON, MAIN, and ELLIS, JJ., concur.

(12 Okl. Cr. 226)

GRAYSON v. STATE. (No. A-2056.)

(Criminal Court of Appeals of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION \S 34 — NAMES OF ADDITIONAL WITNESSES — INDORSEMENT.

In felony cases, other than capital, the names of additional witnesses may be indorsed on an information after the filing of the same, at such time as the court may, by rule, prescribe. Section 5694, Rev. Laws 1910.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 138-143; Dec. Dig. \S 34.]

2. CRIMINAL LAW \S 1149—APPEAL—DISCRETIONARY RULING — NAMES OF ADDITIONAL WITNESSES—INDORSEMENT ON INFORMATION.

Under the statute, permission to indorse the names of additional witnesses on an information during the trial is a matter within the judicial discretion of the trial court, and unless an abuse of this discretion appears prejudicial to the substantial rights of the defendant, its ruling will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3039-3043, 3058; Dec. Dig. \S 1149.]

3. CRIMINAL LAW \S 403—EVIDENCE—PHOTOGRAPHIC COPY OF DEED.

A photographic copy of a deed, the signature to which was alleged to be forged, is admissible in evidence upon preliminary proof, showing that such deed was in the possession of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 889; Dec. Dig. \S 403.]

4. CRIMINAL LAW \S 430—EVIDENCE—CERTIFIED COPY OF RECORDED INSTRUMENT.

On a trial for the forgery of a deed, where it is shown that the alleged forged deed was duly recorded in the office of the register of deeds, a copy of the same, duly certified, is admissible in evidence under the provisions of sections 1170, 5099, and 5115, Rev. Laws 1910.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1019; Dec. Dig. \S 430.]

5. CONSPIRACY \S 41 — CRIMINAL RESPONSIBILITY.

When a conspiracy is entered into to cheat and defraud any person of any property, all persons who engage therein are responsible for all that is done in pursuance thereof by any of their coconspirators until the object for which the conspiracy was entered into is fully accomplished.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. \S 74; Dec. Dig. \S 41.]

6. CRIMINAL LAW \S 423 — EVIDENCE — ACTS AND DECLARATIONS OF COCONSPIRATORS.

In a prosecution for forgery, where the evidence tended to prove that certain persons entered into a conspiracy to forge a deed for the purpose of defrauding another person of the land therein described, the profits to be a divi-

sion of the land or a division of the proceeds, anything said or done in furtherance of the conspiracy by any of said conspirators, between the execution of the deed and the accomplishment of the further purpose of the conspiracy, is admissible in evidence against a coconspirator on a prosecution for the forgery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 989-1001; Dec. Dig. \S 423.]

Appeal from District Court, Muskogee County; R. C. Allen, Judge.

Ed Grayson was convicted of forgery, and appeals. Affirmed.

Crump, Crump & Garrett, of Muskogee (Eaton & Cowley, of Okmulgee, of counsel), for plaintiff in error. W. E. Disney, Co. Atty., and W. W. Cotton and Francis Stewart, Asst. Co. Attys., all of Muskogee, for the State.

DOYLE, P. J. The plaintiff in error, Ed Grayson, was convicted of forgery in the first degree, and in accordance with the verdict of the jury was sentenced to imprisonment in the state penitentiary for the term of seven years. The information charged him with the forging of a general warranty deed to the S. W. $\frac{1}{4}$, section 20, township 14 N., range 13 E., situated in the county of Okmulgee. The deed purported to be executed by Jordon Thompson to one W. R. Rogers, consideration named \$1,200. It bears date of the 25th day of October, 1912, and acknowledged before F. Cleo Hoover, a notary public in and for Muskogee county on said date.

The evidence for the state tends to show: That the legal title to the land at the date of the deed was in Jordon Thompson, a Creek freeman, 21 years old at that time. That about two weeks before the date of the purported deed the defendant met Jordon Thompson in Okmulgee City, and asked Thompson to take a trip with him to the Dallas fair. That a few days later he asked Thompson where his land was, and said to him: "I want you to go up to some office and identify me as Ed Grayson; by so doing I can beat some fellow out of a lot of money;" and Thompson declined to go. That the next day the defendant called at Thompson's house with Elnora Davis and Grace Jones, and wanted the defendant to go hunting and then down to see the girls that night. On the 24th of October, the defendant called at Thompson's house with Ethel Thompson. Jordon was not at home, and he left a letter for him to come to town and take a girl to the show, and to write an answer at once. That for a week the defendant made repeated efforts to obtain the signature of Jordon Thompson, and made statements that if he got his signature, he could get some money for it. An accomplice testified that the defendant was present when the deed was forged. He was corroborated by another witness, who was an innocent tool of the forgers. He admitted

to another witness that he was in Muskogee and helped in the forgery, described how it was done, and the notary's office. The deed was received through the mail on the 26th day of October, 1912, by the register of deeds of Okmulgee county to be recorded, was duly recorded, and returned, as directed, to W. R. Rogers, Iola, Kan. On the 28th day of said month Grace R. McClory delivered to the register of deeds a purported deed to said land from W. R. Rogers to Melvin Thomason, which deed was duly recorded and delivered to her. That Steve Grayson, a brother of the defendant Melvin Thomason and Grace R. McClory conspired with the defendant to defraud Jordon Thompson, and were present when the deed was forged.

The testimony tending to show the circumstances of the forgery was substantially as follows:

Nipple Brown testified that he met the defendant October 25th, in McRae's office, on South Second street, Muskogee, and that the defendant asked him if he would like to make some money. He said, "Yes." The defendant brought a white man over, who asked him if he could read or write, and he said, "No." Steve Grayson, the defendant's brother, was present; heard them talk about the Jordon Thompson land. They went in another room. When they came back, Steve Grayson gave the white man a deed. The white man wrote Jordon Thompson's name on it, and asked the others if it was all right. They then went down to Mrs. Josephine Hill's and then went to another white man's house and came on to the Barnes Building. The first white man did not come upstairs, the other with the defendant and witness went to the notary's office; saw a white lady; the white man gave a card to the lady, and the lady looked at the card, and he gave her the papers and the lady took the acknowledgment. The first white man called himself Rogers, but he was Melvin Thomason. Saw the defendant and his brother Steve and the white man that called himself Rogers at the depot that evening. Steve Grayson in the defendant's presence told witness that he "better not ever testify against him," saying: "You never done us no good, and you never done us no harm. Here is a dollar, go and get you something to drink."

R. O. Wipperman, testified that he knows Melvin Thomason and Nipple Brown; not prepared to say whether the defendant was the other man or not. Melvin Thomason came to his home on the evening of October 25th with Nipple Brown and another negro. Thomason asked for witness' father; had seen Thomason before in his father's office. Thomason wanted a notary. After some conversation witness went with Thomason to find a notary, thinking Thomason was a client of his father. Thomason gave the name of Wallace. Thomason left them at Fourth street and Okmulgee avenue, saying that he

had some parties to see, and handed witness the deed and a silver dollar, and saying:

"You go on with these negroes and find a notary, and I will meet you at Third and Broadway."

The negro, Nipple Brown, was introduced to him as Jordon Thompson; that he went to the Turner Hotel and found Cleo Hoover's name in the directory, and went to her office in the Barnes Building. The deed was signed with an indelible pencil. Nipple Brown acknowledged signing the deed. The real Jordon Thompson was not with them.

On behalf of the defendant, A. C. McRae testified that he was a lawyer; that Steve Grayson was in his office in Muskogee on October 25, 1912, and made a contract for the purchase of the Luvanda Powell allotment; that neither Melvin Thomason, Nipple Brown, nor Ed Grayson were in his office that day.

Steve Grayson testified that he was a brother of the defendant, and was at McRae's office on the 25th; that neither Nipple Brown, Melvin Thomason, nor Ed Grayson called at McRae's office that day; that he went home with Ed Grayson that night on the train.

Grace R. McClory testified that she and Melvin Thomason were in Okmulgee October 25th; that she took the deed from W. R. Rogers to Melvin Thomason, and had it recorded; that she did not make any erasures on a deed.

The defendant, as a witness on his own behalf, testified: That he went out to Jordon Thompson's home three times, once with Elnora Davis and Grace Jones, and again later with Ethel Thompson. He denied telling them about wanting Jordon Thompson's signature. Was in Muskogee October 25th on a pleasure trip, and met a fellow representing himself to be Rogers, who wanted him to help get Jordon Thompson's land. That Rogers went away, and later came back with Nipple Brown. He denied that he had ever admitted that he was connected with the forgery.

In rebuttal, Geo. H. Lessley and C. A. Ballantyne, expert stenographers and typewriters, testified that it was their opinion that the deed in question and the contract between McRae and Steve Grayson were written on the same typewriter.

The action of the court below in permitting the county attorney to indorse the names of additional witnesses on the information after the same was filed is assigned as error.

[1] It appears from the record that the information was filed January 27, 1913, and that the trial of the case commenced on the 24th day of February; that the names of the following witnesses—R. O. Wipperman; Grace Jones; Elnora Davis; Ethel Thompson; C. H. Condon; and F. B. Bayes—were indorsed at least three days before the commencement of the trial, and a written notice containing such names was duly served

upon the defendant. Our statute provides that the county attorney shall indorse on the information—

"the names of the witnesses known to him at the time of filing the same. He shall also indorse thereon the names of such other witnesses as may afterwards become known to him, at such time as the court may by rule prescribe." Section 5894, Rev. Laws.

It follows that there was no error in the action of the court.

[2] It is also contended that the court erred in permitting the county attorney to indorse the names of additional witnesses on the indictment at the trial of the case. It appears that the following additional witnesses were permitted to be indorsed during the trial: Josephine Hill, Benjamin Martin, and R. E. Disney. The last two witnesses did not testify to anything that affected the substantial rights of the defendant. Their testimony related merely to the possession of the alleged forged deed by the defendant's counsel, and that the county attorney had been unable to procure it. In other words, it was merely preliminary proof, made by the county attorney before he offered photographic and certified copies of the deed in evidence. It was not evidence in chief. The existence or location of an instrument is a preliminary question for the court to be decided before secondary evidence is admissible. Their testimony merely concerned the admissibility of evidence, and was not the evidence itself. Under the statute permission to indorse the names of additional witnesses on the information at the trial is a matter resting entirely within the sound discretion of the trial court, and, unless it clearly appears that it was an abuse of discretion, and that it was prejudicial to the substantial rights of the defendant, it will not be held to be reversible error. *Colbert v. State*, 4 Okl. Cr. 500, 113 Pac. 558; *Star v. State*, 9 Okl. Cr. 210, 131 Pac. 542. In our opinion there was no error in permitting the indorsement of the names of the witnesses on the information.

[3, 4] Error is assigned on the action of the court below in admitting photographic copies of the deed in question and of the signature upon said deed, and in admitting certified copies of the deed and of a deed purporting to be from the grantee named in the alleged forged deed to Melvin Thomason. Both the photographs and the certified copies were secondary evidence. They were therefore, upon any view, admissible as such if the best or primary evidence was satisfactorily shown to be unavailable to the state. It was shown by the preliminary proof that the state did not have possession of the deed in question, and never had possession of it and was unable to procure it. The deed was traced to the possession of counsel for the defendant. It was therefore in the possession of the defendant, since it was in the possession of his counsel, when the state last had trace of it.

Upon the question of introduction of certified copies of deeds, our statute provides as follows:

"All instruments affecting real estate and executed and acknowledged in substantial compliance herewith, shall be received in evidence in all courts without further proof of their execution; and in all cases where copies or other instruments might lawfully be used in evidence, copies of the same, duly certified from the records by the register of deeds may be received in evidence; and if the same need not be recorded to be valid for the purpose for which such evidence is offered, a copy duly verified by oath or affidavit of any person knowing the same to be a true copy, may be received in evidence." Section 1170, Rev. Laws.

"The books and records required by law to be kept by any county judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge or other public officers, may be received in evidence in any court; and when any such record is of a paper, document, or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original; but no public officer herein named or other custodian of public records, shall be compelled to attend any court, officer or tribunal sitting more than one mile from his office with any record or records belonging to his office or in his custody as such officer." Section 5115, Rev. Laws.

"Copies of all papers authorized or required by law to be filed or recorded in any public office, or of any record required by law to be made or kept in any such office, duly certified by the officer having the legal custody of such paper or record, under his official seal, if he have one, may be received in evidence with the same effect as the original when such original is not in the possession or under the control of the party desiring to use the same." Section 5099, Rev. Laws.

Section 5882 reads in part as follows:

"Except as otherwise provided in this and the following chapter, the rules of evidence in civil cases are applicable also in criminal cases."

See *Crump v. State*, 7 Okl. Cr. 535, 124 Pac. 632, holding admissible certified copies of deeds duly recorded. See *Luco v. U. S.*, 64 U. S. (23 How.) 515, 16 L. Ed. 545, holding admissible photographic copies of records.

In our opinion the photographic copy and the duly certified copies of the deeds, duly recorded in the office of the register of deeds, were properly admitted.

It is next insisted that the court erred in admitting the testimony of Josephine Hill, as to statements made to her by Melvin Thomason, Steve Grayson, and Grace R. McClory, in the absence of the defendant, and made after the date of the forged deed. Josephine Hill testified that Melvin Thomason and Grace R. McClory called at her home in Muskogee on October 25th, and that evening Melvin Thomason and Nippie Brown called at her home and asked her to show them where a notary public lived, and she told them to go to Mr. Wipperman; that the following week Melvin Thomason told her not to say anything about their being at her house about this business, and wanted to know if she could find him some erasing acid, and she gave him some, and he said that Mrs. McClory had the signature of Jordon Thomp-

son, which she had taken from the affidavit that Jordon Thompson made and filed in his civil suit to set aside the forged deed; also that Steve Grayson told her he was going to swear that he was in the Barnes Building when they went up to Miss Hoover's office, and that it was Jordon Thompson who went up there with them; also that Grace R. McClory told her that she had traced the name of Jordon Thompson on the deed with ink, and had put the "J" on before it was dry and it blotted, and that Melvin Thomason signed the name of Rogers and mailed the deeds back to her to be recorded. It appears that the testimony objected to was admitted by the court under the theory of the state that the defendant had conspired with these parties to procure by forgery and fraud Jordon Thompson's land.

[5, 6] It is insisted by counsel for the defendant that the conspiracy, if any, in this case ended on the 25th day of October, the date of the alleged forgery, and therefore the testimony objected to was inadmissible. In support of their contention they cite the case of Wells v. State, 5 Okl. Cr. 22, 113 Pac. 210. We think the doctrine of that case has no application here. Our Penal Code defines a criminal conspiracy as follows:

"If two or more persons conspire, either:

"First. * * *

"Second. * * *

"Third. * * *

"Fourth. To cheat and defraud any person of any property by any means which are in themselves criminal, or by any means which, if executed, would amount to a cheat or to obtaining money or property by false pretenses." Section 2232, Rev. Laws.

In the case at bar the conspiracy was to obtain the property of Jordon Thompson, not merely by one criminal act, but by a series of criminal acts. The first criminal act was the alleged forgery; then came the utterance of the alleged deed, the filing of it for record; then the second forgery to get the title of the land in the name of Melvin Thomason, and the uttering and filing of that forgery; the forgery of the letters regarding the deeds and false personation. The evidence tended to prove that the fruits of that conspiracy had never been divided. The conspiracy extended, so far as the record in this case is concerned, up to the time of the trial, for two of the conspirators at least were defending their alleged title to Thompson's land, in a civil suit in the district court of Okmulgee county. When a conspiracy is entered into to cheat and defraud any person of any property, all persons who engage therein are responsible for all that is done in pursuance thereof by any of their coconspirators until the object for which the conspiracy was entered into is fully accomplished. And where a conspiracy embraces not merely a series of unlawful acts, but also extends to a division of the fruits and profits of such acts among the conspirators, any-

thing said or done by them, although after the commission of the unlawful acts, but before a division of the profits of such acts, is admissible against all other conspirators. Holmes v. State, 6 Okl. Cr. 541, 119 Pac. 430, 120 Pac. 300; Wishard v. State, 5 Okl. Cr. 610, 115 Pac. 796. And see State v. Pratt, 121 Mo. 566, 26 S. W. 556; Scott v. State, 30 Ala. 503. The theory upon which such evidence is admissible is that the conspiracy does not terminate until there has been a division of its fruits and spoils. See People v. Ople, 123 Cal. 294, 55 Pac. 989, and Wharton Cr. Ev. (9th Ed.) 698.

In our opinion the evidence objected to was competent and was properly admitted.

Finally it is insisted that the court erred in refusing the application of the defendant for a continuance when the state had rested its case. This assignment is based on the action and rulings of the court, hereinbefore considered, in permitting the indorsement of the names of additional witnesses. We think this assignment is without substantial merit. The record in this case is very voluminous, but we have examined it with a purpose to discover whether the defendant has been deprived of that fair and impartial trial to which he is entitled under the law, and have been unable to find any reversible error in the record, and have reached the conclusion that the evidence in the case fully warranted the verdict of the jury.

The judgment herein is therefore affirmed.

FURMAN and ARMSTRONG, JJ., concur.

(12 Okl. Cr. 236)

CARTER v. STATE. (No. A-2140.)

(Criminal Court of Appeals of Oklahoma. Jan. 20, 1916.)

(Syllabus by the Court.)

1. HOMICIDE \S 208—DYING DECLARATION—PREDICATE—EVIDENCE.

Proof that the deceased died within four hours after he was shot; that his wounds were necessarily fatal, that he stated, when he was shot, "he has killed me!" and that he expressed no hope of recovery, sufficiently shows that the deceased was conscious of impending death, and is, in itself, a sufficient predicate for the admission of a written statement made by the deceased shortly after he was shot, purporting to be his dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 430-437; Dec. Dig. \S 203.]

2. CRIMINAL LAW \S 636—ADMONITIONS TO JURY—ABSENCE OF DEFENDANT.

The fact that the trial judge went to the courtroom, where the jury were deliberating, and cautioned the bailiffs against permitting the jury to separate, and the jury that they should speak to nobody, either concerning the case or on any other subject, and that they must keep themselves together as a body of jurors, and not communicate to the outside world, except through their bailiffs, or by permission of the court; that this was in the absence of the defendant and his counsel, and was not in open

court, is no ground for a reversal, where it affirmatively appears that the judge did not speak about the case, and that it was not discussed or referred to by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1486-1482, 2120; Dec. Dig. § 636.]

Appeal from District Court, Okmulgee County; Wade S. Standfield, Judge.

William C. Carter was convicted of manslaughter in the first degree, and appeals. Affirmed.

Crump, Crump & Garrett, of Muskogee, and Eaton & Cowley, of Okmulgee, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, P. J. William C. Carter, plaintiff in error, was informed against for the crime of murder, alleged to have been committed by killing A. Leavitt, by shooting him with a pistol. Upon his trial the jury returned a verdict, finding him guilty of manslaughter in the first degree and assessing his punishment at imprisonment in the penitentiary for the term of four years. From the judgment rendered upon the verdict he appeals.

The evidence shows that A. Leavitt, the deceased, was engaged in the mercantile business in the town of Henryetta. On the day of the homicide, the defendant, accompanied by a friend, went into the store of the deceased about 7 o'clock in the morning for the purpose of buying a pair of shoes. He selected a pair of shoes, price \$4, but which the clerk in the store, with the consent of the deceased, agreed to sell for \$3. He put the shoes on, gave the clerk a \$10 bill in payment, and received the change. He then decided that he did not want the shoes. The clerk or the deceased then returned to him \$3. The defendant left the store and went to his boarding place. Between 12 and 1 o'clock that day he returned to the store, armed with a 32-caliber Smith & Wesson revolver. The deceased was alone in his store at the time.

One witness for the state, George Morey, testified that he was standing across the street from the defendant's place of business, and that he heard the first shot, and looked across the street, and the deceased was several feet in front of the defendant, coming towards the front door, when the second shot was fired; that he stepped inside of a stairway and heard two more shots fired. The evidence further shows that, as the defendant and the deceased came out of the front door of the store, the deceased was in front of the defendant. The defendant had the pistol, but the deceased held the muzzle. As they came out, the deceased fell on his knees. The defendant then flourished the gun around and struck the deceased and turned and walked away. The deceased hollowed, "There he is; catch him! he has killed me."

Dr. Mooney testified that he was called to attend the deceased and found four gunshot wounds on his body; one entered below the sternum and passed through the liver directly towards the spine—this was a fatal wound—one in the right leg above the knee, and one in the palm of the hand. The deceased asked him how bad he was hurt, and he told him he had a fatal wound, and suggested that the defendant better make a statement if he had any to make. The deceased then made a sworn statement, which, omitting situs and verification, is as follows:

"A. Leavitt, being first duly sworn according to law, states upon oath that on July 15, 1912, a man came into his store during the morning and bought a pair of shoes. He brought them back, and he gave back to him his money. He said that I short-changed him, and he then shot me. Nothing further was said or done by me to provoke him. I make this statement fully realizing that I am dangerously wounded and with the expectation that death will ensue from the wounds I now have."

He then stated to Dr. Mooney that he wanted him to take him to a hospital for the purpose of having an operation, regardless of what his condition was. He was then taken on a special train to Muskogee, where he died at 4 o'clock that afternoon, while undergoing an operation.

The defendant, testifying in his own behalf, stated substantially as follows: That he had \$10.85 when he went into Leavitt's store. That he afterwards spent \$3.50 for a pair of shoes, 20 cents at a drug store, 20 cents at a pool hall, and 10 cents for drinks, and at noon he paid for his board \$5.50, making \$9.50. On paying his board he discovered that he had only 35 cents left; that after figuring the amount paid he decided that Leavitt, the deceased, had lacked \$1 of returning the proper change. That he started to go to work. His hours being from 12:30 p. m. to 12:30 a. m. It was raining and he went to his room to get his coat. That his pistol was in his coat pocket. That on his way to work he stopped at the store and Mr. Leavitt was the only person there. That he said to him, "I have stopped by, and I wish to tell you that you made a mistake in my change this morning of one dollar," and he said, "Why didn't you call my attention to it then." That the deceased was behind the counter near the cash register, and the defendant was outside. The deceased said, "You don't mean to accuse me of stealing a dollar," and the defendant answered, "No, sir; I would not accuse any one of stealing a dollar;" and the deceased reached over from behind the counter and commenced to choke him, saying, "I will have you arrested." That as he tried to get the pistol out of his pocket it went off, and from that time on it was a running fight, "And I shot him; I guess I shot him—I would not say whether I did or not. It was just simply a running fight." In rebuttal the state proved by two witnesses that the defendant was im-

mediately arrested, and he then had \$1.35, a silver dollar, a quarter, and a 10-cent piece.

[1] A number of alleged errors committed at the trial are assigned. One of which is that the court erred in admitting in evidence the affidavit purporting to be the dying declaration of the deceased. In order that a dying declaration may be admissible in evidence it should be made to clearly appear that such statement was made under a well-founded apprehension of immediate or impending dissolution, and that all hope of recovery was gone. This may be made to appear from what the injured person said, or where from the nature and extent of his injuries it is evident that he must have known that he could not survive. *Morris v. State*, 6 Okl. Cr. 29, 115 Pac. 1030; *Addington v. State*, 8 Okl. Cr. 703, 130 Pac. 311; *Updike v. State*, 9 Okl. Cr. 124, 130 Pac. 1107; *Hawkins v. State*, 11 Okl. Cr. 73, 142 Pac. 1093. In the last case it was held:

"Proof that decedent died within 12 hours after he was shot, that his wounds were necessarily fatal, and that he stated to persons after he was shot that he was dying, and that he expressed no hope of recovery, sufficiently shows that decedent was conscious of impending death, and is in itself a sufficient predicate for the admission of his statements of the circumstances of the homicide as 'dying declarations.'"

These authorities abundantly show that the court committed no error in admitting in evidence the dying declaration of the deceased.

[2] It is also contended that the court committed error in admonishing the jury in the absence of the defendant and his counsel. The record as to this is as follows:

"By the Court: In overruling the motion for a new trial, the court observes that the sixth ground is, in substance, an exception to the admonition by the court to the jurors and bailiffs having in charge the jury in this case on Sunday, in the absence of the defendant. Let the record show that certain alleged conduct was brought to the attention of the court which the court deemed wise to check in the interest of justice, and that the judge came to the courtroom where the jury were, and in the presence of the jury and bailiffs cautioned the jury and bailiffs against permitting the jury to separate, and that they should speak to nobody either concerning this case nor on any other subject, and that they must keep themselves together as a body of jurors, and not communicate to the outside world, to nobody except through their bailiffs or by permission of the court, and that this was in the absence of the defendant and his counsel, and was not in open court, the court not being convened.

"Mr. Crump. The defendant agrees that that may be the record in the case as to the sixth assignment."

It is the duty of the court to prevent, if possible, any misconduct on the part of the jury, and it is the duty of the officer in charge to see that jurors properly conduct themselves, and observe the requirements of law, and that they do nothing that would prevent a full and fair consideration of the case. It is true also that it is the duty of the court to communicate with the jury only

in open court, in the presence of the defendant and his counsel. But this is far from saying that every irregularity will work a reversal of the judgment. No injury was alleged by this conduct, nor was any attempted to be proved, and while the burden would be on the state to show no prejudice to the substantial rights of the defendant, we think the record shows that burden has been fully met. The language used by the court could not injure the defendant. The case of *Horton v. State*, 10 Okl. Cr. 294, 136 Pac. 177, is in point. There this court held:

"Where, after the jury had retired for deliberation, the judge noticed some of the jurors in the open windows of the jury room, and directed the sheriff to tell the jurors to keep out of the windows, and the sheriff told the jurors to 'get out of the windows and get together and reach a verdict.' Held, that the words spoken were not of such a nature that prejudice to the defendant will be presumed."

We have examined the other matters discussed by counsel, and have arrived at the conclusion that there is no merit in this appeal.

It would seem that the demands of justice and the protection of society clearly required in this case that the penalty prescribed by law for the punishment of the crime of murder should have been imposed upon the defendant, and the only basis for the verdict of a less grade of crime is the testimony of the defendant himself, "swearing his own neck out of the halter." No one can read the evidence without being abundantly satisfied and impressed that the defendant has not been adjudged the degree of punishment he so richly deserves. Juries frequently render such verdicts, and this can only be accounted for upon the theory that the verdict was the result of a compromise of opinion. The judgment of the district court of Okmulgee county is affirmed.

FURMAN and ARMSTRONG, JJ., concur.

(12 Okl. Cr. 242)
BROWN v. STATE. (No. A-2440.)
(Criminal Court of Appeals of Oklahoma. Jan. 20, 1916.)

(Syllabus by the Court.)

FORGERY ~~§~~44—SUFFICIENCY OF EVIDENCE.

In a prosecution for uttering a forged check, the record reviewed, and held, that the evidence is sufficient to support the verdict, and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. ~~§~~44.]

Appeal from District Court, Johnston County; Robt. M. Rainey, Judge.

Bill Brown was convicted of forgery in the second degree, and appeals. Affirmed.

Cornelius Hardy, of Tishomingo, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Bill Brown, was convicted of the crime of forgery in the second degree and sentenced to serve a term of $4\frac{1}{2}$ years in the penitentiary. The judgment was rendered on the 15th day of October, 1914. From the judgment an appeal was taken by filing in this court on April 3, 1915, a petition in error with case-made.

On the part of the state the evidence tended to establish the following facts: On the 20th day of March, 1914, Bill Brown presented a forged check for \$38 to the First National Bank of Milburn, and received therefor said amount; that said check purported to have been drawn by Ben Cravat in favor of Jim Abram, and indorsed by the said Jim Abram. That both names were forged. The defendant offered no testimony.

No briefs have been filed, and we are not advised as to what plaintiff in error relies upon for a reversal. We have examined the information, the evidence, the instructions of the court and the judgment and sentence, and have been unable to find any reversible error in the record.

The judgment of the district court of Johnston county is therefore affirmed, and the cause remanded, with direction that the same be carried into execution.

FURMAN and ARMSTRONG, JJ., concur.

(64 Okl. 350)

BRUCE et ux. v. OVERTON et al.
(No. 4782.)

(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

1. WILLS §231.—ADMISSION TO PROBATE—CONSTRUCTIVE NOTICE—RECORD.

Prior to statehood a will duly admitted to probate at Tulsa, in the Western district of the Indian Territory, imparted constructive notice, although the land devised was situate in another recording district in said Western district, and the will and order of court admitting it to probate were not recorded in the recording district where the land was situate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 560; Dec. Dig. §231.]

2. VENDOR AND PURCHASER §240 — BONA FIDE PURCHASERS—PLEADING AND PROOF.

A person seeking protection as an innocent purchaser of real estate without notice of an outstanding title must both allege and prove the facts constituting him such innocent purchaser, and unless he does so that issue is not raised.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 601, 602; Dec. Dig. §240.]

Commissioners' Opinion, Division No. 6. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by Charles H. Overton and another against C. A. Bruce and wife. Judgment for plaintiffs, and defendants bring error. Affirmed.

Wm. L. Cheatham, of Bristow, for plaintiffs in error. Biddison & Campbell, of Tulsa, for defendants in error.

HATCHETT, C. This suit was instituted by the plaintiffs, Chas. H. Overton and W. H. Manes, against the defendants, C. A. Bruce and Mrs. C. A. Bruce, to recover the possession of the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 9, township 17 N., range 9 E., situated in Creek county, and for \$400 damages for withholding possession thereof. The defendants answered by general denial, and that they were the owners of an undivided one-third interest in the land, and were therefore rightfully in possession of it. The cause went to trial largely upon an agreed statement of facts.

It appears from the statement of facts: That the land in controversy was a portion of the allotment of Noble Perryman, who died on the 25th of January, 1907. Previous to his death, on the 1st of May, 1906, he being over the age of 21 years at that time, he made a will, in which he devised the land in controversy to his daughter, Hattie Grayson. The will was filed for probate on the 23d of February, 1907, in the United States Court for the Western District of the Indian Territory at Tulsa, and duly probated, and an administrator appointed with the will annexed, and the will duly recorded by the clerk of said court, where the record remained until the admission of Oklahoma as a state, when the record was transferred to the clerk of the county court of Tulsa county, and has since there remained. That on the 20th of December, 1907, Hattie Grayson conveyed the land to W. H. Manes by warranty deed for a consideration of \$425, which deed was recorded in the office of the register of deeds of Creek county on the 23d day of December, 1907. On the 28th of March, 1910, W. H. Manes by warranty deed conveyed an undivided one-half interest to Chas. H. Overton, which deed was recorded in the office of the register of deeds of Creek county on the 1st of April, 1910. That prior to the death of Noble Perryman he executed an agricultural lease on the land, which by its terms expired on the 1st of January, 1911, to one Joseph Mays, and that Joseph Mays, after the execution thereof, transferred all his right thereunder to the defendant C. A. Bruce. That Noble Perryman left three children, Hattie Grayson, Phoebe Bruce, and Ennis Perryman. That on the 24th day of January, 1908, Phoebe Bruce by quitclaim deed conveyed all her right, title, and interest in this land to C. A. Bruce for the consideration of \$500. That the land in controversy was, at the time the will was probated, situated in the Western district of the Indian Territory, but not in the Tulsa recording district, and the will was never

recorded at any other place, except in the United States Court at Tulsa.

Judgment was rendered for the plaintiffs for the possession of the land and for \$30 damages, and the defendants have appealed to this court.

[1] It is claimed by the defendants, the plaintiffs in error here, that because the will of Noble Perryman, devising this land to his daughter, Hattie Grayson, was not recorded in the recording district where the land was situated, they are innocent purchasers without notice of the outstanding title, to the extent of an undivided one-third interest from Phoebe Bruce; that having no notice of the outstanding title when they purchased from Phoebe Bruce her interest, they obtained title to the interest she would have had if there had been no will. To this contention we cannot agree. Under the act of Congress of May 2, 1890, a judicial district in the Indian Territory was made equivalent to a county under the Arkansas statutes. *Simon v. United States*, 4 Ind. T. 688, 76 S. W. 280; *Welch v. Ladd*, 29 Okl. 93, 116 Pac. 573. The judgment of the United States Court at Tulsa admitting the will to probate and the record of the same, together with the will, was constructive notice of the contents thereof, and we have been cited to no provision of the Arkansas statutes, which were then in force in the Indian Territory, requiring the same to be recorded elsewhere in order to impart notice to third parties. While it is true there was a statute in force fixing the area of what was known as recording districts, yet we have been cited to no law which required that wills and the order of court admitting them to probate should be recorded in the recording district where the land was situated. This land being situated in the Western district of the Indian Territory and the allottee having died there, the United States Court at Tulsa had jurisdiction of the matter of probating said will and all persons were required to take notice thereof.

[2] The answer of the defendants did not set up that they were innocent purchasers for value without notice of the outstanding title, and neither the evidence introduced nor the agreed statement of facts touched upon that question. While the authorities seem to be somewhat in conflict as to who has the burden in such a case, we think that the weight of authority and the better reason is that the person who claims to be an innocent purchaser of land for value and without notice of a prior unrecorded deed or other instrument showing an outstanding title must both plead and prove the facts necessary to constitute him an innocent purchaser. 39 Cyc. 1778-1782; *Brooks v. Garner*, 20 Okl. 236, 94 Pac. 694, 97 Pac. 995; *Bell v. Pleasant et al.*, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61; *Eversdon v. Mayhew*, 65 Cal. 163,

3 Pac. 641; *Bates v. Bigelow*, 80 Ark. 86, 96 S. W. 125; *Hannan v. Seidentoph*, 113 Iowa, 658, 86 N. W. 44; *Lloyd v. Simons*, 90 Minn. 237, 95 N. W. 903; *Bowman v. Griffith*, 35 Neb. 361, 53 N. W. 140; *Holland v. Ferris* (Tex. Civ. App.) 107 S. W. 102; *Seymour v. McKinstry*, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; *Clark v. Lambert*, 55 W. Va. 512, 47 S. E. 312.

It is an affirmative defense, and the facts constituting the same are usually peculiarly within the knowledge of the person claiming to be an innocent purchaser. He knows whether or not the consideration was paid, and, if so, what it was, and whether he had knowledge of the outstanding title or notice of any fact that would tend to put him upon inquiry, and he is called upon to plead and to prove such facts. The defendants having failed in this case in the trial court to allege facts showing them to be innocent purchasers, and having failed to prove any such facts by the evidence, they did not assume and discharge at the trial the burden which was on them in order to establish that defense.

We therefore recommend that the judgment of the district court be in all things affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 382)

ELLEDDGE v. ARTERBERRY. (No. 5072.)
(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE §159—APPEAL BOND—ORDER OF COUNTY JUDGE.

A county judge at chambers or during vacation has no authority to order that a bond given on appeal from a justice of the peace court shall be strengthened by obtaining additional sureties or that a new bond be executed.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 544, 550-578; Dec. Dig. §159.]

2. JUSTICES OF THE PEACE §159—APPEAL BOND—ORDER OF COUNTY JUDGE.

In counties where county court is held at more than one place, and an appeal is filed in said court during vacation at one place, the county judge sitting at chambers at another place of holding court has no authority to order a new appeal bond to be executed or the old one amended, and such order, when made, is coram non judice and void.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 544, 550-578; Dec. Dig. §159.]

3. JUSTICES OF THE PEACE §159—APPEAL BOND—TIME FOR AMENDMENT—RIGHT.

When a motion is made on the first day of the term to dismiss an appeal from a justice's court on account of a defective appeal bond, and the appellant asks for time in which to cure the objections to the bond, a reasonable time should be granted, and it is an abuse of discretion to forthwith dismiss the appeal.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 544, 550-578; Dec. Dig. §159.]

Commissioners' Opinion, Division No. 6. Error from County Court, Garvin County; W. B. M. Mitchell, Judge.

Action by W. T. Arterberry against J. C. Elledge. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

R. E. Bowling, of Lindsay, and L. H. Hampton, of Pauls Valley, for plaintiff in error. J. S. Garrison, of Lindsay, for defendant in error.

HATCHETT, C. W. T. Arterberry sued J. C. Elledge in a justice of the peace court, and plaintiff obtained judgment. The defendant appealed to the county court of Garvin county at Lindsay; the appeal being filed in said county court on September 13, 1912. A motion was filed by the plaintiff on September 17, 1912, to require the defendant to strengthen his appeal bond, notice thereof having been previously given that same would be heard by the county judge in chambers at Pauls Valley on September 18, 1912. The defendant filed in writing an objection to the hearing in chambers at Pauls Valley, contending that the motion to strengthen the appeal bond must be heard in open court at Lindsay. On September 18, 1912, the county judge sitting in chambers at Pauls Valley heard the motion of the plaintiff to strengthen the appeal bond, sustained it, and ordered that the defendant within ten days file an appeal bond with one or more sureties to be approved by the court or the clerk, otherwise the appeal would be dismissed. Thereafter, on September 28, 1912, the defendant filed a motion asking that the time be extended until October 14, 1912, and the county judge made an order extending the time until that date. On October 15, 1912, the plaintiff filed a motion to dismiss the appeal on the ground that the defendant had failed to comply with the order of the county judge requiring another appeal bond to be filed which should be approved by the court or the clerk thereof. County court convened at Lindsay on December 5, 1912, and the defendant filed a motion asking for five days' additional time in which to strengthen his bond, which was on the same day overruled, and the appeal dismissed for failure to comply with the former order of the county judge made in chambers at Pauls Valley ordering the defendant to file a bond which the court or clerk would approve. From the order dismissing the appeal from the justice court to the county court, the defendant has appealed to this court.

[1] Under section 5473, Revised Laws 1910, the county court on appeal, where the surety is insufficient, may order an appeal bond to be strengthened by the procurement of additional sureties, or may order a new bond to be executed which shall meet the approval of the court, but we think such an order must be made by the court, and a judge in vacation or at chambers has no power to make such an order. Aside from the very limited power conferred by the common law, a judge in chambers or during vacation has only such power and authority which is expressly grant-

ed by the Constitution or statute. *De Lano et al. v. Board of Com.*, 4 Idaho, 83, 35 Pac. 841; *Brown et al. v. E. & M. Lumber Co.*, 44 Neb. 361, 62 N. W. 1070; 23 Cyc. 544.

The statute authorizes the court to make such orders in regard to the appeal bond. Nowhere in the Constitution or the statutes, so far as our information goes, is the jurisdiction given a judge as contradistinguished from a court to order an appeal bond to be amended or a new one executed and filed. *People v. District Court*, 28 Colo. 485, 69 Pac. 1066; *Fisk v. Thorp et al.*, 51 Neb. 1, 70 N. W. 498.

The exact nature of the order in this case is not clear, but it either meant that the old bond should be strengthened by obtaining additional sureties which would meet the approval of the judge or clerk of the county court, or that a new bond entirely should be filed, which would meet such approval. So far as the law involved is concerned, it makes no difference which construction is placed on the order.

[2] But the appeal was pending at Lindsay, and the order recites that it was made in chambers at Pauls Valley. Garvin county was divided into three county court districts. Sess. Laws 1910-11, p. 59. Provision is made for holding such court at two places other than the county seat, one of which is Lindsay, Section 1826, Revised Laws 1910, which section was enacted in 1909, fixes the time of holding terms of the county court in counties where such court is held at two other places in addition to the county seat. So the county judge at chambers in Pauls Valley, during vacation of the Lindsay court, had no jurisdiction or authority to make the order touching the appeal bond in the case pending on appeal at Lindsay, and such act was *coram non jure* and void. See *Laughlin v. Peckham*, 66 Iowa, 121, 23 N. W. 294; *Chase v. Miller*, 88 Va. 791, 14 S. E. 545.

[3] When court convened at Lindsay on December 5, 1912, it had jurisdiction to require the defendant to amend his bond or file a new one. The question is: Did the court abuse its discretion in dismissing the appeal on that day, when the defendant asked for time to cure the objections to his bond. The reason for dismissing the appeal on December 5, 1912, appears to be the failure of the defendant to comply with the former order of the judge which we have held was void. We think a reasonable opportunity should have been given the defendant to cure the objections to his bond after such objections had been passed upon by the court at Lindsay, and that the dismissal of his appeal without such opportunity was an abuse of discretion. We can appreciate the position of the court at the time of making the order. No doubt, it felt that sufficient notice had been given that the bond must be amended, and likely the term at Lindsay was very short and granting further time would be a great inconvenience, but the order at chambers in

Pauls Valley on September 18, 1912, being void, we think when the court convened at Lindsay it should have acted upon the motion of plaintiff to dismiss the appeal and the request of the defendant for time to amend his bond, as though the former order had never been made. The former decisions of this court are to the effect that a party appealing should be permitted upon request to amend a defective appeal bond, rather than that the appeal should be dismissed. *C., R. I. & P. Ry. Co. v. Moore*, 34 Okl. 199, 124 Pac. 989; *Spaulding Mfg. Co. v. Roff*, 34 Okl. 309, 125 Pac. 727; *Spaulding Mfg. Co. v. Witter et al.*, 34 Okl. 313, 125 Pac. 729; *Churchman v. Payte*, 37 Okl. 649, 133 Pac. 178; *Roberts v. Converse*, 37 Okl. 169, 131 Pac. 539; *Harper v. Pierce*, 37 Okl. 457, 132 Pac. 667.

The defendant in error, the plaintiff in the trial court, has not favored us with a brief, and we would have been warranted under the rules of this court, in reversing the cause for such failure, but, as the power of a county judge in chambers or during vacation, in counties where county court is held at more than one place, has been somewhat mooted, we thought best to decide this appeal on its merits.

We recommend that the order of the county court of Garvin county at Lindsay, dismissing the appeal from the justice court be reversed, and the cause remanded, with directions to reinstate the appeal and proceed in accord with this opinion.

PER CURIAM. Adopted in whole.

(54 Okl. 359)

MISSOURI, K. & T. RY. CO. v. WALKER,
County Treasurer, et al. (No. 4983.)

(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

TOWNSHIP—TAX LEVY—LIMIT.

The total township levy for current expenses cannot, without a vote of the people, exceed 3 mills in any one year; and the 10 per cent. which the excise board is authorized to add for delinquent taxes, when added to the sum necessary for current expenses, must not increase the levy beyond the limit of three mills.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 95, 97; Dec. Dig. § 54.]

Commissioners' Opinion, Division No. 6. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by the Missouri, Kansas & Texas Railway Company against David M. Walker, County Treasurer, and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. J. A. McCollum, of Pawnee, for defendants in error.

HATCHETT, C. This suit was instituted by the Missouri, Kansas & Texas Railway Company, as plaintiff, against David M. Walker, county treasurer of Pawnee county, and C. C. Marshall, sheriff thereof, defendants, for an injunction to enjoin the collection of certain taxes assessed against the plaintiff on its property in Jordan Valley township and in school districts Nos. 2 and 51 in Pawnee county. The plaintiff alleged in its petition as grounds for the injunction that in the said school districts there was a levy made in excess of the limitation fixed by the act of the Legislature of March 17, 1910 (Laws 1910, c. 64), and in excess of the limitation fixed by section 9, article 10, of the Constitution, and that in said township there was also a levy in excess of the limitation fixed by said act of the Legislature. A stipulation as to the facts was entered into between the parties and the cause submitted thereon to the court. The stipulation shows that the excise board of Pawnee county made a levy for taxes for current expenses for the year involved for the support of common schools in school district No. 2 of 5.5 mills; for the support of common schools in school district No. 51, 5.5 mills; for township purposes in Jordan Valley township, 3.3 mills. The court granted the relief sought as to the two school districts, holding that the levy was five-tenths of a mill in excess of the limit allowed by law, and enjoined the collection of the excess above 5 mills, but refused to grant the relief sought as to Jordan Valley township, and taxed half the costs against each of the parties, and the plaintiff has appealed to this court.

The principal question involved is:

"What is the limit that the county excise board can levy for township purposes; is it 3 mills or 3.3 mills?"

Section 7376, Revised Laws 1910, is as follows:

"Except as otherwise provided in this article, the total levy for current expenses of each county, city, town, township or school district shall not exceed in any one year the following: County levy, not more than 5 mills: Provided, that any county may levy not exceeding one mill additional in aid of the common schools of the county, and in any county where a county high school is located, an additional levy of not more than one mill may be made for the county high school: Provided, further, that where the assessed valuation of any county is less than four million dollars, the county levy shall not exceed six mills. City levy, not more than seven mills. Incorporated town levy, not more than five mills. Township levy, not more than three mills. School district levy, for the support of common schools, not more than five mills."

Section 7380 provides:

"The excise board shall meet at the county seat on the last Saturday of July of each year for the purpose of examining the estimates of expenses for the county and for each city, town, board of education, township and school district therein. Their meeting shall be public and they shall keep a record of their proceedings."

They shall have power to revise and correct any estimate certified to them where the amount thereof is in excess of the just and reasonable needs of the municipality for which the same is made. When they shall have approved each estimate, if the same shall be within the limits for current expenses, provided by the first section of this article [section 7376] and shall have ascertained the assessed valuation of property taxed ad valorem in the county and in each municipal subdivision thereof, and shall have ascertained the probable income of the county and of each municipal subdivision thereof from all sources other than ad valorem taxation, they shall thereupon make the levy therefor, adding thereto the amount ascertained to be necessary for a sinking fund which, with the money already in such fund, shall be sufficient to pay, at maturity, all bonded indebtedness of such municipality, and for the interest coupons falling due on the outstanding bonds of such municipality; to the total amount so ascertained to be necessary for current expenses, sinking fund and interest coupons shall be added ten per cent. for delinquent taxes. The levies so made by them shall be certified to the county clerk, who shall extend the same upon the tax roll."

The following section then provides for the method of holding elections for the purpose of increasing the levy in case of necessity.

Now the question is whether or not under section 7380, providing the procedure for the excise board, the 10 per cent. which shall be added for delinquent taxes authorizes the board to add such 10 per cent. to the limit fixed by section 7376. In the instant case the excise board fixed the levy in the school districts at 5.5 mills, and in the township at 3.3 mills, each being 10 per cent. higher than the limit fixed by section 7376.

Section 9 of article 10 of the Constitution fixes the limitation for school district levy at not more than 5 mills for school district purposes for support of common schools without a vote of the people of the district. Then if the Legislature intended that the 10 per cent. which the excise board is authorized to add for delinquent taxes should be in addition to the 5 mills authorized for school district levy, then it was clearly beyond the point fixed in the Constitution; but if the law means that the excise board shall ascertain the sum of money necessary for the purposes named therein, then should add 10 per cent. thereto, but that the total should be within the 5-mill levy, the act would be in accord with the Constitution. The act being susceptible of a construction which will uphold it, the courts will so construe it. *C. R. I. & P. Ry. Co. v. Beatty*, 34 Okl. 321, 118 Pac. 367, 126 Pac. 736, 42 L. R. A. (N. S.) 984; *St. L., etc., R. Co. v. Zalondek et al.*, 28 Okl. 746, 115 Pac. 867.

The defendants admit that the 5-mill limitation for school district purposes was binding upon the Legislature, but contend that it was the intent of the Legislature in the section above quoted to fix the maximum limit at 5.5 mills for school district purposes, and 3.3 mills for township purposes, and wherein the Legislature exceeded the limit provided by the Constitution as to the levy for school district purposes, the statute should be re-

duced within such limit, but allowed to stand as fixed for township purposes, because the 3.3 mills would be within the limit of the Constitution. In other words, they want the law in that regard to be made to read as follows:

"That the 10 per centum for delinquent taxes shall be added to the total amount found necessary for current expenses, sinking fund and interest coupons, even though such an addition would exceed the limitation fixed by section 1 of said act, unless such an addition would exceed the limit fixed by the Constitution, and then in that event, no such addition can be made."

Our task is to construe these statutes and ascertain the true intent of the Legislature. It is not to be presumed that the Legislature intended to go beyond the limit fixed by the Constitution in any event. If we place such construction upon this act as contended for by the defendants, then we must say that the Legislature intended to fix a maximum limit for school district purposes beyond that fixed in the Constitution. But if we give this act the construction contended for by the plaintiff, then all of its parts and each of its provisions would be within the maximum levies fixed by the organic law. And further, it is the true rule of construction that all parts of an act of the Legislature should be so construed if possible, as to make them harmonious and give effect to each provision. Section 7376 says:

That "except as otherwise provided in this article (which means that unless an election is held under the provisions of this article) the total levy for current expenses of each county, city, town, township and school district shall not exceed in any one year the following: * * * Township levy not more than three mills; school district levy, for the support of common schools, not more than five mills."

If section 7380 should be construed as to permit the excise board to add 10 per cent. for delinquent taxes to the 3 mills for township purposes and the 5 mills for school district purposes, then section 7376 could not be given its plain and clear meaning, but it would be necessary in that event to give it the meaning that the total levy for township purposes should be 3 mills and an additional 10 per cent., and the total levy for school district purposes 5 mills and 10 per cent.

The trial court evidently took the view that the levy for school district purposes exceeded the limit fixed by the Constitution, and therefore enjoined the collection of the taxes in excess of 5 mills, but that the proper construction of section 7380, Revised Laws 1910, would permit the excise board to levy taxes for township purposes at 10 per cent. above the 3 mills fixed by section 7376. We cannot arrive at any other conclusion than that the trial court erred in so construing the act, and that the true construction is that the total the excise board can levy for township purposes is 3 mills, and that the 10 per cent. which the law provides shall be added for delinquent taxes, when added to the amount estimated to be necessary for current

expenses, for the township must be within the 3-mill maximum limit.

We therefore recommend that the judgment of the trial court be reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff enjoining the collection of the excess in taxes and assessing the costs against the defendants.

PER CURIAM. Adopted in whole.

(54 Okl. 355)

McDONALD v. COBB. (No. 4989.)

(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

1. ANIMALS §95—RESTRAINING OF STOCK—REQUISITES OF NOTICE.

Under Snyder's Compiled Laws of Oklahoma, § 168, also Rev. Laws 1910, § 153, the notice required to be given by a party restraining stock, to the owner thereof, or the party having them in charge, need not be in writing.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 390-396, 402-408, 415; Dec. Dig. §95.]

2. ANIMALS §95—DAMAGES—NOTICE TO ASSESS—COMPUTATION OF TIME.

The 24 hours allowed under the same sections for the giving of notice to the justice of the peace to be and appear on the premises and assess damages must be estimated exclusive of Sunday.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 390-396, 402-408, 415; Dec. Dig. §95.]

Commissioners' Opinion, Division No. 6. Error from County Court, Wagoner County; Leon B. Fant, Judge.

C. C. McDonald brought action in replevin against Alex Cobb. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. H. Graham and H. E. Cunningham, both of Wagoner, for plaintiff in error. W. T. & A. C. Hunt, of Wagoner, for defendant in error.

BOLES, C. This is an action in replevin, instituted by plaintiff in error against defendant in error (hereinafter referred to as plaintiff and defendant, respectively), in the county court of Wagoner county. The replevin suit was defended upon the theory that the cattle claimed in the replevin action were rightfully held by the defendant under and by virtue of the herd law. Plaintiff complains that the defendant was not entitled to the possession of the cattle on account of irregularities in the distraint proceedings; in other words, the notice to the defendant, required under the statute, that his cattle were held to answer damages for trespassing upon the lands of the defendant, should be in writing. Second. That the notice required by the statute to be given the justice of the peace should be given within 24 hours, in the event a settlement cannot be effected after the first notice given; and of these in their order.

[1] The notices referred to are found in Snyder's Compiled Laws of Oklahoma, § 168, also in Rev. L. 1910, § 153, somewhat modified by the revision. Section 168 reads as follows:

"Within forty-eight hours after the stock has been restrained, Sunday not being included, the party so injured, or his agent, shall notify the owner of said stock, when known, and if unknown, the party having them in charge, and if said owner shall fail to satisfy the person whose lands are trespassed upon, he shall within twenty-four hours thereafter, notify some disinterested justice of the peace to be and appear upon the premises to view and assess the damages; such notice to be written."

It will be noticed that the statute provides that the owner shall, within 48 hours after the stock has been restrained, Sunday not being included, notify the owner of said stock, and, if said owner shall fail to satisfy the person whose lands are trespassed upon, he shall within 24 hours thereafter notify some disinterested justice of the peace to be and appear upon the premises and view and assess the damages; such notice to be written.

Plaintiff claims the first notice to the owner or the party in possession should have been in writing, and, having been given verbally, was no notice at all. The statute being mandatory and jurisdictional, a failure to comply with the statute would lose to the defendant his right under the statute to hold the stock for damages sustained. As to the notice, the plaintiff cites *Ensley v. State*, 4 Okl. Cr. 49, 109 Pac. 250; *Clemmens v. State*, 5 Okl. Cr. 119, 113 Pac. 234; *Jones v. Dashner*, 89 Mich. 246, 50 N. W. 849; *Minard v. Douglas County*, 9 Or. 206. In *Jones v. Dashner*, supra, the statute provided that the person impounding animals shall give notice to the owner which shall be delivered to the party or left at his place of abode and shall contain a description of the beasts. It is clear that the notice required under the Michigan statute must be in writing, for the manner of giving the same and the return thereof clearly imply that a written notice was required. In *Clemmens v. State*, supra, Judge Doyle, who wrote the opinion, had under consideration the notice required by statute to be given by the defendant of his intention to appeal. This statute also provides that proof of such service of notice must be filed with the clerk of the court, clearly implying a written notice. But in this case a different statute is before us for consideration. In the instances cited, a written notice was intended by the statute, but the statute before us simply provides that the notice be given, and does not designate what sort of a notice, and in the same statute other notices are required to be given in writing. If the framers of the statute had been of the opinion that it was necessary to give the first notice, and the one complained of herein, in writing, it would have been an easy matter for them to have said so; consequently, we

hold that the notice in the instant case, being verbal, was sufficient.

[2] It is next contended that the notice given to the justice of the peace was not given within the time required by law; that is to say, 24 hours after the giving of the first notice. The evidence shows that the first notice required was given verbally about 12:30 o'clock, Saturday, April 15th. Sunday intervening, within 24 hours, the notice was given to the justice of the peace about 10 o'clock the following Monday. Plaintiff in error contends that Sunday should have been counted in, and that consequently the notice was not given within 24 hours as required by the statute after giving the first notice. This contention is not wholly without reason, but we believe under our statute which provides (section 2937, Rev. L. 1910), "Whenever any act of a secular nature, other than a work of necessity, or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed," the notice required to be given in the present case not being an act of necessity or mercy, Sunday should be counted out, and if the notice is served within 24 hours, not counting Sunday, it would be sufficient. It therefore follows that the notice given the justice of the peace was served in time.

This being the law, we find no error in the record and recommend that the judgment of the court below be in all things affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 369)

GUTENBERG MACH. CO. v. HUSONIAN PUB. CO. (No. 5044.)

(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

1. SALES \S 440—BREACH OF WARRANTY—EVIDENCE OF VALUE—PRICE.

In an action involving a breach of warranty in the sale of personal property, the purchase price is competent evidence of the value of the property if it had been as warranted.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1261-1276; Dec. Dig. \S 440.]

2. APPEAL AND ERROR \S 1064—HARMLESS ERROR—INSTRUCTIONS.

Giving an instruction which as an abstract proposition is erroneous, but, when applied to the evidence, has the same meaning as it would have had if it were strictly correct, is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219, 4221-4224; Dec. Dig. \S 1064.]

3. APPEAL AND ERROR \S 1051—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where a written contract of purchase which contains a warranty is already in evidence, the admission of a letter which does not tend to prejudice the jury nor enlarge the warranty, al-

though it is incompetent, is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4161-4170; Dec. Dig. \S 1051.]

Commissioners' Opinion, Division No. 6. Error from District Court, Choctaw County; A. H. Ferguson, Judge.

Action by the Gutenberg Machine Company against the Husonian Publishing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. E. Stephenson, of Hugo, for plaintiff in error. Stewart & McDonald, of Hugo, for defendant in error.

HATCHETT, O. This was a suit by the plaintiff in error, Gutenberg Machine Company, as plaintiff, against Husonian Publishing Company and other parties in the district court of Choctaw county on promissory notes aggregating \$1,500, and interest, and for the foreclosure of a chattel mortgage on a linotype machine which was given to secure the payment of the said notes. While there were other defendants in the trial court, it was agreed that the defendant in error here was the real defendant, and the case was tried on that theory, and it will be so considered here.

The facts show that the plaintiff had sold the linotype machine to the defendant for \$2,250, part cash, and notes were given for the deferred payments and a chattel mortgage to secure the notes; \$750 had been paid, and this suit was brought to recover on the unpaid notes for the balance of the purchase price, and to foreclose the mortgage on the machine. The defendant tendered into court as full payment of its indebtedness \$250, and set up a breach of warranty in the contract of purchase, and alleged that the defendant had been damaged in the sum of \$1,250, in that the machine did not prove to be as warranted. The jury returned a verdict for the defendant, and judgment was thereupon entered for the plaintiff for the amount of \$250 as tendered, and the plaintiff has appealed to this court.

The following questions are presented and argued in the briefs: (1) That the evidence was not sufficient to sustain the verdict; (2) that the court misdirected the jury in its instructions; (3) that the court admitted incompetent evidence, to go to the jury which was prejudicial to the plaintiff.

[1] 1. On the first proposition the plaintiff contends that the defendant failed to prove the market value of the machine if it had been as warranted, and therefore that the evidence was insufficient to show the amount of its damage. It was incumbent on the defendant to prove the warranty, the consequent breach thereof, and the amount that it was damaged thereby. The evidence shows: That the machine was bought by written order which was duly accepted by

the plaintiff, and that it contained the following provision:

"It is understood and agreed that the Gutenberg Machine Company guarantees the above-described linotype to have been carefully repaired and to be capable of doing as good work as can be done with a new machine of the same kind, when in the hands of a competent workman."

Also that there were a number of defective parts, and that a considerable sum of money was soon expended on it for repairs and new parts, and that it was capable of doing about 50 or 60 per cent. as much work as a new machine of the kind would do. That the purchase price agreed to be paid was \$2,250, and witnesses testified that its value in the condition in which it was received was from \$500 to \$1,200, the jury evidently finding that it was of the value of \$1,000.

Section 2865, Revised Laws 1910, is as follows:

"The detriment caused by the breach of a warranty of the quality of personal property, is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its * * * value at that time."

And the rule in this state, as well as the great weight of authority of the other states, is that the measure of damages for the breach of a warranty of the quality of personal property is the difference between the value of the property if it had been as warranted and its actual value with the defects. *Wiggins v. Jackson*, 31 Okl. 292, 121 Pac. 662, 43 L. R. A. (N. S.) 153; *Spaulding Mfg. Co. v. Holiday*, 32 Okl. 823, 124 Pac. 35; *Spaulding Mfg. Co. v. Cooksey*, 34 Okl. 790, 127 Pac. 414; *Burgess et al. v. Felix*, 42 Okl. 193, 140 Pac. 1180; 35 Cyc. 468, and authorities there cited. But the purchase price is competent evidence of the value of the article purchased as warranted. *Burgess et al. v. Felix*, supra; 35 Cyc. 468-471, and authorities cited.

In *Burgess et al. v. Felix*, supra, it is said: "Proof of the purchase price of the mares by the plaintiff, and that proof not being controverted in any manner, is strong and convincing proof of the value of the mares as warranted, and, in the absence of other evidence as to the value of said mares, the purchase price is prima facie their value as warranted."

In the instant case there was no evidence of the value of the machine as warranted, except the purchase price of \$2,250, and under the rule announced in the last-cited case that was prima facie the value of the machine if it had been as warranted in the contract of sale. See, also, *J. I. Case Plow Co. v. Niles & Scott Company*, 90 Wis. 590, 63 N. W. 1013; *Ask v. Beck* (Tex. Civ. App.) 68 S. W. 53; *Beard v. Miller* (Tex. App.) 16 S. W. 655; *Tatum v. Mohr*, 21 Ark. 349; *C. Aultman & Co. v. Ginn*, 1 N. D. 402, 48 N. W. 336.

So we hold that in this case there was sufficient evidence for the jury to find the value of the machine as warranted, and, there being proof of the breach of warranty and the value of the machine with its defects, there

was sufficient evidence to sustain the verdict as to the amount of damages.

[2] 2. As to the second proposition the plaintiff in error contends that the trial court misdirected the jury as to the measure of damages. A portion of the instruction complained of is as follows:

"Unless you should further find that at the time the mortgage and notes were given there was a contract entered into for the purchase of certain property, and that under the terms of that contract this plaintiff warranted that property to be of certain character and certain quality, and that there has been a breach of said warranty in that it was not of that quality, and that breach is sufficient to reduce the value of that property to the extent that there is not due now over the sum of \$250, then in that event it would be your duty to find for the defendant. In other words, where a contract is entered into and express warranty in the contract that the property will be of certain character, the party who makes these warranties must live up to them, and, if the property proves to be of a character different to that—that is, defective, and not of the quality warranted—and by reason of that the property is of less value than it would have been if it had been of the character and quality warranted in the contract, then the party sued would only have to pay what the property was actually worth if he retained it."

As an abstract proposition of law, this instruction is clearly erroneous. It is tantamount to saying that the measure of damages would be the difference between the purchase price and the actual value of the property as received, and we have held the rule to be that the measure of damages is the difference between the value of the property if it had been as warranted and its actual value as received; but in this case the only evidence of the value of the machine, if it had been as it was warranted to be, is the purchase price. The jury must have found that the purchase price was its value if it had been as warranted. Therefore there is no distinction in this case between the purchase price and the value of the machine if it had been as warranted, and, so far as the evidence here goes, there is no difference between the two rules for the measure of damages. We therefore hold that while, as an abstract proposition of law, the instruction was erroneous, as applied to the evidence in this case, it did not prejudice the rights of the plaintiff. See authorities above cited. The plaintiff requested an instruction which gave the true measure of damages, but the court refused to give it, and gave the one above quoted instead, but we hold in this case that it was not prejudicial error.

[3] 3. On the proposition that the court admitted incompetent evidence over the objection of the plaintiff, it seems that the contract of sale included the following warranty:

"It is understood and agreed that the Gutenberg Machine Company guarantees the above-described linotype to have been carefully repaired and to be capable of doing as good work as can be done with a new machine of the same kind when in the hands of a competent workman."

Evidence was admitted to the effect that the machine was defective, and in the hands of a competent operator it would not do substantially as much work as a new machine. The plaintiff contends that evidence as to the quantity of work that this machine would do was incompetent under this warranty. While the terms of the warranty are not as precise as they could have been made, yet we believe that they were intended to mean that this machine would do as efficient work as a new one, and certainly the efficiency of the machine would cover the amount of work that could be done on it or the speed with which it would do its work. We think that no error was committed by the court in permitting this evidence to be introduced.

The plaintiff further contends that the court committed error in allowing the defendant to introduce in evidence the following letter:

"Chicago, Ill., May 13, 1909.

"Mr. R. G. Hardy, The Husonian, Hugo, Okl. —Dear Sir: In accordance with our promise, we give you herewith proposition on our rebuilt linotype machines.

"We have a number of model 1 two-letter linotypes that we are thoroughly rebuilding. These machines when received in our shop are completely taken apart and immersed in a chemical solution, which removes the paint and grease, enabling us to see the true condition of the machine. The parts of the machines are then assembled in exactly the same manner as they were when being built originally. All worn parts are thrown away and are replaced by new ones.

"We will sell one of these machines, with one magazine, one font of new two-letter matrices, that you may select from the specimen book of the linotype company 30 new spacebands and universal mold, for \$2,250.00, f. o. b. Chicago. Terms to responsible parties—\$500.00 cash and the balance in monthly 6% notes of \$50.00 each, the deferred payments being secured on the machine.

"The model 1 machine will carry all matrices from 5 pt to 11 pt, inclusive. The Universal mold is exactly the same mold that is sent out at this time with new machines. It can be adjusted by the means of liners from 5 pt to 14 pt in body and to any measure up to and including 30 ems pica in length.

"We inclose herewith, a list showing the new and improved parts added to all rebuilt machines.

"We can furnish a heater for either gas, gasoline or coal oil.

"We also have a model 3 two-letter linotype machine that will be in first-class condition. This machine will carry all matrices from 5 pt to 14 pt, inclusive. We will thoroughly overhaul it and sell it, with new matrices, new spacebands, one magazine and Universal mold, for \$2,600.00 f. o. b. Chicago, taking part cash and the balance on time.

"All rebuilt machines are guaranteed to do as much work and as good work, in the hands of a competent workman, as can be had from a new machine.

"We can make shipment of a rebuilt machine at this time within two or three days from receipt of order.

"Hoping to hear further from you and to be favored with your order for one of our machines, which will have our best attention, we are, yours very truly, Gutenberg Machine Company, Will S. Menamin, President. S-ES Enc."

The letter was dated May 13, 1909, and the contract of sale was made on June 10, 1909. We do not think the letter was competent evidence in the case. When the same was offered and objection properly made, the record shows that the court asked this question:

"Do you introduce this as being part of the contract? Mr. Stewart: This shows the relationship of the parties; that's a letter from the company explaining this transaction."

Whereupon the court overruled the objection and allowed it to be introduced. It seems to us that the only purpose of introducing it was to use it to supplement the written contract of purchase. The contract purported to be complete within itself, and could not be varied by extraneous evidence. But, after a careful reading of the letter, we cannot see anything in it which could have prejudiced the plaintiff in the minds of the jury. It seems only to inform the purchaser as to how these secondhand machines were taken apart, repaired, and put together, and the terms of sale, etc., and contains nothing which could tend to enlarge or extend the warranty in the contract of sale, except the following:

"All rebuilt machines are guaranteed to do as much work and as good work, in the hands of a competent workman, as can be had from a new machine."

Having held that the warranty in the contract of sale that this machine is "capable of doing as good work as can be done with a new machine" means also "as much work," we do not think the statement in the letter was different in effect from the warranty in the contract. Therefore the admission of the letter in evidence, while error, was not prejudicial to the substantial rights of the plaintiff, and therefore not reversible error.

Having arrived at the above conclusions, we recommend that the judgment of the trial court be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 354)

REED v. MOORE. (No. 4797.)
(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §28 — LEASE — FRAUD — ORAL AGREEMENT TO REPAIR — BREACH.

Where a lessor agrees orally to make certain repairs and improvements on a building in the future, and the lessor and lessee enter into a lease contract in writing which makes no mention of such repairs, and the evidence shows a failure to comply with such oral agreement, that does not constitute fraud sufficient to set aside the written instrument, in the absence of evidence that the lessor at the time he made such agreement did not intend to carry it out, or that he made it with intent to deceive the lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 82-84; Dec. Dig. §28.]

2. EVIDENCE \Leftrightarrow 442 — PAROL — WRITTEN LEASE—ORAL AGREEMENT FOR REPAIRS.

Parol evidence that, several days prior to the execution of a written lease, the lessor orally agreed to make certain repairs and improvements on the building is not competent in a suit brought on the written lease contract for rent, where the written lease purports to be a complete contract and does not include any agreement to make such repairs.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. \Leftrightarrow 442.]

3. EVIDENCE \Leftrightarrow 443 — PAROL — WRITTEN LEASE—CONSIDERATION—ORAL AGREEMENT.

Although such an agreement to make repairs may have been a part of the consideration, it was a contractual act, and parol evidence thereof was not competent, for if it were permitted it would add by parol another term to the contract as written.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2048-2051; Dec. Dig. \Leftrightarrow 443.]

4. EVIDENCE \Leftrightarrow 443 — PAROL—WRITTEN LEASE—CONSIDERATION—ORAL AGREEMENT.

A ruling of the trial court striking out such evidence, which was introduced over the objection of the opposing party, is not error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2048-2051; Dec. Dig. \Leftrightarrow 443.]

Commissioners' Opinion, Division No. 6. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Carrie A. Moore, administratrix of the estate of John J. Moore, against R. E. Reed. Judgment for plaintiff, and defendant brings error. Affirmed.

Bailey, Wyand & Moon, of Muskogee, for plaintiff in error. Jay A. Anderson, of Muskogee, for defendant in error.

HATCHETT, C. Carrie A. Moore, as administratrix of the estate of John J. Moore, deceased, as plaintiff, sued R. E. Reed, as defendant, in the justice of the peace court in Muskogee to recover \$100 for rent on a certain building which the deceased, John J. Moore, had by written contract rented to Reed for a term of one year for \$50 per month. The defendant answered by general denial, and further that the deceased represented to him orally that if he would sign the rental contract deceased would make certain repairs and improvements on the building; that said repairs and improvements were never made, and the contract was therefore procured by fraud and was without consideration. Judgment was rendered in the justice of the peace court for the defendant, and the plaintiff appealed.

Thereafter the cause was tried in the superior court of Muskogee county without a jury. The defendant introduced evidence to the effect that, several days prior to the date on which the contract was executed, the deceased agreed with the defendant that he would repair and improve the building in a substantial way; that up to that time the defendant had been paying \$25 per month rent, and by the written contract the monthly rent was doubled. The plaintiff objected to this

evidence at the time of its introduction, but the court permitted it to be introduced, then at the close of the evidence, upon motion, struck the same out, and rendered judgment for the plaintiff for \$150 and costs, and the defendant has appealed to this court.

There are two contentions presented: First, that the evidence ruled out showed that the contract was procured by fraud; and, second, that it showed a failure or partial failure of consideration.

[1] Some authorities held that a promise or expression of intention, when there is no present intent to carry out same, and it is made with intent to deceive, will amount to fraud; but it is not necessary for us to pass on that question. There is no evidence in this record that the deceased did not intend to make the repairs at the time he said he would do so, or that he promised to do so in order to deceive or mislead the defendant. The promise was made several days before the contract was executed, and the deceased died some time after the contract was made; and if fraud can be predicated upon a false representation of intention as to a future act, the evidence here is not sufficient to show such a false representation.

[2] We pass to the second question, as to whether the evidence which was stricken out was competent to show a failure or a partial failure of consideration. The general rule is well established that, where a contract has been reduced to writing, parol evidence is not admissible to vary the terms of the writing. It is equally well established that where a recital of the consideration received is put in a written contract, and amounts only to an acknowledgment of the payment thereof, parol evidence as to the true consideration is admissible, although it may tend to vary the writing in that respect. But when the statement of the consideration is "itself an operative part of a contractual act—as when in the same writing the parties set out their mutual promises as consideration for each other—here the word 'consideration' signifies a term of the contract," and parol evidence is not admissible to alter or contradict it. Wigmore, Ev. § 2433; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49; Neville v. Hughes, 104 Mo. App. 455, 79 S. W. 735; Howe v. Walker, 4 Gray (70 Mass.) 318; McNinch v. N. W. Thresher Co., 23 Okl. 391, 100 Pac. 524, 138 Am. St. Rep. 803.

[3, 4] In the case at bar the defendant contends that the deceased agreed orally to improve and repair the building, and that was a part of the consideration for the written rental contract; that the agreement to repair was not performed, and the consideration failed to that extent. The plaintiff contends that the written contract was complete in itself, and parol evidence was not competent to vary its terms. The authorities seem

to hold that a written lease cannot be altered by proving by parol that the lessor agreed to make repairs and improvements. *Johnson v. Witte* (Tex. Civ. App.) 32 S. W. 426; *McLean v. Nical*, 43 Minn. 169, 45 N. W. 15; *Hall v. Boston*, 16 Misc. Rep. 528, 38 N. Y. Supp. 979.

We are of the opinion that parol evidence that the deceased agreed to repair and improve the building was incompetent, for that it would tend to vary the terms of the written contract of lease, and the fact that such promise may have been a part of the consideration did not take it without the rule, because it was a contractual act, and to prove it by parol would be adding another term to the written contract.

The plaintiff in her bill of particulars sues for only \$100, and the judgment is for \$150. In her brief she offers to remit \$50. We therefore recommend that the remittitur be accepted, and the judgment be reduced to \$100, and the judgment affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 377)

DEERE v. NEUMEYER et al. (No. 5062.)
(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

1. INDIANS — §15 — INDIAN LANDS — REMOVAL OF RESTRICTIONS — ORDER OF SECRETARY.

An order of the Secretary of the Interior removing the restrictions upon the alienation of Indian lands, which order provides that same shall not become effective until 30 days after date, does not have the effect of removing restrictions until the 30 days have expired.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. §15.]

2. INDIANS — §15 — SURPLUS ALLOTMENT — REMOVAL OF RESTRICTIONS — SUSPENSION OF ORDER — OPERATION OF STATUTE.

Where the Secretary of the Interior made such order as to the surplus allotment of a full-blood Creek Indian on April 21, 1906, same had not taken effect on April 26, 1906, and the act of Congress of the latter date, extending restrictions upon the alienation of the allotments of full-blood Indians for a period of 25 years, superseded the order of the Secretary of the Interior, and such order was indefinitely suspended and never took effect.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 19, 34, 37-44; Dec. Dig. §15.]

3. INDIANS — §15 — SURPLUS ALLOTMENT — ALIENATION — VALIDITY.

A deed made on July 31, 1906, by a full-blood Creek Indian after the Secretary of the Interior had made such an order on April 21, 1906, is absolutely void because of the act of Congress of April 26, 1906; and a subsequent deed executed by the Indian's vendee, as well as a mortgage taken by such vendee to secure a part of the purchase price of the land, are also void.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 19, 34, 37-44; Dec. Dig. §15.]

Commissioners' Opinion, Division No. 6. Error from District Court, McIntosh County; R. C. Allen, Judge.

Action by Nancy Deere against Mary A. Neumeyer and another. Judgment for de-

fendants, and plaintiff brings error. Reversed and remanded.

J. B. Lucas and Britton H. Tabor, both of Checotah, for plaintiff in error. Claude A. Niles, of Checotah, for defendants in error.

HATCHETT, C. The plaintiff in error, Nancy Deere, née James, brought this suit in the district court of McIntosh county against Mary A. Neumeyer, and Mary A. Neumeyer as executrix of the estate of John G. Neumeyer, deceased, and Frank Britton, for the recovery of 80 acres of land, the same being a portion of the surplus allotment of the plaintiff, and for the cancellation of a deed from the plaintiff to John G. Neumeyer, a deed from said Neumeyer to Britton, and a mortgage from Britton back to Neumeyer to secure the balance of the purchase price which remained unpaid, and for rents on the land during the time it had been in the possession of the defendants.

The defendants in the trial court set up and relied upon a warranty deed executed by the plaintiff to John G. Neumeyer on July 31, 1906. A demurrer was sustained to the reply filed by the plaintiff, and by agreement the cause was submitted on the petition and the answer, and judgment was rendered thereon for the defendants.

It appears that the plaintiff is a full-blood Creek Indian; that the 80 acres of land sued for is a portion of her surplus allotment; that on the 21st day of April, 1906, the Secretary of the Interior made an order removing the restrictions on the surplus lands of the plaintiff, to become effective 30 days from that date. On April 26, 1906, Congress passed an act relative to the Indian Territory, in which is the following provision (section 19):

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of, or incumber in any way, any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by act of Congress." 34 Stat. 144, c. 1876.

On July 31, 1906, the plaintiff, under the name of Nancy Robeson, joined by her husband, executed a warranty deed to the land sued for to John G. Neumeyer, for a purported consideration of \$800. While the petition alleges that the plaintiff signed the deed under the belief that it was a lease, and had never received the consideration mentioned therein, still the principal question, and the one which under our view disposes of this appeal, is whether the land in controversy was restricted at the time the plaintiff executed the deed on July 31, 1906.

[1] That the provision in the order of the Secretary of the Interior that the same should not become effective until 30 days after its date (April 21, 1906) was valid is no longer an open question, as this court has heretofore decided that the Secretary had

the power to insert that provision in his order of removal, and that thereunder restrictions are not removed until the expiration of the 30 days. *Simmons v. Whittington*, 27 Okl. 356, 112 Pac. 1018; *Rogers v. Noel*, 34 Okl. 238, 124 Pac. 976; *Lanham et al. v. McKeel*, 148 Pac. 844.

[2, 3] It is conceded that prior to the order of the Secretary of the Interior the land in controversy was restricted, and the plaintiff could not sell the same. Under the above authorities the order of the Secretary of the Interior did not become effective until 30 days after its date. So that on April 26, 1906, when Congress passed the act placing additional restrictions upon the allotted lands of full bloods, the original restrictions had not been removed from this land. That Congress had the power to, and did by such act, extend the restrictions on the alienation of allotted Indian lands, was decided by the Supreme Court of the United States in the case of *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, and *Heckman et al. v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820.

The act of April 26, 1906, says that no full blood of either of those tribes shall have power to dispose of any of the lands allotted to him for a period of 25 years. Whether the act in question reimposed restrictions on the allotment of a full blood which was free therefrom on the date the act was passed, is not involved in this case and is not here decided. The language of the act includes all of the allotted lands of a full-blood member of the tribes named remaining in his hands and from which restrictions had not theretofore been removed; and we conclude that, the order of the Secretary of the Interior not having become effective when the act of Congress was passed, this was restricted land when said act took effect, and upon its taking effect on April 26, 1906, the order of the Secretary of the Interior removing the restrictions upon the alienation of this land was superseded and indefinitely suspended, and never went in force, and we conclude, therefore, that on July 31, 1906, when the plaintiff executed the deed to John G. Neumeyer, the land sued for was restricted, and the deed was absolutely void. It follows that the other instruments sought to be canceled are as to the plaintiff also void, and plaintiff is entitled to have same canceled and recover possession of the land sued for. While it is not binding on this court, and probably not even persuasive, yet there is satisfaction in knowing that the Interior Department arrived at the same conclusion on the question involved.

We therefore recommend that the judgment of the trial court be reversed, and the cause remanded for further proceedings in accord with this opinion.

PER CURIAM. Adopted in whole.

(54 Okl. 766)
MARKER v. GILLAM. (No. 5128.)

(Supreme Court of Oklahoma. Oct. 5, 1915.

On Rehearing, Jan. 25, 1916.)

(Syllabus by the Court.)

1. ASSIGNMENTS ⇐20, 129—DAMAGES ⇐120
—CONTRACT OF SALE—BREACH OF BUILDING
CONTRACT—MEASURE OF DAMAGES.

On the 28th day of March, 1908, Marker made and entered into a written contract with Garretson, in which he agreed to, and did, sell him a certain tract of land, for the consideration of \$2,500, \$1 cash in hand, and \$2,499, to be paid within two years, subject to an existing mortgage of \$1,200. On the 21st day of July of the same year, Garretson assigned and delivered said contract, for the sale and purchase of said land, to Gillam, as collateral security for the faithful performance of a building contract, in which Garretson undertook the construction of a house for Gillam. On the 28th day of July, Marker sold the land to a man by the name of Dillard for \$6,500. Thereafter, Garretson breached his contract with Gillam for the construction of the building, whereby Gillam was damaged in the sum of \$1,195.79. The difference between the price at which Marker agreed to sell the land to Garretson and its actual value at the time he sold it to Dillard, was \$4,000. *Held*: First, that said contract of sale was assignable; second, that Gillam, could maintain an action for damages against Marker for a breach of said contract of sale, without making Garretson a party to the suit; third, that Gillam's measure of damages would be the amount of damages actually sustained by him by reason of Gillam's failure to keep and perform the terms and conditions of his building contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 32-34, 213-219; Dec. Dig. ⇐20, 129; Damages, Cent. Dig. §§ 291-305; Dec. Dig. ⇐120.]

2. APPEAL AND ERROR ⇐970, 1071 — FIND-
INGS OF FACT—FOUNDATION FOR SECONDARY
EVIDENCE—DETERMINATION OF SUFFICIENCY.

When evidence is introduced tending to show the loss of a written contract, for the purpose of laying a foundation to introduce secondary evidence, as to the contents of said contract, the trial court is required to pass upon the sufficiency of such evidence, and its findings of fact thereon will not be disturbed by this court, unless clearly erroneous, and it appears therefrom that a manifest injustice has been done the complaining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851, 4234-4239; Dec. Dig. ⇐970, 1071.]

3. APPEAL AND ERROR ⇐1005—VERDICT—EV-
IDENCE.

Where the evidence reasonably tends to sustain the verdict, and when the jury has been properly instructed as to the law, and a motion for new trial has been denied, and the verdict of the jury approved by the trial court, this court will not invade the province of the jury to weigh the evidence and disturb the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. ⇐1005.]

Commissioners' Opinion, Division No. 4. Error from District Court, Comanche County; J. G. Johnson, Judge.

Action by E. O. Gillam against George Marker, and, defendant dying, Albert Marker, administrator of his estate, was substituted. Judgment for plaintiff, and defendant brings error. Affirmed.

C. K. Lucas, of Huntington, Ind., and Parmenter & Lenertz, of Lawton, for plaintiff in error. Johnson & Stevens, W. C. Henderson, and J. E. Michaleson, all of Lawton, for defendant in error.

ROBERTS, C. This case comes from the district court of Comanche county, and is an action to recover for breach of contract for sale of real estate.

The record shows that on the 21st day of March, 1908, George Marker, who was the original defendant in the case below, was the owner of a certain quarter section of land in that county, and on that day he entered into a written contract with one Francis Garretson to sell to him said land at the agreed price of \$2,500, subject to a mortgage of \$1,200, payments to be made as follows: One dollar at the date and time of the execution of the contract, which was paid, and \$2,499 on or before two years from the date of the deed, upon payment of which said Marker agreed to convey to said Garretson, or his heirs or assigns, said land, by good and sufficient warranty deed. The contract was acknowledged and delivered to Garretson, on the 11th day of June, 1908, and is as follows:

"Articles of agreement, made this 21st day of March, in the year A. D. 1908, by and between George Marker, party of the first part and Francis Garretson, party of the second part, witnesseth: That said party of the first part hereby covenants and agrees that if the party of the second part, shall make the payments and perform the covenants hereinafter mentioned, on his part to be made and performed, the said party of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatever, by good and sufficient warranty deed and abstract of title, the following lot, piece or parcel of real estate, with the appurtenances thereunto belonging, situate in the county of Comanche and state of Oklahoma, to wit, the northwest quarter of section six (6), in township one (1) north, of range twelve (12) west, I. M. And the said party of the second part hereby covenants and agrees to pay to said party of the first part, the sum of twenty-five hundred dollars, and assume the \$1200.00 mortgage now on the land and in the manner following: One dollar cash in hand paid, the receipt whereof is hereby acknowledged, and the balance as follows, twenty-four hundred and ninety-nine dollars on or before two years, with interest at the rate of six per cent. per annum, payable annually or the whole sum remaining from time to time unpaid, and to pay all taxes, assessments, or impositions that may be legally levied or imposed upon said land subsequent to the year 1907. And in case of the failure of said party of the second part to make either of the payments, or perform any of the covenants on his part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and owing to the fact that we are unable to ascertain the amount of damages at this time, it is mutually agreed that all payments made on this contract shall be retained by party of the first part in full satisfaction and liquidation of all damages by him sustained, and said party of the first part shall have the right to re-enter and take possession of the premises aforesaid. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators, and assigns of the respective parties."

On the 21st day of July, 1908, Garretson, who was still the owner of the contract, sold and assigned said contract to E. O. Gillam, who was the plaintiff below, and the defendant in error herein. The assignment of said contract, from Francis Garretson to E. O. Gillam, which was legally acknowledged, is as follows:

"Know all men by these presents: That I, Francis Garretson, as the owner and holder of, and the person named in a certain article of agreement for deed to the northwest one quarter ($\frac{1}{4}$) of section six (6) in township one (1) north of range twelve (12) west, I. M. and containing one hundred and sixty acres of land, dated March 21st, 1908, by and between George Marker, party of the first part, and the said Francis Garretson, party of the second part, subject to all of the conditions in said article of agreement, I, the said Francis Garretson, in consideration of one dollar in hand paid, by E. O. Gillam, and other valuable considerations hereinafter mentioned, do hereby assign all my right, title, and interest in and to said article of agreement to the said E. O. Gillam, upon the following conditions: That, whereas, the said E. O. Gillam has this 21st day of July, A. D. 1908, entered into an agreement with one J. F. Piercy and F. M. Garretson, the assignor herein, to build, furnish material and perform all labor necessary in constructing a certain dwelling as will more fully appear in said contract, and subject to the conditions in said contract. Now, if the said J. F. Piercy and F. M. Garretson shall perform and keep all of the conditions, terms and obligations on their part to be kept and performed by them according to the terms and conditions in said contract, then this assignment of this contract for deed shall be null and void, otherwise to be in full force and virtue.

"In witness whereof, I, the said Francis Garretson, have hereunto set my hand on this 21st day of July, 1908. Francis Garretson."

The plaintiff alleges that:

"The consideration for the execution and delivery of the sale and assignment of the original contract of sale of said real estate, by the said Francis Garretson to him (E. O. Gillam), was the faithful performance by said Garretson of a certain building contract, made and entered into by and between Francis Garretson, J. F. Piercy, and E. O. Gillam, on the 21st day of July, 1908, for the construction and erection of a certain five-room concrete dwelling, including cellar, to be built on lot 6 in block 58, in the city of Lawton, in accordance with the plans and specifications made and prepared by one T. F. Brodie, architect."

Plaintiff further alleges, in substance, that he is, and at all times since he purchased said contract of sale of said land, on the 21st day of July, 1908, has been, the owner of said contract of sale, and entitled to all the rights and benefits thereunder. And as, and for a breach of said contract, the plaintiff alleges that:

"The said F. M. Garretson failed to keep and perform the terms of said building contract and failed and neglected to construct and erect said house in accordance with the terms of said contract and deliver the same free and clear of all liens as provided therein, but that the said plaintiff was obliged to, and did in fact, pay out the sum of \$1,195.79 on and prior to the 1st day of March, 1909, which said sums the said F. M. Garretson was by his contract bound to pay, but which said sums the said plaintiff was compelled to pay in order to discharge the liens and claims that were entitled to be liens upon said above-described building and the lot upon which the same was situated, and that by reason of the

breach of the said contract by the said F. M. Garretson, the said plaintiff suffered damages in the sum of \$1,195.79 with interest thereon at the rate of 6 per cent. per annum from the 1st day of March, 1909."

For, and as a breach of the contract of sale of the land, the plaintiff alleges:

"That before the time within which the plaintiff had the right to pay said sum of money and to receive such deed, the defendant, unlawfully and without the knowledge or consent of the plaintiff, breached his said contract and sold and transferred said land to one W. F. Dillard, for the sum of \$6,500, which said deed was executed and delivered to said Dillard on the 28th day of July, 1908. That when said defendant conveyed said land to W. F. Dillard on the said date, defendant was aware and well knew that said contract for deed was in existence, and that the same was legally assignable, and defendant conveyed said land without the knowledge or consent of the plaintiff, and thereby breached his said contract for deed and by his said act defendant failed and refused, and still fails and refuses, to comply with his said contract to convey said land to said Francis Garretson, or to the plaintiff. That on the date when said deed was made to said Dillard by defendant, on, to wit, the 28th day of July, 1908, the said land was of value the sum of \$6,500 and the said Dillard paid said sum for said land, as shown by said deed, which deed is of record in the office of register of deeds of Comanche county, Okl., in Book No. 94, page 61, Deed Records of said county, to which reference is hereby made, and the same is referred to and made a part hereof."

The plaintiff further alleges that:

"The difference between the actual value of the land and the price at which defendant agreed to, and did, sell said land to the plaintiff is \$4,001 and that he was obliged to and did, on and prior to the 1st day of March, 1909, pay out the sum of \$1,195.79, which said sums the said F. M. Garretson was by his building contract bound to pay, but which said sums the said plaintiff was compelled to pay in order to discharge the liens and claims that were entitled to be liens upon said above-described building and the lot upon which the same was situated; and that by reason of the breach of the said contract by the said F. M. Garretson, the said plaintiff suffered damages in the sum of \$1,195.79, with interest thereon at the rate of 6 per cent. per annum from the 1st day of March, 1909."

Wherefore plaintiff prays for damages, because of the breach of both of said contracts, in the sum of \$1,195.79, with interest at 6 per cent. from the first day of March, 1909.

A demurrer was filed to the petition, which was overruled and exceptions saved. The principal question raised by the demurrer is the defect of parties, which will be considered hereafter. The defendant answered first by general denial, and as a second and further defense set up many other matters, which amount mostly to specific denials, and would be included in the general denial, and will not be necessary to mention here, except the question of misjoinder of parties, or rather, the failure of plaintiff to make E. O. Gillam, the vendee in the original contract of sale, a party to the action. We will say, however, that all questions raised by the answer have been fully considered. The case was tried to a jury, and verdict and judgment in favor of plaintiff for \$1,195,

and interest, as damages. Motion for new trial was overruled by the court, and defendant brings error.

It appears from the record that the defendant, George Marker, died after the commencement of the suit, and on suggestion of his death, Albert Marker, the administrator of his estate, was substituted as defendant below, and is plaintiff in error herein. To obtain a reversal of the case, counsel for plaintiff make 33 assignments of error, but in their arguments, as stated in their briefs, they group them into three propositions in the following language:

"There are three main points involved in this case. The first is that a building contract with specifications was the basis of the cause of action that Gillam had against Garretson, and for which he was trying to hold plaintiff in error liable, and the specifications were not introduced in evidence, nor sufficient grounds laid for the introduction of secondary evidence, and it was never attempted to prove the contents nor terms of the specifications. The second is that Garretson was a necessary party to these proceedings; he being the assignor of the contract for deed to Gillam as security for the faithful performance of the building contract. The third is that the undisputed evidence in the case shows that Garretson and Piercy had a building contract with Gillam, with specifications attached, whereby they were to build and furnish the material and complete a house according to the contract and specifications; that Garretson, to secure the faithful performance of said building contract, assigned as collateral security the contract for deed; that Garretson and Piercy defaulted on their contract to build, but the amount of the default was never ascertained in an action they were parties to; therefore the evidence is insufficient to sustain the verdict, and judgment should have been for defendant."

[2] The first general error complained of is the failure of the plaintiff to produce and introduce in evidence the written plans and specifications describing the material and manner in which the building referred to in the assignment contract should be constructed, and the admission of secondary evidence as to said plans and specifications without proper foundation therefor. The answer to that assignment is that the record shows some evidence, at least, that the written plans were lost. The trial court passed upon the sufficiency of that proof; and, under the well-established rule, his findings of facts, upon which the secondary evidence was admitted, will not be disturbed by this court, and for that reason that contention cannot be sustained.

[1] The second contention of counsel is that Garretson, the vendee in the original contract of sale, who was also the assignor of said contract, was not made a party to the suit. That proposition must stand or fall upon the question as to whether he was a necessary party to the action, which, as we view it, must be answered in the negative. The contract of sale was unquestionably assigned by Garretson to Gillam, as collateral security for the faithful performance of the building contract. Gillam was the absolute owner of the contract, and his title could

only be defeated upon full completion of the building, according to the terms of the contract. Garretson's interest was only an equity of redemption, or such surplus, if any, that might be left after paying whatever damage, Gillam, as the assignee, might sustain by failure to complete the building.

This case comes clearly within the rule laid down in *C. R. I. & P. Ry. Co. v. Bankers' Nat'l Bank*, 32 Okl. 290, 122 Pac. 499, and is decisive of the question in hand. In that case, Simpson assigned to the bank, as collateral security, his claim against the railway company for damages on account of injuries to freight received by it in transportation under a written contract. The amount of the claim exceeded the face of the debt. The bank brought suit in its own name without joining Simpson. The court held that the claim was assignable, and that the bank could maintain an action thereon, in its own name, and that Simpson was not a necessary party. The language used in that case, applicable here, is as follows:

"The first error assigned is that, as the assignment was intended as collateral security, it did not vest in the plaintiff such an interest as would permit the plaintiff to maintain the action in its own name, and that Simpson was a necessary party in the case. We do not agree with this contention. In *Minnetonka Oil Co. v. Cleveland Vitriified Brick Co.*, 27 Okl. 180, 111 Pac. 326, Mr. Justice Williams, in delivering the opinion of the court, says: 'The more serious question in this record to determine is whether the contract was assignable. At common law no chose in action was assignable. In equity, however, every chose in action, except a tort, was assignable, but subject to all equities that might be set up against it. *McCrum v. Corby*, 11 Kan. 467 (2d Ed. 353); *Kansas Midland Railway Co. v. Brehm*, 54 Kan. 751, 39 Pac. 690; *Barringer v. Bes Line Constr. Co.*, 23 Okl. 131, 99 Pac. 776, 21 L. R. A. (N. S.) 597; *Glenn v. Marbury*, 146 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790. Under our statute, every chose in action, not founded upon a tort, is assignable, and right of action is conferred upon the assignee. See section 4224, *Wilson's Rev. & Ann. St. 1903*; *St. Okl. 1893*, § 3898; *K. C., M. & O. Ry. Co. v. Shutt*, 24 Okl. 96, 104 Pac. 51, 138 Am. St. Rep. 870, 20 Ann. Cas. 255.'

"Simpson's claim against the defendant, not arising out of a pure tort, was assignable. 2 *Wilson's Rev. & Ann. Stat. 1903*, §§ 4163, 4224 (Comp. Laws 1909, §§ 7349, 5558); *K. C., M. & O. Ry. Co. v. Shutt*, 24 Okl. 96, 104 Pac. 51, 138 Am. St. Rep. 870, 20 Ann. Cas. 255; 2 *Wilson's Rev. & Ann. St. 1903*, § 4226 (Comp. Laws 1909, § 5560), provides: 'An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way.'

"In construing this statute before it was adopted by us, the Supreme Court of Kansas, in *Walburn v. Chenault*, 43 Kan. 352, 23 Pac. 657, in deciding that the assignee of a judgment against a railroad company could sue thereon in his own name, notwithstanding that a beneficial interest was reserved to third persons, says: 'The consideration for the assignment was a large indebtedness of Tiernan to Chenault's Bank, or the bank of which he was president;

and it was agreed that the proceeds of the judgment should be applied in payment of the indebtedness, and to the discharge of an attorney's lien which had attached to the judgment. The assignment was absolute, and is such as to vest in the assignee the whole legal title. He had such a beneficial interest in the proceeds of the judgment that he could bring an action in his own name, without joining other parties, who by collateral agreement might be entitled to a share of the proceeds. Under section 28 of the Code, it is provided that an action may be brought by a "person with whom or in whose name a contract is made for the benefit of another, * * * without joining with him the person for whose benefit it is prosecuted." The assignee was authorized to receive the proceeds of the judgment, and the assignment is such as to afford complete protection to the plaintiffs in error against a second action by other persons interested in the proceeds of the judgment, and to whom the assignee may be required to account. The plaintiffs in error were not limited or cut off from any defense by reason of the assignment, and the absence of parties to whom the assignee must account cannot cause any future embarrassment to the plaintiffs in error. In *Williams v. Norton*, 3 Kan. 295, it was held that where a note was assigned to one with a beneficial interest in the proceeds of the same, and with an understanding that he was to receive the money on it, such person was the real party in interest, within the meaning of the Code, and might sue in his own name, although he was not entitled to apply to his own use the whole of the proceeds. *Allen v. Brown*, 44 N. Y. 228; *Pom. Rem. Sec. 132*. The action was properly brought in the name of the assignee, and no prejudice could result to the plaintiffs in error by his failure to join other parties interested in a part of the proceeds of the judgment, or by his failure to allege his liability to them.'

"It is true here, as in the case of *Walburn v. Chenault*, supra, that a recovery by the plaintiff is a complete protection to the defendant against any other claim which Simpson might assert, and that any defense which it might urge against Simpson it might likewise urge against the plaintiff. While there is some conflict in other jurisdictions as to whether the assignee may sue when the assignment is intended merely as collateral security (4 Cyc. 99-101, and notes), we think the previous decisions of this court, and of the Supreme Court of Kansas construing our statute, are sufficient to establish the right to such an assignee to maintain the action without joining the assignor."

It must be apparent from the foregoing case, and authorities therein cited, that Garretson was not a necessary party, and there was error in the court so holding.

[3] The third contention is that:

"The evidence in the case shows that Garretson and Piercy had a building contract with Gillam, with specifications attached, whereby they were to build and furnish the material and complete a house according to the contract and specifications; that Garretson, to secure the faithful performance of said building contract, assigned as collateral security the contract for deed; that Garretson and Piercy defaulted on their contract to build, but the amount of the default was never ascertained in an action they were parties to. Therefore the evidence is insufficient to sustain the verdict, and judgment should have been for defendant."

This proposition simply goes to the sufficiency of the evidence to sustain the verdict of the jury and judgment of the court. A verdict or findings of the jury based upon evidence reasonably tending to support them will not be disturbed on appeal. *Lucas v. Brokefield*, 8 Okl. 284, 57 Pac. 166. That

rule has been established and followed in a great many cases in this court. We might further add here that we have carefully gone over the briefs and record in this case, and are entirely satisfied that the verdict and judgment are fully sustained by the evidence. Many questions have been raised by counsel for plaintiff in error, and the case has been briefed and argued with much more than ordinary care and ability, and the writer of this opinion has given them all consideration, but it must be apparent that it would be impracticable for the court to discuss each one separately.

Upon full consideration of the whole case, we are of opinion that no prejudicial error has been committed, and that it should be affirmed.

On Rehearing.

The judgment in the lower court was in favor of plaintiff for \$1,195, with interest at the rate of 6 per cent. per annum, from the 1st day of March, 1909. That judgment was affirmed by this court on the 5th day of October, 1915. On motion for rehearing, the original opinion is modified in this: The judgment in the district court is reduced to the sum of \$1,080, to draw interest at the rate of 6 per cent. per annum from the date thereof, which was January 27, 1913. The case is, in all other respects, affirmed and further rehearing denied.

PER CURIAM. Adopted in whole.

(54 Okl. 387)

OWENS v. FARMERS' & MERCHANTS' BANK OF DUKE. (No. 5090.)

(Supreme Court of Oklahoma. Jan. 4, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 166 — REPLY—NEW MATTER IN ANSWER.

New matter in an answer, which does not constitute a defense, does not require a reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 321½–328; Dec. Dig. \S 166.]

2. PLEADING \S 343 — ANSWER — REPLY — JUDGMENT ON PLEADINGS.

An allegation in an answer that the plaintiff, in an action by an assignee upon a promissory note, did not pay the defendant or any one else anything for the note, does not constitute a defense if true, and judgment on the pleadings should not be granted on the ground that no reply was filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1048–1051; Dec. Dig. \S 343.]

Commissioners' Opinion, Division No. 6. Error from District Court, Osage County; H. H. Hudson, Judge.

Action by the Farmers' & Merchants' Bank of Duke against J. A. Owens. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert S. Stuart, of Pawhuska, for plaintiff in error. Jos. D. Mitchell, of Pawhuska, and Robinson & Hamilton, of Altus, for defendant in error.

HATCHETT, C. The Farmers' & Merchants' Bank of Duke brought this suit in the district court of Osage county against J. A. Owens, upon a promissory note executed by the defendant, Owens, to the Duke State Bank of Duke, alleging that after the execution of said note the Duke State Bank sold, assigned, and transferred the same to the plaintiff. The defendant answered as follows, omitting the caption:

"Comes now the defendant, J. A. Owens, and in answer to petition of plaintiff filed herein, alleges and states that the defendant denies each and every allegation contained in the plaintiff's petition except such as are hereinafter admitted. The defendant admits that he executed the note sued upon and set forth in plaintiff's petition.

"The defendant denies that the plaintiff is the legal holder and owner of said note, or that the same was ever legally transferred or assigned to said plaintiff.

"For a further defense the defendant alleges that the plaintiff paid nothing for said note, and that no consideration whatsoever passed from the plaintiff for said note to this defendant or any other party. (Italics ours).

"Wherefore the defendant having fully answered prays that the plaintiff take nothing by this action, and that the defendant be dismissed, hence with the costs herein expended."

The cause thereafter came on for trial, and the defendant, Owens, moved for judgment on the pleadings for the reason that no reply had been filed by the plaintiff to the answer. The court overruled the motion for judgment on the pleadings, proceeded with the trial, and judgment was rendered for the plaintiff, and the defendant appealed.

The only question presented is whether or not a reply was necessary to the answer filed. The plaintiff in error contends that the following paragraph of his answer:

"For a further defense the defendant alleges that the plaintiff paid nothing for said note, and that no consideration whatsoever passed from the plaintiff for said note to this defendant or any other party"

—was new matter and required a reply, else it should have been taken as confessed, and judgment entered for him in the trial court.

[1, 2] It will be noticed that this is not a plea of want of consideration when the note was executed by the defendant, Owens, to the Duke State Bank, but it is a plea that the plaintiff, the Farmers' & Merchants' Bank of Duke, paid nothing for the said note either to the defendant or any other person.

Section 4779, Revised Laws of Oklahoma 1910, is as follows:

"Every material allegation of the petition, not controverted by the answer, and every material allegation of new matter in the answer, not controverted by the reply, shall, for the purposes of the action, be taken as true. * * *

But where the new matter alleged in the answer does not constitute a defense to the action, then it does not require a reply. West v. Cameron, 39 Kan. 736, 18 Pac. 894; Hickey v. Anheuser-Busch Brewing Ass'n, 36 Colo. 386, 85 Pac. 838.

So if the above-quoted paragraph of the defendant's answer did not constitute a de-

fense to the action, then no reply was necessary. The said paragraph amounts to an allegation that the plaintiff did not pay anything for the assignment of the note from the Duke State Bank to it. If this were a suit between the two banks upon the assignment, then the question of consideration might be material; but it is a suit between the assignee and the maker of the note, and so far as the latter is concerned, it is not material whether the plaintiff paid anything for the note or not just so the plaintiff was the legal owner and holder thereof. *Geisreiter et al. v. Sevier*, 33 Ark. 522; *Shane et al. v. Lowry*, 48 Ind. 205; *Musselman et al. v. Hays*, 28 Ind. App. 360, 62 N. E. 1022; *Gould v. Leavitt*, 92 Me. 416, 43 Atl. 17.

So, admitting the truth of the paragraph of the answer in question, that the plaintiff did not pay anything for the said note, that would not have constituted a defense, and therefore it was not necessary for the plaintiff to file a reply thereto.

We conclude, therefore, that the action of the trial court in overruling the motion of the defendant for judgment on the pleadings was correct, and recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 779)

CITY OF ARDMORE v. SAYRE. (No. 5176.)

(Supreme Court of Oklahoma. Oct. 12, 1915.

Rehearing Denied Jan. 25, 1916.)

(Syllabus by the Court.)

1. OFFICERS ⇐7—REMOVAL OF APPOINTING POWER.

Where an officer holding under appointment, is guilty of malfeasance or maladministration in office, as a general rule, the appointive power carries with it the inherent power of removal, unless prohibited by law.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 8, 9; Dec. Dig. ⇐7.]

2. MUNICIPAL CORPORATIONS ⇐155—OFFICERS—POWER TO REMOVE.

Where a city charter provides for an officer, known as city engineer of said city, and also provides that "said engineer shall be appointed by the mayor, by and with the consent of the board of city commissioners, and shall hold his office for a term of two years, unless sooner removed, as provided in this charter," and said charter contains no provision for the removal of officers, held, that the fact that the charter fails to provide for the removal of city officers is by implication an inhibition upon the power of the mayor and board of commissioners to remove the city engineer of such city from office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 342-345; Dec. Dig. ⇐155.]

3. OFFICERS ⇐39—"DE FACTO OFFICER."

An "officer de facto" is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where such duties and functions of the office are exercised by one

who was in actual possession of it, under color of title.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 61; Dec. Dig. ⇐39.]

For other definitions, see *Words and Phrases*, First and Second Series, *De Facto Officer*.]

4. MUNICIPAL CORPORATIONS ⇐147—OFFICERS—"DE FACTO OFFICER"—PERSON ILLEGALLY APPOINTED.

Where one person is holding an office by legal appointment, and claiming to be such officer de jure, the mere fact that another person may take possession of said office, and perform some of the duties and functions of said office, under a pretended appointment by an officer or public board, or body acting against a plain provision of the statute, and without any color of right, power, or jurisdiction to remove the de jure officer, or to appoint such pretending officer, such pretended appointee is not a de facto officer, for the reason that, under such circumstances, there cannot be two different officers, de jure and de facto, in possession of an office at the same time, where one incumbent only is provided by law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 324, 325; Dec. Dig. ⇐147.]

5. OFFICERS ⇐95—DE JURE OFFICER—RIGHT TO SALARY—PAYMENT TO USURPER.

The rule that, where the salary of an office is paid to a de facto officer, this defeats the right of the de jure officer to recover the legal salary of such office, does not apply to a mere usurper of said office or one pretending to hold such office without any color of title thereto.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 134, 139; Dec. Dig. ⇐95.]

6. PLEADING ⇐290—ALLEGATIONS NOT DENIED UNDER OATH—APPOINTMENT AND AUTHORITY OF OFFICER—ADMISSIONS.

In all actions allegations of appointment or authority of a public officer shall be taken as true, unless the denial of the same be verified by the contending party, his agent or attorney, and such allegations will be construed as stating that such officer is a duly and regularly authorized officer, with full power, right, and authority to perform the duties and functions of such office; and the failure to deny such allegations under oath will be taken as an admission of the title to such office as alleged, with full power and authority to perform the duties and functions thereof.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 859-863, 866½; Dec. Dig. ⇐290.]

Commissioners' Opinion, Division No. 4. Error from District Court, Carter County; S. H. Russell, Judge.

Action by H. H. Sayre against the City of Ardmore. Judgment for plaintiff, and defendant brings error. Affirmed.

F. M. Adams, of Ardmore, for plaintiff in error. Potterf & Walker, of Ardmore, for defendant in error.

ROBERTS, C. This action was commenced in the district court of Carter county by H. H. Sayre, defendant in error herein, against the city of Ardmore, plaintiff in error, to recover the sum of \$1,500 alleged to be due him as one year's salary as city engineer of said city. On motion of plaintiff for judgment on the pleadings, the court rendered judgment against the city, and in favor of the plaintiff, for the full amount claimed.

For the facts involved we must depend entirely upon the pleadings. Therefore, in order to obtain a better understanding of the case, we will set out the pleadings in full, which are as follows:

"Comes now said plaintiff, leave of the court first being had and obtained, and files this, his first amended petition, and pleads as follows, to wit:

"(1) That during the times hereinafter mentioned, the city of Ardmore was, and has ever since continued to be, a municipal corporation of the state of Oklahoma, and duly incorporated under the laws governing cities of the first class.

"(2) That the city of Ardmore has what is known as a commission form of government, the elective officers of said city being mayor, together with four commissioners, who derive their authority from the charter of said city, which charter has been duly approved as by law required.

"(3) In addition to the elective officers provided for in said charter as aforesaid, the said charter further provides for an officer known as city engineer of said city, section 5, article 3, of said charter providing that he shall be appointed by the mayor by and with the advice and consent of the board of commissioners, and shall hold his office for a term of two years, unless sooner removed as provided in this charter; that, in pursuance of said authority, the mayor, on or about May 18, 1908, appointed this plaintiff city engineer of the city of Ardmore, and the said appointment was by the commissioners duly approved as by the charter provided; that by virtue of the said appointment the said plaintiff, Sayre, had a right to hold said position for the term of two years from the date of his appointment as aforesaid.

"(4) Plaintiff further states that on April 20, 1910, without any authority of law, or without any right or color of right, and without any notice to this plaintiff, or without any charges being filed against him, James A. Cotner, then the mayor of the city of Ardmore, handed this plaintiff a notice in the form of a letter, announcing that this plaintiff was dismissed from the service of the city for insubordination, a copy of which letter is attached hereto, and made a part of this amended petition as Exhibit A; that upon receipt of this letter plaintiff at once wrote a letter to the then mayor, stating, in substance, that he did not recognize the authority of the mayor to dismiss him from office, a copy of which letter is hereto attached and made a part hereof as Exhibit B.

"(5) Plaintiff further states that subsequent to the date of the receipt of the notice from the mayor in which the said mayor attempted to usurp his official authority as set out in the preceding paragraph, that is to say, on the 25th day of April, 1910, the said mayor preferred charges in writing against the said plaintiff and announced that the matter would be heard at the city hall on the evening of April 27, 1910; that at the appointed time and place plaintiff was on hand protesting against the authority of the mayor and commissioners to expel him from his office as city engineer, without hearing one word of testimony, and in the face of the fact that the charter in no manner provides for removal of an appointive officer, and in no place, directly or indirectly, gives authority to the mayor and board of commissioners to remove an appointive officer, the said commissioners at said meeting on said date passed a resolution to the effect that it is the sense of the board of commissioners that they have power to suspend or dismiss any appointive officer at any time they deem such action expedient, a copy of which resolution is hereto attached and made a part hereof as Exhibit C.

"(6) Plaintiff further states that it is not within the power or authority of the mayor and board of commissioners to thus amend the char-

ter of the city of Ardmore, it being provided in said charter that the citizens can change the same on an initiative vote of the qualified electors of the city, and the said resolution was of no effect, and, as this plaintiff believes and alleges, was fraudulently passed by said board for the purpose of illegally delegating to themselves power and authority which they did not possess.

"(7) Plaintiff further states that immediately after the passage of the resolution made a part hereof as Exhibit C the board passed another resolution, a copy of which is attached hereto as a part hereof and marked Exhibit D, in which resolution they stated that on account of the proven inability of the present engineer, this plaintiff, to act in harmony with the mayor and commissioners, that said friction seems to be caused by the malicious interference of parties on the outside, which resolution was pure dictum, and not warranted by the facts as shown at said hearing, for the reason that in no way was any testimony offered to substantiate said allegations, the said resolution further requesting this plaintiff to tender his resignation; it being the intent of said resolution to say to said plaintiff in an indirect way that his services were no longer required by the city, and that it was the purpose of the board of commissioners to dismiss him by virtue of said resolution in the event the said plaintiff did not resign his office as city engineer on or before May 1, 1910.

"(8) That, notwithstanding this, plaintiff was legally in possession of and exercising the functions of the office of city engineer under and by provisions of the city charter of the city of Ardmore, and, without any warrant or right or law, the mayor and commissioners, at a meeting held at the city hall in the city of Ardmore on or about the 6th day of May, 1910, peremptorily undertook to dismiss this plaintiff from his office, and since that time has not recognized him as city engineer nor permitted him to perform his duties as such, and all this was done without the consent and over the objections of this plaintiff, and without any warrant of law, the said plaintiff at that time and now contending that he is the legally qualified city engineer of the city of Ardmore, Okla., his office expiring May 18, 1911, according to the terms of said charter as aforesaid.

"(9) That since the action of the said mayor and commissioners wherein they delegated to themselves, without warrant of law, the right to declare the office of the city engineer vacant, this plaintiff, although legally entitled thereto, has not been receiving the emoluments of said office, which are the sum of \$125 per month, which amount is payable monthly to this plaintiff.

"(10) Plaintiff states that at all times since the action of the mayor and board of commissioners as aforesaid he has resided in Ardmore, Okla., and has considered himself the legally qualified city engineer, and has been ready and willing to perform the duties of said office, but the said mayor and board of commissioners have not recognized him as city engineer nor permitted him to perform the functions of said office, and, as this plaintiff is informed, the said mayor and board of commissioners have not attempted to appoint any other person as city engineer since their action in which they attempted to remove this plaintiff as aforesaid.

"(11) Plaintiff further states that by virtue of his being city engineer as aforesaid he is entitled to the sum of \$125 a month salary as aforesaid, and the same has not been paid to him since the 1st day of May, 1910; that the amount due him now at this date is for the 12 months beginning May 1, 1910, and ending April 30, 1911, that is to say, 12 months' salary, which amounts to \$1,500.

"Wherefore plaintiff prays that he have judgment against the city of Ardmore for the said

sum of \$1,500, together with all costs herein expended."

The petition was duly verified. Attached to said petition, and marked Exhibit A, appears the following:

"Mr. H. H. Sayre, City Engineer, Ardmore, Oklahoma—Dear Sir: You are hereby dismissed from the service of the city of Ardmore, for insubordination. James A. Cotner, Mayor.
"JAC-OH."

Also attached to said petition, and marked Exhibit B, appears the following:

"Ardmore, Okl., April 20, 1910.

"Hon. Jas. A. Cotner, Mayor of Ardmore, Ardmore, Oklahoma—Dear Sir: I have your letter of even date herewith, in which you advise me that I am dismissed from the service of the city of Ardmore for insubordination.

"In reply, I beg to state that I do not recognize the authority of the mayor of the city of Ardmore to peremptorily discharge me without any action of the board of commissioners and without any opportunity for being heard in defense of myself.

"If I have been guilty of insubordination, I demand, as an American citizen, that I be presented with the charges against me and be given an opportunity to be heard in my defense.

"Until I am discharged by the board of commissioners, after a hearing in which I am allowed to defend myself, I shall consider that I hold the office of city engineer of Ardmore, and will act accordingly.

"Yours very truly, H. H. Sayre,
"City Engineer."

Also attached to said petition, and marked Exhibit C, appears the following:

"Be it resolved by the board of commissioners of the city of Ardmore that the right to suspend or dismiss any appointive officer or employé of the city goes with the power to appoint or employ, and it is the sense of the board that the commissioners of the city of Ardmore have the power to do so at any time that they may deem such action expedient and necessary."

Also attached to said petition, and marked Exhibit D, appears the following:

"Whereas, on account of the proven inability of the present city engineer, H. H. Sayre, to act in harmony with the mayor and commissioners of the city of Ardmore; and

"Whereas, this friction seems to be caused by the malicious, unwarranted, and unauthorized interference of parties on the outside, who have not the best interests of the city at heart, by their influence have caused Mr. Sayre to become suspicious of the integrity of the mayor and rebellious in executing the wishes of the board, as expressed through the mayor, thereby rendering him [the engineer] unfitted to act in this capacity:

"Therefore be it resolved by the board of commissioners that Mr. Sayre is hereby requested to tender to the board of commissioners his resignation, same to take effect on the completion of this month's [April] services, and that this action is taken without prejudice in the premises.

"Passed and approved this 27th day of April, 1910.

"[Seal.] [Signed] Jas. A. Cotner, Mayor.

"[Signed] G. H. Bruce, City Clerk."

Afterwards the defendant filed its general demurrer to the amended petition of the plaintiff, as follows:

"Comes now the defendant in the above styled and numbered cause and demurs to plaintiff's amended petition, and says that the same does not contain allegations sufficient to constitute

a cause of action against it, either in law or equity, and of this it prays judgment of the court."

The trial court overruled the demurrer, to which action of the court the defendant excepted; and thereupon the defendant filed its answer, which is as follows:

"Comes now the defendant in the above styled and numbered cause, and without waiving its demurrer, but still insisting upon the same, says:

"(1) That it denies all and singular the allegations contained in plaintiff's petition, except those herein admitted.

"(2) That it admits that it is a municipal corporation, as is alleged in paragraph 1 of said petition, and that Exhibits A, B, C, and D of said petition are true copies of the instruments mentioned therein.

"(3) That it admits that on the 25th day of April, 1910, the mayor of the city of Ardmore preferred charges in writing against the said plaintiff and announced that the same would be heard on the evening of April 27, 1910, at which meeting the plaintiff asked for further time and for a copy of the charges against him, which charges were furnished him, and the same were heard at a subsequent meeting of the commissioners, and said plaintiff appeared in person and refused to give any testimony whatever in reference to whether or not he should be discharged as said engineer.

"(4) That on the 6th day of May, 1910, the mayor and board of commissioners of the city of Ardmore dismissed the plaintiff as its city engineer, which they had a lawful right to do, and passed a resolution dismissing him as such engineer, which resolution is hereto attached, made a part hereof, and marked Exhibit A. (See Exhibit D, plaintiff's petition.)

"(5) That since the plaintiff herein was dismissed as city engineer, to wit, on or about the 1st day of May, 1910, that L. J. Meyers has been both in law and in fact the duly qualified and acting city engineer and drawing the emoluments of said office, and has at all times since said date exercised within the said city all the duties of said office of said engineer, performing all the work and duties that were performed by the plaintiff herein before his dismissal, and has made his reports to the commissioners of the city of Ardmore, and has received the salary of said office since said dismissal up to and until the 18th day of May, 1911, during all of which time he performed all the duties devolving upon the city engineer, and was recognized by the defendant herein as such officer and as performing all the duties, and was paid all the salary and emoluments of said office during said time, and the said plaintiff herein has not performed any of the duties whatever of said office during said time, and has not been in possession of said office from the date of his dismissal up to and until this time, but has been engaged in the general insurance business, and has earned more than \$1,500 in said business during said period, and that during none of said time has the plaintiff been in the possession of the office of city engineer, but the said office has been in the possession of the said L. J. Meyers at all times since the 1st day of May, 1910, until he ceased to be said officer as alleged above.

"(6) That the income and revenue provided for the year ending June 30, 1911, has been exhausted, and there is no income or revenue for the year ending June 30, 1912, out of which plaintiff's claim could be paid, and there was no levy made for the same, and that at all times from May 1, 1910, to May 1, 1911, the outstanding indebtedness of the city of Ardmore in the aggregate exceeded 5 per cent. of the debt limit at and prior to the time that the plaintiff herein was appointed said engineer by the mayor and board of commissioners of the city of Ardmore, and the said city of Ardmore, while

it especially denies that it is indebted to the plaintiff herein in any sum whatever, but in event it should be determined that it is under any obligation to the said plaintiff, then this defendant would show that it has no legal means under the law whereby it could raise money to pay any such indebtedness, for the reason that the 5 per cent. debt limit has already been reached, as is hereinbefore alleged, and for that reason no judgment can be recovered against this defendant in this action.

"Wherefore, premises considered, defendant prays that it go hence without any day, and that it recover its costs herein expended."

Attached to said answer, and marked Exhibit A, is a copy of the same instrument as is attached to plaintiff's amended petition and marked Exhibit D.

Thereafter plaintiff filed his demurrer to defendant's answer, which was overruled, and exceptions preserved. The plaintiff then filed his reply to the defendant's answer, which was a general denial. The plaintiff thereupon filed a motion for judgment on the pleadings, which motion is as follows:

"Comes now the plaintiff, H. H. Sayre, and moves the court for a verdict on the pleadings in the above entitled cause, and as grounds for said motion states as follows, to wit:

"(1) Because the answer of the defendant filed herein admits every material allegation in plaintiff's petition, and under plaintiff's amended petition he is entitled to a verdict in this case.

"(2) Because, the office of city engineer under the law not being vacant by reason of the attempted discharge of this plaintiff, it is immaterial as to whether L. J. Meyers was appointed engineer or not, as this plaintiff was entitled to his compensation to the end of his term, and, if he was unlawfully deprived thereof, he is entitled to recover in this action.

"(3) Because the question of debt limit or the tax limit of the city of Ardmore has nothing whatever to do with this case, this not being an effort to recover by reason of a contract, and should not be considered in arriving at a verdict in this case."

The motion was sustained, and judgment rendered for plaintiff in the sum of \$1,500, as above stated, to which defendant excepted. Motion for new trial was overruled, exceptions preserved, and defendant brings error.

Counsel for the city presents several assignments of error, but in his brief submits but two propositions, which are as follows:

First. "The trial court erred, in overruling the defendant's demurrer to the plaintiff's petition."

Second. "The court erred in sustaining the motion of plaintiff for judgment on the pleadings."

[6] The first contention of counsel under the assignment that the trial court erred in overruling defendant's demurrer to the petition is:

"That the petition does not disclose that H. H. Sayre was the qualified and acting engineer of the city of Ardmore."

This insistence cannot be sustained, for the reason that by reference to the petition we find it is alleged in paragraph 3 that:

"The mayor, on or about May 18, 1910, appointed this plaintiff city engineer of the city of Ardmore, and the said appointment was by the commissioners duly approved, as by the charter provided."

And in paragraph 7 it is alleged that:

"Plaintiff was legally in possession of and exercising the functions of the office of city engi-

neer under and by the provisions of the charter of the city of Ardmore."

This is certainly a plain allegation of appointment, qualification, and possession, and also an allegation of claim of right to hold the office. These allegations also answer the contention of counsel that:

"Before a person claiming to have been ousted from a public office can recover his damages, that is, loss of salary and emoluments of office, he must first establish his title to the office as provided by law."

What more would counsel want, or what more could he ask? Here is an allegation of appointment, qualification, possession, and performance of duty. Counsel states, and we think correctly, that:

"The law presumes that the rightful holder of an office, is in the rightful possession of the same, and entitled to the emoluments thereof."

Under the allegations above stated, which were duly verified, and not denied under oath, the plaintiff was the rightful holder, and in possession of the office, and entitled to the salary and emoluments.

Under section 4759, Rev. Stat. Okl. 1910, Ann., which was in force at all the times referred to herein:

"Allegations of any appointment of authority shall be taken as true unless the denial of the same be verified by the affidavit of the party."

Besides, it must not be overlooked that the right to the salary of a public officer does not depend upon the performance of duty as such officer. If so, official salaries would be very uncertain.

As stated by Judge Dillon in his great work on Municipal Corporations (5th Ed.) § 425:

"In the case of officers the compensation—usually a salary—is attached to the office as an incident, and is not dependent upon the performance of actual service, while the salary or compensation of an employé is intended as remuneration for services actually rendered."

As stated in Carroll v. Siebenthaler, 37 Cal. 195:

"The principle that the salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise, was affirmed in Dorsey v. Smyth, 28 Cal. 21, and Stratton v. Oulton, 28 Cal. 44. The petitioner having been elected and qualified, and being ready and willing to enter upon the discharge of the duties of his office, became entitled to the salary attached to the office, and his right to the salary was unaffected by the fact that an usurper discharged the duties of the office."

Sections 4920 and 4925, Rev. Stat. Okl. 1910, referred to by counsel, have no bearing in this case. These sections refer exclusively to proceedings in the nature of quo warranto. This is plainly and solely an action to recover money due from the city to the plaintiff for salary as city engineer. The original petition evidently contemplated an action in the nature of quo warranto, but that proceeding was abandoned by the amended petition, and the cause based entirely upon an action against the city to recover money due for salary. No objection was made to this change of cause of action, nor to the

party defendant. The city appeared, demurred to the petition, and, upon that being overruled, answered without protest or objection. The original case was abandoned, a new and different defendant substituted, and the cause of action changed without objection, and, in fact, apparently by the consent of the city.

We are now brought to the second assignment of error, wherein counsel for the city contends that the trial court erred in sustaining the motion of plaintiff for judgment on the pleadings. In support of this specification counsel submits three propositions:

(1) That the answer presents a substantial issuable fact, which requires testimony to determine the rights of the parties. We do not so understand the issues. As stated before, the petition alleges, in substance, that plaintiff is, and at all times was, the duly elected, qualified, and acting city engineer, that he has at all times resided in the city, and considered himself the legally qualified city engineer, and has at all times been ready and willing to perform the duties of said office, but said mayor and board of commissioners have not recognized him as such officer, nor permitted him to perform the duties of said office, and that said mayor and board of commissioners have not attempted to appoint any other person as city engineer since their action in which they attempted to remove plaintiff from office. All these allegations go to the appointment and authority of plaintiff to hold the office of city engineer. They are made under oath, and not denied by the oath of defendant, its agent or attorney, and therefore must be taken as true. As stated in *Baird Inv. Co. v. Harris*, 209 Fed. 297, 126 C. C. A. 217:

"The failure to deny under oath [in such cases] is equivalent to an admission in the answer. The general allegation of an authorized agency [appointment of authority in this case] will be presumed to be an agency [authority] with full powers legally conferred."

It is apparent that no issues of fact are presented in the pleadings.

(2) He further contends that one L. J. Meyers has been, since the 1st day of May, 1910, both in law and in fact, the duly qualified and acting city engineer, and is drawing the emoluments of his office, and has at all times since said date exercised within said city all the duties of said office of city engineer, and has made his reports to the commissioners of said city, as such engineer, and further alleges that plaintiff has not been in possession of said office from the date of his dismissal, but has been engaged in other business, and has earned more than \$1,500 in said business during said time, and, further, that the revenue for that year has been exhausted, and there is no revenue or provision for the payment of the plaintiff's claim or judgment if obtained. This allegation is, no doubt, made for the purpose of attempting to show that Meyers is in possession of and performing the duties of said office, and is therefore a de facto officer; but this conten-

tion cannot be sustained, for the reason: (a) That the answer is not verified, and cannot be considered against the verified petition of plaintiff alleging appointment and performance of duties of the office. *Baird Investment Company v. Harris*, supra. This doctrine is laid down in *Mitchell v. Knudtson*, 19 N. D. 736, 124 N. W. 946, in the following language:

"The allegation that Knudtson was the 'duly and authorized agent of the Knudtson Land Company' should be construed as stating that he was a duly and regularly authorized agent of said company for all purposes in connection with the transaction set forth in the complaint. By admitting such allegation to be true, it must be admitted to be an admission of such agency with full authority in the premises. This court has recently held that an allegation in a complaint that a contract was entered into between parties will be presumed to be a legal contract and in writing, if a written contract is necessary for the purposes of the contract. *Hanson v. Svarverud* [18 N. D. 550], 120 N. W. 550. The same principle is applicable here. The general allegation of an authorized agency will be presumed to be an agency with full powers legally conferred."

These decisions are based upon statutes which provide:

"In all actions, * * * allegations of any appointment of authority shall be taken as true, unless the denial of the same be verified by the party, his agent, or attorney." Section 4759, Rev. Stat. 1910.

[3, 4] It requires no argument to show that defendant cannot admit in one breath that plaintiff is the duly appointed officer, attempting to perform the duties of his office, and deny it in the next. It is well settled upon reason and by numerous authorities that two persons cannot occupy one office at the same time, one as a de facto, and the other a de jure, officer. Under these facts, as alleged in the petition, and admitted by the answer, Meyers has no standing or rights as a de facto officer. The definition of a "de facto officer," as given by counsel for plaintiff in error, taken from *Ex parte Crump*, 135 Pac. 433, is as follows:

"An 'officer de facto' is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interest of the public and third persons, where the duties and functions of the office are exercised by one who was in the actual possession of it under color of title."

The modification of the possession and occupancy of the office by the phrase "who was in possession of it under color of title" is controlling in this case. Here the city was operating under what is known as a freeholders' charter. The petition alleges:

"The charter provides for an officer known as city engineer of said city, and section 5, article 3, of said charter provides that he shall be appointed by the mayor, by and with the advice and consent of the board of commissioners, and shall hold his office for a term of two years, unless sooner removed as provided in this charter."

[1, 2] It is admitted that the charter contains no provision for the removal of the city engineer from office. The question now pre-

sented is whether the power or authority of the mayor to appoint carried with it the power of removal? Such seems to be the general rule adopted in this state, unless prohibited by statute. The rule laid down in *Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14, is as follows:

"If the officer is guilty of malfeasance or maladministration in office, it is within the power of the appointing power to remove him, unless expressly prohibited by law."

The same doctrine was announced in *Ewing v. Turner*, 2 Okl. at page 94, 35 Pac. 951.

The question now is: Does the charter prohibit the removal by the appointing power? We are of opinion that it does. The language of the charter is positive that "he shall hold his office for a term of two years, unless sooner removed as provided in this charter," and no provision for the removal is provided in the charter. This, to our mind, is a clear inhibition on the right or power of the mayor and board of commissioners to remove. It follows, therefore, as a natural corollary, that the action of the mayor and board in that behalf was not merely voidable, but absolutely void, and in consequence thereof their action in attempting to appoint another city engineer was also void, and did not carry with it even a color of title to the office.

In *Cameron v. Parker*, supra, 2 Okl. at page 297, 38 Pac. at page 21, the court says:

"As a matter of course, the court must necessarily be governed by the law conferring upon the Governor the power of removal. If the court should determine that the Governor had unlawfully exercised his power of removal, or possessed no such power under the law, it could not hold that the plaintiff had, under the law, either an absolute or prima facie title; or, if the court should hold that the Governor had no power or authority to appoint an officer without the advice and consent of the council, under the law it could not hold that the plaintiff had either an absolute or a prima facie title thereto."

It would seem from the foregoing that whatever Meyers may have done, he was acting simply as a usurper, and his rights, if involved, would be determined as such. Nor do we intend to intimate that he was acting in bad faith.

[5] Counsel further insists that, the city having paid Meyers for his services as city engineer, it is not liable to the plaintiff for his salary, and base their contention on the case of *Stearns, Mayor, v. Sims*, 24 Okl. 623, 104 Pac. 44, 24 L. R. A. (N. S.) 475, wherein the following language is used:

"Where a de jure chief of police is, pending suit on charges against him in the district court, wrongfully suspended by order of the judge thereof at chambers, which said order is later set aside and said suit dismissed, and where said city pays a chief of police de facto, during his incumbency, the salary provided by law, said officer de jure, after obtaining possession of the office, cannot recover from the city the salary for the same period."

That case does not sustain the contentions of counsel, for the reason that it involves the

question of payment to a de facto officer—one who held colore officii. In the instant case the pretended appointment, being absolutely void, made without even a color of power or right, was simply a nullity. As said by Justice Campbell, *Wayne County v. Benoit*, 20 Mich. 176, 4 Am. Rep. 387:

"There is a distinction taken by many authorities between an office held de facto, under color of title, and one usurped without any legal pretext."

The case of *Stearns, Mayor, v. Sims*, supra, is distinguished from the instant case in this: That in the case cited, holding that the de jure officer could not recover from the city where the salary had been paid to the de facto officer, the de jure officer had been suspended by the district court as provided by law, and the de facto officer appointed by the legal appointing power. There was no question of jurisdiction either in the power of the court to suspend nor the power to fill the vacancy during suspension. The temporary officer was clearly a de facto officer. It would certainly be extending the doctrine to a dangerous point to say that an officer could be displaced by a power or body without any colorable right or jurisdiction, and another person placed in the position, and the salary paid to the pretended officer, and thereby defeat the regular officer of his right to recover his salary from the paying body, especially where the pretended, wrongful removal is made by the same power that is responsible for the payment. The answer does not even allege that the full or regular salary was paid to Meyers. It simply says, in substance, that he received payment, but does not state the amount. But that is immaterial. He was not entitled to any of it. He could not possibly have taken the first step to recover it by establishing his title to the office. Judge Cooley, in his dissenting opinion in *Auditors of Wayne County v. Benoit*, 20 Mich. 176, 192, 4 Am. Rep. 382, having involved a somewhat similar question, uses the following language:

"The only case directly in point is that of *People v. Smyth*, 28 Cal. 21, and there it was held that the lawfully elected officer, who had been excluded by one coming in by color of title, might, after recovery of the office, maintain an action against the county for his salary during the usurpation, notwithstanding it had been previously paid to the usurper. This decision appears to me to be sustainable on the soundest reasons of public policy. A wrong is done to society and public order in every instance in which the usurpation of a public office takes place; and the rules of law ought to be such as to give the greatest possible discouragement to such a proceeding. The county authorities, in a case like this, ought not to be told that they may countenance the intrusion with impunity, and deliver over to a usurper the emoluments of an office to which he has neither a legal, nor a moral claim. Such a rule encourages usurpations, and tends to lower the standard of public morality. Public policy requires that municipal officers should be allowed to sanction or recognize the intrusion only so far as may be necessary to give the public the full benefit of protection which the rule regarding the acts of officers de facto was designed to afford."

From a careful consideration of the entire record, we are of opinion that the case should be affirmed.

PER CURIAM. Adopted in whole.

(53 Okl. 24)

In re GROSS PRODUCTION TAX OF WOLVERINE OIL CO. (No. 7428.)

(Supreme Court of Oklahoma. Oct. 12, 1915. Rehearing Denied Jan. 17, 1916.)

(Syllabus by the Court.)

1. COURTS \S 206 — JURISDICTION OF SUPREME COURT—TAXATION.

The only questions properly determinable by this court in the exercise of the exclusive and original jurisdiction conferred by Act March 11, 1915 (Laws 1915, c. 107, art. 2, subd. A) \S 1, are those instituted to determine the validity of the act, and not those that may arise in the administration of the law, or that concern the application or distribution of the revenues collected.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 206.]

2. LICENSES \S 1, 11 — PETROLEUM TAX — OCCUPATION TAX — STATUTE — "PROPERTY TAX."

The gross production tax imposed by subdivision A of the act of March 11, 1915, is not a property tax, but, instead, is a tax on the business or occupation named therein, the amount of which is determined by the value of the gross production of petroleum and other commodities named, produced during the last preceding quarter annual period. Such tax the Legislature may provide for by section 12, art. 10, of the Constitution.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 1, 18-21; Dec. Dig. \S 1, 11.

For other definitions, see Words and Phrases, First and Second Series, Property Tax.]

3. TAXATION \S 200—OCCUPATION TAX—EXEMPTION—NATURE OF STATUTE.

That portion of the act which provides that the tax levied shall be "in lieu of any other taxes that might be levied and collected upon an ad valorem basis upon the equipment and machinery in and around any well producing natural gas or petroleum or other mineral oil, and used in actual operation of such producing well from which a gross production tax is collected as herein provided," is not an exemption from taxation as prohibited in sections 46, 46U, 50, art. 5, of the state Constitution, but a substitution of one form of taxation for another upon the conditions named in the act.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 319; Dec. Dig. \S 200.

For other definitions, see Words and Phrases, First and Second Series, Exemption.]

4. TAXATION \S 4 — SUBJECTS OF TAXATION — SELECTION BY LEGISLATURE—POWER.

Section 13, art. 10, of the Constitution gives to the Legislature authority to select the subjects of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 3-14; Dec. Dig. \S 4.]

5. TAXATION \S 42—CLASSIFICATION OF SUBJECTS—REASONABLENESS.

The power of the Legislature to distinguish, select, and classify objects of taxation has a wide range of discretion. While the classification must be reasonable, and not arbitrary, there is no precise application of the rule of reasonableness, and there cannot be an exact exclusion or inclusion of persons or things. This right is expressly recognized in section

22, art. 10, of the Constitution, which provides that nothing therein shall be held or construed to prevent the classification of property for purposes of taxation and the valuation of different classes by different means or methods.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 90-95; Dec. Dig. \S 42.]

6. TAXATION \S 42 — CLASSIFICATION — REVIEW BY COURTS.

To justify judicial interference, the right to classify being a legislative function, the classification adopted must be based on an invidious and unreasonable distinction with reference to the subject of the tax. Unless this appears, the court will not declare the classification void, though it may not approve its terms, or may question the wisdom of its enactment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 90-95; Dec. Dig. \S 42.]

7. TAXATION \S 40 — UNIFORMITY — GROSS PRODUCTION TAX.

The act imposing a gross production tax equal to one-half of 1 per centum of the gross value of ores bearing lead, zinc, jack, gold, silver, or copper, or asphalt, 2 per centum of the gross value of the production of petroleum or other mineral oil or natural gas, and which omits to impose such production tax on coal, is not repugnant to section 5, art. 10, of the Constitution, providing that taxes shall be uniform upon the same class of subjects.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 68-89; Dec. Dig. \S 40.]

8. TAXATION \S 42 — UNIFORMITY — PRODUCTION TAX.

The imposition of a gross production tax, based on the gross value of the production of petroleum or other mineral oil or natural gas, as provided by section 1 of subdivision A of the act of March 11, 1915, but which provides that, whenever the mining of said commodity is so carried on and conducted through a federal agency, the state has no authority to impose and collect therefrom such tax, and provides that property of those so engaged shall be taxed on an ad valorem basis, and not be subject to the gross production tax provided to be levied in the act, is not in conflict with section 5, art. 10, of the Constitution, requiring that taxes shall be uniform upon the same class of subjects.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 90-95; Dec. Dig. \S 42.]

9. TAXATION \S 40—PRODUCTION TAX—VALIDITY OF STATUTE—AD VALOREM TAX.

The production tax imposed by the act not being an ad valorem tax on property, the statute is not repugnant to section 8, art. 10, of the Constitution, requiring that all property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair and voluntary sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 115-124; Dec. Dig. \S 49.]

10. TAXATION \S 38 — STATUTE IMPOSING TAX—STATEMENT OF PURPOSE—GROSS PRODUCTION TAX.

The act sufficiently states the purpose of the tax levy, and is not, therefore, repugnant to the provisions of section 19, art. 10, of the Constitution, requiring that every act enacted by the Legislature levying a tax shall specify distinctly the purpose for which the tax is levied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 67; Dec. Dig. \S 38.]

11. CONSTITUTIONAL LAW \S 229 — UNIFORMITY OF TAXATION—EQUAL PROTECTION.

The provision of the Fourteenth Amendment to the Constitution of the United States

that no state shall deny to any person the equal protection of the laws does not prevent a state, in the exercise of its sovereign right, from adjusting its system of taxation in all proper and reasonable ways, nor compel the states to adopt an invariable rule of uniform taxation. The amendment intends only that the equal protection and security shall be given to all under like circumstances, and that no greater burdens should be laid upon one than are laid upon others in the same situation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229.]

Original action between the State Board of Equalization and E. B. Howard, as State Auditor, and the Wolverine Oil Company, to determine the validity of portions of the act of March 11, 1915, as provided for by said act, and pursuant to section 5303, Rev. Laws 1910. Validity affirmed.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for Wolverine Oil Company. Sherman, Veasey & Davidson, Rice & Lyons, Carroll & Mason, A. A. Richards, Randolph, Haver & Shirk, E. H. Chandler, C. W. Grimes, John M. Chick, and C. C. Magee, all of Tulsa, amici curiae. S. P. Freeling, Atty. Gen., and Smith C. Matson and J. H. Milley, Asst. Attys. Gen., for the State Board of Equalization and E. B. Howard, State Auditor.

SHARP, J. [1] The importance of the legal questions presented by the present controversy is readily apparent, when it is known that there is involved many provisions of the state Constitution, both conferring power and containing limitations upon the Legislature in the exercise of the taxing power of the state; also the right of the state constitutionally to impose taxes of certain kinds, due to the fact that a considerable portion of the oil and gas production of the state is carried on through the instrumentality of a federal agency; also there is presented the question that the tax levy denies to the producers, or certain of them, the equal protection of the laws of the state, which the Fourteenth Amendment to the federal Constitution guarantees shall not be abridged by state action. The portions of the act the constitutional validity of which are attacked will appear throughout the course of the opinion. Many of the legal questions presented are new in the jurisprudence of the state, and are somewhat difficult in their application to the anomalous conditions under which the oil and gas industry in the state is carried on.

The nature and character of the tax provided for in section 7464, Rev. Laws 1910, as amended by section 1, art. 2, subd. A, of the act of March 11, 1915 (1915 Sess. Laws, pp. 180-183), first demands our attention; for upon a proper construction of the statute in the particulars named must largely rest our conclusions. Section 7464 does not materially differ from section 6 of the act of May 26, 1908 (Laws 1908, c. 71, art. 2), authorizing the

levy and collection of a gross revenue tax from persons, firms, corporations, or associations engaged in the production of petroleum or other mineral oil, or natural gas, and which act was amended by Act March 27, 1909 (Laws 1909, c. 38, art. 2) § 1. Construing the amended statute in *McAlester-Edwards Coal Co. et al. v. Trapp*, 43 Okl. 510, 141 Pac. 794, it was held that the tax intended to be assessed and collected thereby was upon the value of the property owned by plaintiffs, and not upon the agency or the means used by the federal government in its intercourse and dealings with the Indian tribes. The same conclusion was reached by the District Court of the United States for the Eastern District of the state in *Choctaw, O. & G. R. Co. v. Harrison*, not reported. A different result was arrived at by the District Court for the Western District in Missouri, *K. & T. R. Co. v. Meyer*, 204 Fed. 140, where it was said, under the facts in that case, that the tax imposed was in effect a tax upon the business of mining. From the decision of Judge Campbell in the *Harrison Case* an appeal was prosecuted direct to the Supreme Court of the United States, where the judgment of the trial court was reversed, and it was said that the act, in effect, prescribed an occupation tax. *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234. Section 6 of the act of May 26, 1908, having thus been construed and characterized as being an occupation tax, and not a tax on property as such, it becomes important to note wherein the act under review differs from the one condemned. In the beginning of the amendment to section 7464, it is provided that:

"For the purpose of estimating the value of any property rights attached to or inherent in the right to mineral in this state after the same is segregated from the ore in place, and in lieu of any other method of taxing the same and in lieu of any other taxes that might be levied and collected upon an ad valorem basis upon the equipment and machinery in and around any well producing natural gas or petroleum or other mineral oil and used in actual operation of such producing well from which a gross production tax is collected as herein provided (but oil or other mineral if on hand for more than thirty days at tax rendering period shall be taxed ad valorem in the taxing district where situated). * * *

This provision is not contained in the original act. Under the latter act the tax is designated as a "gross production" tax, while under the former it is referred to as a "gross revenue" tax, and is payable to the state auditor, and not to the state treasurer, as was formerly the case. The original act (referring to the gross revenue tax) provided that it should be in addition to the taxes levied and collected upon an ad valorem basis upon such mining, oil, or gas property, and the appurtenances thereunto belonging, equal to one-half of 1 per centum of the gross receipts from the total production of petroleum or other mineral oil, or of natural gas, while the present act provides that the gross produc-

tion tax payable to the state auditor shall be equal to 2 per centum of the gross value of the production of petroleum or other mineral oil or natural gas. The present act also contains the following provisos at the end of amended section 7464:

"* * * Provided, that any such person, firm, association or corporation shall at the time of making its report to the state auditor set out specifically the amount of the royalty, if any, exempt from taxation by law and in computing the said tax shall pay on the actual cash value of the entire gross production, less such exempt royalty; provided further, that wherever the mining of ores bearing lead, zinc, jack, gold, silver or copper or petroleum or other mineral oil, or natural gas, is so carried on and conducted through a federal agency, that the state has no authority to impose and collect therefrom a gross production tax, that as to all such persons, firms, associations, or corporations engaged in the mining of ores bearing lead, zinc, jack, gold, silver, copper or other mineral oils or natural gas, such property of such person, firms, associations or corporations, including leases when the same are subject to be taxed by the state, shall be taxed on an ad valorem basis, and not be subject to the gross production tax, provided to be levied in this act."

It will further be seen that the present statute omits any reference to coal, and fixes the per centum of taxes payable upon the gross value of the minerals named, and of petroleum or of other mineral oil, or of natural gas, and not according to the gross receipts from production.

Looking to the title of the act, under article 2, dealing with the question at hand, the only words indicative of its character are "Special Taxes—Mining Property and Gross Revenue Tax." So we must look elsewhere in the determination of its nature. As already seen, the tax in the body of the act is referred to as a "gross production tax," while under the old act the nature of the tax, according to the language used, was a "gross revenue tax." The use of the word "revenue" in the former, while the latter act uses the word "production," is unimportant. It is further provided in the latter act that oil or other minerals, if on hand for more than 30 days at tax rendering period, shall be taxed ad valorem in the taxing district where situated. The fact that the present act makes the tax levied in lieu of any other method of taxing the same does not, of course, of itself, constitute the tax a tax upon the property of those engaged in the production of oil or gas. While the language of the old act, which provided that the gross revenue tax should be in addition to the taxes levied and collected upon an ad valorem basis, was referred to by the Supreme Court in the Harrison Case, the court's characterization of the tax was not made to rest upon that fact. The tax is not levied by assessment or upon estimate of the amount of taxes required to be levied; neither is it on account of property owned on a given day. As was said in the Harrison Case:

"The requirement is not on account of property owned on a given day, as is the general cus-

tom where ad valorem taxes are provided for, and as the Oklahoma laws require."

The act also provides that, whenever the mining of petroleum or other mineral oil or natural gas is so conducted through a federal agency that the state has no authority to impose and collect therefrom a gross production tax, as to all such persons, firms, associations, or corporations engaged in the mining of ores bearing lead, zinc, jack, gold, silver, copper, or other mineral oils or natural gas such property of such person, firms, associations, or corporations, including leases when the same are subject to be taxed by the state, shall be taxed on an ad valorem basis, and not be subject to the gross production tax provided to be levied by the act. Clearly the act contemplates two kinds of taxation, and not alone a tax on property as such. This fact is emphasized by the provision of the act requiring that oil or gas on hand for more than 30 days at tax rendering period shall be taxed ad valorem in the taxing district where situated, and by the provision that the mining of oil or gas, when carried on and conducted through a federal agency, shall be taxed on an ad valorem basis, and not be subject to the gross production tax provided for by the act.

[2] Nor does the history of the legislation and the decision of the Supreme Court in the Harrison Case tend to change our views as to the nature of the act or the intention of the Legislature in its passage. Shortly prior to the convening of the last Legislature the Supreme Court had decided in the Harrison Case that a federal agency could not be subjected to an occupation or privilege tax by a state; but, on the other hand, the right of the state to levy an ad valorem tax on the personal property of such instrumentality was expressly recognized. In fact, this conclusion had already been reached by this court, in *Re Indian Territory Illuminating Oil Co.*, 43 Okl. 307, 142 Pac. 997. This, we think, was precisely what the Legislature by the act in question intended doing and did; that is to say, that an occupation tax should be levied on the kinds of minerals named in the act and upon petroleum or other mineral oil or natural gas, other than where the production was carried on and conducted through a federal agency, and that as to such property, including leases when the same were subject to be taxed by the state, the same should be taxed by the proper taxing authorities on an ad valorem basis, at the same time making provision for the deduction of certain exempt royalty. In the present act, as in the old, save as to the production carried on and conducted through a federal agency, the manifest purpose was to reach the gross value of the proceeds, and secure a certain percentage thereof, the same in legal effect as was said by the Supreme Court to be the purpose of the former statute, and which the court said was a method commonly pursued in

respect to license and occupation taxes. Referring to sections 2 and 3 of the original act, it was held in *Meyer v. Wells Fargo & Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445, that there was no warrant for calling the tax a property tax. The tax, other than that provided for when the business is carried on and conducted through a federal agency, is payable only on the basis of the gross value of the production. If there be no production, regardless of the value of the property, no tax is authorized. In short, the tax is one levied on the occupation or business; the standard adopted for the determination of its amount being the value of the gross production of the commodity taxed.

By section 12, art. 10, Constitution, the Legislature was given the power to provide for the levy and collection of various kinds of taxes, including license, franchise, gross revenue, income, and production taxes. That the Legislature acted within its constitutional authority is therefore clear, unless it be made to appear that the act itself is in violation of other provisions of the Constitution. A proper construction of the statute, therefore, as already indicated, authorizes the conclusion that it was the purpose of the Legislature, gathered both from the language employed and from the current history of the times, to levy and collect a tax on the business of producing oil or gas, the amount thereof to be measured by the value of the gross production, where not carried on and conducted through a federal agency, but, where such was the case, the property of the person, firms, associations, or corporations engaged in the mining of oil or gas, including leases made the subject of taxation, should be taxed on an ad valorem basis under the general taxing laws of the state. Property of the latter character, except oil and gas leases, were, prior to the passage of the act, subject to taxation. *Rev. Laws 1910, §§ 7302, 7304, 7305.* This, as already seen, was also expressly provided for, both in the act of May 26, 1908, and in the amendment thereto of March 27, 1909. See, also, section 1, subd. A, of the act of March 11, 1915. To those who could not be reached by a tax on the occupation or business, by reason of a controlling jurisdiction in the general government, no effort was made to impose or collect such tax.

The taxing power of the state is one of its highest attributes of sovereignty, and its authority to tax all subjects over which its sovereign power extends is undeniable; but it cannot tax the instruments of the federal government, nor the means employed by Congress to carry into effect the powers conferred by the federal Constitution. *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907. As was held by the Supreme Court, in *McCullough v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579:

"The government of the Union, though limited in its powers, is supreme within its sphere of action; and its laws, made in pursuance of the Constitution, form the supreme law of the land."

Again, in this connection, it was said by Chief Justice Marshall, in *Weston v. Charleston*, 2 Pet. 479, 7 L. Ed. 481, after referring to the court's former opinion in *McCullough v. Maryland*:

"All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission," but not "to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States."

To these early landmarks in our jurisprudence having to do with the taxing power of the states, we refer that the limitations upon the power of the state may not be overlooked, and the fact made clear that the state, while without authority to impose and collect an occupation tax upon a federal instrumentality acting under congressional authority, is not for that reason deprived of the right to levy and collect such tax upon those engaged in business of the same nature or kind admittedly within its jurisdiction. The fact that the tax is one beyond the power of the state to impose, where the circumstances may establish a federal agency, will not be permitted to embarrass or prevent the sovereign authority of the state lawfully to impose such tax on those not within the federal jurisdiction. To so hold would be a surrender by the state of one of its first and most important functions of government. A case very much in point is that of *State v. Missouri, K. & T. R. Co. of Texas* (Tex. Sup.) 100 S. W. 146. The statute there imposed upon railroads managing a line of railroad in the state for the transportation of passengers, freight, and baggage an annual tax on their gross receipts. The Texas & Pacific Railway Company, a railroad operating in that state, was incorporated under an act of Congress, and not subject to the tax imposed by the act of the Legislature. *State v. Texas & Pac. R. Co.*, 100 Tex. 279, 98 S. W. 884. It was urged by other railroads that the statute was unconstitutional for various reasons, among which was that it was in conflict with section 2 of article 8 of the state Constitution, providing that:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

It was held that the railway company named did not belong to a class within the authority of the Legislature for the purpose of imposing an occupation tax, and that the occupation tax on railroads imposed by the statute, levying on railroads doing business in the state a tax on their gross receipts, was not in conflict with said provision of the Constitution. The effect of the decision was to sustain the validity of the act of the Legis-

lature, notwithstanding its inapplicability to one of the principal railroads within the state, but over which the Legislature was without power to levy such tax. Here the statute, operating alike upon all those engaged in the industries named and over which the state could rightfully exercise the authority attempted, and not being discriminatory, within a constitutional meaning, is not repugnant to section 5, art. 10, of the Constitution, requiring that "taxes shall be uniform upon the same class of subjects." The statutes provide that all real property in the state, other than such as is specifically exempted, shall be subject to taxation. Rev. Laws 1910, § 7302; section 1, subd. A, c. 107, Sess. Laws 1915. Yet, notwithstanding the statute, a large amount of land is not taxed and cannot be, by reason of treaty stipulations or agreements containing covenants against taxation made and entered into between the government of the United States and the Indian tribes in the state, and which provisions inure to the benefit of the enrolled tribal members to whom the lands of the tribe were allotted. *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; *Gleason v. Wood*, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. 947; *English v. Richardson*, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949. It could not successfully be contended, nor has it to our knowledge ever been claimed, that because of the nontaxability of these lands for the time other lands of like character, but unrestricted in the matter of exemption from taxation, were not, therefore, subject to taxation; and this regardless of both our Constitutional inhibitions against exempting property from taxation, and requiring that all taxes shall be uniform upon the same class of subjects.

In the leasing of the lands of the Osage Nation for oil and gas, as well as in the making of such leases on the restricted lands of certain of the allottees of the Five Civilized Tribes, the Department of the Interior, acting pursuant to lawful warrant, has in behalf of these Indians, whom Congress has regarded as dependent, and in need of the government's aid and protection, assumed full and complete jurisdiction and control during the period of dependency. This form of general guardianship is exercised because of the duty owing these dependent people, that the vast oil and gas deposits underneath their lands may be developed and marketed, and those lawfully entitled thereto given the benefit thereof. As was said in the *Harrison Case*, the instrumentalities made use of by the general government are the lessees of such lands or their duly authorized assignees. More need not be said in this connection, for the question is foreclosed by the opinion in the *Harrison Case*. The limitation upon the state's power in this regard is expressly recognized by the act itself, and by counsel, who say that the state cannot levy an occupation

or privilege tax upon a federal instrumentality acting under congressional authority.

[3] It is urged with much ability that the provision of the act which provides that "In lieu of any other taxes that might be levied and collected upon an ad valorem basis upon the equipment and machinery in and around any well producing natural gas or petroleum or other mineral oil, and used in such actual operation of such producing well," violates both sections 46, 46u, and 50, art. 5, of the state Constitution, prohibiting the Legislature from passing any law exempting any property within the state from taxation, and that whether the tax be upon the property as such or upon the occupation or business. The first contention is easily met; for by the terms of the act the property named is not exempt unless a gross production tax is collected as therein provided. If a property tax is collected under the general taxing laws of the state, no gross production tax is levied or collected, unless, possibly, in the case of oil on hand for more than 30 days from tax-rendering period. Hence as to such tax the act does not attempt to exempt equipment and machinery. Such is the clear and unmistakable intent of the act, giving to the language used its plain and commonly accepted meaning.

As to those liable to and who pay a gross production tax, it will be noted that the act does not in terms exempt equipment and machinery, but provides that the payment of the gross production tax shall be in lieu of any other tax that might be levied and collected on said property upon an ad valorem basis. This is not an exemption from taxation within the meaning of the constitutional inhibitions, but a substitution of one form of taxation for another upon the terms and conditions named. The equipment and machinery referred to is confined to that used in the actual operation of producing wells, hence does not include equipment and machinery on hand, and not so used. By the act a tax is levied based upon the value of the gross production. This can only arise through the discovery and production of oil or gas. The equipment and machinery owned by the producer, and which is an indispensable agency in the discovery and production of the commodity, forms a part of the property out of which the production arises. Without it production is impossible. The same is not taxed directly, neither are the lands or leases, where the production is through a lessee.

A very instructive case, and one that gives strong support to our views, is that of *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614. There an act of the Dakota Legislature exempted from taxation, other than as provided by the act, lands granted to aid in the construction of the Northern Pacific Railroad, which were outside of the right of way and not used in its business as a common carrier, and provided for the taxation of railroads by percentage

of gross earnings in lieu of all other taxes. It was insisted that the lands were simply "property owned by railroad," and not "railroad property," and that, although railroad property might be taxed in a given special method and at a special rate, yet by the term "railroad property" was simply meant property necessary for the use in the usual daily conduct of the business of the company as a common carrier by rail, and that any lands outside of that used, although owned by a railroad company, could not be classified and taxed in any different manner from lands owned by an individual, otherwise such classification would be purely arbitrary, and the taxation in that way would be illegal; that no earnings arose from those lands, because the earnings upon which the tax was assessed were by the terms of the act restricted to "the gross earnings * * * arising from the operating of said railroad, and such earnings were not created by, nor did they arise from, nor were they in any way connected with, these lands." It was held that at the time these lands were so closely connected with the railroad, its construction and operation, as, in effect, to be part and parcel thereof; that they made the gross earnings possible, upon the same principle that they partly issued out of the right of way, the roadbed, the track, cars, engines, tanks, and other confessedly "railroad property." In the course of the opinion it is said:

"Although the act here provides for taxation of the gross earnings arising from the operation of the road, the phrase means earnings which arise because of its operation. The road is in operation, and the earnings which it is thereby enabled to make are to be taxed. Property which the company owns, and which has enabled and continues to enable it to operate its road, is part of the property from which the earnings arise by reason of such operation, and is within the meaning of the act. These lands are of this description. Although they are not taxed directly, yet the same is true of the right of way, the roadbed, the engines, cars, and water tanks, * * * without which the road could not be operated. In substance, it must be said that without the existence of all the various pieces of property just enumerated gross earnings would be quite impossible. It is also true in regard to these lands. * * * And, looking at those facts, we see that unquestionably these lands have indirectly contributed to the gross earnings derived from operating the road, and that such earnings have arisen and been made possible by reason of the lands. They have not only aided in making these gross earnings possible, but they have formed, and still do form, a material fact in the combination of circumstances contributing to the construction of the railroad, to its operation, and to its earnings."

[4, 5] Concerning the right of the Legislature to classify objects of taxation, it may be said the power is one that must be exercised subject to the restrictions of the state Constitution. This power in the Legislature is expressly recognized in our organic law, and authority given to fix the valuation of different classes by different means or methods (section 22, art. 10), but with the limitation "that taxes shall be uniform upon the same class of subjects" (section 5, art. 10).

It has been said that classification for taxation is not necessarily based upon any essential difference in the nature of the various subjects. It may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods so as to produce just and uniform results, or it may be based upon just and well-grounded considerations of public policy. Judson on Taxation, pp. 563, 564, 592. The power of the state to distinguish, select, and classify objects of taxation has a wide range of discretion. The classification must be reasonable, but there is no precise rule of reasonableness, and there cannot be an exact exclusion or inclusion of persons and things. Cooley on Taxation, pp. 76, 77. The principle thus announced, differing only in the form of expression, was followed in *Pacific Express Co. v. Selbert*, 142 U. S. 351, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 296, 18 Sup. Ct. 594, 42 L. Ed. 1037. The rule, however, is not without its limitations, for it is equally well settled that the classification must always rest upon some difference which bears a reasonable and just relation to the act, in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. Is the present act, levying one rate of tax on oil and gas, and a lesser rate on ores bearing lead, zinc, jack, gold, silver, copper, or asphalt, and which omits a gross production tax on coal, in conflict with this rule? Clearly it is not. That mining property or the business of mining may be placed in a class by itself and taxed by some method peculiarly appropriate to that class is a valid exercise of a constitutional right on the part of the Legislature, and needs the citation of no authorities in its support. Equally well settled is the rule that it is competent for the Legislature to arrange and divide the various subjects of taxation into distinct classes, provided the tax is uniform upon all those belonging to the same class, and upon which it operates. *Commonwealth v. Germania Brewing Co.*, 145 Pa. 83, 22 Atl. 240; *People ex rel. Iron Silver Mining Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144; *People ex rel. Hatch v. Reardon*, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515; note to *Bacon v. Board of State Tax Com'rs*, 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 339 et seq., 86 Am. St. Rep. 524; *Glasgow v. Rowse*, 43 Mo. 479; *Gatlin v. Tarboro*, 78 N. C. 119; *Metropolitan St. R. Co. v. New York*, 199 U. S. 1, 47, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381.

[8-9] To justify judicial interference, the right to classify being a legislative function, the classification adopted must be based on an invidious and unreasonable distinction or

difference with reference to the subject of the tax. Unless this appears, the courts will not declare the classification void, though it may not meet their approval. There are, in fact, many good reasons for making the classification adopted by the Legislature. The nature and character of oil and gas, their relation one to the other in the natural state, means of discovery, kind of labor employed, and cost of production and marketing furnish good and sufficient reasons for the levy of a tax greater in amount than a tax of a like character placed on lead, zinc, and the other mineral ores named in the act. Nor does the omission of coal from the imposition of a production tax affect the statute. It should be kept in mind that the tax is not on the property, but, instead, upon the business or occupation. Producers of oil and gas in the state are not therefore arbitrarily discriminated against, contrary to the uniformity clause of the Constitution, by the tax imposed upon the value of their gross production, because it does not include the production of all minerals, or because those which it does include are not taxed at the same rate. In the *Ohio Tax Cases* (*Ohio River & Western R. Co. v. Dittay et al.*, 232 U. S. 586, 34 Sup. Ct. 372, 58 L. Ed. 737) it was urged that the act of the Ohio Legislature arbitrarily discriminated against the plaintiffs in error and other railroad companies, in that it did not include all other public utilities carrying on business within the state, those omitted, it was said being grain elevators, stockyards, ferries, bridge companies, and innkeepers, and that the law did not operate uniformly among the utilities that were taxed, since on electric light, gas, natural gas, waterworks, telephone, messenger or signal, union depot, heating, coaling, and water transportation companies the tax amounted to 1.2 per cent. of gross intrastate receipts, as to suburban and interurban railroads it was fixed at 1.2 per cent. of gross intrastate earnings, and on express and telephone companies it was 2 per cent., while on railroads, including plaintiffs in error, it was 4 per cent. of such earnings, and the same on pipe line companies. With regard to the contention that the statute violated both the "uniformity" clause of the state Constitution and the "equal protection" clause of the Fourteenth Amendment, the opinion reads:

"Both of these contentions turn upon the familiar question of classification, concerning which so much has been written. We agree with the court below that whether the question be considered in view of the uniformity and equality provisions of the Ohio Constitution, or of the 'equal protection' clause of the Fourteenth Amendment, the result is the same; it cannot be said that the classification rests upon no reasonable and sufficient basis of distinction. *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 253, 71 N. E. 636, 1 Ann. Cas. 25; *Kentucky R. Tax Cases*, 115 U. S. 321, 337, 6 Sup. Ct. 57, 29 L. Ed. 414, 419; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 10 Sup. Ct. 533, 33 L. Ed. 892, 895; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293,

18 Sup. Ct. 594, 42 L. Ed. 1037, 1042; *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 121, et seq., 30 Sup. Ct. 496, 54 L. Ed. 688, 692."

Again, in the course of the opinion, it was said that the tax was, in substance as well as in form, an excise or privilege tax; that its reasonableness, unless some federal right be violated, was within the discretion of the state Legislature; that it had already been seen that the classification adopted could not be deemed illusory; that is, that there was no apparent violation of the equality provisions of the state Constitution, or of the "equal protection" clause of the Fourteenth Amendment, although railroad and pipe line companies were required to pay at the rate of 4 per cent. of their annual intrastate earnings, while other public service corporations paid a less percentage. Authorities in harmony with those cited are numerous. Among them are *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 22 Sup. Ct. 431, 46 L. Ed. 679; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 235, 26 Sup. Ct. 232, 50 L. Ed. 451; *People ex rel. Hatch v. Reardon*, supra; *Braun et al. v. Chicago*, 110 Ill. 186; *Maine v. Western U. Tel. Co.*, 73 Me. 518. The principles of equality and uniformity do not require the equal taxation of all pursuits or classes of business, nor prevent the Legislature from taxing some kinds of business, while omitting others; but only that the burden of taxation shall be imposed equally upon all those engaged in the same vocation, or, as provided by our Constitution, "upon the same class of subjects." *Rhinehart v. State*, 121 Tenn. 420, 117 S. W. 508, 17 Ann. Cas. 254; *State v. Galveston, H. & S. K. Co.*, 100 Tex. 157, 97 S. W. 71; *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 47 L. Ed. 663; *Kittanning Coal Co. v. Commonwealth*, 79 Pa. 100; 37 Cyc. 732. A rule requiring that all kinds of business be included within some class made the subject of taxation as authorized in section 12, art. 10, of the Constitution, would deprive the state of its right to select its subjects of taxation and be in violation of section 13, art. 10, of the Constitution.

[10, 11] The objection is made that the act is in violation of section 19, art. 10, Constitution, in that, being an act levying a tax, it fails to specify distinctly the purpose for which the tax is levied. The act is not an exercise of the police power, but is, instead, a revenue measure. *Binion v. Oklahoma Gas & Electric Co.*, 28 Okl. 356, 114 Pac. 1096. Section 19 of article 10 is identical with section 180 of the Constitution of Kentucky 1891, except that the latter has an additional provision giving to the General Assembly the power to authorize counties, cities, or towns to levy a poll tax; in fact, it is said that the above provision of our Constitution was taken from the Kentucky Constitution. This provision of our Constitution was before the court in *McGannon, Adm'r, v. Trapp, Auditor*, 33 Okl. 145, 124 Pac. 1063, Ann. Cas. 1914B, 620, where it was held that it did

not apply to the act of May 26, 1908, imposing an inheritance tax upon the transfer of property, but applied only to annually recurring taxes.

The construction of the constitutional provision before us has frequently been before the court of last resort of Kentucky. In *Commonwealth et al. v. United States F. & G. Co.*, 121 Ky. 409, 89 S. W. 251, the order of the fiscal court of Taylor county levying a tax for the year 1901 wholly omitted to state the purpose for which the tax was levied, and the order was held to be void. In *Chesapeake, O. & S. W. R. Co. v. Commonwealth*, 129 Ky. 318, 108 S. W. 248, 111 S. W. 334, 33 Ky. Law Rep. 882, the order of the fiscal court levied a tax, but failed to designate the purpose for which it was levied, and it was likewise held invalid. To the same effect are *Somerset v. Somerset Banking Co.*, 109 Ky. 549, 60 S. W. 5; *United States Fidelity Co. v. Board of Education*, 118 Ky. 355, 80 S. W. 1191; *Morrell Refrigerator Car Co. v. Commonwealth*, 128 Ky. 447, 108 S. W. 926, 32 Ky. Law Rep. 1389. In *Pulaski County v. Watson*, 106 Ky. 500, 50 S. W. 861, it was ordered that the sheriff of Pulaski county for the year 1894 be directed to collect 25 cents on each \$100 of the taxable property reported by the assessor for said year, and pay same to the county treasurer, in accordance with the law, for the purpose of paying claims against the county. The order was held sufficient. In *McInery v. Huelsfeld*, 116 Ky. 28, 75 S. W. 237, the resolution of the fiscal court levied a tax of 38 cents on the \$100, which recited that it was apportioned as follows:

"Three cents for the purpose of creating a sinking fund with which to purchase a poor farm and erect suitable buildings thereon, 10 cents for the maintenance and repair of the public roads and bridges of the county, and 25 cents to defray the general county expenses."

And it was held that the resolution satisfied the purposes of the levy with sufficient distinctness. In *Mt. Pleasant v. Eversole*, 96 S. W. 478, 29 Ky. Law Rep. 830, it was held that the ordinance of a town out of debt levying a property tax "for municipal purposes * * *" sufficiently specifies the purpose for which the tax was levied, within the provisions of section 180 of the Constitution, requiring an ordinance imposing a tax to specify distinctly the purpose for which the same was levied.

In *Meyer et al. v. Lynd-Bowman-Darby Co.*, 35 Okl. 480, 130 Pac. 548, the act providing for a graduated tax on land holdings did not specify distinctly or otherwise, the purpose for which the tax was levied, and was therefore held to be void.

Turning to the act in question, we find that in section 4 it is provided that all gross production revenues collected by the state auditor under the provisions of the act shall be paid into the state treasury—

"* * * one-half to be credited to the general revenue fund of the state, and applied to the

current expense of the state government (and any unexpended balance at the close of each fiscal year shall be credited to the common school fund of the state * * * as are other common school funds); the remaining one-half shall be, by the state treasurer distributed to the county treasurer of the counties from whence the same was collected, in proportion to the school enumeration of such counties, and the same shall be distributed in aid of common schools of such counties upon a per capita basis as are other common school funds."

The act contains a further section that, if for any reason the provisions of section 4 may prove ineffective, then at once shall the proceeds of all gross production tax collected pursuant to the act be paid into the general revenue funds of the state, and be applied to the current expenses of the state government, and that any unexpended balance at the end of each fiscal year shall be credited to the common school fund of the state, to be distributed as are other common school funds of the state. We have seen, therefore, that the primary object of the act was to levy a tax, one-half of which should go into the general revenue fund of the state, the remaining one-half to be distributed to the counties from whence the tax was collected, in the proportion named; same to be distributed in aid of the common school funds of such counties. But, if the latter provision could not be made effective, then the entire proceeds of the tax collected should be applied to defray the ordinary expenses of the state; any unexpended balance at the end of each fiscal year to be credited to the common school fund of the state.

But it is urged that the revenue collected is to be used in a manner contrary to the provisions of the Constitution; hence the purpose of the act is unlawful. The purposes for which the tax was imposed we have already seen. Generally speaking, it is the duty of the Legislature to provide for the levy of taxes to defray the expenses of the state government. The Legislature has also the power, under certain limitations, to levy a state tax in aid of the public schools. *Atchison, T. & S. F. Ry. Co. v. State*, 28 Okl. 94, 113 Pac. 921, 40 L. R. A. (N. S.) 1; *Thurston v. Caldwell*, 40 Okl. 206, 137 Pac. 683. In its broadest sense, therefore, the purpose for which the tax is levied is not an unlawful one. Whether the tax collected should be credited and distributed under sections 4 and 4B of the statute is not necessary to a determination of the present proceedings. It involves a question of the distribution of the revenue collected when the same reaches the state treasurer. By the express language of the act, this court is given exclusive and original jurisdiction of any and all suits instituted to determine the validity of the act, and not to pass upon all questions arising out of its administration by the executive officers of the state. As to whether the revenues collected and received by the state treasurer should be credited and distributed under sections 4 or 4B of the

act, and the effect of the statute making oil on hand for more than 30 days at tax rendering period liable to an ad valorem tax, it is proper to call attention to article 3 of the statute, which provides that:

"The invalidity of any section, subdivision, clause, or sentence of this act, shall not in any manner affect the validity of the remaining portion thereof."

It is urged that one part of the statute cannot be declared void and leave any part in force, unless the statute is so composite, consisting of such separable parts, that, when the void part is eliminated, another living tangible part remains, capable by its own terms of being carried into effect, consistently with the intent of the Legislature, which enacted it in connection with the void part. A number of authorities are cited which announce the foregoing rule, and among which is that of *Meyer v. Wells Fargo Co.*, 223 U. S. 293, 32 Sup. Ct. 218, 56 L. Ed. 445. The latter case was an appeal from the Circuit Court of the United States for the Western District of Oklahoma to review a decree enjoining the collection of a tax upon the gross receipts of a nonresident express company, and it was said that the act could not be upheld without being so remodeled that it would be a mere speculation whether the Legislature would have passed it in the new form. Generally, it may be said that because one section or provision of an act may be unconstitutional and void does not necessarily render the entire statute or enactment void; that, if the act can be given operation and effect without such void provision, the valid portions of it will be allowed to stand, unless the court is unable to say or to know that the Legislature would have passed the act without the void provision. Statutes similar in their wording to section 3 of the act have on several occasions been before the courts, and in each instance to which our attention has been called have been upheld, though not always without limitations upon the extent to which they should be allowed to control the courts in passing upon the validity of the statutes. In *State ex rel. Clarke v. Carter*, 174 Ala. 266, 56 South. 974, a section of the act provided that, if any of its provisions should be held void, it should not affect any other section or provision of the act. It was said by the court that, by reason of such provision, it was relieved of any doubt as to the legislative intent. In *State ex rel. Crumpton v. Montgomery*, 177 Ala. 212, 59 South. 294, it was held not within legislative competency to bind the courts by any declaration or pronouncement in their unfettered functions of determining the constitutional validity of enactments. But it was said that the court did not doubt that it was within legislative competency to remove by express assertion in the act any uncertainty in the judicial mind as to what the Legislature would have done in respect of the adoption

of the act, with the invalid parts thereof stricken therefrom before passage. In *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489, it was said that the court knew of no good reason why the Legislature might not declare its intention that one part or section of the law is not a compensation for, and that it may be separated from, the balance of the act, for the very purpose of saving such balance from being invalidated in case the first named part or section be held unconstitutional. In *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 1114, 37 L. R. A. (N. S.) 466, it was held that by section 27 of the act the Legislature made clear that it did not intend the provisions relating to those who were entitled to partake of its benefits to be so far an integral part of the act that it could not be eliminated in part, without destroying the act in its entirety. Referring to this section, it was said:

"It is there expressly provided that the adjudication of invalidity of any part of the act shall not affect the validity of the act as a whole or any other part thereof. This means that the Legislature intended the act to be enforced as far as it may be, even though it might not be valid in its entirety. It was competent for the Legislature so to provide."

In *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C, 706, a section of the statute in question provided that, if any part of the act should be declared unconstitutional, the Legislature intended to pass the statute without that part. And it was said that such statutes imposed upon the courts the duty of supporting the legislative will as far as possible. But, the question not going to, or at least not necessarily going to, the validity of the act, we refrain from the expression of any further opinion involving the law's administration; this because of the limitation upon our jurisdiction in an original suit. The tax not being an ad valorem tax on property, the statute imposing it is not in conflict with section 8, art. 10, of the Constitution, requiring that all property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair and voluntary sale.

It is urged that the act in question violated the requirements of uniformity of taxation prescribed by the state Constitution, and thereby denies to the Wolverine Oil Company and others similarly situated the equal protection of the laws of the state which the Fourteenth Amendment of the federal Constitution guarantees shall not be abridged by state action. We may here observe that it cannot be denied but that the state, keeping within the limits of its own fundamental law, can adopt any system of taxation or classification that it deems best for the common good and the maintenance of its government, provided such classification be not in violation of the Fourteenth Amendment. Such is the demand and right of the states

in their relation to the general government, as recognized by the federal courts. In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, a case often cited, the question arose as to whether a statute of Pennsylvania subjecting bonds and other securities issued by corporations to a higher rate of taxation than was imposed on other monied securities was a denial of the equal protection of the laws to corporations. The contention was met by Mr. Justice Bradley, who held that there was no distinction which the state was not competent to make, saying:

"All corporate securities are subject to the same regulations. The provisions in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, except certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state Legislature, or the people of the state in framing their Constitution."

Again, in *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025, the question was the constitutional validity of a law taxing corporate franchises and business. The court held that the statute was not a denial of the equal protection of the laws. It said that:

The amendment "does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property."

In *Connolly v. Union Sewer Pipe Co.*, supra, it was held that a tax could be imposed only upon certain callings and trades; for, when the state exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. In *Kentucky R. Tax Cases*, 115 U. S. 321, 337, 6 Sup. Ct. 57, 29 L. Ed. 414, 419, the court sustained, as not inconsistent with the "equal protection" clause of the Fourteenth Amendment, the Kentucky statute providing for the assessment of railroad property for purposes of taxation in a mode different from that prescribed as to ordinary real estate, or as to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies. The court said that:

"The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally

and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and the other corporations in the methods and instrumentalities by which the value of their property is ascertained."

In *Delaware R. Co. Tax*, 18 Wall. 206, 231, 21 L. Ed. 888, 896, it was said that:

"It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the state. Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

In *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035, it was held that the Fourteenth Amendment of the United States Constitution did not prevent the state from adjusting its system of taxation in all proper and reasonable ways, nor the classification of property for taxation; that the Missouri statute imposing a tax upon the business of express companies was not repugnant to the Fourteenth Amendment because it did not impose a like tax upon railroad or steamboat companies which carried express matter. In *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 30 Sup. Ct. 496, 54 L. Ed. 688, one of the last expressions of the Supreme Court on the subject at hand, it is said by Mr. Justice Harlan:

"But we will not speculate as to the motives of the state, and will assume—the statute, neither upon its face nor by its necessary operation, not suggesting a contrary assumption—that the state has by good faith sought, by its legislation, to protect or to promote the interests of its people. It is sufficient for the disposition of this case to say that, except as restrained by its own Constitution or by the Constitution of the United States, the state of Texas, by its Legislature, has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government; that, so far as the power of the United States is concerned, the state has the right, by any rule it deems proper, to classify persons or businesses for the purposes of taxation, subject to the condition that such classification shall not be in violation of the Constitution of the United States."

It was held that the statute requiring that all wholesale dealers in specified articles should pay a tax of a given amount on their occupation, without exacting a similar tax on wholesale dealers of other articles, could not, on the face of the statute, or by reason of any facts within the judicial knowledge of the court, be held within the meaning of the Fourteenth Amendment, to deprive the taxpayer of his property without due process of law, and to deny him equal protection of the laws, and that the federal court could not interfere with the enforcement of the statute simply because it may disapprove its terms or question the wisdom of its enactment, or because it could not be sure as to the precise reasons inducing the state to enact it.

These opinions are but few of the many expressions by the Supreme Court of the United States as to the power of the state in the passage of laws imposing or providing for the imposition of taxes. Having seen,

by the terms of the act, that there is nothing unreasonable or invidious in the selection of the subjects of taxation, or in the classification thereof according to the Constitution of the state, and following the rule announced by the Supreme Court, we may fairly conclude that no rights of the producing companies vouchsafed by the federal Constitution have been denied, or in any wise impaired, by the provisions of the statute in question or the collection of the tax thereby imposed.

This disposes of the principal contentions, and all we feel that go to the constitutionality, or involve the validity of that part of the act involved. There are, however, a number of other questions of minor importance presented, but which have to do principally with the administration of the law. These should not be difficult of solution in the light of our conclusions. It would seem that all taxes illegally collected and held by the state auditor, if such there be, should at once be repaid those who paid such taxes, either in whole or in part, according to the facts. All taxes lawfully collected will, of course, be paid into the state treasury. The matter of the collection of an ad valorem tax is one for the proper taxing authorities. All the Justices concur.

(28 Idaho, 293.)

BUCK v. BOARD OF TRUSTEES OF ST. MARIES INDEPENDENT SCHOOL DIST. NO. 1, IN BENEWAH COUNTY et al

(Supreme Court of Idaho. Dec. 31, 1915.)

1. MANDAMUS — 154 — SUPERINTENDENT OF SCHOOLS—REINSTATEMENT—PETITION—SUFFICIENCY.

Where petitioner seeks to take advantage of a subdivision of an act which, among other things, provides that when an independent school district shall employ a specified number of teachers, it shall be known as an independent school district of class A, but fails to allege the number of teachers employed in said district, *held*, that the petition is bad on demurrer.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. —154.]

2. STATUTES — 161—CONSTRUCTION—AMENDATORY ACTS.

Where an act of the Legislature is sought to be amended by two acts passed at the same session of a subsequent Legislature, and it appears that the two amendatory acts conflict and are irreconcilable with each other, but the later amendatory act and the original act are reconcilable, for the purpose of determining the intention of the Legislature the first amendatory act will be deemed to have been superseded and repealed by the latter.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 230-234; Dec. Dig. —161.]

3. SCHOOLS AND SCHOOL DISTRICTS — 63—INDEPENDENT SCHOOL DISTRICTS—STATUTES.

Held, that the trial court did not err in holding that subdivision B, § 129, c. 159, Sess. Laws 1911, as re-enacted by Sess. Laws 1913, c. 115, p. 450, which includes section 3, was superseded and repealed by chapter 159, Sess. Laws 1913, p. 527.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 114, 149-160; Dec. Dig. —63.]

4. MANDAMUS — 154 — SUPERINTENDENT OF SCHOOLS—REINSTATEMENT—PETITION—SUFFICIENCY.

Held, that the action of the trial court in sustaining the demurrer to the petition of appellant and dismissing the action was not error.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 296-316; Dec. Dig. —154.]

Appeal from District Court, Benewah County; R. N. Dunn, Judge.

Action by E. H. Buck against the Board of Trustees of St. Maries Independent School District No. 1, in Benewah County, and another. From judgment for defendants, plaintiff appeals. Affirmed.

Taylor & Hull, of St. Maries, for appellant. John P. Gray, W. F. McNaughton, and C. H. Craig, all of Coeur d'Alene, and Wm. D. Keeton, of St. Maries, for respondents.

BUDGE, J. This action was brought by appellant Buck for a writ of mandate directing the board of trustees of St. Maries school district No. 1 in Benewah county to reinstate him as superintendent of schools in that district. The respondents filed a general and special demurrer to the petition, which demurrer was sustained by the trial court. Thereupon appellant refused to plead further, and elected to stand on his original petition, whereupon judgment of dismissal of the action was entered. This is an appeal from the judgment.

The petition for writ of mandate alleges that on August 31, 1914, and for some time prior thereto and at all times mentioned in the petition, the city of St. Maries and a portion of the surrounding territory did and now does constitute an independent school district of class A, known as "St. Maries Independent School District No. 1 in Benewah County, Idaho;" that on said date, and during all the times mentioned in the petition, appellant, Buck, was the holder of a valid teacher's certificate, authorizing him to teach in both the grade and high schools of the state of Idaho; that on the 31st day of August, 1914, the said school district, through its board of trustees, entered into an agreement or contract with appellant, whereby he was employed and appointed to act as superintendent of schools in and for said school district, for a term of three years, commencing with the school year, September 1, 1914; that said contract or agreement was made pursuant to section 3, of subd. B, § 129, contained in section 17, c. 115, Sess. Laws, 1913, p. 449, by virtue of which statutory provision appellant became ex officio the executive officer of said board of trustees; that pursuant to said contract and agreement, appellant, proceeding in good faith, entered upon the discharge of his duties as superintendent of schools in said school district and as ex officio executive officer of said board of trustees, and did in a faithful, competent, careful, skillful, and mor-

al manner act as such superintendent of schools in and for such school district, and as such executive officer during the school year of 1914-15, receiving therefor the consideration specified in said agreement; that on or about April 5, 1915, said school district, acting by and through its board of trustees, attempted to discharge appellant without cause, and did cause him to be notified that after the close of the school year of 1914-15 his services as superintendent of schools would no longer be desired by said school district, but did not attempt to discharge this appellant at any regular meeting of said board of trustees; and that said school district, acting by and through its board of trustees or otherwise, did not discharge, or attempt to discharge, appellant on the grounds that he had been guilty of incompetency, immorality, or gross neglect of said duties, but attempted to discharge him without a good and valid reason therefor, and without specifying any reason whatsoever. The complaint further alleges that under the provisions of Session Laws 1913, p. 450, appellant is given an absolute right by statute to be discharged only upon the ground that he has been guilty of incompetency, immorality or gross neglect of duty, and upon one or all of such grounds alone, but for no other reason or cause. The petition alleges that appellant has not been guilty of either or any of said grounds, and that his discharge was unauthorized, illegal, and wrongful and in excess of the powers granted to said school district, and prevents the use and enjoyment by appellant of the rights to which he is entitled. Petition further alleges that on June 2, 1915, the appellant demanded of the board of trustees of said school district that he be reinstated as superintendent of the schools of said district, which demand the board of trustees refused. Appellant alleges that he complied faithfully with all the terms and provisions of his agreement, and stands ready at all times to perform, comply with, and undertake the duties of superintendent of schools of said district and ex officio executive officer of the board of trustees, and that he has no plain, speedy, or adequate remedy at law.

This case comes before this court on appeal, involving a question of law raised by the general and special demurrer as to the sufficiency of the petition, and may be determined, so far as the action of the trial court is concerned in sustaining the demurrer and dismissing the petition, upon the sole ground of whether subdivision B, § 129, c. 159, Sess. Laws 1911, as amended by section 17, c. 115, Sess. Laws 1913, p. 450, was in force and effect at the time the contract or agreement between appellant and the board of trustees of St. Maries independent school district No. 1 in Benewah county was entered into. If it was not in force at that time, the question whether the proceeding of man-

damus instituted by appellant is the proper remedy need not be determined here. Subdivision B, supra, was first enacted by the Legislature during the eleventh session, and is to be found in the Session Laws of 1911 at page 532, and provides:

"When an independent school district shall employ thirty-five (35) or more teachers, it shall be known as an independent [school] district of class A, and shall have, in addition to the above enumerated powers and duties, the following special powers and duties: * * *

"3. To employ a superintendent of schools for a term not to exceed three (3) years, who shall be the executive officer of the board, with such powers and duties as they may prescribe, together with such powers and duties as are now or may hereafter be prescribed by the laws of the state, to fix, allow and order paid his salary, and to discharge said superintendent for incompetency, immorality, or gross neglect of duty."

At the twelfth session of the Legislature section 129, c. 159, Sess. Laws 1911, was amended, and subdivision B was re-enacted practically verbatim (Sess. Laws 1913, p. 450), the only change being that the number of teachers necessary to constitute a class A district was reduced to 20. This act was signed by the Governor on March 10, 1913. At the same session of the Legislature section 129, supra, was again amended, and the number of teachers necessary to constitute a class A district, as shown in subdivision B (Sess. Laws 1913, p. 528), was increased to 35, being the original number provided by the eleventh session, supra. This last act was signed by the Governor on March 12, 1913.

[1, 4] The demurrer in this case assailed the petition on the ground that the number of teachers employed in the respondent district was not set up in the petition. In order to bring appellant within the provisions of subdivision B, § 129, c. 159, Sess. Laws 1911, as amended by Sess. Laws 1913, c. 115, p. 450, or of subdivision B, § 129, supra, as amended by Sess. Laws 1913, c. 159, p. 528, we think it was absolutely necessary for him to allege in his petition the number of teachers employed in the district by which he was employed to act as superintendent, and that the petition was subject to demurrer on this point. If the district did not employ the number of teachers provided for under the act, it would not be classified as an independent school district of class A.

[2, 3] The trial court held that subdivision B, § 129, c. 159, Sess. Laws 1911, as amended by Sess. Laws 1913, c. 115, p. 450, was not the law at the time the contract was entered into between appellant and respondent, because it was in direct conflict with subdivision B, § 129, c. 159, Sess. Laws 1911, as amended by Sess. Laws 1913, c. 159, p. 528. Going further, it will be seen, from a comparison of section 17, c. 115, Sess. Laws 1913, p. 449, with chapter 159, Sess. Laws 1913, p. 527, in both of which enactments section 129, c. 159, Sess. Laws 1911, was amended, that there are conflicting provi-

sions other than subdivision B. In paragraph 3, subdivision A, of amended section 129, supra (chapter 115, Sess. Laws 1913, p. 449), respecting independent school districts generally, a maximum tax levy of 20 mills is provided for the payment of bonds, and in such school districts as maintain rural school routes an additional levy of not to exceed 10 mills is provided; while paragraph 3, subdivision A, of said amended section (chapter 159, Sess. Laws, 1913, p. 527), provides a maximum tax levy for the payment of bonds of not to exceed 10 mills, and an additional levy for the maintenance of rural school routes of not to exceed 4 mills.

It will thus be observed that there is an irreconcilable conflict between these two enactments of the 1913 session, not only touching the number of teachers to be employed in order to give an independent school district the dignity of standing in class A, but also in the matter of special tax levy for the purposes therein specified. And it might be fairly assumed that, when the Legislature was dealing with the question of the levy of taxes, in view of the publicity that has been given in recent years to the burden of taxation in this state, their attention was directed to this particular phase of the subject in the last enactment. However, it appears to us that if the later enactment, supra, it to control in the matter of taxation, it would be unreasonable to hold that it did not apply to the number of teachers that an independent school district must employ in order to come within the class of independent school districts known as class A.

The amount of revenue that may lawfully be raised in any particular school district would necessarily control the number of teachers that could be employed by such district, and the salaries they could afford to pay. It would be inconsistent to hold that it was the intention of the Legislature to decrease the amount of revenue that an independent school district may collect, and at the same time confer upon it additional powers and duties that would necessarily involve larger expenditures. Or, stated differently, it is fairly inferable from the act decreasing the revenue of an independent school district that the Legislature intended also to decrease the number of independent school districts in class A, thus reducing the expenses of those districts.

If the latter act in question governs in the matter of revenue, it should also control the action of the board of trustees of an independent school district as to all other matters. We cannot consistently reach the conclusion, in the face of a positive statute dealing with a matter of such great importance to the taxpayers residing within an independent school district, that the Legislature inadvertently used the words "35 teachers," when it was their intention to provide for but 20, no more than we could hold that they used the words "ten mills" in providing a

maximum special levy for a given purpose, when they intended to say 20 mills. The presumption would naturally be that the Legislature in reducing the special levies intended to restrict the class.

It may well be conceded, from a consideration of the two amendatory acts of 1913 of the act of 1911, that there is a doubt as to the real intention of the Legislature in first reducing and then increasing the number of teachers in an independent school district of class A. However, it must be admitted that the two amendatory acts are directly in conflict and cannot be harmonized. And where such a condition exists—that is, where two acts are conflicting—it becomes necessary for this court to follow the rule it has heretofore applied in such cases. In the case of *Peavy v. McCombs*, 28 Idaho, 143, 140 Pac. 965, this court very aptly said:

"In case of an irreconcilable conflict between two acts passed at the same * * * Legislature, the one should prevail which was last approved by the Governor; the approval of the Governor being the last act in the process of legislation. * * *"

Section 129, c. 159, Sess. Laws 1911, as amended by Sess. Laws 1913, c. 159, p. 527, confers upon trustees of independent school districts that are not in class A the power to employ or discharge teachers at will, while subdivision B of that section limits the power of boards of trustees of independent school districts of class A, where superintendents have been employed under proper contracts, and who, by reason of such selection and employment, become the executive officers of said boards, to discharge such superintendents only for incompetency, immorality, or gross neglect of duty. It necessarily follows, therefore, that unless the respondent district employed 35 teachers, it was not, at the date the contract was entered into with the appellant, an independent school district of class A. That being true, the powers of the board of trustees of the respondent district were not limited or restricted so far as the removal of the appellant is concerned. *Ewin v. Independent School Dist. No. 8*, 10 Idaho, 102, 77 Pac. 222; *Hermann v. Independent School Dist. No. 1*, 24 Idaho, 554, 135 Pac. 1159.

On an examination of section 129, c. 159, Sess. Laws 1911, and the amendment thereof in the Sess. Laws 1913, c. 159, p. 527, we find that the latest act reduces the revenue, as heretofore stated, and leaves the number of teachers to be employed in an independent school district, in order that the district shall be known as an independent district of class A, at 35 as in the original act. The reduction of taxation is clearly provided for, and the latter law as amendatory of the former is uncontradictory and reconcilable with the 1911 act, while the amendment of section 129, supra, Sess. Laws 1913, c. 115, p. 449, conflicts with the act subsequently passed by the twelfth session at pages 527 and 528,

and also with act of the 1911 session at page 531.

We do not think this court would be authorized to accept certain amendatory provisions of the act approved by the Governor on March 10, 1913, and found at page 449, Sess. Laws 1913, and reject the balance, and adopt certain amendments of the act approved March 12, 1913, found at page 527, Sess. Laws 1913, and reject the balance, when we can take the latter amendment and compare it with the law sought to be amended, viz., section 129, c. 159, Sess. Laws 1911, p. 531, and reconcile them. We have therefore, after a careful consideration, reached the conclusion that the trial court did not err in holding that subdivision B, § 129, c. 159, Sess. Laws 1911, as amended by Sess. Laws 1913, p. 449, which includes section 3 relied on in paragraphs 3 and 4 of appellant's petition, was superseded and repealed by chapter 159, Sess. Laws 1913, p. 527, and that the action of the trial court in sustaining the demurrer to appellant's petition was not error. The judgment of the trial court in sustaining the demurrer and in dismissing the petition of appellant is affirmed. Costs are awarded to respondents.

SULLIVAN, C. J., and MORGAN, J., concur.

(28 Idaho, 302)

DAUGHERTY v. NAGEL.

(Supreme Court of Idaho. Dec. 31, 1915.)

1. WITNESSES \S 300—IMMUNITY FROM SELF-INCRIMINATION — PROCEEDINGS TO REMOVE OFFICER—"CRIMINAL CASE."

A proceeding under section 7459, Rev. Codes, providing for the removal of a public officer for collecting illegal fees for services rendered or to be rendered, or for refusal or neglect to perform the official duties pertaining to his office, while in form a civil action is, nevertheless, in substance and effect a criminal prosecution, coming within section 13, article 1, of the Constitution declaring that "no person shall be * * * compelled in any criminal case to be a witness against himself"; and it was not the intention of the Legislature in enacting section 1 of Senate Bill 28, Sess. Laws 1909, p. 334, to compel a defendant, in an action brought by a private citizen for defendant's removal from office for refusal or neglect to perform the official duties pertaining to his office and to obtain a judgment as a penalty in the sum of \$500 for the informer, to become a witness against himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1042, 1042½; Dec. Dig. \S 300.

For other definitions, see Words and Phrases, First and Second Series, Criminal Case.]

2. OFFICERS \S 74—PROCEEDINGS TO REMOVE—JURISDICTION—INFORMATION—"REFUSED OR NEGLECTED TO PERFORM OFFICIAL DUTIES."

Where, under section 7459, Rev. Codes, authorizing the district court to entertain an information verified by the oath of any person against an officer within its jurisdiction charging him with being guilty of charging and collecting illegal fees or with having refused or neglected to perform his official duties, an information charges that the defendant knowingly, intentionally, and illegally performed the du-

ties of his office, such allegations do not charge that the defendant refused to perform the duties of his office, but charge that he performed said duties; therefore it was not error for the trial court to strike out said allegations from the information, for the reason that the trial court would, under such allegations, be without jurisdiction, said defendant being subject to prosecution upon indictment by a grand jury or information of a county prosecuting attorney, as provided under sections 7445-7457, Rev. Codes.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 101-103, 105, 106; Dec. Dig. \S 74.]

3. EVIDENCE \S 387—BOARD—RECORDS—CONCLUSIVENESS.

Where, as a matter of fact, the defendant with the other two members of the board of county commissioners met as a board of equalization on the first Monday of July, 1913, as provided by law, and continued in session up to and including the fourth Monday of July, 1913, for the purpose of equalizing the assessment of all property entered upon the real property assessment roll, and heard and determined all complaints in regard to the assessment of such property, and also examined the real property assessment roll tract by tract, name by name, and the value of each item of property assessed, although the minutes of the meeting of said board of equalization through the inadvertence of the clerk recited that the board met as a board of county commissioners, when in truth and in fact they met as a board of equalization, held, that it was not error for the trial court to permit counsel for defendant upon cross-examination to establish the fact that said board met as a board of equalization.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1698-1713; Dec. Dig. \S 387; Statutes, Cent. Dig. § 385.]

4. NONSUIT AND DENIAL OF NEW TRIAL APPROVED.

Held, from an examination of the entire record in this case, that the trial court did not err in granting respondent's motion for nonsuit, nor in refusing to grant appellant's motion for a new trial.

Appeal from District Court, Bonner County; R. N. Dunn, Judge.

Action by Gordon Daugherty against John G. Nagel, as a member of the Board of County Commissioners of Bonner County. From judgment for defendant, plaintiff appeals. Affirmed.

See, also, 27 Idaho, 511, 149 Pac. 729.

F. A. McCall, of Coeur d'Alene, O. C. Grananger, of Hope, Peter Johnson, of Sandpoint, and Black & Wernette, of Coeur d'Alene, for appellant. Herman H. Taylor, of Sandpoint, for respondent.

BUDGE, J. This action was brought by appellant in the district court of the Eighth judicial district against respondent under section 7459, Rev. Codes, for the purpose of obtaining respondent's removal from office as a member of the board of county commissioners of Bonner county, and for judgment in the sum of \$500 in favor of the informer as provided for in that section. The information sets forth two causes of action. A demurrer, however, was interposed to the first cause of action and by the trial court sustained, which action of the trial court is not involved in this appeal. This cause was tried

to the court without a jury upon the second cause of action. After appellant's testimony was introduced, counsel for respondent interposed a motion for nonsuit, which was granted. Judgment was thereupon entered for respondent dismissing the second cause of action. Thereafter a motion for a new trial was made by appellant and by the trial court overruled. This is an appeal from the order of the trial court overruling appellant's motion for new trial.

There are 57 errors assigned in appellant's brief. For the purpose of disposing of this appeal, however, we will consider only such as we deem necessary under three heads.

[1] The first error assigned is based upon the action of the trial court in sustaining the objection made by counsel for respondent when respondent was called by appellant for cross-examination in pursuance of the provisions of section 1, Senate Bill 28, Sess. Laws 1909, p. 334. From the record it appears that at the beginning of the taking of testimony appellant, for the purpose of making out his own case, called respondent as a witness, whereupon counsel for respondent objected to respondent's giving any testimony in support of the information upon the ground that the proceedings were brought under section 7459, Rev. Codes, providing for the removal of public officials, which proceeding is in its nature and effect a criminal action, coming within section 13, article 1 of the Constitution, which provides that:

"No person shall be * * * compelled in any criminal case to be a witness against himself."

The trial court sustained the objection, and this action on the part of the court is fully supported by the Supreme Court of the United States in the case of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and by the Supreme Court of California in the case of *Thurston v. Clark*, 107 Cal. 285, 40 Pac. 435. In the latter case the court aptly said:

"Removal from office under the summary proceeding provided for by section 772, supra [which is substantially identical with section 7459, Rev. Codes], is a punishment for wrongdoing by the class of officials designated in chapter 2 of title 2 of part 2 of such Code. * * * In all its essentials of cause and effect, the latter is a criminal proceeding, equally with the former. The proceeding is a non-descript, but resembling somewhat a *qui tam* action. But whatever, its garb, it is in body and spirit, in its aim and object, a process for the punishment of crime. When the Constitution declares that no person shall be compelled in any criminal case to be a witness against himself, it must be construed to apply to all cases in which the action prosecuted is not to establish, recover, or redress private and civil rights, but to try and punish persons charged with the commission of public offenses. A criminal case is an action, suit, or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form a statute may clothe it; it is still a criminal case, and the person charged therein is protected from being an enforced witness against himself by theegis of the Constitutions, national and state."

[2] The second objection urged by appellant and assigned as error is the action of the trial court in striking out, on respondent's motion, paragraph 8 of the amended information, which charges respondent as a member of the board of county commissioners of Bonner county, and while acting in conjunction with the other two members of the board and performing the duties and functions of a board of equalization, with having knowingly, intentionally, and illegally and in violation of section 64, chapter 58, Laws of 1913, permitted assessments to stand, whereby certain pieces of property were assessed at less than their full cash value.

It must be remembered that this proceeding was instituted under section 7459, supra. This section provides substantially that any officer within the jurisdiction of the district court, who has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, is subject to removal therefrom in a summary proceeding at the instigation of a private citizen in whose favor, in the event of the removal of the public official, a judgment shall be entered in the amount specified in the statute.

Respondent is not charged in said paragraph 8 with having refused or neglected to perform the official duties pertaining to his office, but he is charged with having knowingly, intentionally, and illegally permitted assessments to stand, whereby certain pieces of property were assessed at less than their full cash value. If this was done knowingly, willfully, and intentionally, it would constitute willful and corrupt misconduct in office, and not a failure or neglect of official duty within the meaning of section 7459, supra. In other words, respondent, as charged, did not refuse to perform a duty; neither did he neglect to perform such duty; but he is charged with knowingly, intentionally, and illegally performing said duty. He is not charged with failure to act, but with acting in an unlawful and corrupt manner. The charge is not nonfeasance, but malfeasance in office, and if it be true, respondent would be liable to prosecution under sections 7445-7457, Rev. Codes.

Where an official is charged with knowingly, intentionally, and illegally performing the duties of his office as a ground for his removal, his good faith or intention in doing the act with which he is charged is a matter upon which he is entitled to be heard in evidence, and the truth or falsity of such charge is for the jury, and not for the arbitrary disposition by the court.

If the allegations in paragraph 8 of the amended information be true, respondent necessarily must, as heretofore stated, have performed—not refused to perform—his official duties, and, together with the other members of the board of equalization, pass-

ed upon the assessed property as it appeared upon the assessment roll of real property of the county. Otherwise he could not have knowingly and intentionally permitted improper assessments to stand. Had he refused to act at all in regard to this matter, he would clearly be subject to removal under the provisions of section 7459, supra; but having acted, if he knowingly, illegally, and corruptly acted, he would be subject to removal under sections 7445-7457, supra, which, among other things, provide that:

"An accusation in writing against any district, county, precinct, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed." That "the accusation must state the offense charged, in ordinary and concise language, and without repetition." That "if the defendant pleads guilty, or refuses to answer the accusation, the court must render judgment of conviction against him. If he denies the matters charged, the court must immediately, or at such time as it may appoint, proceed to try the accusation." And that "the trial must be by a jury, and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor."

Under section 7459, supra, a public official who is charged in the information of a private citizen with refusing or neglecting to perform the official duties pertaining to his office is not entitled to a jury trial. But a public officer who, while in the performance of his official duties, is charged with knowingly, intentionally, and illegally performing those duties is entitled to a jury trial. His good faith and intention in doing the act with which he is charged are matters upon which he has the constitutional right to a trial by a jury.

Section 64, chapter 58, Sess. Laws 1913, should be construed in *pari materia* to sections 7445-7457, supra. While it is true that section 64, chapter 58, supra, provides that:

"Any member of the board of county commissioners who knowingly permits any assessments to stand, or permits any alteration to be made in the assessment roll, whereby any property is assessed at more or less than its full cash value, shall be guilty of a misdemeanor and of malfeasance in office, for which he may be removed from office in the manner provided by law for the summary removal of public officers from office"

—it does not provide for the imposition of a judgment in favor of the informer and against the official in the sum of \$500; nor is it amendatory of section 7459, supra. For these reasons and in the absence of an express provision to that effect, we are of the opinion that it was not the intention of the Legislature to extend the provisions of section 7459 to include violations of section 64, chapter 58, supra.

The proceedings provided for under section 7459, Rev. Codes, are clearly restricted to cases where an officer is guilty of knowingly, willfully, and corruptly charging and collecting illegal fees for services rendered or to be rendered in his office, or of knowingly, willfully, or corruptly refusing or neglecting

to perform the official duties pertaining to his office. *Collman v. Wanamaker*, 27 Idaho, 342, 149 Pac. 292; *Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *McRoberts v. Hoar*, 152 Pac. 1046. And as neither of these offenses was charged against respondent in paragraph 8 of the amended information, the trial court did not err in striking out that paragraph.

In the case of *Siebe v. Superior Court et al.*, 114 Cal. 551, 46 Pac. 456, the court had under consideration section 772 of the California Penal Code, which is practically identical with section 7459, Rev. Codes of Idaho, and in that case it was said:

"Pen. Code, section 772, authorizing the superior court to entertain an accusation made under oath by a private citizen against an officer within its jurisdiction, charging him with having collected illegal fees, or with having refused or neglected to perform his official duties, does not confer jurisdiction to entertain such an accusation charging an assessor with having assessed certain property at a sum below its full value; such act, if corruptly done, being 'willful and corrupt misconduct in office,' subjecting the officer to indictment, and, if not, being of a judicial nature, and one for which he is not amenable to the penal laws."

The third assignment of error complained of is based on the action of the trial court in granting respondent's motion for a nonsuit. It is contended by counsel for appellant that the evidence was sufficient to support the material allegations of the amended information as found in paragraphs 1 to 7, inclusive, of appellant's second cause of action, and that the court should have required respondent to introduce proof to establish his defense to those charges which, in substance, are that the respondent knowingly, intentionally, willfully, and illegally, while acting with the other two members of the board of county commissioners of said Bonner county, failed and refused to meet, organize, and remain in session as a board of equalization from day to day, from the first Monday in July, 1913, up to and including the fourth Monday in July, 1913, as required by law, for the purpose of equalizing assessment of all property entered upon the real property assessment roll; failed to determine complaints in regard to the assessment of such property; failed to examine the real property assessment roll, tract by tract, name by name, and the value of each item of property; and knowingly and illegally permitted certain pieces of property to escape assessment.

[3] On an examination of the entire record it clearly appears, we think, that respondent met with the other two members of the board of county commissioners, as required by law, and thereafter organized as a board of equalization in pursuance of law; that they remained in session as a board of equalization during the entire time required by law; and that the adjournments and reconventions of the board from time to time were not illegal, and did not vitiate their subsequent acts. It further appears that the deputy clerk of said board of county commis-

sioners in preparing the minutes of the board inadvertently showed that they were sitting as a board of county commissioners, when in truth and in fact they were performing the duties of a board of equalization.

The trial court did not err in permitting counsel for respondent, upon cross-examination, to inquire into the facts as they really were. The respondent was not bound by what the record showed, unless it stated the truth.

[4] We have examined the entire record in this case and have failed to find any evidence in support of the material allegations of appellant's amended information, upon which this cause was tried, that would have justified the court in refusing to grant respondent's motion for nonsuit. Finding no error in the record, we have reached the conclusion that the trial court was justified in refusing to grant appellant's motion for a new trial.

The judgment of the trial court is affirmed, with costs to respondent.

SULLIVAN, C. J., and MORGAN, J., concur.

(28 Idaho, 428)

STATE v. JONES.

(Supreme Court of Idaho. Jan. 22, 1916.)

1. CRIMINAL LAW \S 1130—PRESENTATION FOR REVIEW—BRIEF—INSTRUCTIONS—EVIDENCE.

In a criminal case the sufficiency and appropriateness of an instruction must be determined from the evidence, and, where no reference is made in appellant's assignment of errors to the particular evidence relied upon in making such assignment, and the page or folio of the transcript wherein such evidence may be found is not cited in the brief, such evidence will not be considered by the appellate court in connection with an offered instruction refused by the lower court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2956, 2965-2970, 3205; Dec. Dig. \S 1130.]

2. CRIMINAL LAW \S 782—INSTRUCTIONS—EVIDENCE.

Under the provisions of section 7886, Rev. Codes, it is the duty of the court in a criminal case to instruct the jury upon the law of the case, but it is equally the duty of the jury to determine for itself what facts have been proved, and of this they are the sole judges. It is their province to determine the truth, force, and importance of the facts which have been placed before them by the evidence. It is not the duty of the court, in instructing the jury, to draw inferences from the facts in proof, or to point out to the jury what inferences they might or could draw from such facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. \S 782.]

3. CRIMINAL LAW \S 811—INSTRUCTIONS—EVIDENCE.

It is error for the court, in a criminal case, to give an instruction which is argumentative in form and directs the attention of the jury specially to certain portions of the evidence, and suggests to them certain inferences of fact to be drawn therefrom, thereby singling out for

their consideration particular facts favorable to the defendant, and ignoring other evidence having a contrary tendency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1787, 1969-1972; Dec. Dig. \S 811.]

4. CRIMINAL LAW \S 829—REFUSAL OF INSTRUCTIONS COVERED.

Where, in a criminal case, the matter contained in an instruction offered on behalf of the defendant and refused by the court is fully covered by another instruction given by the court, which is just as favorable to the defendant as the one refused, the court commits no error in such refusal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829.]

5. CRIMINAL LAW \S 829—SELF-DEFENSE—REFUSAL OF INSTRUCTION.

Certain proffered instructions considered, and held, that the lower court committed no error in refusing to give them to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829.]

6. AFFIDAVITS \S 5—VALIDITY—POWER TO ADMINISTER OATHS—COUNTY OFFICERS.

Section 6055, Rev. Codes, which provides, "An affidavit to be used before any court, judge or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace, or notary public in this state," is not exclusive or a limitation upon section 1953, Rev. Codes, which provides, "Every county officer and every justice of the peace may administer and certify oaths." An oath taken before any officer authorized under the law to administer it has the same force as if taken before an officer particularly designated by law.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. \S 18-27; Dec. Dig. \S 5.]

7. CRIMINAL LAW \S 1160—APPEAL—DENIAL OF NEW TRIAL—CONFLICTING EVIDENCE.

The ruling of the trial court will not be disturbed in passing upon conflicting affidavits, where the misconduct of the jury is in question, in support of, and in opposition to, a motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3084; Dec. Dig. \S 1160.]

8. OATH \S 1—NATURE AND REQUISITE.

An "oath" is a solemn appeal to the Supreme Being in attestation of the truth of some statement, and an outward pledge that one's testimony is given under an immediate sense of responsibility to God.

[Ed. Note.—For other cases, see Oath, Cent. Dig. \S 1; Dec. Dig. \S 1.]

Appeal from District Court, Benewah County; R. N. Dunn, Judge.

H. C. Jones was convicted of manslaughter, and appeals. Affirmed.

F. C. Highsmith, of St. Maries, for appellant. J. H. Peterson, Atty. Gen., Herbert Wing, Asst. Atty. Gen., N. D. Wernette, of Coeur d'Alene, and Ed S. Elder, of St. Maries, for the State.

BUDGE, J. An information was filed against appellant on January 28, 1915, in the district court of the Eighth judicial district in and for Kootenai county, charging him with the crime of murder in the second degree, in the killing of one Charles E. Plunkitt on or about December 1, 1914. The crime was committed in Kootenai county, in terri-

tory which subsequently was included in Benewah county when the latter county was created. After the organization of Benewah county, this case was transferred to the district court of that county for trial. Defendant was tried before the court and jury, and was found guilty of manslaughter, and sentenced to serve a term in the state penitentiary of not less than two nor more than ten years. Motion for a new trial was then made and overruled. This is an appeal from the judgment, and from the order of the trial court overruling appellant's motion for a new trial.

Appellant specifies four assignments of error: (1) The court erred in refusing defendant's instruction No. 1; (2) the court erred in denying defendant's motion to strike from the record the affidavits of ten certain jurors; (3) the court erred in denying defendant's motion for new trial; and (4) the court erred in entering judgment and passing sentence on the verdict. These assignments of error will be discussed and disposed of in their order.

The instruction offered and refused upon which the first error is predicated is as follows:

"You are to determine from the evidence the state of mind of the defendant when he shot and killed the deceased (if he did so), and in that connection you may consider threats (if any) made by the deceased, either expressed or implied, regarding the defendant, the reputation of the deceased (if such it was) as a violent and dangerous man, the defendant's personal knowledge (if such he had) that the deceased was a violent and dangerous man, the relation of the deceased and the defendant, and all other facts in the case that may shed light on the case.

"And you are further charged that the relative size and strength of the deceased and the accused should be considered by you in determining the question whether or not the defendant had reasonable grounds to apprehend death or great bodily harm at the hands of the deceased.

"And in this connection you are further instructed that the defendant is not required to wait until an actual assault made upon him has reached a stage where resistance would be useless. If the situation is such that a reasonable man in the situation of defendant would be justified in believing that his life is in danger, or that he was in danger of great bodily harm, which was to be committed upon him, he could act; and what was apparent danger to him should be considered by you as the real danger."

[1] That portion of the first paragraph of appellant's requested instruction which refers to threats is subject to numerous objections, but we will not detail them all. It is a cardinal rule that the sufficiency and correctness of an instruction must be determined from the evidence; and we fail to find any reference in appellant's assignments of error, nor does he direct our attention in his brief by folio or page of the transcript, to any evidence therein showing that the deceased made threats regarding appellant either expressly or impliedly. Under the well-known rule of practice, where no reference is made in the brief to the page or folio of the transcript where evidence relied upon can be

found, such evidence will not be considered by this court in connection with an offered instruction refused by the lower court.

We find in the case of *Campbell v. State*, 133 Ala. 81, 31 South. 802, 91 Am. St. Rep. 17, the following instruction was requested by defendant:

"The court charges the jury that any threats made by deceased towards defendant, if such threats are shown to have been made by deceased, whether recently made or not, may be considered by the jury, in connection with all the other evidence in the case, in determining whether or not there was real or apparent danger to defendant at the time he fired the fatal shot."

It will be seen that this instruction is practically the same as appellant's proffered instruction in the case at bar. The Supreme Court of that state held that the instruction had been properly refused, for the reason that it was argumentative.

That portion of the first paragraph of appellant's requested instruction in respect to the reputation of the deceased as a violent and dangerous man and the appellant's personal knowledge of this fact is clearly objectionable on the ground that it is not within the province of the court to select a particular fact and suggest to the jury what effect they may give it. The jury are to consider all the evidence and base their verdict upon their conclusions from it as a whole. *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Gilmore v. State*, 126 Ala. 20, 28 South. 595; *Commonwealth v. Hourigan*, 89 Ky. 305, 12 S. W. 550; *State v. Cantlin*, 118 Mo. 100, 23 S. W. 1091. We will refrain from comment upon the phrase of the first paragraph of appellant's refused instruction as to the relation of the deceased and the appellant, since our attention has not been directed in the brief to any testimony in the transcript bearing upon this matter. The entire first paragraph of appellant's proposed instruction is subject to the objection that it is argumentative, and is an effort on the part of appellant, by the medium of an instruction, to call attention to, and to emphasize, certain parts of the evidence particularly favorable to him.

The second paragraph of appellant's proposed instruction with reference to the relative size and strength of the deceased and the accused we find is substantially what was contained in an instruction requested by defendant and refused by the court in the case of *Gordon v. State*, 140 Ala. 29, 36 South. 1009. It is as follows:

"The jury may consider the age and size and character of the defendant and the size and age and character of deceased, in connection with all the other evidence in this case, in order to determine whether the defendant was impressed with a reasonable necessity, either apparent or actual, to shoot."

In that case the Supreme Court held on appeal that the instruction was bad for the reason that it was argumentative.

The instructions quoted from the cases of *Campbell v. State* and *Gordon v. State*, *supra*, were both offered, as was the one in the

case at bar, for the express purpose of determining the state of mind of the defendant when he committed the act with which he was charged, but neither of them is as far-reaching in an effort to emphasize and give undue prominence to isolated facts as the one we have here under consideration.

[2] Under the provisions of section 7886, Rev. Codes, the court, in charging the jury, must state to them all matters of law necessary for their information, but is not required, and it would be error, to charge the jury, either of its own motion or by giving requested instructions, with respect to any particular matters of fact. It is the duty of the court to instruct the jury upon the law of the case, but it is equally the duty of the jury to determine what facts have been proved, and of this they are the sole judges.

[3] It will be observed from a reading of the first and second paragraph of appellant's requested instruction that the attention of the jury is directed to certain facts favorable to appellant for the purpose of indicating that he was entitled to have these facts more carefully scrutinized and weighed than other evidence adduced on the trial which tended to prove his guilt of the crime charged. In short, the jury are invited, in this instruction, to treat lightly all of the facts in the case except the particular ones pointed out as being more advantageous to appellant. The jury are told to consider the threats made by the deceased, either express or implied, regarding the appellant. They are not admonished to consider threats or conduct of the appellant against the deceased. They are advised to consider only the reputation of the deceased as a violent and dangerous man, but not that of the appellant. By adopting this method counsel for appellant sought to have the court argue to the jury, through the instruction, that from a consideration of these particular facts to which their attention was then directed they would be warranted in reaching the conclusion that the appellant's mind was in such a condition of fear as to wholly justify him in committing the deadly assault as an act of self-defense. While it was proper for the trial court to permit evidence to be introduced showing the relative size and strength of the deceased and appellant (*State v. Buster*, 28 Idaho, —, 152 Pac. 193), yet we know of no rule of law which imposes the additional duty upon the court of saying to the jury, for the benefit of a defendant, that, if the deceased is a larger man than the defendant, the defendant is, for that reason alone, justified in committing a murderous assault upon him. Nor should the size of the deceased necessarily determine the question of whether a defendant has reasonable grounds to apprehend death or great bodily harm. If, in other words, it is incumbent upon the trial court to point out and call attention to cer-

tain acts and conduct of the deceased, and to comment upon the relative size and strength of the deceased and the defendant, it is equally its duty to call to the attention of the jury certain facts which may be damaging to the defendant.

All of the facts in this case were before the jury, and it was for them to determine the truth, force, and importance of those facts. It certainly was not the duty of the court to draw inferences from the facts in proof. Neither was it proper for it to point out what inferences the jury might or could draw from them. The rule seems to be that, where an instruction is argumentative, and directs the attention of the jury especially to certain portions of the evidence, and suggests to them certain inferences of fact to be drawn therefrom, thus singling out for their consideration particular facts favorable to the defendant, and ignoring, by failing to particularize, other evidence having a contrary tendency, the giving of such an instruction is error.

We think, therefore, that the first two paragraphs of appellant's requested instruction were properly refused by the court, as we deem such an instruction to be argumentative, giving undue prominence to certain portions of the evidence, and suggesting inferences of fact to be drawn therefrom by the jury.

[4, 5] The matter contained in the third and last paragraph of appellant's requested instruction was fully covered in the instructions given by the trial court; and, as the instructions given were more favorable to appellant than the one asked, he cannot be heard to complain. The instructions given covering this particular point read as follows:

"If the jury believe from the evidence that the defendant, H. C. Jones, at the time he fired the fatal shot which killed the deceased (if he did fire the fatal shot and kill him), believed, and had good reason to believe, that his life was in imminent danger, or that he was in danger of receiving great bodily harm at the hands of the said Charles E. Plunkitt, then I instruct you that the defendant was justified in firing said shot, and you should acquit him. * * *

"You are further instructed that before the jury can convict the defendant they must be satisfied to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and, unless the jury are so convinced by the evidence of defendant's guilt that they would venture to act upon that decision in matters of the highest concern and importance to their own interest, then they must acquit the defendant."

We are fully satisfied that the foregoing instructions given by the court, in connection with other instructions given, correctly stated the law of self-defense as applied to the facts in this case, and that the appellant was in no wise prejudiced by the refusal of the court to give the instruction he requested.

[6] The second assignment of error is based on the action of the trial court in refusing,

on motion for a new trial being made by appellant, to strike from the record the affidavits of the ten jurors of the panel before which the defendant was tried, for the reason that the same were sworn to before the prosecuting attorney, deputy clerk of the district court, and chairman of the board of county commissioners—officers of Benewah county. It is contended by counsel for appellant that the affidavits were null and void and should not have been considered by the trial court in resisting their motion for a new trial. The question, therefore, arises whether the county officers taking these oaths are authorized so to do, and, if so, can such affidavits be used before the trial court as counter affidavits in opposition to a motion for a new trial?

Section 6055, Rev. Codes, provides:

"An affidavit to be used before any court, judge or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace, or notary public in this state."

Section 1983, Rev. Codes, provides:

"Every county officer and every justice of the peace may administer and certify oaths."

It is insisted by counsel for appellant that section 6055 is a limitation on section 1983, and that no affidavit can be used before any court, judge, or officer of this state, unless it be taken by the officer designated in the former section. These two sections of our statutes have never been construed by this court, as the question is now before us for the first time, but we find that they were taken from the California Codes, and both have received a construction by the Supreme Court of that state.

In the case of *Halle v. Smith*, 128 Cal. 415, 60 Pac. 1032, it was insisted that section 4113 of the Political Code of California (which corresponds with section 1983, Rev. Codes), gave authority to officers therein enumerated to administer and certify oaths only in proceedings peculiar to their own department or office. The court said:

"While it is not improbable that this is what the framers of the Code meant, still there is no such restriction in the language used, and there is no such room given for the play of construction as would warrant this court in overturning the judgment by taking that view. Neither do we think that section 2012 of the Code of Civil Procedure [which corresponds with section 6055, Rev. Codes] excludes all officers except those therein mentioned from taking affidavits to be used before a court. * * * It is not confined to affidavits to be used before a court or judge, but includes affidavits to be used before any other 'officer of this state'; and we think that this section and all other sections of the same Code on the subject * * * are all cumulative, and that, where a general authority is given an officer to 'administer and certify oaths,' that authority cannot be limited by judicial construction to particular kinds of oaths."

[§] Section 1983, Rev. Codes, provides in express terms that every county officer and every justice of the peace may administer and certify oaths. An "oath" being a solemn appeal to the Supreme Being in attestation of the truth of some statement, and an out-

ward pledge that one's testimony is given under an immediate sense of responsibility to God, it would seem that one taken before any officer authorized under the law to administer it would have the same force and effect as if taken before an officer particularly designated. It is the taking of the oath before a properly constituted official that should entitle it to weight and consideration for any purpose, rather than its administration by a particularly designated officer.

From the record in this case it appears that the ten affidavits of the jurors objected to by counsel for appellant were submitted by the state in opposition to the affidavits of McGillvray, Ellixmann, Thompson, and Bowers, who made affidavits to the effect—and all of their affidavits are in the same language—that when the jurors who tried the case of the state against the appellant went upon the street of St. Maries, where the cause was tried, in company with two bailiffs, that one of the jurors, whose name to the affiant was unknown, separated himself from the other jurors, and left the presence of the bailiffs, and engaged in a conversation in a low voice with a man who was walking upon the streets in said city, whose name was also to affiant unknown, that this conversation continued in said manner for several minutes, and that affiant saw one of said jurors, whose name to affiant was unknown, leave the bailiffs and the other jurors and enter a retail storehouse in said town, and so absented himself from the remaining jurors and bailiffs for a period of from three to five minutes.

The counter affidavits made on behalf of the state by the ten jurors whose oaths were administered and certified by county officers in the manner above stated were all directly contradictory to those made by the four above named persons for the appellant, and were to the effect that during the entire trial of said cause the jury was kept together and was in the custody of two bailiffs; that they never separated, and none of the members of the jury were ever separated to such an extent that the rest of the jurors and the bailiffs could not see and hear what was transpiring. Each of the ten jurors state positively in their affidavits, which are objected to by appellant, that they did not talk with any one other than among themselves, and then not about the case until it was finally submitted, and that there was no separation of any one of their number from the jury or the bailiffs at any time during the entire trial of the cause.

In addition to the affidavits of these ten jurors, we have the affidavits of the two additional jurors taken before the clerk of the district court of Benewah county to the same effect, and also the affidavits of the bailiffs appointed by the court, who had charge of the jury, to the effect that during the entire trial of this cause the jury were kept togeth-

er and never allowed to separate, and that affiants could see and hear what transpired at all times; that during the entire trial none of the jurors conversed with any one who was not a member of the jury. We think that these affidavits, independent of the ten affidavits against which the objection that they were not sworn to before the proper officer is urged would be sufficient to overcome the affidavits made by McGillivray, Ellixmann, Thompson, and Bowers. Upon an examination of the affidavits of these last-named persons, it will be observed that they say they did not know the juror who, they state, talked with some person other than a juror, or the person with whom such conversation was had, or the business house which the juror is alleged to have visited. From these affidavits it could be fairly assumed either that the affidavits were intended to be so worded that a prosecution for perjury could not be based thereon, or, viewing the affidavits in a more favorable light, it seems to have been a case of mistaken identity which was made so apparent to the trial court that in passing upon them it considered they were entitled to no weight in support of appellant's motion for a new trial. It may also have appeared strange to the trial court, in view of the activity displayed at the trial in appellant's behalf by one of the affiants who was a detective, that he should be wholly ignorant of the name of the juror or the name of the person with whom that juror is supposed to have had a conversation, or the business house in the village of St. Maries in which one of the jurors is alleged to have entered, or of any other material fact that was possible of being directly contradicted by the person or persons charged with the violation of the statutes and the positive instructions of the court.

[7] This court has the same power to pass upon affidavits furnished on motion for new trials and in opposition thereto as has the trial court, and, having examined all of the affidavits submitted for and against the motion, we find there is a direct conflict as to the facts alleged in the affidavits made on behalf of appellant and those made on behalf of the state. That being true, where the misconduct of the jury is involved, the ruling of the trial court will not be disturbed. *People v. Biles*, 2 Idaho (Hash.) 114, 6 Pac. 120.

In our opinion, the learned trial court did not err in refusing to give the instruction asked by appellant, or in refusing to strike the affidavits from the files, or in its ruling in denying appellant's motion for a new trial.

To our minds it is very evident that no injustice has been done the appellant in this case, and that the sentence and judgment of the trial court was properly entered, and the judgment is hereby affirmed.

SULLIVAN, C. J., and MORGAN, J., concur.

(21 N. M. 236)

In re DEXTER-GREENFIELD DRAINAGE DIST. (No. 1782.)

(Supreme Court of New Mexico. Dec. 31, 1915.)

(Syllabus by the Court.)

1. STATUTES \S 123 — TITLE AND SUBJECT-MATTER—DRAINAGE ACT.

Section 82, c. 84, Laws 1912 (section 1958, Code 1915), construed, and limited, in its application to such persons as have been assessed for the cost of construction of works of a drainage district, and, as so construed, held not to be unconstitutional as violative of section 16 of article 4 of the Constitution, which prohibits the Legislature from embracing more than one subject in a bill.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 176-183; Dec. Dig. \S 123.]

2. CONSTITUTIONAL LAW \S 61, 67, 74 — DRAINS \S 2—DRAINAGE DISTRICTS—CONSTITUTIONALITY OF STATUTE—"POWER OF TAXATION."

Chapter 84, Laws 1912 (sections 1877-1958, Code 1915), which provides for the organization of drainage districts through the courts, held not to be unconstitutional as violative of section 1 of article 3 of the Constitution, which provides that no officer charged with the exercise of powers properly belonging to one of the three departments of the state government shall exercise any of the powers properly belonging to either of the other departments, except as otherwise in the Constitution provided or permitted, the duties imposed by the act being held to be judicial in character, and not legislative or executive; nor unconstitutional as violative of section 5 of article 5 of the Constitution, which provides for the nomination, and by and with the consent of the Senate, the appointment by the Governor of all officers whose appointment or election is not otherwise provided for, the commissioners of drainage districts being held not to be of the class contemplated by the section; nor unconstitutional as conferring upon the courts the powers of taxation, the duty and power of approving and confirming assessments for benefits in drainage districts being held not to be the power of taxation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 103-107, 123, 124; Dec. Dig. \S 61, 67, 74; Drains, Cent. Dig. \S 17; Dec. Dig. \S 2.

For other definitions, see Words and Phrases, First and Second Series, Taxation.]

3. DRAINS \S 2 — DRAINAGE DISTRICTS — ORGANIZATION — "CORPORATION" — "PUBLIC CORPORATION."

Said chapter held not to be violative of section 6 of article 11 of the Constitution, which provides that all domestic corporations shall be organized by and through the State Corporation Commission; drainage districts being held to be public corporations, and of a class not comprehended by the section of the Constitution.

[Ed. Note.—For other cases, see Drains, Cent. Dig. \S 17; Dec. Dig. \S 2.

For other definitions, see Words and Phrases, First and Second Series, Corporation; Public Corporation.]

4. EMINENT DOMAIN \S 2 — DRAINAGE DISTRICTS — TAKING PROPERTY WITHOUT COMPENSATION.

Said chapter held not to be violative of section 20 of article 2 of the Constitution, which prohibits the taking of private property for a public use without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 8-12; Dec. Dig. \S 2.]

5. DRAINS \hookrightarrow 36—DRAINAGE DISTRICTS—PETITION FOR ORGANIZATION.

Section 35 of chapter 84, Laws 1912 (Code 1915, § 1911), held to give the right of appeal to this court from the findings of the district court in regard to the required signatures of the petition for the organization of a drainage district within 30 days after the same are filed and, consequently, to cut off the right thereafter to question such findings; such findings being findings of fact upon which the court assumes to act.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 44-50; Dec. Dig. \hookrightarrow 36.]

6. APPEAL AND ERROR \hookrightarrow 169—PRESENTATION BELOW—NECESSITY.

A question not presented to the trial court will not be considered here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. \hookrightarrow 169.]

Appeal from District Court, Chaves County; McClure, Judge.

Jacquez Michelet filed a remonstrance to the report of the commissioners of the Dexter-Greenfield Drainage District for assessments. The remonstrance was overruled, and he appeals. Affirmed.

Dye & Mathews, of Roswell, for appellant. Reid & Hervey and George S. Downer, both of Roswell, for appellee.

PARKER, J. This is an appeal from an order of the district court of the Fifth judicial district within and for the county of Chaves, overruling the remonstrance of the appellant, Jacquez Michelet, to the report of the commissioners of the Dexter-Greenfield drainage district upon assessments for benefits, damages, and costs of construction in said district theretofore filed in said court.

There are five assignments of error, all of which seem to be relied on by the appellant, attacking the constitutionality of what is known as the drainage law of New Mexico, being chapter 84 of the Laws of the Legislative Assembly, approved June 14, 1912, set forth in Code 1915 as sections 1877 to 1958, inclusive, and also the refusal of the court to allow the appellant to submit evidence tending to prove that the original and amended petitions filed in said court, initiating the proceeding for the establishment of this drainage district, were not signed by a majority of the adult owners of lands within the proposed district, not by adult owners representing one-third in area of the lands situated therein. We will consider these assignments of error in the order in which they appear in the assignments of error on file in this cause.

[1] 1. It is insisted that the drainage act is unconstitutional and void, in that it contravenes section 16 of article 4 of the Constitution by embracing within itself two separate and distinct subjects. This section provides that the subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject

shall be passed, except general appropriation bills, and for the codification and revision of the laws. This assignment of error proceeds upon the theory that section 82, providing that any persons, firm, corporation, or association may exercise the right of eminent domain, and can take and acquire land and right of way for the construction, operation, and maintenance of a drainage ditch in the manner provided by law for the condemnation and taking of property in the state of New Mexico for railroad, telegraph, and other public purposes, is a separate and distinct subject from the remainder of the act, to wit, the organization and operation of drainage districts, and conferring additional powers on certain officers, and providing for the issuing of bonds, and levying assessments on lands benefited, etc., as set forth in the title of the drainage act. It is argued by the appellant that this section is an unrestricted grant of the right of eminent domain, without regard to its connection with any drainage district as provided for in the preceding sections of the act, and that it may be extended to cases not only for private drains, but to drains for other than agricultural purposes, as restricted by the general provisions of the drainage act. We do not deem it necessary to discuss one of the answers which the appellee makes to this proposition, to wit, that, although an act may include two distinct subjects, the whole act shall not be declared void if it is possible from an inspection of the act itself to determine which part of the act is void, and which is valid, because in our opinion section 82, when construed in the light of the remaining provisions of the act, does not embrace a different or distinct subject from such provisions. If this were a proceeding to review a judgment granting the right of condemnation to a private drain, or to a drain for other than agricultural purposes, there might be some force to the appellant's contention; but our opinion is that this section, in view of section 79 of the drainage act, which contains a direct reference to section 82, was intended by the Legislature to confer this power, not upon private drainage systems or for purposes other than agriculture, but upon the individual owners of lands embraced within a drainage district, as provided for in the drainage act. Section 79 of the drainage law provides, in substance, that the owner of any land that has been assessed for drainage, as provided in the drainage act, shall have a right to use the drain as an outlet for lateral drains, and that if his land is separated from such drain by the land of others, and he is unable to agree upon the terms upon which he may construct his lateral across such land, he may acquire a right of way by condemnation as provided by sec-

tion 82. When the act is so construed, it constitutes an important and vital part of the general plan of drainage, as outlined by the Legislature, and does not constitute a separate and distinct subject. We understand the rule to be that, in cases of this kind, that construction will be adopted which would sustain the constitutionality of the law, and confine the operations of the objectionable section to the general scope of the act. *Lewis' Sutherland* on Stat. Cons. vol. 1 (New Ed.) § 298; *Northup v. Hoyt*, 31 Or. 524, 49 Pac. 754; *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824.

[2] 2. The appellant's principal contention is based upon his second assignment of error, which is that the drainage law contravenes section 1 of article 3 of the state Constitution, by charging the district courts and the judges thereof with the exercise of powers properly belonging to the legislative and executive departments of the state government.

This section is the usual constitutional provision that no person, or collection of persons, charged with the exercise of powers properly belonging to one of the three departments of government, shall exercise any power properly belonging to either of the others, except as otherwise expressly directed in the Constitution.

The argument of appellant is that this law requires the district court to organize drainage districts, to appoint commissioners and remove them, and appoint their successors, fix their compensation, and make and confirm assessments against lands included in the drainage districts, which the appellant contends are executive or ministerial duties. The principal case cited by appellant is *Tyson v. Washington Co.*, 78 Neb. 211, 110 N. W. 634, 12 L. R. A. (N. S.) 350, wherein the court denied the power of the Legislature to provide a right of appeal from the action of the board of county commissioners in establishing a drainage district, upon the ground that the same was not conducive to the general convenience and public welfare. A reference to this case will reveal the fact that the drainage act referred to was an act in which a Legislature had committed the general procedure of organizing a drainage district to the board of county commissioners, and the court held that, inasmuch as the Legislature had seen fit to confer this power upon the board of county commissioners, it became a ministerial duty and not a judicial one, and the right of appeal, standing separate and alone in such legislation, would be contrary to the constitutional provision which was in substance the same as our own. Our opinion is, however, that this was a different situation from that presented to the court in the case at bar. The drainage law of New Mexico provides for a judicial proceeding from start to finish. It provides generally for filing in the district court a petition, and sets forth what the petition shall contain, the requisite number of signers, and the number of acres

which must be represented. It provides for a judicial hearing after due and proper notice, upon the question of the sufficiency of the petition, the constitutionality of the law, and the jurisdiction of the court, and if the petition is found sufficient the court appoints three commissioners to make a preliminary investigation and report, and upon this report the court declares the district established, and orders the commissioners to cause a survey to be made to establish assessments to meet the cost of construction and make a report thereon, and upon the filing of this report, and the giving of notice as provided by the statute, the court considers the report of the commissioners as provided by the act, and particularly the question as to whether the benefits exceed the cost, and, after disposing of any remonstrances that may be filed, makes its order in the form of an ordinary decree, confirming or rejecting the report.

The statute under consideration is almost a direct copy of the Wisconsin drainage law, and the Supreme Court of that state, in the case of *Stone v. Little Yellow Drainage District*, 118 Wis. 388, 95 N. W. 405, after giving a general summary of the act as above mentioned, held:

"That such order or decree is the culmination of an entirely judicial proceeding we cannot doubt, nor that, as a corollary thereof, it may be enforced by the court rendering it by any or all of those processes inherent in courts of justice. The view that this proceeding is a judicial one has the support of intimations at least from this court and from the courts of Illinois, whence, in very large measure, the statutes were adopted."

The distinction between the case at bar and the case of *Tyson v. Washington County*, as above set forth, is further shown by a later decision of the Supreme Court of Nebraska, in which the court considered the constitutionality of the later drainage law (Laws 1905, c. 161; Rev. Stat. Neb. 1913, § 1797 et seq.), providing for the organization of drainage districts through the courts, and held that the law was not in contravention of the Constitution of that state in attempting to confer upon the district courts powers and duties not judicial in their character. *Barns et al. v. Minor et al.*, 80 Neb. 189, 114 N. W. 146. The court distinguished the latter case from the case of *Tyson v. Washington County*, by stating that the act under consideration in the last-mentioned case had committed the matter of the organization of drainage districts to the board of county commissioners, stating:

"The case at bar, however, presents such facts and conditions relating to the sufficiency of the procedure, and the character and quantity of the lands sought to be affected thereby, as may, and is likely to, be drawn in question and give rise to a judicial inquiry as to their existence. So it was enacted that such inquiry shall be had as a preliminary step to the organization of the corporation and the existence of its corporate powers.

"Manifestly, as it seems to us, the court in such a proceeding is called upon to exert no other

than its ordinary judicial functions. The statute prescribes that, if certain steps have been taken and certain facts exist, a governmental corporation shall be deemed to have been created, not otherwise, and the court by the exercise of its usual powers and by the observance of judicial methods ascertains and determines that such steps have or have not been taken, or that such facts do or do not exist, and from these premises draws an inference or reaches a conclusion which it pronounces in a form of a judicial order or judgment in like manner and in like effect as in ordinary cases."

The appellant makes the point that under the drainage law these districts are corporations, and the act provides, therefore, for the organization of corporations by an order of the district court, and that, whether such corporations are municipal or private corporations, the Legislature is without authority to confer upon the courts the power to organize corporations. We do not think there is any merit in this contention. The court does not organize the corporation, as stated in the cases of *Barns v. Minor and Stone v. Little Yellow Drainage District*, supra. The Legislature provides for the organization thereof and defines the procedure therefor. The court makes a judicial determination as to whether the requirements of the statute have been complied with, and applies the law thereto as required by the statute. *Bisenius v. City of Randolph*, 82 Neb. 520, 118 N. W. 127; *Wickham v. City of Alexandria*, 23 S. D. 556, 122 N. W. 597; *Town of Edgewater v. Liebhardt*, 32 Colo. 307, 76 Pac. 366; *Young v. Salt Lake City*, 24 Utah, 321, 67 Pac. 1066; *City of Winfield v. Lynn*, 57 Pac. 549; *Eskridge v. City of Emporia*, 63 Kan. 368, 65 Pac. 694.

It is further contended that this act confers upon the district courts duties and powers not judicial, in that they are required to appoint the drainage commissioners and fix their compensation, and that these commissioners are, and are expressly declared by the act to be, public officers. Our Constitution (article 5, § 5) provides that the Governor shall nominate, and by and with the consent of the Senate appoint, all officers whose appointment or election is not otherwise provided for. It is a serious question whether or not the power to appoint to office or to fill vacancies is inherently an executive function, and belongs exclusively to that department of the government; but we do not find it necessary here to determine that question. Our opinion is that, having determined that this act provides for the organization of drainage districts as a judicial proceeding entirely, the power to appoint commissioners is just as much an incident to the exercise of the court's jurisdiction in the entire proceeding, as would be the appointment of a receiver to take charge of property involved in litigation. A con-

stitutional provision similar to the one above mentioned was held in *People v. Morgan*, 90 Ill. 558, involving the appointment of a park commissioner, to confer upon the Governor the appointment of all officers whose appointment had not been provided for in the Constitution, or by the rightful exercise of legislative power, and not to confer upon the Governor in all cases the exclusive power to appoint to office.

A great many cases are cited and relied upon by the appellant, which deny the power of the court to appoint to office; but, without considering the question as to whether these cases constitute the weight of authority upon the inherent right and exclusive power of the executive to appoint to office, the cases do not touch the question now under consideration. They are cases involving the appointment of a supervisory committee for a county jail, a board of administration for a municipal hospital, park commissioners, excise commissioners, waterworks trustees, custodian of the court grounds, and expert witnesses. This class of cases is clearly distinguishable from the case at bar, and from a great many cases sustaining the right and power of the court to appoint to office if the matter is incidental to the exercise of judicial power. Undoubtedly in the case at bar the appointment of drainage commissioners, and the fixing of their compensation, and the filling of vacancies, is incidental and absolutely necessary to the exercise of the general powers conferred upon the court to organize and establish these drainage districts.

The Supreme Court of Wisconsin has also considered the question of the power of the courts to appoint to office, in the case of *In re Appointment of Revisor*, 141 Wis. 592, 124 N. W. 670. In this case, referring to the organization of drainage districts, the Supreme Court said:

"The various laws, * * * authorizing circuit courts and judges to organize drainage districts on petition and appoint drainage commissioners to carry out extensive systems of drainage of swamp lands by levying special assessments, have been sustained by this court against vigorous and able attacks, although the exact point now under consideration seems not to have been discussed. * * * The general law, however, authorizing the formation of such districts, and the appointment of commissioners in the same way * * * was vigorously attacked in the case of *Stone v. Drainage District*, 118 Wis. 388 [95 N. W. 405], as not a judicial proceeding, and after full argument the validity of the statute was sustained. Under this general law it is to be noted that the drainage commissioners appointed by the court or judge are required to take the constitutional oath of office and give a bond, and that they have a definite term which is called their term of office. * * * In view of these decisions, it must be conceded, I think, in considering what duties may properly be delegated to courts, that this court has already taken a view which would seem to entirely justify the conclusion, without further examination, that the power to appoint a revisor and his assistants is one which may properly be conferred on the judiciary."

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 60 Kan. 863.

It is also contended that this act is obnoxious to the Constitution in the particulars above mentioned, because it imposes upon the district courts the duty of approving and confirming assessments to be made upon the lands reported to be benefited by the work to be done in the drainage district. Appellant argues that this confers upon the court the power of taxation, and this power cannot be so conferred. The cases referred to in the appellant's brief upon this point are cases involving the collection of taxes, as distinguished from assessments for benefits, as provided in this act. There is a distinction in the authorities between a tax and a special assessment, when involved in the question of the constitutional power to levy and collect the same. As is stated in *Cooley on Taxation*, vol. 2, p. 1153:

"The general levy of taxes is understood to exact contributions in return for the general benefits of government. * * * Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of the property peculiarly situated as regards a contemplated expenditure of public funds."

This question has been before the Supreme Court of Wisconsin several times. It seems that the organization of drainage districts, and the assessment of shares by judicial proceedings, has been considered more in this state than any other state, and it probably was the first state to put forth this idea in the organization of such corporations and the construction of such works. In the case of *Bryant et al. v. Robbins et al.*, 70 Wis. 258, 35 N. W. 545, the court thoroughly considered the very objection which the appellant has raised, and said:

"It cannot fairly be claimed in this case that the court directly exercises the power of taxation. It is true it may initiate a proceeding which will result in local charges or assessments upon land; but this it does in many cases, as where it sustains street improvements or works for the improvement of harbors and public waters. * * * It may be conceded that the laying of taxes is properly the exercise of a legislative, as distinguished from a judicial, function. Still it is obvious that, whenever the court sustains a law authorizing a work the expense of which is charged against property specially benefited, it exercises the same power or function which the court does in authorizing the drainage proceeding under the law in question. * * * In the present case, the commissioners make the assessment upon the land specially benefited by the drainage, and to the extent of such benefits. We can perceive no valid objection to the agency by which the assessments are made, or to the principle upon which they are laid."

See, also, the following authorities: *Kilgour v. Drainage Com'rs*, 111 Ill. 342; *Board of Improvement of Paving District No. 5 v. Sisters of Mercy*, 86 Ark. 109, 109 S. W. 1165; *Farnham v. City of Lincoln*, 75 Neb. 502, 106 N. W. 666; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Holly v. Orange County et al.*, 39 Pac. 790; *Arnold v. Knoxville*, 90 S. W. 469; *Huston v. Clark*, 112 Ill. 344; *Des Moines & M. Levee District v. C., B. &*

Q. R., 240 Mo. 614, 145 S. W. 35, 39 L. R. A. (N. S.) 543; *Billings Sugar Co. v. Fish*, 40 Mont. 256, 106 Pac. 565, 26 L. R. A. (N. S.) 973, 20 Ann. Cas. 264.

In considering generally the constitutionality of this law with respect to all the points urged by the appellant in his second assignment of error, we think it important to consider, in this connection, our own constitutional provision relative to providing for the drainage of lands, and the decisions of the Supreme Court of Illinois considering a similar provision. Section 4 of article 16 of our state Constitution provides that the Legislature is authorized to provide by law for the organization and operation of drainage districts and systems. By the amendment of 1878, the state of Illinois adopted a similar provision in its Constitution, and this constitutional provision has been construed many times by the Supreme Court of that state. In the case of *Kilgour v. Drainage Com'rs*, 111 Ill. 342, in which the opinion was rendered as early as 1884, the court said:

"Under the amendment of the Constitution (section 31, art. 4) adopted in November, 1878, the Legislature is expressly empowered 'to provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches,' etc. This general grant of power, being unrestricted in terms, carries with it, by necessary implication, all other powers necessary to make the general grant effective, and to accomplish the results intended. As to the mode in which this power is to be exercised, the Legislature is left the sole judge."

In the case of *Blake v. Cadwell*, 109 Ill. 504, the Supreme Court of Illinois thoroughly considered the additional amendment, as well as the general provisions of the drainage law of that state. In the course of its opinion, the court observed:

"The contention is that the act is in contravention of the Constitution in two respects: First, in that it embraces more than one subject, and is therefore within the prohibition of section 13, art. 4; and, second, in that it authorizes the county court, and not the owners of lands, to create the corporation. * * * We are unable to discover, here (in the constitutional amendment), any limitation or restriction upon the General Assembly as to the agencies to be used in the creation of the corporation. Surely there can be no reason why the county court may not be invested with power to inquire into and find the existence of certain preliminary facts deemed important as prerequisites to the corporation. This is not unusual, but in all like cases, where the facts deemed necessary to be found are of a nature that the General Assembly cannot conveniently investigate them, the practice has been to refer their determination to some local tribunal. * * * It is the statute that creates the corporation, not the county court; but the statute only becomes operative when the prescribed facts are found, and the finding is entered of record by the county court, as directed by the act."

See, also, *Huston v. Clark*, *supra*, and *People v. Drainage Commissioners*, 143 Ill. 417.

In fact, it might be here observed that a drainage law very similar to our own has been before the Supreme Courts of Illinois

and Wisconsin a number of times upon various questions involving its constitutionality, and this legislation has invariably been sustained. The cases from the state of Illinois will all be found by a reference to the foregoing citations, and in the state of Wisconsin by reference to the case of *Stone v. Little Yellow Drainage District*, above cited. See generally upon this proposition the following authorities: *Sanderlin v. Luken*, 152 N. C. 738, 68 S. E. 225; *O'Neill v. Yellowstone Irrigation District*, 44 Mont. 492, 121 Pac. 283; *Scott v. Marley*, 124 Tenn. 388, 137 S. W. 492; *State v. Superior Court*, 42 Wash. 491, 85 Pac. 264; *State v. Crosby*, 92 Minn. 176, 99 N. W. 636; *Spencer v. District Judge*, 55 Minn. 278, 56 N. W. 1006; *City of Seattle v. Seattle Ry. Co.*, 50 Wash. 132, 96 Pac. 958; *State v. Ensign*, 55 Minn. 278, 56 N. W. 1006.

Our opinion therefore is that the New Mexican drainage act is not in violation of any of the provisions of our state Constitution set forth by the appellant under his second assignment of error.

[3] 3. The appellant urges that said chapter 84, Laws of 1912, violates the provision of section 6 of article 11 of the Constitution, which provides that all domestic corporations shall be organized by and through the Corporation Commission. We do not think there is any merit in this contention. The court, in the first place, does not organize the corporation, but merely sits in judgment as a judicial tribunal to ascertain that certain required facts and conditions exist. The statute thereupon organizes the corporation. See specifically on this point section 36 of the act, section 1912, Code 1915. See, also, in this same connection, the cases of *Barns v. Minor* and *Stone v. Little Yellow Drainage District*, supra.

A more conclusive reason for denying the appellant's proposition arises out of the very terms of the section of the Constitution, supra. The grant of power and jurisdiction to the State Corporation Commission as to the organization of corporations is limited to domestic corporations. We do not understand the words "domestic corporations," as used in the section, to include all corporations which are local in character, that is to say, corporations organized under the laws of the state. At the time of the adoption of this section of the Constitution, we had in the state various other kinds of corporations which were domestic in the sense that they were organized under the law of the state, but which were evidently not intended by the Constitution makers to be included within the jurisdiction of the State Corporation Commission. For instance, at that time we had a provision for the organization of irrigation districts as provided by chapter 140, Laws 1909, and chapter 109, Laws 1909, section 2949 et seq., Code 1915. We also had community ditches or acequias which were declared by section 5744, Code 1915, to be

corporations or bodies corporate with power to sue or to be sued as such. These two corporations were as much domestic corporations as are drainage districts organized under the provision of chapter 84, Laws of 1912, supra. All three of these classes of corporations are organized for the purpose of exercising a public function, and are not organized for private gain. It would hardly be contended, we think, that community acequias, or irrigation districts, must necessarily be organized under the supervision of the State Corporation Commission, because the nature of their powers, and the methods prescribed by law for such organizations, are incompatible with the exercise of jurisdiction by the State Corporation Commission. That commission is given power to issue charters for domestic corporations, and amendments or extensions thereof. Neither of these corporations have any charter, require none; but the statute itself, by force of its own terms, declares that when certain facts exist a corporation shall be deemed to have been created. Just so with drainage districts. A drainage district has no charter, requires none; but the statute organizes it upon the finding and determination by the district court that certain facts exist. It seems clear therefore that the power and jurisdiction committed to the State Corporation Commission to issue charters to domestic corporations must have been intended to include only such domestic corporations as require, under the law, the issuance to them of charters, and does not include corporations of the class under consideration. It is to be further noticed that the further provision in section 6 of article 11 of the Constitution, as follows: "And through which shall be carried out all of the provisions of this Constitution relating to corporations, and the laws made in pursuance thereof"—has no controlling influence. The Constitution of the state, except in section 4 of article 16, to be hereafter noticed, makes no reference to corporations of this kind.

Section 4 of article 16 of the Constitution is as follows:

"The Legislature is authorized to provide by law for the organization and operation of drainage districts and systems."

It is to be observed that this provision of the Constitution does not contemplate, necessarily, that drainage districts shall be corporations. The grant to the Legislature under this section would seem to be plenary, and to authorize it to provide for drainage districts in such form as it in its discretion may adopt. The section cannot be said to relate to corporations within the meaning of the clause of section 6, art. 11, of the Constitution, supra. Similar provisions to those in section 4 of article 16 have been before the courts of Illinois. See *Kilgour v. Drainage Com'rs*, 111 Ill. 342, and *Blake v. Caldwell*, 109 Ill. 504, quotations from which have been heretofore inserted.

[4] 4. It is again objected, upon the part of the appellant, that this act violates section 20 of article 2 of the Constitution, because it provides for the taking and damaging of private property without providing any definite or certain fund out of which compensation shall be paid for the property so taken and damaged. Appellant cites authorities to sustain the contention that, under constitutional provisions providing that private property shall not be taken for public use without just compensation, there must be a certain and definite fund out of which the compensation therefor is to be paid. *Conn. River R. Co. v. Franklin Co. Com'rs*, 127 Mass. 50, 34 Am. Rep. 338; *Tuttle v. Knox Co.*, 89 Tenn. 157, 14 S. W. 486; *Godfrey v. District Court*, 44 Minn. 299, 46 N. W. 355.

There are several sections in the drainage law providing for the condemnation of lands covering condemnation for laterals, for outlets, and for railroad rights of way, etc. See sections 57 and 58. Section 39 provides, in connection with the report of the commissioners as to the estimated total cost of the proposed work, that such estimate shall include the total amount of all probable damage to land within and for the district, and section 64 extends to the commissioners the power to borrow money by means of notes, bonds, etc., for the purpose of paying for the construction or repair of any work or any indebtedness that may lawfully be incurred. Section 68 is as follows:

"The damages allowed to the owners of lands shall be paid or tendered before the commissioners shall be authorized to enter upon such lands, for the construction of any drains or ditches proposed thereon. * * *"

It will be observed from the foregoing that no fund is necessary to be designated out of which this compensation is to be paid, in view of the fact that it must be paid before the land can be taken; but, even if it were necessary to designate such fund, we think the act sufficiently designates the fund, to wit, the amount raised by assessments upon the lands, followed by the sale of its bonds or notes.

In the case of *Conn. River R. Co. v. Franklin Co.*, supra, the statute failed to provide for the payment before entry of the damages, and the only security provided for, for payment after entry, was the earnings of a railroad owned by the state. In the case of *Tuttle v. Knox Co.*, supra, the statute nowhere provided either for the payment of damages, for the assessment of the amount of damages, for the means of collecting damages, or by whom they should be paid. In the case of *Godfrey v. District Court*, supra, the statute failed to provide that the city was primarily liable for the compensation awarded for land taken for public parks. It will be seen that these cases do not cover provisions similar to those in our drainage act. We think that the act provides within the provisions of the Constitution for just compensation for such property as may be taken

or damaged in the construction of the drainage system.

[5] 5. The last assignment of error relied on by the appellant is the action of the court in refusing the tender of proof offered by the appellant to meet the allegations set forth in paragraph 2 of his remonstrance. This allegation is:

"That this court has never acquired, and does not now possess, any jurisdiction whatever of the subject-matter of this proceeding, nor of the property included in said so-called drainage district, nor of the persons who own said property for the reason that neither the original petition herein filed on the 30th day of November, 1912, nor the amended petition herein filed on the 6th day of March, 1913, was signed by a majority of the adult owners of lands within the proposed district described and referred to in said proceedings, nor by adult owners representing one-third in area of the lands within said proposed drainage district to be reclaimed, benefited, or otherwise affected by the work proposed to be done therein."

The question now is: Did the court err in refusing the tender of proof offered by the appellant to sustain this allegation?

It is the contention of the appellees that the court did not err in sustaining the objection of the commissioners to this tender of proof for the reason that the remonstrance was filed and the proof was offered, not at the hearing provided by the statute for the organization of the district, but at the hearing held long afterwards, provided by law for the hearing upon the report of the commissioners upon assessments for benefits and damages, and that therefore the same constituted a collateral attack upon the organization of the district, and was not admissible. A solution of this question will require a brief outline of the provisions of the drainage law.

The act provides, as heretofore stated, for the filing in the district court of a petition, asking the organization of a drainage district, and describing its boundaries, which petition must be signed by at least a majority of the adult owners of lands within any district, who shall represent one-third in area of the lands within said district, and that upon the filing of such petition the court shall enter an order fixing a time and place when and where such petition will come on for hearing, and provides for the manner of giving notice to all the owners of lands within the district of such hearing. Section 11 provides:

"On the day fixed for hearing on such petition all parties owning lands, or any interests or easements in land, within said proposed district, or who would be affected thereby, may appear and contest: (1) The sufficiency of the petition. (2) The sufficiency of the signers of the petition. (3) The sufficiency of the notice. (4) The constitutionality of the law, and (5) The jurisdiction of the court. * * *"

The act also provides that at this hearing the court shall hear and determine whether or not the petition contains the signatures of a majority of the adult owners of lands within said proposed district, who represent one-third in area of the lands proposed to

be affected by the work. If the court finds in the affirmative upon these facts, and in favor of the constitutionality of the law and the jurisdiction of the court, it is required to appoint three commissioners who shall forthwith organize and make a further preliminary report to the court, and, upon such report being filed, notice shall be given of another hearing thereon. In this report the commissioners are required to state: (1) Whether the proposed work is necessary, or would be of utility in carrying out the purposes of the petition. (2) Whether the proposed work would promote agricultural interests, and whether there are any lands described in said petition which would not be benefited by said improvement. (3) Whether the total benefits will exceed the cost. And (4) they shall also fix, as near as may be, the boundaries of said proposed district. Upon this hearing the court shall make and enter its findings upon the matters set forth in the report as above mentioned. It is provided that at either of these hearings any interested party may appear and remonstrate.

Section 34 provides that if the preliminary report be that the benefits of the proposed work will exceed the damage and cost of construction, and that the agricultural interests will be promoted, and no remonstrance is filed, or if, on the trial of the issues made on said report, the court finds that the benefits will exceed the damages and cost of construction, the court shall make and file such findings in writing, and make an order confirming said report.

Section 35 provides:

"Such findings and order shall be final and conclusive unless appealed from to the Supreme Court within thirty days after filing thereof."

Section 36 provides that, after the filing of said order, such drainage district shall be, and is thereby declared to be, organized as a drainage district by the name mentioned in the petition, and with the boundaries fixed in the order affirming the report, and shall be a body corporate, etc.; and section 37 provides that the commissioners shall immediately employ a competent drainage engineer and proceed to have all necessary levels taken and surveys made, and lay out the proposed work and make a map thereof, and plans, profiles, and other specifications, and report in writing to the court the starting point, routes, and termination of the proposed work, the boundaries as finally established, what lands will be injured by the work, and shall award to each tract the amount of damages allowed, what lands will be benefited, and the total amount, as near as they can determine that the proposed work will cost.

A hearing is also provided upon the last-mentioned report, and upon such hearing the court shall confirm the report of the commissioners or dismiss the same. If the court confirms it, it then enters an order in the

nature of a final decree providing for the construction of the work upon the plan outlined in this report, and for the assessment of the costs thereof as provided by the statute.

The record in this case shows no remonstrance upon the part of the appellant at either of the first two hearings. It shows, furthermore, that he was one of the signers of the original petition herein, and that notice of the first hearing was duly served upon him, as provided by the act. After the filing of the petition in this manner, and the giving of notice as provided by law, a hearing was had in accordance with the statute, and the court, on March 8, 1913, entered its order herein sustaining the petition, and expressly finding, among other things, that the petition was signed by a majority of the adult land owners within the proposed district, and that the signers are adult owners of one-third or more of the lands lying therein. The record further shows that the commissioners made their preliminary report, and on June 23, 1913, after due and proper notice, a hearing was had thereon, and the court entered its order in all things confirming the report of the commissioners.

The above and foregoing review of the drainage law and of the proceedings of this case are sufficient to show that the appellant in this case undertook to raise the question of the sufficiency of the petition at a time long after the time provided for by the statute. The act provides a full and fair opportunity for all interested parties to appear and raise the very question which the appellant undertook to raise at another and later time. Undoubtedly, from a practical standpoint, it was the intention of the Legislature to have these questions determined before the expenditure of large sums of money in the making of the survey and preparation of the plans, profiles, and specifications, as provided in section 39 above referred to. We are of the opinion that the orders of the court entered in this proceeding, finding at the conclusion of the hearing provided by law for that purpose that the petition was sufficiently signed, as above indicated, were a final adjudication of that question, and the same could not be attacked in any method whatever, except as provided by the statute, to wit, by appealing from the order sustaining the petition within 30 days from the entry thereof, and that any other method of attack, whether in the same proceeding, or in any other proceeding, constitutes a collateral attack, and is unavailable.

The case of *People v. Waite*, 213 Ill. 423, 72 N. E. 1087, was a quo warranto proceeding to test the legality of the organization of a drainage district upon the ground that the record of the county court did not show that the petition upon which the county court acted at the time the district was organized

was signed by a majority of the adult landowners of the district. The court said:

"In the case at bar the petition provided by the statute was filed in the county court of Coles county, and the statutory notice to all persons interested was given. That county court then had jurisdiction of the subject-matter and of the parties and was authorized to act. If it erred in holding that the petition was signed by the requisite number of adult landowners of the district or in refusing to permit persons who had signed the petition after the organization of the district to withdraw their names from the petition, the remedy of the parties in interest who deem themselves aggrieved by the decision of the court was to have the case reviewed upon appeal or by writ of error, and not by quo warranto proceeding."

The case of *O'Neill v. Yellowstone Irrigation District*, heretofore cited in this opinion (44 Mont. 492, 121 Pac. 284), contains an adjudication of this question, involving the organization of an irrigation district under provisions very similar to our drainage law. In dealing with the question of the right of a landowner to attack the sufficiency of the petition, or any other matters of fact required to be raised at the first hearing, other than by appeal, after such hearing the Supreme Court of Montana observed:

"It is now too late to question the validity of the proceedings either preliminary to the order of the court establishing the district, or those had for the purpose of authorizing the board of commissioners to issue bonds. By section 4 the findings and order of the court establishing the district is made conclusive upon all the owners of lands included in it, and final, unless an appeal be taken therefrom to this court within sixty days after its entry."

This question was also considered by the federal court of the southern district of California, in the case of *Miller v. Perris Irrigation District* (C. C.) 85 Fed. 693, in which the court said:

"Among the issues upon which the court passes in confirmation proceedings are the very ones presented by complainant in his bill, namely, whether or not the requisite number of bona fide freeholders signed the petition to the board of supervisors, and also whether or not due notice of such petition was given. These issues the court must necessarily find in the affirmative before any order of confirmation will be reached; and it will be seen that, in some of the cases above cited, these two questions were the identical questions passed upon by the court. If the final order or decree in a proceeding for confirmation were *res adjudicata*, there would be an estoppel by judgment against litigating again the issues so adjudicated. Considering, however, such a proceeding but one to secure evidence, as held in *Tregea v. Board*, *supra*, still, since, the evidence so secured, the final decree or order is conclusive, it must prevail whenever offered. In other words, the ultimate effect of an order of confirmation is the same, whether it operates as an estoppel by judgment, or as conclusive evidence. It is decisive of the legality of the existence of the district."

See, also, *People v. O'Hair*, 29 Ill. App. 239; *People v. Munroe*, 227 Ill. 604, 81 N. E. 704.

The appellant urges that the position of the court below in sustaining the objection of the commissioners to this tender of proof, if the court had already made its findings relative to the sufficiency of the petition, and entered its order sustaining the petition, was nothing more nor less than an attempt to confer jurisdiction upon itself by ruling to that effect. The finding in favor of the sufficiency of the petition, and the order of the court based thereon, are simply the evidence of the existence of the facts conferring the jurisdiction. It is the law that confers the jurisdiction, and not the court, and public policy requires that where the jurisdiction of the court, as provided by statute, is based upon the ascertainment and determination of certain facts, and a full and fair opportunity is given to all parties interested to be heard thereon, and a right of appeal afforded final determination of those facts, constitutes *res adjudicata* and cannot be inquired into at any other time, or by any other method than that provided by the statute. If this were not true, and the practice adopted by the appellant in this case were allowed, parties could remain silent until vast amounts of money were expended in the construction of these drainage districts, and then come forth and raise these facts and cause a possible waste of this money, when they might just as well have raised it before the expenditure.

[8] 6. Appellant argues in his brief that even if the court's original ruling as to jurisdiction was correct when made, and was conclusive as to the facts then found, that the court might have lost jurisdiction by subsequent changes. This view presents a question not necessary for us to consider, as this question was not raised in the court below, and no tender of proof was offered thereon. Undoubtedly the appellant had the right to prove, if he could, that the court had, since the entry of its order sustaining the petition, lost its jurisdiction by subsequent changes in the boundary; but no such offer was made.

From all the foregoing it follows that none of the assignments of error relied on by the appellant are, in our opinion, well taken, and cannot be sustained.

The judgment of the district court will be affirmed, and it is so ordered.

ROBERTS, C. J., concurs. HANNA, J., being absent, did not participate in this decision.

(79 Or. 226)

NICHOLAS v. TITLE & TRUST CO.*

(Supreme Court of Oregon. Jan. 11, 1916.)

1. EASEMENTS 61 — INJURY TO RIGHT — EQUITABLE RELIEF.

Upon proper application, a court of equity will enjoin interference with an owner's easement when the injury complained of is irreparable, the intermeddling continuous, or the remedy at law for damages inadequate.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. 61.]

2. EQUITY 42 — WAIVER OF OBJECTION TO JURISDICTION.

Where defendant fails to demur for lack of equitable jurisdiction of the subject-matter to a complaint to protect an easement, and also joins in an application for equitable relief, any objection on that ground is waived.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. 42.]

3. PRINCIPAL AND AGENT 99 — REPRESENTED AUTHORITY.

The authority of an agent to bind his principal in contracts with a third party is measured, not only by the agent's express delegation of power, but also that which he is held out by the principal as possessing, provided the third party had reason to believe and did believe the agent was acting within his authority, and such party would sustain a loss if the contract were not binding upon the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261; Dec. Dig. 99.]

4. DEDICATION 44 — PRINCIPAL AND AGENT 123 — REPRESENTATIONS THROUGH AGENT — SUFFICIENCY OF EVIDENCE.

In a suit to determine an adverse interest in realty, evidence held sufficient to show that the owner of land knowingly permitted intending purchasers to believe that the printed plat thereof shown to them by his agent had been duly recorded, and also that he held out such agent as his general agent in negotiating sales.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. 44; Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. 123.]

5. DEDICATION 44 — PAROL DEDICATION — ESTABLISHMENT.

To establish a parol dedication, evidence must be adduced tending to substantiate a clear intention to devote some particularly described land to a public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. 44.]

6. DEDICATION 44 — INTENTION OF OWNER — SUFFICIENCY OF EVIDENCE.

In a suit to determine an adverse interest in realty, evidence held sufficient to show an intention on the part of the owner of lots, selling them through an agent, to make a parol dedication to the public, as indicated upon a printed plat shown purchasers, of parts of certain streets bordering on certain blocks as highways 60 feet in width.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. 44.]

7. DEDICATION 39 — REPRESENTATIONS BY OWNER — ESTOPPEL.

Where the owner of land surveyed it into lots, blocks, and streets, and prepared a map thereof, showing streets of certain width, which he exhibited to intending purchasers, who bought before he changed his mind as to the width of the streets, and superseded the map which he had exhibited by a recorded plat differing therefrom as to the width of the streets, he irrevocably

dedicated to the public the highways as shown by the map, without acceptance by any corporate authority, as such circumstances create an estoppel in pais.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 77; Dec. Dig. 39.]

8. EVIDENCE 174 — BEST EVIDENCE — COPY — STATUTE.

Under L. O. L. § 712, providing that there shall be no evidence of the contents of a writing, other than the writing itself, except when the original is in the possession of the party against whom the evidence is offered, and he withholds it upon notice to produce, and when the original cannot be produced by the party by whom the evidence is offered in a reasonable time with proper diligence, and its absence is not owing to his neglect or default, in a suit to determine an adverse interest in realty, where the width of streets was in question, the point being whether the owner of land, selling it, had represented, by exhibiting a printed map, that streets were of a certain width, two duplicates of the printed map exhibited to the purchaser of the original plat of the district were admissible in evidence for plaintiff, though he offered no testimony to explain his failure or inability to produce the original from which the copies were made, since copies of printed duplicates are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561-564, 566-569; Dec. Dig. 174.]

9. DEDICATION 43 — WIDTH OF HIGHWAYS — EVIDENCE.

In a suit to determine an adverse interest in realty, where plaintiff was seeking to establish that certain streets on which his lots abutted were 60 feet in width, and before delivery of his deed the original purchaser from the owner, who dedicated the ways, had examined the block, stepped the width of the highways bordering them, found them to be 60 feet, and saw them marked out with white stakes similar to one received in evidence, his attention being then attracted to the post, the admission in evidence of testimony relating to the stakes, as marking the lines of one of the streets, was proper.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 83, 84; Dec. Dig. 43.]

10. DEDICATION 63 — EXTINGUISHMENT OF PUBLIC RIGHT — ADVERSE POSSESSION.

Where the successor in title of the original owner of lands, who, before selling, platted them so as to dedicate highways to the public, did not improve or encroach upon such highways, the statute of limitations never began to run against the right of the successor in title of an original purchaser from the original owner to insist upon the maintenance of the highways, since the grantees of a dedicator may extinguish the right of the public in a street only by an unlawful encroachment thereon for a term equal to the period of the statute of limitations, which purpresture raises an estoppel.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 106-106; Dec. Dig. 63.]

11. DEDICATION 31 — ACCEPTANCE — NECESSITY.

A formal acceptance of a dedication of a street is unnecessary, since approval by the municipality will be implied.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. 31.]

12. DEDICATION 39 — ESTOPPEL — NOTICE TO GRANTEE — IMPUTATION.

Where the grantee of lands from an owner, who by exhibiting a plat to intending purchasers had dedicated highways marked thereon, could have ascertained the fact by white stakes driven in the ground, to mark the borders of the high-

ways, so as to induce an inquiry as to the source, nature, and extent of the easements, such grantee was estopped to deny that the original owner had made a parcel dedication binding upon it, although it secured title for valuable consideration by mesne conveyances.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 77; Dec. Dig. ¶ 39.]

Department 1. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by H. B. Nicholas against the Title & Trust Company. From the decree, both parties appeal. Modified and affirmed.

This is a suit to determine an adverse interest in real property. The complaint alleges in effect that the plaintiff, H. B. Nicholas, is the owner and in the possession of block 23 in Gearhart Park, Clatsop county, Or.; that this block is bounded on the east by Summit avenue, which is 60 feet wide, and on the south by Seventh street, of the same width; that plaintiff has an easement in and a right to the use of the avenue and street mentioned to their full width bordering upon that block; that the defendant, the Title & Trust Company, a corporation, claims all that part of Seventh street so described, the east half of Summit avenue at the place specified, and also some interest in such block, which claims are without right and void.

The answer denies the material averments of the complaint, and alleges in substance that Summit avenue is only 25 feet wide, and that Seventh street does not and never did extend south of the block mentioned, setting forth the facts whereby the defendant asserts a title to the land joining the block on the south, and also the premises bounded by a line 25 feet east of the east border of the block specified. The prayer of the answer is in part:

"That plaintiff be forever barred and estopped from making or asserting any claim in or to said property and the use and enjoyment of said streets, otherwise than as set forth and described in the duly recorded map and plat thereof."

The reply put in issue the allegations of new matter in the answer, whereupon the cause was tried, resulting in a decree establishing Seventh street south of block 23 to be 60 feet wide, and Summit avenue east of that block to be only 25 feet in width, and both parties appeal.

Kenneth L. Fenton, of Portland (W. D. Fenton and Ben C. Dey, both of Portland, on the brief), for appellant. R. W. Nicholas and W. C. Nicholas, both of Portland (Newton McCoy, of Portland, on the brief), for respondent.

MOORE, C. J. (after stating the facts as above). The evidence shows that in the year 1888 M. J. Kinney purchased a large tract of land in Clatsop county, Or., bordering on the Pacific Ocean, and soon thereafter caused a part of the premises to be surveyed into lots, blocks, streets, etc. A map, purporting

to set forth the outlines of the survey, was prepared, and 1,000 copies were printed, and entitled:

"Gearhart Park, as laid out and recorded by M. J. Kinney, Clatsop Co., Oregon. Regular lots, 50x100. Scale, 1 inch 800 ft. W. I. Crawford, Gen. Agt. Gearhart Park, Seaside, Oregon."

The printed plat contains lines representing cross streets extending from Cottage avenue on the west to the Astoria & South Coast Railroad on the east, which streets are numbered, commencing at the north, from First to Twelfth, respectively. Block 23, as indicated, is situated immediately east of a creek and bounded on the north by Sixth street, on the east by Summit avenue, and on the south by Seventh street, each being designated by parallel lines which, according to the scale specified, represent the streets as being 60 feet wide. The map referred to depicts all the land embraced in Gearhart Park as segregated into a park, lots, blocks, streets, etc.

Mr. Kinney and his wife, on August 21, 1890, duly acknowledged a plat of Gearhart Park, whereon the east end of Seventh street is represented as terminating at the stream mentioned, which is called Neacoxie creek. Summit avenue is indicated as being the first highway east of the creek, extending south from First street to the southeast corner of block 23, and is marked by parallel lines denoting a space of 25 feet. Kinney and his wife on September 2, 1890, executed to Mrs. Winnie H. Waite a deed conveying:

"All of block number twenty-three in Gearhart Park, in Clatsop county, Oregon, as said park has been laid out by us and recorded in the office of the recorder of conveyances of said county."

The plat so acknowledged was filed for record September 11, 1890, and Mrs. Waite's deed was also filed for the same purpose November 24th of that year. Mr. Kinney, in July, 1899, appointed Newton McCoy his agent to sell lots and subscribed his name to a writing which so far as material herein reads:

"In consideration of one dollar and valuable services to be performed by said Newton McCoy, we hereby give him for three months from the date hereof the exclusive sale of the real property in Gearhart Park at the prices indicated upon the plat of said park hereto attached, marked 'Exhibit A,' and made a part hereof."

The plat thus referred to, with the memorandum attached, was duly identified and received in evidence, and is a duplicate of the printed plat, having noted thereon in red ink, between lines representing lots, various numbers ranging from 50 to 500. Kinney also conveyed away block 24, which lies immediately north of block 23, but is separated from it by Sixth street. He on January 24, 1905, executed to the Theo. Kruse Catering Company, a corporation, a deed of all lots, blocks, and tracts in Gearhart Park then remaining unsold. This conveyance included all the land in the park east of the creek, except blocks 23 and 24. The county

court of Clatsop county made an order, January 3, 1908, vacating all the streets and avenues east of the creek that are noted on the recorded plat, except Sixth street and the parts of Fifth street and of Summit avenue which are north and east of blocks 23 and 24. All the unsold lots, blocks, and tracts in the Park, which were so owned by the corporation last named, were duly transferred by mesne conveyances to the defendant, which became vested with the legal title thereto March 29, 1910.

Sixth street, between blocks 23 and 24, was excavated to a depth of 15 feet or more below the surface of the ground at that place. Thereafter, to wit, on May 11, 1911, Mrs. Waite and her husband executed a warranty deed, conveying "all of block 23 of Gearhart Park, in Clatsop county, Oregon," to the plaintiff, who had paid for the land before he examined the records of that county, and without knowing that the printed plat had not been recorded. The defendant caused a survey to be made of its real property east of the creek, immediately south of block 23 when extended to the railroad, and on November 4, 1911, acknowledged a map thereof whereon the land portrayed is designated as "Woodland Park Addition to Gearhart Park," which plat was filed for record on the 13th day of that month. By the latter survey no street borders upon the south line of block 23. No improvement of any highway east of the creek has been made, except on Sixth street. Teams drawing wagons have passed back and forth along Summit avenue for some distance south of Sixth street, though much of the way is covered with standing timber. If the angle of repose be assumed as 45°, and Summit avenue is only 25 feet wide, as decreed, it would necessarily follow that, in cutting down that highway to intersect Sixth street, the bottom of the banks of the excavation would terminate in a line 2½ feet above the grade immediately to the north.

The plaintiff in the summer of 1911 orally informed the defendant, and on August 29, 1912, and October 1st of the latter year, respectively, gave to it written notices, that he claimed and should attempt to establish an easement 60 feet in width on the east and south of his land. No acknowledgment of his claim having been made, this suit was instituted May 5, 1913, and terminated as hereinbefore mentioned. E. P. Waite, who negotiated the purchase of block 23 for his wife, testified that he bought the land from M. J. Kinney through the latter's agent, W. I. Crawford. In referring to the printed plat, a duplicate of which was received in evidence, the witness stated upon oath that it was similar to the one which he saw in the office of such principal and agent at the time he purchased; that in company with Mr. Crawford he personally examined block 23 before buying it and adverting to the dedicated

highways by which the land was bordered he stated:

"And at the time my understanding with the agent was that there were 60-foot streets around the whole block."

Alluding to white stakes which he then saw driven in the ground to indicate the width of such streets, and comparing them with a stake which had been received in evidence, he testified:

"My remembrance is refreshed by this very stake. I particularly noticed and observed that they were rather larger than what was ordinarily put into platting, it seemed to me. * * * Q. Do you remember any representations that were made with respect to these streets, further than what is shown by the map? A. No; I think nothing more than that I was given to understand that they were all 60-foot streets. Why I mentioned this is the fact that in buying that block, as the building portion was shortened on the west side by the stream, Neacoxie, I was distinctly informed that the streets bordering it (the block) on the south, east, and north were 60 feet, which would exclude any one building closer or encroaching on my block lines, thus making it more desirable."

On cross-examination this witness was asked:

"You bought this property more upon your own view of the premises, by going upon it and stepping the distances off, rather than by this so-called plat, here marked 'Plaintiff's Exhibit A.' A. Yes, sir; except by stepping distances off. Q. You were not guided by that to any extent? A. I am not positive but when Mr. Crawford and I went over the ground that he had one of these maps (meaning the printed plat), and as we passed along and would look at a block we would verify it on the map, until I made my selection. We must have had something to guide us as well, and I think he used one of these public plats, which he took from his office or carried in his pocket; but they had them distributed all around, you know."

This witness further testified that lots were offered him by Mr. Crawford south of block 23.

The plaintiff, an attorney, testified that, when he purchased block 23, he found the stake set to mark the southeast corner; that 60 feet east thereof he found another stake, which he subsequently broke off, and the latter post, having been identified, was received in evidence; that he thereafter found north of block 23 eight other white stakes, similar to the one last referred to, which posts were set to mark the corners of blocks, in parallel lines 60 feet apart, designating Summit avenue as originally surveyed and appearing on the printed plat; and that Mr. Waite, a brother-in-law, showed him a duplicate of the printed plat before buying the block; whereupon the witness advised that the premises could be safely purchased, since the streets bordering thereon were 60 feet in width.

W. R. Nicholas, the plaintiff's son, who is a surveyor, corroborates his father's testimony in respect to the discovery of the stakes and the places where they were standing. This witness was unable to find any stakes set at 25 feet, or any other distance less than 60 feet, east of the west line of Summit avenue, nor could he find any stakes east of the

creek marking the south line of Seventh street.

M. J. Kinney testified that he never dedicated or intended to give to the public any real property south of block 23; that he may have had an agreement with some intending purchasers as to the sale of lots, but did not think he had delivered to them any deeds until the plat was recorded; that he marked in lead pencil the prices to be demanded for lots on a plat which he gave to Mr. Crawford, who made many sales for him; that he had no surveys made, except such as are delineated on the recorded plat; and that he never intended to dedicate any part of the premises in conformity with the printed plat, in referring to which he stated upon oath:

"I never saw this plat until after it was printed. Q. Do you remember when it was printed? A. No; I think not. I think Mr. Crawford started out to advertise this property considerable, and he got out this, and he got out an advertisement sheet, and he got it out before I saw him; when I did see him, I called his attention to some irregularities in it, but it was too late to stop it, because it had already been printed."

This witness, referring to Seventh street east of the creek, testified:

"I think it was my intention that there should be a street running along south of block 23 and blocks 37 and 38, but it was not dedicated."

In answer to the question, "Did you ever authorize Mr. Crawford to get out this map shown as Plaintiff's Exhibit A?" he replied, "I certainly did not." On cross-examination, however, Mr. Kinney admitted he had two surveys made of the land west of the creek; but, the first having been found to be erroneous, he caused a resurvey to be made. Referring to the printed plat, to which was attached the written appointment of Mr. McCoy, the witness stated upon oath that he did not write the figures appearing in red ink upon that map, nor did he believe he authorized such notation. Alluding to the representations imputed to his agent in negotiating a sale of block 23, he further testified:

"Mr. Crawford had no right to sell any property contrary to the abstracts and plats that I furnished him; if he did, he went beyond his duty. Q. Mr. Crawford was your duly authorized agent in the sale of the property, all the time from the time of platting, until when? A. He sold property during the latter part of 1890, and during the year 1891. Q. Well, wasn't he your agent in contracting for the sale of property in Gearhart Park, before you filed the plat for record? A. Limited only."

The foregoing is deemed to be a fair summary of sufficient of the evidence to illustrate the legal principles involved.

[1] It is argued by defendant's counsel that the plaintiff had a full, complete, and adequate remedy at law for the redress of his supposed grievances, thereby precluding a resort to a court of equity, and, such being the case, an error was committed in denying a motion to dismiss the suit. No demurrer to the complaint appears to have been interposed. Upon proper application a court of

equity will enjoin interference with an owner's easement, when the injury complained of is irreparable, or the intermeddling is continuous, or the remedy at law for the recovery of damages will be inadequate. 10 Am. & Eng. Ency. Law (2d Ed.) 431; 14 Cyc. 1216; Washburn, Easements (4th Ed.) 747; Church v. Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; Morse v. Whitcomb, 54 Or. 412, 102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832; Gyra v. Windler, 13 Ann. Cas. 841.

[2] A court of equity thus having general jurisdiction to protect an easement at the suit of an owner, any defect in a complaint, interposed for that purpose in such forum, is waived when the defendant fails to demur for lack of jurisdiction of the subject-matter and also joins in an application for equitable relief. Kitcherside v. Myers, 10 Or. 21, 23; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004; Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; State v. Blize, 37 Or. 404, 61 Pac. 735; Moore v. Shofner, 40 Or. 488, 67 Pac. 511; Investment Co. v. Garbade, 41 Or. 123, 68 Pac. 6; Killgore v. Carmichael, 42 Or. 618, 72 Pac. 637; Maxwell v. Frazier, 52 Or. 183, 96 Pac. 548, 18 L. R. A. (N. S.) 102; Bradt v. Sharkey, 58 Or. 153, 113 Pac. 653; Carroll v. McLaren, 60 Or. 233, 118 Pac. 1034; Bowsman v. Anderson, 62 Or. 431, 123 Pac. 1092, 125 Pac. 270. The defendant by failing to demur to the complaint, and by praying for affirmative relief in its answer, thereby waived all questions of jurisdiction, since a court of equity has the right to hear and determine suits involving easements.

[3] The important question to be considered is whether or not the act of Mr. Kinney in appointing Mr. Crawford to sell his lots and blocks in Gearhart Park, and in knowingly permitting that agent to exhibit to intending purchasers a duplicate of the printed plat, upon which Summit avenue was represented as being 60 feet wide and Seventh street, east of Neacoxie creek, as of equal width, estops the defendant as a subsequent grantee from denying the representations so contained on the printed plat as against the plaintiff as the successor in interest of Mrs. Waite the original purchaser of block 23. The authority of an agent to bind his principal in contracts made with a third party is measured, not only by the agent's express delegation of power, but also by that which he is held out by the principal as possessing, provided, however, the third party had reason to believe and did believe the agent was acting within and not exceeding his authority, and such party would sustain a loss if the contract was not regarded as that of the principal. Hardwick v. State Insurance Co., 20 Or. 547, 26 Pac. 840; Hahn v. Guardian Assurance Co., 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709; Connell v. McLoughlin, 28 Or. 230, 42 Pac. 218; Harrisburg Lumber Co. v. Washburn, 29 Or. 150, 156, 44 Pac. 390; Durkee v. Carr, 38 Or. 189, 63 Pac. 117; Neppach v. O. & C. R. R. Co., 46 Or. 374,

80 Pac. 482, 7 Ann. Cas. 1035; Rumble v. Cummings, 52 Or. 203, 95 Pac. 1111.

[4] It will be remembered that Mr. Kinney testified Mr. Crawford possessed only limited authority to represent him in selling lots and blocks. This statement, as between them, is undoubtedly true as a matter of fact; but as to a third person who dealt with the agent such sworn declaration is not a correct expression of the law applicable to the circumstances of this case. By permitting Mr. Crawford to exhibit to intending purchasers a duplicate of the printed plat, entitled "Gearhart Park as laid out and recorded by M. J. Kinney, * * * W. I. Crawford, Gen. Agent," the principal thereby tacitly, at least, represented that the agency was not special and that the plat so displayed had been duly recorded. From Mr. Kinney's sworn statement that he marked in lead pencil the prices of lots and blocks on a plat which he delivered to Mr. Crawford, it is reasonable to infer that such map was a duplicate of the printed plat. This deduction is strengthened by the written appointment of Mr. McCoy attached to another printed plat on which were noted in red ink figures representing the prices demanded for the separate pieces of real property which were offered for sale. As to who wrote such numbers on that plat is immaterial. The conclusion seems irresistible that Mr. Kinney knowingly permitted intending purchasers to believe the printed plat had been duly recorded and also that he held out Mr. Crawford as his general agent in negotiating sales of real property in Gearhart Park.

Did Mr. Kinney, by such representations and conduct, make a parol dedication of Summit avenue to the width of 60 feet east of block 23, and of Seventh street of equal width extending south of that block, as indicated on the printed plat, notwithstanding different designations of such contemplated highways appear on the recorded plat? It will be kept in mind that Mr. Kinney testified two surveys of land in Gearhart Park were made west of Neacoxie creek. From the discovery of white stakes driven in the ground in parallel lines 60 feet apart, it is believed the first survey included land east of that stream, and that such stakes were undoubtedly intended originally to mark the boundaries of Summit avenue. The stake received in evidence and brought up discloses on two sides at right angle the letters, "Str," and on the third side the letters and figures, "B137," which number corresponds with that of the block designated at that place on the printed plat and indicating the southwest corner of such block. The letters "Str" on both sides of the stake as indicated, designate Summit avenue on the west and Seventh street on the south. It is fairly to be inferred that divisions of real property, as delineated on the printed plat, were made to correspond with the lines of the first survey, and that Mr. Crawford used a duplicate of

that plat to designate particular lots and blocks when negotiating with Mr. Waite for the sale of block 23, before the second plat was filed for record. Whether or not Mrs. Waite's deed was delivered when it was acknowledged is impossible accurately to determine from the evidence before us. Mr. Kinney's testimony is to the effect that he believed no deeds were delivered to purchasers until after the plat was recorded, though some deeds were acknowledged prior thereto. It is believed the printed plat antedates the making of the recorded plat, and that the former was used by Mr. Crawford in negotiating a sale of block 23, and employed in pointing out on the ground the contemplated highways by which the premises were bordered.

It has been repeatedly held that when an owner of land causes it to be surveyed into lots, blocks, streets, and alleys, pursuant to which measurements a map is prepared, representing the lines run upon the ground, and he exhibits that map to intending purchasers in consummating the sale of real property indicated on the plat, he thereby irrevocably dedicates to the public the contemplated highways, parks, and commons thus designated, and no acceptance by any corporate authority is essential to give validity to the donation. *Lownsdale v. Portland*, 1 Or. 398, Fed. Cas. No. 8,579; *Leland v. Portland*, 2 Or. 46; *Carter v. Portland*, 4 Or. 339; *Meier v. Portland Cable Ry. Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; *Hogue v. Albina*, 20 Or. 182, 25 Pac. 386, 10 L. R. A. 673; *Steel v. Portland*, 23 Or. 176, 31 Pac. 479; *Spencer v. Peterson*, 41 Or. 257, 68 Pac. 519, 1108; *Nodine v. Union*, 42 Or. 613, 72 Pac. 582; *Oregon City v. O. & C. R. Co.*, 44 Or. 165, 74 Pac. 924; *Christian v. Eugene*, 49 Or. 170, 89 Pac. 419; *Moore v. Fowler*, 58 Or. 292, 114 Pac. 472; *Kuck v. Wakefield*, 58 Or. 549, 115 Pac. 428; *Harris v. St. Helens*, 72 Or. 377, 143 Pac. 941.

[5-7] In order to establish a parol dedication, evidence must be adduced tending to substantiate a clear intention to devote some particularly described land to a public use. *Lewis v. Portland*, 25 Or. 133, 35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 772; *Morse v. Whitcomb*, 54 Or. 412, 102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832; *Parrott v. Stewart*, 65 Or. 254, 132 Pac. 523; *Jones v. Teller*, 65 Or. 328, 133 Pac. 354. A consideration of all the evidence tends to establish an intention on the part of Mr. Kinney to make a parol dedication, to the public, as contemplated highways 60 feet in width, of the parts of Summit avenue and Seventh street that border upon block 23, as indicated upon the printed plat, though he subsequently intended that map should be superseded by the recorded plat; but sales of land in Gearhart Park having been made by exhibiting to purchasers a duplicate of the printed plat before the other map was recorded, such circumstances create an estoppel in pais, pre-

venting him from asserting any survey contrary to that evidenced by the printed plat, so far as block 23 might be affected thereby.

[8] The plaintiff's counsel, without offering any testimony to explain his failure or inability to produce the original plat of the survey of Gearhart Park, from which map it is asserted the printed copies must have been made, was permitted, over objection and exception, to submit in evidence two of such duplicates, and it is maintained that errors were thereby committed. The statute invoked to sustain the legal principle insisted upon, as far as involved herein, reads:

"There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases: 1. When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in section 782. 2. When the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default." L. O. L. § 712.

The clause thus referred to, in the language quoted, is as follows:

"The original writing shall be produced and proved except as provided in section 712. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss; but the notice to produce it is not necessary where the writing itself is a notice, or where it has been wrongfully obtained or withheld by the adverse party." Id. § 782.

In order to uphold the rule thus declared, reliance is placed upon the case of *Jones v. Teller*, 65 Or. 328, 133 Pac. 354, where it was held that a blueprint, purporting to represent the locus in quo, and which had been received in evidence, would not be considered for any purpose, since no testimony had been offered to prove that any effort had been made to produce the original. In that case the plaintiff, referring to the map so admitted in evidence, testified that his grantor had a blueprint something like that. The lack of such proper identification afforded a sufficient reason to warrant the exclusion of the blueprint.

In the case at bar, however, a duplicate of the printed plat was particularly identified as being similar to that used by Mr. Crawford in effecting a sale to Mrs. Waite of block 23, and as between her and Mr. Kinney, the principal and then owner of the premises, each printed plat was an original. "It sometimes happens," says an author, "that there are a number of duplicates of the same document, as in the case of placards, newspapers, etc. In such case, to prove the contents any one of the several copies is admissible." McKelvey, *Evidence* (2d Ed.) § 272. "Any one of duplicate instruments may be introduced in evidence without accounting for any other. In this connection, however, the term 'duplicate' signifies more than a mere copy; the instruments must be identical not only verbally but also in legal import." 19 *Harvard*

Law Rev. 123. See, also, 2 *Wigmore*, Ev. § 1232. No error was committed in receiving in evidence duplicates of the printed plat.

[9] It is argued that an error was committed in receiving, over objection and exception, testimony relating to white stakes found driven in the ground along Summit avenue, at a distance of 60 feet from the west line thereof, since it was not disclosed by whom these posts were set, nor that Mr. Waite's attention was called to them when he examined block 23 with a view of purchasing it for his wife. When the first survey of Gearhart Park was made is not manifest from an examination of the testimony. Mr. Kinney and his wife acknowledged the deed which they gave to Mrs. Waite about two years after they purchased the real property. Prior to the delivery of that deed Mr. Waite had examined block 23, stepped the width of the highways bordering that block and found them to be 60 feet, saw the white stakes similar to the one received in evidence, and his attention was then attracted to these posts. Such facts do not bring the case within the rule announced in *Carlyle v. Sloan*, 44 Or. 357, 75 Pac. 217, and no error was committed as alleged.

[10] It is maintained that the proposed dedication to the public of the highways, the width and existence of which are challenged herein, cannot be considered as open for a time exceeding the statute of limitations; that such dedication was lost by nonuser, and that an error was committed in awarding to the plaintiff any relief beyond that conceded by the answer. The sale of a lot bordering upon a street that is indicated on a plat of survey, amounts to an irrevocable offer by the dedicator, that so far as he is concerned, the proposed highway, unless legally vacated, shall forever remain open to the public.

[11] A formal acceptance of the donation is unnecessary, since an approval of the gift by municipal officers will be implied. *Carter v. Portland*, 4 Or. 339; *Meier v. Portland Cable Ry. Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; *Hogue v. Albina*, 20 Or. 182, 25 Pac. 386, 10 L. R. A. 673. The grantees of the dedicator may extinguish the right of the public in and to a street by an unlawful encroachment thereon for a term equal to the period of the statute of limitations, which purpresture raises an estoppel against the municipality on the ground of the negligence of its officers in failing to assert a right to the easement. *Schooling v. Harrisburg*, 42 Or. 494, 71 Pac. 605; *Nodine v. Union*, 42 Or. 613, 72 Pac. 582; *Oliver v. Synhorst*, 48 Or. 292, 86 Pac. 376, 7 L. R. A. (N. S.) 243; *Portland v. Inman-Poulsen Lumber Co.*, 66 Or. 86, 133 Pac. 829, 46 L. R. A. (N. S.) 1211, Ann. Cas. 1915B, 400. Neither Summit avenue nor Seventh street has been improved or encroached upon, except that Woodland Park addition to Gearhart Park has been surveyed and platted so as to join block 23 on the

south, and the defendant is in such constructive possession of the disputed premises as the delivery of its deed imports. Since there has been no invasion of the plaintiff's right, the statute of limitations never began to run against his remedy.

[12] It is urged that though Mr. Kinney, by the acts and conduct of his agent, may have made a parol dedication of the disputed easements to such an extent as to be binding upon him, the defendant for a valuable consideration secured its title by mesne conveyances and had no knowledge of such dedication, and hence no estoppel in pais can arise as against it. In *Carter v. Portland*, 4 Or. 339, it was determined that whatever information, respecting a parol dedication of public parks, was sufficient to attract the attention of a purchaser to the prior rights and equities of the public in and to the premises, so as to put him upon inquiry as to the source, nature, and extent of the dedication, would operate as notice, and that when the evidence showed the purchaser had such knowledge as would induce further investigation, notice would be implied. In that case the circumstances antedating and attending the purchase of two blocks in the city of Portland by the plaintiffs were reviewed, and it was held they had acquired such knowledge of a prior parol dedication to the public of such blocks as to prompt inquiry and charge them with notice, and authorize a reversal of a decree which they had secured quieting their title.

The plat of Woodland Park addition to Gearhart Park shows the initial point of the survey of that tract is the southeast corner of block 23. The white stakes driven in the ground to mark the east and west borders of Summit avenue could have been found by the defendant's agent who had charge of the survey. One of these stakes, set at the southeast corner of block 37, and 60 feet east of the southeast corner of block 23, had thereon at right angles the letters "Str," clearly indicating the location of Seventh street immediately south of blocks 23 and 37. As these proposed highways were marked upon the ground prior to the execution of the deed to the defendant, though neither Summit avenue nor Seventh street is referred to in such deed, the rule adopted in *Green v. Miller*, 161 N. C. 24, 76 S. E. 505, 44 L. R. A. (N. S.) 231, is not controlling herein. From an inspection of the white stakes mentioned the defendant could have obtained such knowledge of the original survey as to induce an inquiry as to the source, nature, and extent of the easements; and, this being so, notice of the survey as thus marked upon the ground must be implied and imputed to the defendant.

Other assigned errors are deemed immaterial, and for that reason they will not be discussed. From these considerations it follows that the decree herein should be modified, so

as to widen Summit avenue, east of block 23, from 25 feet to 60 feet, and in all other respects to be affirmed; and it is so ordered.

BURNETT and McBRIDE, JJ., concur.

(79 Or. 71)

CANNON v. HOOD RIVER IRR. DIST. et al.

(Supreme Court of Oregon. Jan. 18, 1916.)

1. WATERS AND WATER COURSES §216—IR-RIGATION—CONSTITUTIONALITY OF STATUTE.

L. O. L. § 6186, providing for the assessment of irrigation taxes upon lands within irrigation districts for the purposes therein contemplated, and directing the collection and disbursement of such taxes, is constitutional.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 306; Dec. Dig. §216.]

2. WATERS AND WATER COURSES §231—IR-RIGATION DISTRICT—TAXES—RESTRAINING COLLECTION—PLEADING.

In an action to restrain the collection of an irrigation tax assessed by virtue of L. O. L. § 6186, plaintiff alleged in effect that but a small portion of his lands was susceptible of irrigation; that the assessment was made simply because the lands were within the boundaries of the district, and not according to the benefits derived; that all tracts in the district were assessed by the same standard of valuation; and that there was a difference between his lands and other tracts assessed in the district, but he did not particularize as to how many acres could be irrigated, or as to what the difference was between his and other lands, nor did he allege that there was any difference in the location of his property with reference to the canal, or give any reason why he would not be benefited to the same extent as other land-owners subject to the tax. *Held*, that the complaint was general and did not state a cause of suit.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. §231.]

3. PLEADING §8—CONCLUSIONS—FRAUD.

In an action to restrain the collection of an irrigation tax assessed upon his lands, it is not sufficient for the plaintiff to allege that the assessment was fraudulent, but he must state facts, and not mere conclusions.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½, 68; Dec. Dig. §8.]

4. TAXATION §5—LANDS OF THE UNITED STATES—EQUITABLE ESTATE.

Where homestead entry has been made under the laws of the United States, final prospect submitted, and final certificate issued, it operates to transfer an equitable estate, and immediately renders the land liable to taxation, although the United States holds the title until the patent issues.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 17, 31-44; Dec. Dig. §5.]

5. WATERS AND WATER COURSES §231—IR-RIGATION DISTRICTS—LANDS INCLUDED.

Although the title to lands, embraced within the boundaries of an irrigation district at the time such boundaries were fixed pursuant to statute, was in the United States, an assessment of an irrigation tax thereon after title thereto had passed to an individual was valid, as at the time of such transfer of title the lands were embraced within the limits of the district as legally as they were within the limits of the

county, and no further proceedings were necessary to lay a foundation for levying tax thereon.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ¶ 231.]

6. WATERS AND WATER COURSES ¶231—IRRIGATION DISTRICTS—PRESUMPTIONS.

In a suit to restrain the collection of an irrigation tax, when the validity of the irrigation district is not questioned, it must be assumed that the district was legally organized.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ¶ 231.]

7. WATERS AND WATER COURSES ¶231—IRRIGATION DISTRICTS—RESTRAINING COLLECTION OF TAXES.

When plaintiff claims that his lands are not susceptible of irrigation, and that irrigation would be injurious, the equitable powers of the court cannot be invoked to relieve him from the burden of taxation without benefit until after he has demanded from the district board, and been refused, the right to have his lands set apart from the district.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 320; Dec. Dig. ¶ 231.]

8. TAXATION ¶610—RESTRAINING COLLECTION OF TAXES—CONDITIONS PRECEDENT.

One invoking the powers of a court of equity must do equity, and, before a taxpayer can be heard to urge the invalidity of a tax and enjoin the collection of an excessive levy, he must first pay or tender for payment the amount legally levied.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1244; Dec. Dig. ¶ 610.]

In Banc. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by A. M. Cannon, as trustee for Guy W. Talbot, and others, against Hood River Irrigation District, and others, to restrain the collection of an irrigation tax. Decree for defendants sustaining a demurrer, plaintiff appeals. Affirmed.

This is an appeal by the plaintiff from a decree sustaining the demurrer to his complaint and dismissing the suit. His pleading alleges, in substance, that he is the owner in fee simple of 120 acres of land described therein situated in the Hood River irrigation district; that the defendant was organized and is existing under the provisions of chapter 7, tit. 41, L. O. L.; that during the year 1909, under the provisions of section 6186, L. O. L., the district assessor assessed 80 acres of plaintiff's land at \$18,000 for the purpose of paying interest on bonds issued by the district in 1905, to the amount of \$100,000, and for construction expenditures incurred by it, the tax amounting to \$252. The plaintiff seeks to restrain the collection of such tax upon three separate grounds: (1) That the composition of the soil and the topographical formation is such that but a small portion of the whole area is susceptible of irrigation, and the irrigation of the land is of doubtful expediency; that the officers levied the assessment simply because his lands are within the boundaries of the district, and not according to the benefit derived; and that for

the same year they assessed all the tracts therein by the same standard of valuation to an amount sufficient at 14 mills on the dollar to pay the interest and expenses of the district; (2) that at the time of the organization of the district the title to the lands on which the assessment was made was in the government of the United States and so remained until April 11, 1907, when patent issued; that no steps had been taken after the issuance of the patent to include the lands within the boundaries of the district prior to the assessment, therefore the same were not legally within such boundaries, and for that reason the assessment was null and void; (3) that the assessor of the district for the purpose of the assessment illegally placed a valuation of \$225 an acre on 80 acres of his land, well knowing that the same was not worth to exceed \$100 an acre, and that such valuation was so fixed fraudulently and capriciously for the purpose of compelling the plaintiff to pay more than his equable share of the taxes of such district; and that the assessor was unfair, in that he apportioned to plaintiff a greater number of acres of the whole area of his tract than he did to other residents of land of the same character of about the same or greater area. The defendant demurred to the complaint for the reason that the same did not state facts sufficient to constitute a cause of suit.

A. M. Cannon, of Portland, in pro. per. E. E. Stanton, of Hood River (John Baker, of Hood River, on the brief), for respondents.

BEAN, J. (after stating the facts as above).

[1] Section 6186, L. O. L., provides:

"The district assessor must, between the first Monday in March and the first Monday in June of each year, assess all the lands situated in the district as hereinafter stated. He must view and assess upon the lands situated in the district a charge sufficient to pay all charges and expenses, and all obligations incurred by virtue * * * of the issuing of any bonds, as herein contemplated, for the construction, purchase, or acquisition of any canals, works, or property as contemplated in this act. And all lands situated within said district shall be assessed and a charge placed thereon, in the manner herein contemplated, in proportion to the benefit derived by the construction * * * of any canals, works, or property, according to the benefit of each lot, parcel, or tract of land actually and separately received, which charges must be collected and paid into the district treasury and must be placed to the credit of the district, and paid out as in this act provided."

It is contended by plaintiff that the statute pursuant to which the tax was levied is unconstitutional. The law is valid and has been upheld and action thereunder sustained by this court in several cases, namely, *Board of Directors v. Peterson*, 64 Or. 46, 128 Pac. 837, 129 Pac. 123; *Board of Directors v. Peterson*, 149 Pac. 1051; *Rathfon v. Payette*, etc., *Irrig. Dist.*, 149 Pac. 1044. Laws of the same purport have been enacted and upheld by the courts in several states.

[2] The complaint of plaintiff is a gen-

eral one. While he alleges that but a small portion of the whole area of the 120-acre tract is susceptible of irrigation, no statement is found as to how many acres can be so irrigated. A portion of his lands being situated so as to be irrigated from the system then being constructed, the same would be benefited thereby. While plaintiff indicates that there is a difference between his land and other tracts assessed in the district, he makes no mention of what the difference is, or whether it is trifling or substantial. He avers that 80 acres of his domain were assessed at \$225 an acre, and that other lands in the district were taxed by the same standard of valuation; yet it is not alleged that there was any difference in the location of his property with reference to the canal, or otherwise, or any reason shown why he would not be benefited to the same extent as other landowners subject to the tax. The first cause of the complaint does not state a cause of suit.

[3] The third separate cause of suit, to the effect that the assessor placed a valuation of \$225 an acre upon the land when he knew at the time that it was not worth in excess of \$100 an acre, and that the assessment was fraudulently and capriciously made for the purpose of compelling the plaintiff to pay more than his equitable share of the taxes, is a mere conclusion. Facts are not stated showing that other acres in the district were not assessed upon the same valuation, and in order for the plaintiff to be injured his assessment must be shown to be out of proportion to that of the other lands taxed. It is not sufficient for the defendant to allege that the assessment was fraudulent, but it is incumbent upon him to state the facts upon which such wrong is based. Fraud will not be presumed. *So. Oregon Co. v. Coos County*, 39 Or. 185, 64 Pac. 646.

[4] The second cause of suit alleges that at the time of the organization of the district the title to the lands was in the government of the United States. It does not show whether at that time the final certificate for the land had been issued by the United States Land Department.

Where a homestead entry has been made under the laws of the United States, final proof submitted, and final certificate issued, it operates to transfer an equitable estate, and immediately renders the land liable to taxation, although the United States holds the title until the patent issues. *Johnson v. Crook County*, 53 Or. 329, 100 Pac. 294, 133 Am. St. Rep. 834; 37 Cyc. 887.

[5] However, the tax upon the tract in question was not levied prior to the issuance of the patent. The boundary lines of the irrigation district had been fixed pursuant to the statute in so far as shown by the complaint, and when the title passed from the government of the United States the land

was embraced within the limits of the irrigation district just as legally as it was within the limits of the county; and no further proceedings were necessary in order to lay a foundation for levying a tax thereon. If the plaintiff was dissatisfied on account of his land being included within the district, he should have pursued the remedy pointed out by the statute.

[6, 7] This is not an action to test the validity of the corporation, and we must assume that the district was legally organized. *O. S. L. Ry. Co. v. Pioneer Irrig. Dist.*, 16 Idaho, 578, 102 Pac. 904. In *Andrews v. Lillian Irrig. Dist.*, 66 Neb. 458, 92 N. W. 612, 97 N. W. 336, where an irrigation district was formed under a law similar to ours, plaintiff claimed that his lands were not susceptible of irrigation, were wet and swampy requiring drainage, and that irrigation would be injurious. It was held that the equitable powers of the court could not be invoked to relieve the plaintiff from the burden of taxation without benefit until after he had demanded from the district board, and been refused, the right to have his lands set apart from the district. The law governing irrigation districts has been three times amended since the tax in question was levied.

[8] Passing the matter of the manner of asserting the complaint, there is another potent reason why the plaintiff cannot enjoin the collection of the tax. One invoking the powers of a court of equity must do equity, and before a taxpayer can be heard to urge the invalidity of a tax and enjoin the collection of an excessive levy, he must first pay or tender for payment the amount legally levied. The defendant fails to allege that he has done this. *Brown v. School Dist.*, 12 Or. 345, 7 Pac. 357; *Goodnough v. Powell*, 23 Or. 525, 32 Pac. 396; *Hibernian Benevolent Society v. Kelly*, 28 Or. 173, 42 Pac. 3, 30 L. R. A. 167, 52 Am. St. Rep. 769; *Dayton v. Multnomah Co.*, 34 Or. 239, 247, 55 Pac. 23; *Alliance Trust Co. v. Multnomah County*, 38 Or. 433, 437, 63 Pac. 498. The complaint is vulnerable to the demurrer.

There was no error in the ruling of the lower court, and the judgment is affirmed.

EAKIN, J., took no part in the consideration of this case. HARRIS, J., did not sit.

(79 Or. 1)

STATE ex rel. MULLINS, Dist. Atty., v.
PORT OF ASTORIA et al.

(Supreme Court of Oregon. Jan. 11, 1916.)

1. CONSTITUTIONAL LAW §15 — CONSTRUCTION OF CONSTITUTION.

Sections of the Constitution relating to the same subject-matter must be read and construed together.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 9; Dec. Dig. §15.]

2. MUNICIPAL CORPORATIONS ¶56—POWERS OF GOVERNMENT—CONSTRUCTION OF CONSTITUTION.

Although the chief purpose in construing constitutional provisions is to ascertain and give effect to the intention as expressed in the language employed, nevertheless sections designed to grant attributes of sovereignty to specified local subdivisions of the state, thus limiting the power of the Legislature, should be strictly construed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 148; Dec. Dig. ¶56.]

3. MUNICIPAL CORPORATIONS ¶4—MUNICIPALITIES—DISTINCTIONS.

Const. art. 11, § 2, as amended in 1906, declares that corporations may be formed under general laws, but shall not be created by special laws, and that the Legislative Assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town, but the legal voters of every city and town may enact and amend their municipal charter, subject to the constitution and laws of the state. Article 4, § 1a, declares that the initiative and referendum powers reserved to the people are reserved to the legal voters of every municipality and district as to all local, special, and municipal legislation of every character, and that the manner of exercising such powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. *Held*, that both constitutional provisions recognize a distinction between cities and towns which are pure municipalities and other municipalities which do not have so extensive a power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 4, 5; Dec. Dig. ¶4.]

4. MUNICIPAL CORPORATIONS ¶1—PORTS—NATURE OF.

A port organized under L. O. L. §§ 6114-6125, declaring that municipal corporations designated as ports may be incorporated, and that they may make, change, and abolish such rules and regulations for the use or navigation in harbors or rivers or the placing of obstructions or the removal therefrom as may be convenient, and such rules and regulations may be enforced by fines and penalties, is a municipal corporation within Const. art. 4, § 1a, art. 11, § 2.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1, 1½; Dec. Dig. ¶1.]

For other definitions, see Words and Phrases, First and Second Series, Municipal Corporation.]

5. MUNICIPAL CORPORATIONS ¶57—POWERS OF—DEFINITION—"INTRAMURAL"—"EXTRAMURAL."

The powers of a municipal corporation are "intramural" and "extramural"; the one being the powers exercised within the corporate limits, and the other being those exercised without.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. ¶57.]

6. MUNICIPAL CORPORATIONS ¶56—POWERS—RIGHT TO EXERCISE.

While Const. art. 4, § 1a, authorizes cities and towns to prescribe the manner for exercising the initiative and referendum powers as to local matters, and article 11, § 2, authorizes them to amend their own municipal charters subject to general laws, a city or town is not entitled to assume extramural authority which has not been granted by prior legislative act, the

constitutional provisions being applicable only to intramural powers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 148; Dec. Dig. ¶56.]

7. MUNICIPAL CORPORATIONS ¶47—POWERS—CHARTERS—AMENDMENT.

A port incorporated under L. O. L. §§ 6114-6125, attempted, after section 6121 was amended in 1915 (Laws 1915, p. 62) by adding a provision empowering ports to acquire and operate steamboats and other craft for transportation business, to exercise such powers, although the amendment had not been accepted by the voters of the port. Const. art. 11, § 2, provides that corporations may be formed under the general law but shall not be created by special laws, that the Legislature shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town, and that the voters of each city and town may enact and amend their municipal charter subject to state laws. Article 4, § 1a, declares that the initiative and referendum powers reserved to the people are reserved to the legal voters of every municipality and district as to all local and special and municipal legislation, and that the manner of exercising the power shall be prescribed by general laws, except that cities and towns may provide for the manner of exercise. *Held*, that as, in view of the two constitutional provisions, the Legislature is not precluded from amending laws previously passed concerning municipalities other than towns or cities, and as a port can exercise no power unless authorized by law, the port may, though the amendment was not adopted by its electors, engage in transportation business; such adoption being unnecessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 126; Dec. Dig. ¶47.]

Bean, J., dissenting.

In Banc. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by the State, on the relation of C. W. Mullins, District Attorney of Clatsop County, against the Port of Astoria, a municipal corporation, and G. B. McLeod and others, commissioners of the Port. From a decree dismissing the suit, plaintiff appeals. Affirmed.

In 1909 the Legislature enacted a law—

"to provide for incorporation under general law of ports in counties bordering upon bays or rivers navigable from the sea or containing bays or rivers navigable from the sea, and to provide for the manner of incorporating such ports and defining the powers of ports so incorporated."

The statute appears as chapter 39 in Laws of 1909, and is codified in L. O. L. from section 6114 to 6125, inclusive. The purpose of the Legislature is accomplished by providing for a petition, an election, a canvass of the votes, and a proclamation of the result of the election. It is stated in section 6120, L. O. L., that from and after the date of the proclamation made by the county court the territory—

"embraced within the limits defined in such proclamation shall be a separate district to be known as the port whose name is specified in such proclamation, and the inhabitants thereof shall be a corporation by the name and style of the port specified in such proclamation, and as such shall have perpetual succession, and by the said names shall exercise and carry out the cor-

porate powers and objects hereinafter conferred and declared."

Under the terms of section 6121:

"Such corporation shall have power": (1) To improve all bays, rivers, and harbors within its limits and between its limits and the sea; (2) to contract with the government of the United States to do any part of the work of making or maintaining such a depth of water as the government of the United States may from time to time determine to make or maintain; (3) to exercise the right of eminent domain in carrying on any work which the port is authorized to do; (4) to exercise control of all bays, rivers, and harbors within their limits, and between their limits and the sea, with the power to make, change, or abolish wharf lines and "to make, establish, change, modify or abolish such rules and regulations for the use or navigation in such harbors and rivers, or the placing of obstructions therein or the removal of obstructions therefrom, as it may deem convenient, requisite or necessary or in the best interests of the maritime shipping and commercial interests of the said port, and the said rules and regulations so made by it to be enforced by such fines, penalties, and punishments as it in the exercise of sound discretion may deem necessary; and the fines or penalties so imposed or levied shall be recovered in the name of said corporation in any court of this state having jurisdiction of actions for the recovery of fines and penalties imposed by state laws, and shall inure and belong to said corporation, and all punishments so imposed shall be enforced in the name of said corporation in any of the courts of this state having jurisdiction of crimes and misdemeanors under said laws"; (5) to establish, maintain, and operate a tugboat and pilotage service in said port and between said port and the sea, and to that end to purchase, lease, and operate boats; (6) to acquire lands, to construct canals, and maintain and operate wharves, warehouses, and dry docks; (7) to do anything which may become requisite, necessary or convenient in carrying out any of the powers granted; (8) to borrow money and issue bonds; (9) to assess, levy, and collect taxes upon all property within its boundaries.

We read in section 6122, L. O. L., that:

"The power and authority given to corporations organized under the provisions of this act is vested in and shall be exercised by a board of commissioners, five in number, each of whom shall be a qualified voter within the limits of said corporation."

Within ten days from the issuance of the proclamation by the county court declaring that the legal voters have created a port, the Governor of the state appoints five commissioners, who shall serve for definite periods after which their successors are elected by the legal voters of the port.

The port of Astoria was organized in 1910 under the general law providing for the incorporation of ports. The Legislative Assembly in 1915 (Laws 1915, p. 62) amended section 6121 by adding the following:

"Also to acquire, charter, own, maintain and operate steamboats, power boats, vessels and water crafts for the transportation of all kinds of merchandise, passengers and freight for hire, and to engage generally in the coastwise trade and commerce both domestic and foreign and in transporting for hire all kinds of merchandise and freight. Also to establish, operate and maintain water transportation lines in any of the navigable waters of the state of Oregon and waters tributary thereto, any portion of which may touch the boundaries of such port. Also to own, acquire, construct, operate and maintain railroad terminal grounds and yards, and con-

struct, operate and maintain such line or lines of railroad, with necessary side track, turnouts and switches and connection and arrangements with other common carriers, as in the judgment of the port commissioners may facilitate water commerce between such point and points within the boundaries of the port as the port commissioners may from time to time determine, all for hire, and to carry and transport freight and to move passenger trains thereon and thereover for hire. Also to engage generally in the business of buying and selling coal, fuel oil and all kinds of fuel for steamboats and power boats and power vessels of all kinds, and generally to do and cause to be done all things necessary and convenient whether herein expressed or not to successfully carry out the powers herein granted."

After narrating the organization of the port and reciting the amendment to section 6121, L. O. L., the complaint alleges:

That the commissioners are claiming that the amendment of 1915 enlarged the powers of the port of Astoria so as to enable the board of commissioners to acquire and operate boats for the transportation of passengers and freight; that the legal voters of the port have never amended the charter of the port nor held an election for that purpose; that the "port of Astoria has properly and legally, in so far as it had the power, so to do passed, adopted, and ordained resolutions and ordinances in the manner provided by its act of incorporation, to establish, maintain, own, and operate steamboats, power boats, vessels and water crafts for the transportation of all kinds of merchandise, passengers, and freight for hire, and to establish, operate, and maintain water transportation lines upon the navigable waters of the state of Oregon"; that the port has already expended over \$5,000 for the purpose of establishing, operating, and maintaining water and transportation lines, and will, unless restrained, expend "the sum of \$100,000 to purchase, own, maintain, and operate steamboats, power boats, vessels, and water crafts for the transportation of all kinds of merchandise, passengers, and freight for hire, and to establish, operate, and maintain water transportation lines in the navigable waters of the state of Oregon and waters tributary thereto."

The complaint concludes with a prayer asking that the commissioners be restrained from acquiring or operating boats for the transportation of passengers or freight. The plaintiff declined to plead further after a demurrer to the complaint was sustained, and thereupon the court, rendered a decree dismissing the suit. The appeal prosecuted by the plaintiff presents only such questions as were raised by the demurrer.

C. W. Mullins, Dist. Atty., and Norblad & Hesse, all of Astoria, for appellant. W. W. Cotton, Arthur C. Spencer, and Carey & Kerr, all of Portland (Omar C. Spencer, of Portland, on the brief), amici curiæ. G. C. Fulton and A. C. Fulton, both of Astoria, for respondents.

HARRIS, J. (after stating the facts as above). It will be observed from the foregoing statement that the situation presented here is one where the port of Astoria was incorporated in 1910 under a general law which was enacted in 1909, and which did not, at the time of the incorporation of the port of Astoria, include the power to acquire and operate boats for the transportation of

passengers and freight; in 1915 the general law was amended so as to add to the powers of a port, previously enumerated and defined by the act of 1909, the right to maintain boats for the transportation of freight and passengers; the legal voters of the port have never held an election to decide whether they desire to exercise the new power named by the amendment; and the commissioners are acting on the assumption that the amendment of 1915 by its own force conferred upon all existing ports adequate authority to engage in the transportation business.

On the facts narrated by the complaint, the defendants argue that the Legislature possesses supervisory control over ports, and, when exercising such control, has full authority to regulate or enlarge or even to withdraw powers previously granted; that, when the Legislature does speak through a general law, which in any way affects existing ports, that general law by its own compelling force immediately operates upon all existing ports; and that therefore the amendment of 1915 by its own vigor conferred upon the port of Astoria and all other like corporations the right to operate boats for the transportation of passengers and freight. The plaintiff takes the position that the port of Astoria is a municipality with a charter which cannot be amended by the Legislature, and that therefore the port cannot engage in the transportation business until the legal voters first accept the privilege offered by the act of 1915 and incorporate the additional power into the charter by an election held for that purpose.

The difference in the conclusions reached by the litigants is traceable to the wide divergence of the opinions held by them concerning the proper construction to be placed upon section 2 of article 11 and section 1a of article 4 of the state Constitution. The storm center of the dispute between the parties hangs around the organic law, and on that account the two sections mentioned are here set down at length. Section 2 of article 11 reads thus:

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the state of Oregon."

Section 1a of article 4 declares that:

"The referendum may be demanded by the people against one or more items, sections, or parts of any act of the Legislative Assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more

items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum nor more than fifteen per cent. to propose any measure, by the initiative, in any city or town."

[1, 2] That portion of section 2 of article 11 which deals with the liquor traffic, commencing with the words "and the exclusive power," was incorporated into the Constitution in 1910; but all that part of the section which precedes the words last quoted, as well as section 1a of article 4 were adopted and became effective in 1906, and, so far as they relate to the same subject-matter, must be read and construed together. *McKenna v. City of Portland*, 52 Or. 191, 96 Pac. 552; *McMinville v. Howenstine*, 56 Or. 451, 465, 109 Pac. 81, Ann. Cas. 1912C, 193; *Branch v. Albee*, 71 Or. 188, 197, 142 Pac. 598; *Duncan v. Dryer*, 71 Or. 548, 552, 143 Pac. 644; *Kalich v. Knapp*, 73 Or. 553, 577, 142 Pac. 594, 145 Pac. 22; *Robertson v. Portland*, 149 Pac. 545, 547. As declared in *Branch v. Albee*, supra:

"In construing a constitutional provision, the whole provision is to be examined with a view to ascertaining the meaning of every part. The presumption is that every clause has been inserted for some useful purpose, and therefore the instrument must be construed as a whole, in order that its intent and general purposes may be ascertained; and, as a necessary result of this rule, it follows that, wherever it is possible to do so, each provision must be construed so that it will harmonize with all others, without distorting the meaning of any of such provisions, to the end that the intent of the framers of the provision may be ascertained and carried out."

While the prime purpose is to ascertain and give effect to the intention as expressed in the language employed, yet the two sections now being considered are designed to grant attributes of sovereignty to specified local subdivisions, and, such grant being a limitation on the power of the Legislature, it should be strictly construed as was properly held in *Thurber v. McMinville*, 63 Or. 410, 414, 128 Pac. 43; and this rule of construction must be applied here, notwithstanding the suggestion broached in *State v. Schluer*, 59 Or. 18, 27, 115 Pac. 1057, and regardless of the inference that may possibly be drawn from *Schubel v. Olcott*, 60 Or. 503, 515, 120 Pac. 375.

[3] Prior to 1906 the Legislature was granted authority to create a corporation for municipal purposes by special laws. Until that time section 2 of article 11 read thus:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amend-

ed, or repealed, but not so as to impair or destroy any vested corporate rights."

Under the present form of the organic law, however, the Legislative Assembly is prohibited from creating any kind of a corporation by a special law, but it has the power to provide for the formation of corporations under general laws, whether such corporations be private or public, essentially proprietary, or purely municipal, since section 2 of article 11 opens by stating:

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws."

See *Farrell v. Port of Columbia*, 50 Or. 169, 173, 91 Pac. 546, 93 Pac. 254; *Straw v. Harris*, 54 Or. 424, 431, 103 Pac. 777; *Branch v. Albee*, 71 Or. 188, 194, 142 Pac. 598; *Kalich v. Knapp*, 73 Or. 558, 567, 142 Pac. 594, 145 Pac. 22; *State ex inf. v. Gilbert*, 66 Or. 434, 439, 134 Pac. 1038; *State v. Hall*, 73 Or. 231, 239, 144 Pac. 475.

The first sentence of section 2 of article 11 employs the word "corporations," and therefore that comprehensive term, as used in the opening sentence of that section, includes private corporations. Both the permission to provide for the formation of corporations under general laws and the prohibition against the Legislative Assembly creating them by special laws apply to private as well as to other corporations; but, turning to section 1a of article 4, it will be observed that there private corporations are in no way referred to. It must also be noted that section 1a of article 4 speaks of "municipalities and districts," while section 2 of article 11 uses the terms "corporations," "municipality, city or town," and makes no mention of "districts." Both sections of the organic law do, however, occupy common ground when municipal corporations are considered. An analysis of the two sections will make it reasonably clear that two classes of municipalities are embraced: (a) Cities and towns, or pure municipalities, as we know them in this jurisdiction; and (b) all institutions which, though not cities and towns, are nevertheless municipalities within the purview of the Constitution. In the second sentence of section 2 of article 11 the Legislative Assembly is prohibited from interfering with any charter or act of incorporation for any "municipality, city or town," while the succeeding sentence grants the power to enact and amend their municipal charter only to the legal voters of every "city and town," and thus by implication denying the right to enact or amend a charter to the legal voters of municipalities which do not rise to the dignity of a city or town. The suggested classification of municipalities is still further emphasized by section 1a of article 4; for there initiative and referendum powers are reserved to the legal voters "of every municipality and district." The manner of exercising the conferred powers "shall be prescribed by general laws"; but "cities

and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation." The circumstance that the initiative and referendum powers are conferred upon all the legal voters of "every municipality and district" with permission granted to none of such municipalities or districts, except the single class of cities and towns, to prescribe their own procedure for exercising the granted powers, only accentuates the idea that this section of the Constitution embraces not only cities and towns, but also a class of institutions which are municipalities within the meaning of the organic law, although not cities and towns. If a city or town does not adopt a method of its own for the exercise of the right to initiate and refer municipal legislation, such municipality may make use of a general law enacted by the Legislature; but the initiative and referendum powers lie dormant, and cannot be availed of by a municipality, which is not a city or town, except in the manner prescribed by general laws, because cities and towns are the only municipalities which are authorized to provide for the manner of exercising the powers. *McKenna v. Portland*, 52 Or. 191, 195, 96 Pac. 552; *Kiernan v. Portland*, 57 Or. 454, 459, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 839; *State ex rel. v. Kelsey*, 66 Or. 70, 78, 133 Pac. 806; *Long v. City of Portland*, 53 Or. 92, 96, 98 Pac. 149, 111; *McBee v. Springfield*, 58 Or. 459, 462, 114 Pac. 637; *Schubel v. Olcott*, 60 Or. 503, 508, 120 Pac. 375; *State ex rel. v. Portland Ry., L. & P. Co.*, 56 Or. 32, 37, 107 Pac. 958; *Duncan v. Dryer*, 71 Or. 548, 552, 143 Pac. 644; *State ex inf. v. Gilbert*, 66 Or. 434, 134 Pac. 1038.

There is yet additional evidence that municipalities other than cities and towns are included within the embrace of the Constitution. It is interesting to note that ever since Oregon was admitted to statehood section 9 of article 11 has formed a part of the state Constitution, and the language of that section recognizes the existence of municipalities other than cities and towns, for the wording is, "no county, city, town or other municipal corporation"; and it is proper to add the observation that in *Cook v. Portland*, 20 Or. 580, 584, 27 Pac. 263, 13 L. R. A. 533, this court, when speaking of section 9 of article 11, declared that:

"Here is a direct interpretation from the Constitution itself. A municipal corporation is not necessarily a county, city or town."

Furthermore, the existence of the two classes of municipalities has been recognized by the judiciary, not only before 1906, but since the adoption of section 2 of article 11 and section 1a of article 4 of the Constitution. *Acme Dairy Co. v. Astoria*, 49 Or. 520, 524, 90 Pac. 153; *Schubel v. Olcott*, 60 Or. 503, 510, 120 Pac. 375. We conclude, therefore, that the Constitution is not confined in its operation to cities and towns, but that the term "municipality" signifies more, and con-

sequently includes institutions other than cities or towns.

[4] It will now be necessary to determine whether the defendant port is a municipality within the meaning of the organic law. While we recognize the difference between a corporation organized "for municipal purposes," as was permitted by section 2 of article 11 prior to 1906, and a pure municipality like a city, still the test for determining the existence of a municipality is as prescribed in *Cook v. Portland*, 20 Or. 580, 586, 27 Pac. 263, 13 L. R. A. 533, where this court held that the port of Portland was created for municipal purposes, and that it was therefore such a corporation as the Legislature could create by a special law.

"The test of a corporation for municipal purposes adopted by this court seems to have been the right or power to exercise some of the functions of government, and this we apprehend is the true test."

The Legislature has accorded to ports some of the qualities of municipal corporations; for we read in the first section of chapter 39, Laws 1909 (section 6114, L. O. L.), that:

"Municipal corporations designated as ports may be incorporated * * * in manner as in this act hereinafter provided."

A port exercises some of the functions of government. Among the powers enumerated the port is authorized—

"to make, establish, change, modify or abolish such rules and regulations for the use or navigation in such harbors and rivers, or the placing of obstructions therein or the removal of obstructions therefrom, as it may deem convenient, requisite or necessary or in the best interests of the maritime shipping and commercial interests of the said port, and the * * * rules and regulations so made by it to be enforced by such fines, penalties, and punishments as it in the exercise of sound discretion may deem necessary; and the fines or penalties so imposed or levied shall be recovered in the name of said corporation in any court of this state having jurisdiction of actions for the recovery of fines and penalties imposed by state laws, and shall inure and belong to said corporation, and all punishments so imposed shall be enforced in the name of said corporation in any of the courts of this state having jurisdiction of crimes and misdemeanors under said laws."

It is true that "rules" and "regulations" are the terms employed; but the mere names are not conclusive, because the thing named is described in detail, and from the description the substance is known, and the thing called a "rule" or "regulation" is, in fact, an ordinance or a municipal law carrying a fine or penalty or punishment for a violation. It is clear then that a port possesses at least some of the characteristic qualities even of a pure municipality.

The act of 1909 gives further recognition to ports as municipalities by carefully providing for the operation of the initiative and referendum. It is set forth in section 6124, L. O. L. (section 8 of chapter 39, Laws of 1909), thus:

"In the exercise of the initiative and referendum powers reserved under the Constitution of

the state of Oregon to the legal voters of every municipality and district as to all local, special, and municipal legislation of every character in and for their respective municipalities and districts the president of the board of commissioners of said corporation shall exercise the duties of mayor of a city or town and the secretary shall perform the duties of auditor or recorder of a city or town, and the attorney of the corporation shall perform the duties of the attorney of a city or town, and if there be no attorney of said corporation then the duties required of attorney shall be performed by the secretary of such corporation."

The Legislature has therefore viewed a port as a municipality: (a) By defining it to be a municipality; (b) by granting authority to exercise functions of government, to enact certain laws, and to provide fines, penalties, and punishments for violations; and (c) by making provisions for the operation of the initiative and referendum powers. This court has confirmed the views of the law-makers by classing a port with municipal corporations. *Straw v. Harris*, 54 Or. 424, 430, 103 Pac. 777; *State ex rel. v. Port of Bay City*, 64 Or. 139, 143, 129 Pac. 496; *Cook v. Portland*, 20 Or. 580, 27 Pac. 263, 13 L. R. A. 533; *Kiernan v. Portland*, 57 Or. 454, 466, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339; *State ex rel. v. Swigert*, 59 Or. 132, 133, 116 Pac. 440. When speaking of the port of Toledo in *Mackay v. Port of Toledo*, 152 Pac. 250, 252, this court says:

"It must be conceded that defendant is a municipal corporation" within the meaning of section 358, L. O. L.

[5] While a port is neither a city nor a town, and although it is not necessary to attempt the solution of any problem growing out of the use of the initiative and referendum powers when exercised by cities and towns, nevertheless a survey of our own judicial utterances made concerning pure municipalities, when considered in their relation to the Legislature, may afford some aid in reaching a correct decision of the instant controversy. Powers exercisable by cities and towns may be placed in two separate classes, which, for the sake of brevity and the want of better terms, will be designated as: (1) Intramural; and (2) extramural. When the legal voters of a city enact municipal legislation which operates only on themselves and for themselves, and which is confined within and extends no further than the corporate limits, then such voters are exercising intramural authority. When, however, the legal voters of a city attempt to exercise authority beyond the corporate limits of their municipality, they are using an extramural power.

[6] By the plain provisions of the Constitution the Legislature is prohibited from enacting, amending, or repealing a city charter by a special law. The language employed in section 2 of article 11 has been the subject of much discussion, resulting in a contrariety of opinion as to whether the Legislature possesses authority to enact a general law when it has the effect of amending the charters of

cities and towns. Even this court has not followed an unswerving course when considering the right of the Legislature to enact general laws affecting the intramural powers of cities. Opinions which either hold or assume that the Legislature is permitted to pass general laws regulating intramural authority appear in many adjudications. *Straw v. Harris*, 54 Or. 424, 437, 103 Pac. 777; *Kiernan v. Portland*, 57 Or. 454, 467, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339; *State ex rel. v. Port of Tillamook*, 62 Or. 332, 341, 124 Pac. 637, Ann. Cas. 1914C, 483; *Churchill v. Grants Pass*, 70 Or. 283, 288, 141 Pac. 164; *State ex inf. v. Gilbert*, 66 Or. 434, 439, 134 Pac. 1088; *McMinnville v. Howenstine*, 56 Or. 451, 457, 109 Pac. 81, Ann. Cas. 1912C, 193; *State ex rel. v. Swigert*, 59 Or. 132, 135, 116 Pac. 440; *West Linn v. Tufts*, 146 Pac. 986, 987. See, also, *California-Oregon Power Co. v. City of Grants Pass* (D. C.) 203 Fed. 173, 175; *Portland Ry., L. & P. Co. v. City of Portland* (D. C.) 210 Fed. 667, 672; and the dissenting opinions in *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 145 Pac. 22. The right of the Legislature to amend municipal charters by general laws has been squarely denied in *Branch v. Albee*, 71 Or. 188, 142 Pac. 598; *Kalich v. Knapp*, supra; *Pearce v. Roseburg*, 150 Pac. 855, 859.

The legal voters of cities and towns are not obliged to look to the Legislature for the right to exercise any intramural power; but the whole sum of intramural authority is set at large, and the legal voters may exercise all of that authority or only such part of it as they may desire, subject, of course, to the Constitution and criminal laws of the state, and subject also to the right of the people of the commonwealth to amend charters or enact supervisory legislation by the use of the initiative. *Robertson v. Portland*, 149 Pac. 545, 547. Extramural authority, however, is not available to the legal voters of cities and towns, unless the right to exercise it has first been granted either by a general law enacted by the Legislature or by legislation initiated by the people of the whole state. The right to employ intramural authority finds its source in the language of the Constitution, because the legal voters of cities and towns are by that instrument expressly empowered to enact and amend their own charters; but permission to employ extramural authority must be granted to cities and towns before the privilege can be exercised. One power coexists with the Constitution, while the other power does not exist at all, unless the people of the whole state either grant the authority themselves by the initiative or extend the privilege through their representatives, the Legislature. *Thurber v. McMinnville*, 63 Or. 410, 415, 128 Pac. 43; *Branch v. Albee*, 71 Or. 188, 205, 142 Pac. 598; *Coleman v. La Grande*, 73 Or. 521, 525, 144 Pac. 468; *Kalich v. Knapp*, 73 Or. 558, 578, 142 Pac. 594, 145 Pac. 22; *State ex rel. v. Port of Tillamook*, 62 Or. 332, 341, 124

Pac. 637, Ann. Cas. 1914C, 483; *Riggs v. Grants Pass*, 66 Or. 266, 268, 134 Pac. 776; *Couch v. Marvin*, 67 Or. 341, 345, 136 Pac. 6; *City of McMinnville v. Howenstine*, 56 Or. 451, 466, 109 Pac. 81, Ann. Cas. 1912C, 193. The opinion of Mr. Justice King in the last-mentioned case is not in harmony with what is said here, but the reasoning of that opinion has never been followed, and is now disapproved, although a correct result was reached. Precedents have firmly established the rule that extramural power cannot be employed by cities and towns unless a law exists permitting it, and some prior adjudications have advanced a step further, and held that a general law enacted by the Legislature permitting the exercise of extramural power does not by its own force ingraft that power upon the charter of a city, but the general law may be likened to a continuous offer of a power which nevertheless cannot be used until the legal voters of the city have accepted the offer by amending their charter so as to include the proffered power. *Riggs v. Grants Pass*, 66 Or. 266, 270, 134 Pac. 776; *Kalich v. Knapp*, 73 Or. 558, 564, 142 Pac. 594, 145 Pac. 22. While it may be dictum, still it would seem that there is much force in the contention that, if a city cannot exercise a given power unless permission is first granted, and if the Legislature can lawfully grant that permission, then the Legislature may with equal right regulate and supervise the power granted or, unless prevented by the intervention of vested rights, withdraw it entirely.

[7] We have determined that a port is a municipality within the meaning of the Constitution, although it is not a city or a town, but we have yet to ascertain the relations subsisting between a port and the Legislature. Ports cannot be created by the Legislature by special laws (*Farrell v. Port of Columbia*, 50 Or. 169, 91 Pac. 546, 93 Pac. 254), but they may be formed under general laws (*Straw v. Harris*, supra). All corporations may be formed under general laws. All corporations cannot, however, enact or amend their own charter or acts of incorporation. Only one class of corporations is authorized to enact or amend a charter. The right of a city or town to enact or amend its charter exists only because the third sentence of section 2 of article 11 of the Constitution creates the right; and the language which confers the privilege by necessary implication excludes all other corporations. Cities and towns are not the only corporations embraced by section 2 of article 11 because private corporations are included in the first sentence, nor are cities and towns the only municipalities mentioned in that section of the organic law. At the time of the adoption of section 2 of article 11 municipalities other than cities and towns were in actual existence, and the very section of the organic law which accords to cities and towns the

right to enact and amend their own charters also recognizes that other municipalities than cities and towns did exist, and when a particular class of municipalities, as cities and towns, was selected from municipalities in general and favored with a specified privilege, the single act of selection was of itself equivalent to saying that no other kind of municipalities could exercise the same privilege. The argument has been made and approved in at least one case that the amendment of a charter is municipal legislation within the meaning of section 1a of article 4, and that the right to enact municipal legislation included the right to amend a charter or act of incorporation of a port. *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145. As already noted, both sections of the organic law must be construed together. Both sections were adopted at the same time. It is plain that section 2 of article 11 gives cities and towns power to enact or amend their own charters, while other municipalities are excluded; and, construing the two sections of the Constitution together, it cannot be said that section 1a of article 4 was designed to grant a power which a companion section purposely withholds. It is incongruous to assert that the power to amend is granted by section 1a of article 4 and prohibited by section 2 of article 11. Both sections of the Constitution operate with equal force; one is not more potent than the other. However, there is no conflict in the organic law. By the terms of section 1a of article 4 every municipality, whether it be a city or town, or whether it be a port, has the right to employ the initiative and referendum powers "as to all local, special, and municipal legislation," and this means that such municipality may apply the initiative and referendum powers when enacting municipal legislation to carry out and make effective an authority previously granted. A city is chartered to improve streets, to assess the cost of the improvement against adjoining property, and to enact ordinances for carrying out the granted power. The ordinances which are enacted in the exercise of the power to improve constitute municipal legislation. It is true that amending a charter may in an enlarged sense constitute municipal legislation; but the power to enact that kind of municipal legislation is confined to cities and towns, and exists only because of section 2 of article 11. A port is granted power to adopt rules and regulations carrying fines, penalties, and punishments, to be imposed for any violations; and when the port, in pursuance of the previously granted power, prescribes rules and regulations with fines, penalties, or punishments, it is adopting municipal legislation within the meaning of section 1a of article 4. All municipalities are granted the initiative and referendum powers, but none except cities and towns are favored with the privilege of providing for

the manner of exercising those powers thus granted. All classes of municipalities may be formed under general laws, but none except cities and towns are favored with the privilege of enacting or amending their own charters or acts of incorporation. It seems clear then that municipal legislation, within the meaning of section 1a of article 4, when applied to municipalities, other than cities and towns, refers to legislation which is permitted and made necessary for carrying into effect a lawful power previously granted. It must be remembered, too, that "municipal legislation" does not embrace every step taken or act done by a municipality. *Long v. City of Portland*, 53 Or. 92, 101, 98 Pac. 149, 1111. A port has no right to legislate unless that right is first created by a law; but, when the right to legislate is conferred, then section 1a of article 4 immediately operates, and the initiative and referendum are at once made available, and the exercise of such power to legislate is municipal legislation. If it does not rise to the dignity of a city or town, a municipality cannot take unto itself and exercise any power whatever, unless the right is first granted by a law passed by the people of the whole state or by a general statute enacted by the Legislature. The fact that a port cannot exercise any power at all unless permitted by some law passed by the Legislature or enacted by the people of the whole state with the aid of the initiative, and the circumstance that a port is not a city or town, and therefore cannot amend its own charter or act of incorporation, lead with a compelling force to the conclusion that the Legislature has ample authority to amend laws previously passed by it concerning ports. Moreover, saying that a port cannot exercise any power unless expressly permitted by the Legislature or allowed by the people of the entire state, and stating that a port cannot amend its own charter or act of incorporation, when taken together, are equivalent to a declaration that the Legislature possesses ample authority to adopt amendments which at once operate on all ports. The Constitution does not carry any inhibition against the Legislature enacting general laws which regulate or even withdraw powers previously granted by that body of lawmakers to municipalities, which are not cities or towns, unless vested rights create an insurmountable obstacle. When the Legislature grants a power to ports, that power is not irretrievably lost to the Legislature; but the same lawmaking body may afterwards by a general law regulate, add to, lessen, or even withdraw that power to the same extent as before 1906. A striking illustration of the results which would be worked out by the argument of plaintiff is furnished by the statute providing for the formation of ports. Section 6121, L. O. L., declares that:

"To the full extent which the state of Oregon might itself exercise and control or to which it can grant to corporations organized under the provisions of this act the right to exercise the same, corporations organized under the provisions of this act shall be and are hereby granted full control of all bays, rivers, and harbors within their limits, and between their limits and the sea, with full power and authority to, from time to time, make, establish, change or abolish wharf lines in such harbors and rivers."

By the terms of the statute the port of Astoria is clothed with all the power of control over the Columbia river from that port to the sea; and yet another port may be organized farther up the river, and the second port is also armed with the same complete control over the waters of the river to the sea, so that two public bodies of exactly equal potency, and possessing powers identically the same in degree, quality, and kind, are applying all their powers to the same thing, namely, the Columbia river from the port of Astoria to the sea. Two or more ports cannot each exercise the whole sum of jurisdiction over the same thing at the same time. It is like the meeting of two irresistible forces. If the legal voters of a port have the right to decide whether a general law amending the powers of ports shall apply to that port, then such legal voters have an equal right to decide for themselves that they will not relinquish or suffer the impairment of any power previously granted to them; and, if they can decline to surrender a power, they can refuse to permit the Legislature ever again to enact any legislation which in the slightest infringes upon the previously granted power to control the Columbia river to the sea; and, furthermore, any power whatsoever, when once granted to a port and accepted by it, would be forever lost to the Legislature from the very moment of the grant. But the language of the Constitution does not contemplate that a port, when formed under a general law fashioned by the Legislature, assumes the shape of an imperium in imperio. A port is not endowed with the quality of independence, but it is subordinate to the Legislative Assembly. When the Legislature grants power to a port, that power is not thereby irretrievably lost to the grantor, but the grant may be increased or diminished, or even revoked if vested rights have not intervened. The port of Astoria is now clothed with the powers which were added by the act of 1915. The views herein expressed overrule *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145.

Reducing a portion of the discussion to the form of a recapitulation: (1) No corporation may be created by a special law passed by the Legislative Assembly, but all kinds of corporations may be formed under general laws passed by the Legislature. (2) Section 2 of article 11 and section 1a of article 4 employ the term "municipality" in a comprehensive sense, so as to include: (a) Pure municipalities like cities and towns; and (b) all other municipalities, including ports.

(3) Cities and towns are favored with two distinct privileges not awarded to any other municipality: (a) They may enact and amend their own charters; (b) they may prescribe their own procedure for the exercise of the initiative and referendum. (4) Powers exercisable by cities and towns are of two classes: (a) Intramural; and (b) extramural. There are precedents holding that cities and towns are immune from interference by the Legislature when exercising intramural powers, and prior adjudications may also be found which decide that the Legislature may enact general laws affecting the exercise of intramural powers. The rule is now established that cities and towns cannot use extramural powers unless first permitted to do so by a law passed by the Legislature or the people of the whole state. (5) Section 1a of article 4 does not empower a municipality to take unto itself any municipal authority, but the language "local, special, and municipal legislation" only means that, if a power which has been lawfully granted carries with it the right to legislate, then that right to legislate is "municipal legislation." This section of the Constitution does not mean that a municipality can legislate unto itself a power to legislate. None but a city or a town can legislate a power unto itself without the aid of a statute, and that privilege is confined to the exercise of intramural powers. Excluding cities and towns, all municipalities may be controlled, supervised, and regulated by general laws passed by the Legislature, provided such general laws do not impair the initiative and referendum powers concerning "municipal legislation," to the same extent as before 1906, when section 2 of article 11 and section 1a of article 4 became parts of the Constitution.

The decree of the circuit court is affirmed.

BEAN, J. (dissenting). But one question is necessarily involved in this suit, viz.: What force or construction shall be given to chapter 53, Laws of 1915, amending section 6121, L. O. L.? In strict harmony with that part of section 2 of article 11 of the Constitution which provides that "corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws," the Legislature enacted chapter 39, Laws of 1909 (section 6114, L. O. L., etc.), providing for the incorporation under general law of municipalities designated as ports. The act prescribes a form of petition for an election for the organization of a port, a form for proclamation of the result, and a form for an act of incorporation, or what may be termed a charter for the municipality, when the same is adopted by the formation of a port under the provisions of the act. The law has been sustained and upheld at various times. *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Bennett Trust Co. v. Sengstacken*, 58 Or. 333, 113 Pac. 863. This has always been done, as the

writer understands, upon the theory that such general law furnishes convenient and serviceable machinery or forms to be used in the creation of ports. It does not purport to create a port, or confer any authority upon such a municipality, except by adoption thereof, by the legal voters of the district desiring to come within its provision and complying therewith; in other words, ports are purely voluntary corporations. In 1910 the port of Astoria was organized in conformity to the directions of the act and pursuant to a general plan inaugurated and authorized by section 1a of article 4 and section 2 of article 11, as amended in 1906, providing for local self-government. In making this compact the people of the port of Astoria adopted as their act of incorporation or charter the many provisions of the law of 1909 detailing the powers and privileges of ports so organized. This document then served the people of that district as their warrant of authority or charter, for all intents and purposes, as fully as though the same had been enacted for this particular port by the people of the whole state. All this was in perfect harmony with the Constitution and the statute. In 1915 the Legislative Assembly, in furtherance of the plain mandate of our organic law, deeming it wise to extend the provisions of the act of 1909, and provide a further plan so that ports might avail themselves of additional privileges, if the people residing therein so desired, adopted chapter 53, Laws of 1915, amending section 6121, L. O. L., by adding to subdivision 5 thereof the following:

"Also to acquire, charter, own, maintain and operate steamboats, power boats, vessels and water crafts for the transportation of all kinds of merchandise, passengers and freight for hire, and to engage generally in the coastwise trade and commerce both domestic and foreign and in transporting for hire all kinds of merchandise and freight. Also to establish, operate and maintain water transportation lines in any of the navigable waters of the state of Oregon and waters tributary thereto, any portion of which may touch the boundaries of such port. Also to own, acquire, construct, operate and maintain railroad terminal grounds and yards, and construct, operate and maintain such line or lines of railroad, with necessary side track, turnouts and switches and connection and arrangements with other common carriers, as in the judgment of the port commissioners may facilitate water commerce between such point and points within the boundaries of the port as the port commissioners may from time to time determine, all for hire and to carry and transport freight and to move passenger trains thereon and thereover for hire. Also to engage generally in the business of buying and selling coal, fuel oil and all kinds of fuel for steamboats and power boats and power vessels of all kinds, and generally to do and cause to be done all things necessary and convenient whether herein expressed or not to successfully carry out the powers herein granted."

This, it should be kept in mind, should be read into the act of 1909 as a part thereof. In neither of the legislative enactments is any intention evinced to make the amendment mandatory or to in any way change

any act of incorporation of a port then existing. On the other hand, the general plan prescribed in the first act is carefully preserved. The constitutionality of the amendment is not and cannot be questioned. *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Bennett Trust Co. v. Sengstacken*, 58 Or. 333, 113 Pac. 863. The commissioners of the port of Astoria, however, reading this amendment, and apparently forgetting that it was merely a suggested plan to be availed of by the voters or not, as they might elect, proceeded to enforce its provisions as though it had been regularly adopted, and prepared to expend the sum of \$100,000 in the purchase and operation of steamboats, power boats, vessels, and water crafts, etc., without the sanction in any manner of the legal voters of the port. This suit is the result.

The position of the commissioners is not sanctioned by either the organic law or legislative enactment. Reverting to the last section of the act of 1909, of which section 6121, L. O. L., as amended, is now a part, we find the following declaration:

"Nothing in this act contained shall be construed as in any way altering or abridging powers now exercised or enjoyed, or by law authorized to be exercised or enjoyed by or reserved unto any such port or corporation heretofore created by and now existing under the laws of this state: Provided, however, that any such port or corporation heretofore organized and now in existence, may reincorporate under the provisions of this act."

This emphasizes the intent expressed in the general features and language of the law to the effect that it was not supposed by the lawmakers that the amendatory enactment would be taken as a charter before being adopted by the electors of a port. Nowhere in the act is it manifest that it was the legislative will that the original or amendatory act should have a retroactive effect or change the status of the existing port. If, as declared in the statute, it is necessary for a port to incorporate under and adopt as its law any part of the statute, it is just as essential that it adopt the whole, or the amendment of 1915, in the same manner. For a port to do this works no hardship; otherwise it would be possible for the Legislative Assembly to pass a general law for the organization of ports with little power, say 1 per cent., and after several ports were incorporated thereunder to amend the several acts of incorporation or charters by enacting a general law giving municipalities 99 per cent. of the authority, without the consent of the electors of the district. In 1906 the people of the state changed their organic law and ordained as follows:

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to

the Constitution and criminal laws of the state of Oregon."

That a port is a municipality is not questioned. To give the act of 1915 the force contended for by defendants would be to hold that the Legislative Assembly may enact, amend, or repeal the act of incorporation of the port of Astoria. That the Legislature is inhibited from changing the act of incorporation of a municipality known as a port is just as plain as that such lawmaking body is enjoined from enacting, amending, or repealing the charter of a city or town. *Acme Dairy Co. v. Astoria*, 49 Or. 520, 90 Pac. 153; *Branch v. Albee*, 71 Or. 188, 142 Pac. 598; *City of Portland v. Nottingham*, 58 Or. 1, 112 Pac. 28; *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 145 Pac. 22; *McKeon v. City of Portland*, 61 Or. 385, 122 Pac. 291; *Pearce v. Roseburg*, 150 Pac. 855; *State v. City of Portland*, 65 Or. 273, 133 Pac. 62. Further, as already stated, the legislative branch of the state government has not expressed a willingness to amend such an act. It has, in so far as it has the power, granted the privilege to the people of the different ports to change the law under which they exist. The port law is in the nature of an enabling act. It is analogous to our old local option liquor law, which was ineffective in any part of the state until voted upon and adopted. Section 1a of article 4 of the Constitution is as follows:

"The initiative and referendum powers reserved to the people of this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. * * *

This, as stated, was adopted at the same time as the first revision of section 2 of article 11, and it is well settled that both should be read in pari materia. In *Kalich v. Knapp*, supra, Mr. Justice McNary declared the rule to be:

"The Constitution as it is now built withholds the Legislature from amending any municipal charter by legislation, be it direct or indirect, general or special, which is properly and purely the subject of municipal concern and regulation."

In *Pearce v. Roseburg*, 150 Pac. 855, at page 859, the amended charter of the city of Roseburg did not limit the amount of money to be raised by taxation for the purpose of providing a sinking fund for the payment of the bonds mentioned in the amendment to the charter. Mr. Justice McBride, speaking for the court, said:

"The writer * * * considers it is settled in this state that as to matters purely municipal the state Legislature cannot intermeddle by either general or special legislation, although as to matters affecting the people generally the power of the Legislature is still unlimited, and the latter proposition cannot be maintained un-

less this court shall materially modify its holding in *Kalich v. Knapp*."

In *Robertson v. City of Portland*, 149 Pac. 545, at page 547, Mr. Justice Harris, speaking for the court, announced the following:

"If the electors of a municipality choose to do all things that may lawfully be done, they must manifest that choice by their charter, and, if they are contented with the right to exercise less than the whole power, their decision is likewise written in the charter. When the Legislature passed a special law amending a charter, it was deemed to be a special grant of power, and, if the voters of the entire state enact special legislation affecting a city charter, it would receive a like construction. The people of any municipality can now do that which the Legislative Assembly can no longer do, but at one time could do. * * * The charter of a city is to its citizens and officers the measure of their authority over persons and property."

Riggs v. Grants Pass, 66 Or. 266, 134 Pac. 776, is a case which, if followed, would be decisive of the one at hand. The city had by charter amendment authorized a bond issue of \$200,000 for the purpose of building a railroad from the city to a point outside its limits. This amendment was adopted in 1912, at which time there was in existence no legislative authority from the state to exercise these extramunicipal rights. In 1913 the Legislature passed an act authorizing cities to own and operate railroads running to points outside their limits; the law being general in its nature. One of the questions considered in the case was whether this act of the Legislature validated the charter amendment, or in itself operated as an amendment of the city charter. Mr. Justice Eakin, speaking for this court, stated:

"Defendants insist that the legislative act of February 27, 1913 (page 541 of the Laws of 1913), gives validity to the charter amendment of December 18, 1912; but it can have no retrospective effect. It does not operate as an amendment of city charters; but charters may be amended to take advantage of powers granted. * * * The attempted amendment to the charter was unauthorized when adopted, and the legislative act could give it no vitality. Neither it nor the legislative act authorized a particular issue of bonds to build a particular railroad or purchase any particular real estate; but before the city can have the benefit of the statute it must act affirmatively by making its charter conform to it, and then proceeding in the manner provided in its charter and ordinances."

So in *Churchill v. Grants Pass*, 70 Or. 283, 141 Pac. 164, the right of the same city to own and operate a railroad to a point outside its limits as mentioned in the last case was involved. It was held, in substance, that since the state had by general law given its consent to the exercise of this power, and the legal voters had determined in their charter to exercise the power, no objection could be found upon those grounds, clearly showing that two things are necessary in order to authorize a municipality to act in such matters, viz.: (1) The conferring of power; (2) the embracing of the authority within the charter or act of incorporation.

The construction of the law contended for would be repugnant to both sections of the

Constitution quoted above. *Farrell v. Port of Portland*, 52 Or. 582, 98 Pac. 145; *Kalich v. Knapp*, supra. Overruling *Farrell v. Port of Portland*, supra, does not pave the way for upholding the decree of the lower court in accordance with the majority opinion. It is further necessary to eliminate from our organic law the injunction against the Legislative Assembly amending any "act of incorporation for any municipality." If the power to amend such a municipal document under a general law does not reside in the people of a port, then, such authority having been plainly withdrawn from the Legislative Assembly, resort must be had to the electorate of the whole state. This procedure does not seem to have been contemplated under the home rule scheme. Some of the difficulties encountered in the *Port of Portland Case* have been obviated by the passage of the general port law. That case has been a guide for about eight years and cited with approval many times by this court. In the opinion of the writer, the majority opinion unsettles several other decisions in this state under which rights have been established, and suggests its own weakness in this: That after a few years its force, too, may perchance be annulled. As to this phase of the case we adopt as apropos the language of Mr. Justice Burnett in his dissenting opinion in *Kalich v. Knapp*, 73 Or. at page 587, 145 Pac. at page 27:

"Another doctrine equally well settled is that of stare decisis, to the effect, that, when a decision has once been rendered, it amounts to an authoritative construction of the law, and should not be disregarded or overturned, except for very cogent reasons showing beyond question that on principle it was wrongly decided. The principle is that laws are largely conventional rules of action, and it is more important that the rule be settled as a guiding precept to the public than that by the action of the courts the law should be made to fluctuate like the tides. *State v. Clark*, 9 Or. 486; *Multnomah County v. Sliker*, 10 Or. 65; *Despain v. Crow*, 14 Or. 404, 12 Pac. 806; *Corvallis v. Stock*, 12 Or. 391, 7 Pac. 524; *Sheridan v. Salem*, 14 Or. 328, 12 Pac. 925; *Paulson v. Portland*, 16 Or. 450, 19 Pac. 450, 1 L. R. A. 673; *Everding v. McGinn*, 23 Or. 15, 35 Pac. 178."

Yet, in order to conform to the will of the commissioners of a port exercising their supposed functions without the sanction of the people, whom they were chosen to serve, we are asked to give a force to a statute which was never intended by the makers thereof. This would open the door for the enactment by the Legislature of laws governing ports, independent of the voters of the locality affected, and compel them to bear burdens of taxation which they never voluntarily assumed—a step in return to the old system which the people of the state of Oregon have repudiated and laid aside.

For these reasons, I am compelled to withhold my assent to the classical opinion by Mr. Justice HARRIS.

(79 Or. 260)
STERRETT & OBERLE PACKING CO. et al.
v. CITY OF PORTLAND et al.

(Supreme Court of Oregon, Jan. 25, 1916.
On Petition for Rehearing, Feb. 15, 1916.)

1. FOOD — POWERS OF STATE — POLICE POWER.

Laws for the inspection of foodstuffs are within the police power of the state.

[Ed. Note.—For other cases, see *Food*, Cent. Dig. §§ 1, 2; Dec. Dig. —1.]

2. FOOD — POLICE POWER — EXERCISE BY CITY.

Under the Portland charter, conferring power to require inspection of articles of food, the city may exercise the state police power as to the inspection of foodstuffs.

[Ed. Note.—For other cases, see *Food*, Cent. Dig. §§ 1, 2; Dec. Dig. —1.]

3. CONSTITUTIONAL LAW — CLASS LEGISLATION — INVALIDITY.

A municipal ordinance requiring that plants of those persons without the city slaughtering more than five animals a week should be subject to inspection, and providing that persons slaughtering less than that number might dispose of their meats upon presenting the carcasses for inspection in the city, is not invalid as an unreasonable classification.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. —208.]

4. FOOD — POWERS — EXTRATERRITORIAL POWERS.

While a city cannot enforce an ordinance providing for the inspection of slaughterhouses and meats as to establishments located without its boundaries, it may require submission to inspection as a condition precedent to the sale of the meats within the city.

[Ed. Note.—For other cases, see *Food*, Cent. Dig. §§ 3, 4; Dec. Dig. —3.]

5. CONSTITUTIONAL LAW — POLICE POWER — JUSTIFICATION.

The police power of the states and other governmental subdivisions is justified on the theory that the welfare of the people is the supreme law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. —81.]

6. CONSTITUTIONAL LAW — CLASS LEGISLATION — VALIDITY.

A statute designed to prevent spread of contagious diseases, or to protect public health, which operates on all alike, is not invalid under the state or federal Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. —81.]

7. CONSTITUTIONAL LAW — CONSTRUCTION — VALIDITY.

The constitutionality of a statute or ordinance is usually to be tested by what it authorizes and permits to be done.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 43-45; Dec. Dig. —47.]

8. CONSTITUTIONAL LAW — CLASS LEGISLATION — VALIDITY OF CLASSIFICATION.

To justify a classification in a statute or ordinance, there must be some difference between the classes which bears a just and proper relation to the purposes of the law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. —208.]

9. CONSTITUTIONAL LAW — CLASS LEGISLATION — INVALIDITY.

An ordinance, providing for the inspection of meats and slaughterhouses located without the

city, as a condition precedent to the sale of products within the city, but exempting slaughterhouses and packing plants subject to federal inspection laws is invalid in so far as it prescribes higher inspection regulation than those fixed by the federal laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.]

In Banc. Appeal from Circuit Court, Multnomah County; William N. Gatens, Judge.

Action by the Sterrett & Oberle Packing Company and others against the City of Portland and others. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

On June 10, 1914, the city council of Portland passed Ordinance No. 29063, designed to regulate the slaughtering of animals and the sale of carcasses and parts thereof which are intended for consumption in the city, and providing a penalty for the violation thereof. It prescribes regulations for the sanitation and inspection of slaughterhouses located within one mile of the city and outside its limits. As regulations they are not binding, because the council has no power to legislate for territory beyond the city boundaries. The provisions respecting such slaughterhouses amount only to conditions imposed upon the right to sell in the city the meat of animals slaughtered within the one-mile zone. The sale of such meat in the city is prohibited unless those regulatory provisions are complied with. The plaintiffs are engaged in the business of selling meat in Portland. Some of them own and operate slaughterhouses which are located outside of and within one mile of the city, and their supply of meat originates from animals killed at such establishments by persons who slaughter more than five animals a week.

The plaintiffs instituted this suit for the purpose of enjoining the enforcement of the ordinance on the ground that it is void because it contravenes the Constitution of the United States and of the state of Oregon in the following particulars: (1) It abridges the privileges and immunities of citizens of the United States; (2) it grants to a class of citizens privileges and immunities which upon the same terms do not equally belong to all citizens; and (3) it discriminates unlawfully against the class of meat sellers to which the plaintiffs belong, and no reasonable grounds exist for such classification and discrimination. The complaint alleges in substance as follows: That meat which originates from animals slaughtered at places more than one mile from Portland and which originates from animals slaughtered within a mile of the city, but slaughtered by persons who do not kill more than five animals a week, is sold as a regular business in the city of Portland. That only one concern in the state of Oregon has federal inspection of its meat and slaughterhouses which are located outside of and more than

one mile from the city, and that it sells its meat and meat products within the municipality. That persons whose slaughterhouses and meats are inspected by the United States Department of Agriculture are entirely excepted and exempted from every provision of the ordinance.

Plaintiffs claim that the allegations of the complaint show that this ordinance operates to deprive them of their lawful privilege of selling meat in Portland on the same terms that are accorded to their competitors, consisting of two other classes of meat sellers created by the ordinance. It also appears from the complaint: That by the ordinance all persons who have slaughterhouses within a mile of the city, except those who do not kill more than five animals a week, must comply with the many expensive regulations set out in the ordinance as to sanitation, construction, and maintenance of their slaughterhouses, and as to the ante mortem and post mortem inspection of the animals and carcasses slaughtered, and must obey the orders and dictations of the municipal inspectors; otherwise, their meats are prohibited from being sold in the city. That all persons who slaughter animals at places more than a mile from Portland, and those who within one mile thereof kill not to exceed five animals a week, are not required to comply with the expensive regulations of the ordinance as to sanitation, construction, and maintenance of their slaughterhouses, nor submit their animals to an ante mortem inspection, but may bring them to the city and have them pass a post mortem inspection there, which right is denied to carcasses slaughtered within one mile of the city where more than five animals a week are killed.

A demurrer was filed to the complaint, on the ground that the facts stated entitled plaintiffs to no relief. This was sustained. Plaintiffs refused to plead further, and a decree was rendered, dismissing the complaint, from which plaintiffs appeal.

E. B. Seabrook, of Portland (Malarkey, Seabrook & Dibble, John F. Logan, and J. J. Fitzgerald, all of Portland, on the brief), for appellants. W. P. La Roche and Henry A. Davie, both of Portland, for respondents.

BEAN, J. (after stating the facts as above). The question for determination upon this appeal is whether the facts so alleged in the complaint and admitted by the demurrer show that the ordinance has the improper and illegal effect claimed by the plaintiffs; that is, does the ordinance abridge any lawful privilege of the plaintiffs, or grant any special franchise to other classes of meat sellers which is not allowed the plaintiffs on the same terms or unreasonably discriminate against them. Counsel for the plaintiffs contend that the ordinance in question

is unenforceable and void. It is claimed by the city that the purpose and aim of the ordinance is to preserve and protect the public health, which renders it necessary and convenient to classify meat sellers into three different classes, as follows:

The first consists of all persons engaged in the city in selling meats which have been inspected by the United States Department of Agriculture or which have been slaughtered in an establishment inspected by it. This class, which is styled by the plaintiffs as the "more favored" one, is wholly excepted from the provisions of the ordinance by section 2 thereof.

The second class consists of those engaged in Portland in selling meat which has been slaughtered outside of and more than one mile from the city, or, if slaughtered outside of and within a mile of the municipality, meat slaughtered by persons who kill no more than five animals a week. This class may sell such meat within the city, provided they present the carcasses for inspection at some place therein in accordance with section 12 of the ordinance, without complying with the provisions thereof as to permits for slaughterhouses, sanitation, inspection, etc. These the plaintiffs term the "less favored" class.

The third class consists of all persons engaged in the city in selling meat which has been slaughtered outside of and within one mile of the city by persons who kill more than five animals a week. They are prohibited from selling such meat within the city unless they comply with the several sections of the ordinance. They are not permitted, as the second class is, to have their meats inspected within the city, but are expressly excluded from so doing by the provisions of section 12. The plaintiffs term this last class, to which they belong, the "unfavored and burdened."

Plaintiffs maintain that the classifications made by the ordinance stifle competition and are positively detrimental and opposed to the allowed purpose of protecting the public health. It is asserted on behalf of the city that at the present time, and for many years past, the city of Portland has had in operation several ordinances designed to protect the public health from the ravages of disease spreading through food products. There are sanitary ordinances, market ordinances, and an ordinance prohibiting the slaughtering of animals within the city limits. The proprietors of butcher shops, delicatessen stores, restaurants, and other eating places are required to observe certain regulations with respect to the conduct of their business, and are prohibited from selling or offering for sale any food products which are unfit or unwholesome for human food. With the growth and expansion of the city, it has become a difficult problem for the officials in charge to see to it that these several regulations are strictly observed and the prohibitions enjoined are not violated to the injury of the public. These circumstances gave rise

to additional legislation upon the subject of health protection, and it was found that stricter compliance with the sanitary and health regulations of the city could be effected by the enactment of an ordinance requiring a thorough inspection of food products before the same were admitted to the city to be offered for human consumption. Experience showed that contagious and infectious diseases are communicated in a great majority of cases through milk and meat products. Accordingly, some time ago, the city of Portland enacted an ordinance requiring a thorough inspection of dairy herds and of milk produced therefrom before such milk could be even brought into the city for the purpose of offering the same for sale therein.

The meat inspection ordinance is designed to provide for a thorough inspection of all meat and meat products before the same are admitted to the market places of the city to be offered for sale for human consumption, in order to protect the public health. The elimination of slaughterhouses from the city limits naturally caused their location a short distance from the municipal boundaries. It is conceded that the slaughterhouses from which the city's supply of meat is chiefly derived are located within the prescribed one-mile zone, with the exception of one under federal regulation.

[1, 2] The enactment of laws for the inspection of foodstuffs is within the police power of the state. This is not questioned. *Chicago Bd. of Trade v. Cowen*, 252 Ill. 554, 96 N. E. 1084; *Foot v. Stanley*, 117 Md. 335, 82 Atl. 380; *Patapsco Guano Co. v. Bd. of Agriculture*, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191. The Portland charter confers the power to require the inspection of articles of food offered for sale for human consumption within the municipality where it applies to those who bring or send their products into the city for sale for such purposes. *Norfolk v. Flynn*, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771, 99 Am. St. Rep. 918; *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399; *Adams v. Milwaukee*, 144 Wis. 871, 129 N. W. 518, 43 L. R. A. (N. S.) 1072.

[3] We will first consider the ordinance as to the second class, or all persons engaged in the city in selling meats which have been slaughtered outside of and more than a mile from the municipality, or, if slaughtered outside of and within a mile of the city, meat slaughtered by a person who slaughters no more than five animals a week. As a matter of fact, it is asserted that there are very few, if any, establishments beyond the one-mile zone at which more than five animals are slaughtered each week for sale in the city. With regard to those who slaughter less than five animals a week it would be manifestly impracticable to require them to observe the regulations with respect to slaughterhouses. It is not to be presumed that such persons maintain slaughterhouses.

They are mostly small farmers who occasionally sell the meat of an animal on the public markets of Portland. There are reasonable grounds for making a separate classification for such small producers. See *Ex parte Case*, 70 Or. 291, 301, 135 Pac. 881, 141 Pac. 746. Different regulations for such a class are made in the federal rules for the inspection of meats for interstate and foreign commerce.

It would not seem practical for the city inspectors to travel all over the state or at great distances beyond the confines of the city, in order to perform their duties and inspect establishments located outside of the one-mile limit. None of the members of the second class, however, are immune from regulation. Section 12 of the ordinance provides that the members of this class who desire to sell meats for human food in the city shall bring their products to a central depot for inspection, and that the same shall be passed or condemned according to the provisions of the ordinance. This arrangement was made by the legislative department of the city with a full knowledge of local conditions. Such classification may depend upon the degree of evil without being arbitrary or unreasonable. *International Harvester Co. v. Mo.*, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; *Ozan Lbr. Co. v. Union Co. Nat. Bank*, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; *Chicago Dock & C. Co. v. Fraley*, 228 U. S. 680, 33 Sup. Ct. 715, 57 L. Ed. 1022. We cannot say that the municipal law is either arbitrary or unfair because farmers who slaughter a few animals and sell the meat for human food within the city, and some others from a distance who possibly may do so, all under inspection, are not subject to all the regulations as to sanitation of slaughterhouses, etc. As said by Mr. Justice Peckham in *Ozan Lbr. Co. v. Union Co. Nat. Bank*, 207 U. S. 251, at page 256, 28 Sup. Ct. 89, on page 91 (52 L. Ed. 195):

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a Legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

[4, 5] The first and third classes embrace by far the major portion of the packing houses from which the Portland market derives its supply of meats. It is, of course, apparent that as compulsory regulations, the ordinance is extraterritorial and unenforceable. The city has no power to enforce a compliance with them because places and operations regulated are situated beyond the city's

borders. But in so far as the ordinance prohibits the sale within the city of the products of those places, unless the regulations have been complied with, it is enforceable and a compliance with the regulations is exacted as a condition precedent to the selling of such products in the city. The Constitution of the United States was framed on the theory that all power resides in the people, and in promulgating that instrument the people of the several states reserved to themselves all powers except those expressly delegated to the federal government by the Constitution. Among the powers so reserved to the people was that which has come to be known as the police power of the several states and it has been appropriately said that the police power is inherent in all government. It is, so to speak, a weapon for self-defense which must necessarily be possessed by all governments. It is that power by which the greatest good may be secured to the greatest number. From this principle has arisen the maxim: "*Salus populi suprema est lex.*" In conformity with this maxim a fair and liberal construction should be applied to all laws which are intended to protect the health of the people in general. That rule has been uniformly applied, even where the enforcement of the law will result in sundry burdens and inconveniences to individuals. A greater reason for such an application of the rule exists in these modern times on account of increasing population, and the many new agencies and methods for the distribution of food, medicines, and other articles for human consumption. The wisdom of salutary laws relating to contagious diseases and proper restraints in relation thereto, cannot be questioned. In order to promote the public health individual convenience and profit must be enjoyed in proper subjection to and observance of the laws for the protection of the same. *State v. Starkey*, 112 Me. '8, 90 Atl. 431; *Stettler v. O'Hara*, 69 Or. 519, 139 Pac. 743. Under fair and reasonable classifications and regulations, plaintiffs would have no valid cause to complain on account of some inconvenience and necessary expenditures required by the ordinance for the public weal.

[6] We come next to the first class, which is wholly exempt from the provisions of the ordinance as to slaughterhouses, which are inspected by the United States Department of Agriculture, wherever situated. A statute designed to prevent the spread of contagious diseases or to protect the health of the public, which operates upon all substantially alike, is not inimical to the federal or state constitution. *Adams v. Lytle* (C. C.) 154 Fed. 876; *Adams v. Milwaukee*, 144 Wis. 371, 129 N. W. 518, 43 L. R. A. (N. S.) 1072, and notes; *Pierce v. Dillingham*, 203 Ill. 148, 67 N. E. 846, 62 L. R. A. 888.

[7, 8] The requirements of the ordinance applicable to the third class, to which plaintiffs belong, were adopted from and are

substantially identical with the regulations governing the meat inspection of the United States Department of Agriculture made effective May 1, 1908. Soon after the passage of the ordinance these rules were changed in important particulars; therefore the exemption of persons coming within the first class from the provisions of the ordinance has a material effect upon the plaintiffs, or the third class, who are doing business in the sale of meats in the city of Portland in competition with the first class. The constitutionality of a statute or ordinance is usually to be tested, not by what is actually done under it, but by what it authorizes and permits to be done. *McQuillin, Mun. Corp.* § 811; *Elkhart v. Murray*, 165 Ind. 304, 75 N. E. 593, 1 L. R. A. (N. S.) 940, 112 Am. St. Rep. 288, 6 Ann. Cas. 748; *Henderson v. Durham Co.*, 132 N. C. 779, 44 S. E. 598; *Guthrie Co. v. Cameron*, 3 Okl. 677, 41 Pac. 640. To justify classifications for the purpose of legislation whereby several classes are affected differently by the law, there must be some reasonable ground for the classifications. There must be some difference between the classes which bears a just and proper relation to the purposes of the law and to the classifications. *Gulf, etc., Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *State v. Wright*, 53 Or. 344, 100 Pac. 296, 21 L. R. A. (N. S.) 349; *Kellaher v. Portland*, 57 Or. 575-584, 112 Pac. 1076; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169. Where a classification is based upon no reasonable ground and bears no just or proper relation to the object of the law, but is in fact an arbitrary selection and results in unjust discriminations, it cannot be justified, and the act attempting to make such classification must be declared void. *State v. Wright*, supra; *Kellaher v. Portland*, supra; *Chaddock v. Day*, 75 Mich. 527, 42 N. W. 977, 4 L. R. A. 809, 13 Am. St. Rep. 468; *Gulf Co. v. Ellis*, supra; *Cotting v. Goddard*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. An act which denies to the plaintiffs the equal protection of the laws, or grants to others special privileges or immunities which upon the same terms do not equally belong to the plaintiffs, is prohibited by the Constitutions of the United States and of the state of Oregon. Section 1, art. 14, Const. U. S.; section 20, art. 1, Const. Or.

[9] The vital question in this case is: Are the provisions of the ordinance discriminatory? By section 3 of the ordinance it is made unlawful to sell, have, or keep or expose for sale for human food any meats which should be condemned under section 13. By section 2 the first class is entirely exempted from the provisions of section 3. This distinction cannot be said to be based upon any necessity or convenience for the protection of the public health. After about six years' experience the United States Department of Agriculture changed the regulations governing the meat inspection, which

became effective November 1, 1914, and are found in a pamphlet issued July 30, 1914. Under these regulations, which govern the first class named in the ordinance, a large amount of meat and meat products may be passed as fit for human food which are required to be destroyed by the terms of the ordinance. Some of the differences between the federal regulations and those of the ordinance as applied to the second and third classes are as follows: (1) Section 13, subd. 10, par. 1, of the ordinance requires the condemnation of carcasses of swine suffering from hog cholera and the destruction thereof under sections 14 and 15 of the ordinance. By subdivision B, par. 2, § 4, regulation 11 of the Federal Regulations (see page 28 thereof) a carcass in which the lesions of hog cholera are slight and limited in extent may be passed for sterilization, and after sterilization may be canned and sold for human food. See Regulation 15, page 36 of the Federal Regulations. (2) Section 13, subd. 26, of the ordinance requires the condemnation of the carcasses of certain pregnant animals. By section 20 of regulation 11 of the Federal Regulations (page 33) such carcasses may be sterilized and sold for human food. (3) Section 13, subd. 27, of the ordinance requires the condemnation of the carcasses of all calves, pigs, kids, and lambs under three weeks of age regardless of their condition. By paragraph 1 of section 21 of regulation 11 of the Federal Regulations (page 33) such carcasses may be used for human food, provided the meat complies with certain stated requirements. Other regulations differ so that those governing the first class are not so drastic as the requirements of the ordinance; therefore meat and meat products, which under the federal regulations are suitable for food for human consumption and may be sold for that purpose in the city of Portland, without municipal inspection, by persons of the first class, if presented by members of the second and third classes, must be condemned and destroyed under the terms of the ordinance.

If one class of persons are granted the privilege of vending certain kinds of meat and meat products in the city, why should not members of the other two classes be accorded the right to sell the same kind of foodstuffs? The classification in this respect does not appear to be based upon a fair or reasonable foundation and this discrimination cannot be upheld. It is not for the court to suggest which kind of regulations is preferable. Had the exemption of the members of the first class from the requirements of the ordinance as to inspection been provided for as long as the products of their establishments were subject to federal inspection under regulations like those contained in the city ordinance, then when the amendments of the federal regulations were made the excepted class would automatically have come within the provisions of the municipal law, and the objectionable features of the or-

dinance would have been obviated. Doubtless the city by appropriate amendment of its ordinance can adjust the matter, so that important business enterprises will not be unnecessarily inconvenienced or jeopardized, and the different persons interested can with reasonable safety make preparation to conform to the beneficial requirements of the law.

The decree of the lower court will be modified to conform herewith.

EAKIN and BENSON, JJ., absent.

On Petition for Rehearing.

BEAN, J. The petition for rehearing in this cause suggests that the formal concluding part of the memorandum opinion is misunderstood. In referring to the ordinance in question it is stated in the opinion as follows:

"The classification in this respect does not appear to be based upon a fair or reasonable foundation and this discrimination cannot be upheld."

This conclusion leads to but one result, namely, the decree of the lower court is reversed, the demurrer to the complaint will be overruled, and the ordinance declared invalid.

It is further stated in the opinion that:

"It is not for the court to suggest what kind of regulations is preferable."

This shows that the court did not pass upon any ordinance that may be enacted, although the matter of an amendment to the ordinance entered into the oral argument. With this correction, the petition for rehearing is denied.

(79 Or. 78)

SINK v. ALLEN.

(Supreme Court of Oregon. Jan. 18, 1916.)

1. APPEAL AND ERROR §1001—REVIEW.

Where there is any evidence to support it, a verdict will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. §1001.]

2. BILLS AND NOTES §520 — VALIDITY — FRAUD—EVIDENCE.

In an action on a note given in payment of brokerage fees to become due in a transaction not already consummated, evidence held to show that the note was procured by fraud.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. §520.]

3. BILLS AND NOTES §373—HOLDER.

Where a note was procured through fraud, the payee's transferee cannot recover unless a purchaser in good faith without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 966-970; Dec. Dig. §373.]

4. BILLS AND NOTES §497—ACTIONS—BURDEN OF PROOF.

Where it is shown that the original payee procured a note through fraud, the holder has the burden of showing that he acquired it in good faith for value and without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. §497.]

5. TRIAL §60—PROOF—ORDER OF.

In an action on a note claimed to have been procured through fraud, the court, having a discretion as to order of the proof, may allow proof of the fraud before proof that the holder was charged with knowledge thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 141-145; Dec. Dig. §60.]

6. BILLS AND NOTES §525—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action on a note procured through fraud, evidence held to show that the holder was not a bona fide purchaser for value, without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. §525.]

Department 1. Appeal from Circuit Court, Sherman County; D. R. Parker, Judge.

Action by E. Sink against J. M. Allen. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an action to recover upon a promissory note given by the defendant to one Walter H. Moore, and by him indorsed as collateral security upon a joint note from himself and J. A. Harbke to the Wasco Milling Bank, in Moro. Harbke subsequently paid the note given to the bank, and the Allen note was turned over to him. Harbke states the acts constituting his title to the note in this language:

"In the first place, I paid what he [Moore] borrowed at the bank to buy an automobile with, and the note was turned over to me. I held it until I sold my part of the garage to him. Then he turned over that note with some others. We probably had a couple or three thousand dollars standing out here, and he took the whole thing and gave me two or three different notes, and then his own note for \$800. * * * The money we borrowed we used in the automobile business. If I had stayed in the business, half of the money would be mine, but I sold out, and that money was carried right along with the debts, so it all came out of him."

The facts leading up to the execution of the note by Allen and its subsequent transfer to plaintiff may be briefly summarized as follows: For years W. H. Moore and defendant had been very close friends. Defendant was living at Sisters, Crook county, Or., but had large holdings of real estate in Sherman county, which he wanted to sell, and for several years Mr. Moore had been living in Portland, and had been engaged in the real estate business, banking, investments, etc. In the fore part of May, 1913, defendant and his wife, having business in the Henry Building, in Portland, noticed Walter H. Moore's name on one of the office doors. Mr. Allen said:

"I will go in and see Walter; I have known him for years."

In the office they found Mr. Moore, J. A. Harbke, and an elderly man by the name of Springer. Moore introduced Mr. Harbke to Mr. and Mrs. Allen as his partner, saying, in effect, that they were soon coming back to Sherman county to engage in the automobile and real estate business, that Harbke would run the business in town, and that he would look after it on the outside. Moore

left the office a few minutes, and Allen noticed that Harbke and Springer were talking about a deal for Springer's property, but that Harbke did not seem to have anything satisfactory to offer. Allen then said that he had a stock and grain ranch that might suit Springer's son, the one for whom the deal was to be made. While Allen and Springer were talking Moore returned, and, after conversing with Harbke in an undertone for a time, asked Harbke if he had nothing else to put up. Then Moore heard Allen and Springer talking trade, and he joined them and said:

"Why, Johnny, I didn't know your place was for sale. I thought you had got rid of that. Yes; your place would be just what this man wants."

Thereupon they discussed various phases of the proposed deal, the kinds and values of the respective properties, etc., and arrangements were made. That afternoon Allen and his wife went out with Moore and Springer to look over the Springer properties in Portland which were to be considered in the trade. Allen informed Mr. Moore that, not being familiar with Portland prices, he would have to depend on him as an old friend to see that he got a good deal and right prices; also that the property must be such that Allen could secure a loan of at least \$15,000 on it in order to clear up indebtedness and pay the mortgages on his farm, as he would have to turn the farm over to Springer clear of incumbrance. Moore assured him he would see to it that Allen got that much or even \$20,000 if he needed it as a loan on the Springer property, and would see that the prices were fair and reasonable. The first property looked at was on Lucretia street, and was priced to Allen at \$15,000, and Moore told him it was well worth it. They looked over the remainder of the property, had a general understanding in regard to the same, and arranged for Mr. Springer's son to examine the Allen properties in Sherman county. Agreeing to meet later, defendant and his wife went home. Upon notice from Moore they returned to Portland the latter part of May, where they again talked over the details of the trade. Among other things, Allen found that the price of the Lucretia street property had been raised from \$15,000 to \$25,000. Allen objected to this, but Moore insisted that the property was well worth that amount, that it would be easy to secure the necessary loan, and that the deal was a good one. Finally, the terms having been again accepted under Moore's assurance and the positive understanding and condition that unless the loan could be secured the deal could not be completed, Moore went to Attorney Hosford's office and had the contract drawn. Later in the day they all went to the attorney's office and, on the plea that the Springers were in great haste to catch the train, the contract was only hastily sketched over

and explained, but not read. Moore assuring Allen that everything was all right, the contract was signed, and immediately sent to Southern Oregon for the signatures of the other parties thereto. It was some time before Allen saw the contract again, and before he found out that the clause concerning the \$15,000 loan had been omitted. After signing the contract the Springers immediately left, and Moore and Mr. and Mrs. Allen went down on the street. Moore then asked Mr. and Mrs. Allen to go over to his office, and suggested that they give him the note now in question to cover his commission. They informed Mr. Moore that the deal was yet uncertain, and that the commission was not yet due, but he finally prevailed upon them to go up to his office. There he referred to old times, reciting several instances in which they had helped one another, and claiming that their relations had been a great deal like brothers. He informed them that of late years he had had a hard time, that the note would help him, and again assured Allen that the deal would go through and was a good transaction, that he would see to it that Allen secured the loan above referred to, and that the note should never go out of his hands, and, further promising them that in case the deal should not go through he would return the note to them, he wheedled Allen into signing the note, which was for \$1,659.25. Of this \$1,000 was commission from Allen to Moore, and the balance was a part of Springer's commission, assumed by Allen as a part of the terms of the deal, all to become due when the deal was completed. Notwithstanding Moore's promise not to transfer the note, in just about one week's time he had sent the note up to his partner at Moro, where it was put up as collateral security to the bank at Moro for a partnership loan to Moore & Harbke for \$1,000. Later Harbke paid off the note to which the said note of Allen was collateral, and said note of Allen was turned over to him. About August, 1913, Moore & Harbke claim to have dissolved their said partnership business in Sherman county, and Harbke claims to have acquired the note in the adjustment of said business with Moore, but did not take over the note until after he had conferred with plaintiff in regard to the same, and thereupon some understanding was had to the effect that, when Harbke should take over the Allen note, it should be passed on to plaintiff, and Harbke should have credit for the amount of the same, upon a note for \$27,000 claimed to be due from him to plaintiff. Harbke did not indorse the note to plaintiff. Plaintiff claims to have accepted the Allen note, without indorsement as aforesaid, for the full amount of its principal and interest, and to have credited the same upon a note for \$27,000 from Harbke to him, secured by one of the best farms in Sherman county; that said

\$27,000 note of Harbke so due to him was kept in Harbke's safe in his office in Portland, to which plaintiff had no key; that they took this note out of Harbke's safe, acting together, and took it over to another office to have a bookkeeper indorse the payment on the back in order, as plaintiff said, that it might be done legally. In the meantime Allen and Moore had made many attempts to secure the loan on the Springer property. After remaining in Moro a few months Harbke returned to Portland, and, at Moore's suggestion, Allen tried to get the said loan through Harbke. He also tried through many others, but the best offers he could get were from only \$7,000 to \$9,000, thus showing that Moore's valuation of the Springer property was ridiculously high, and that the values had been grossly misrepresented. Not being able to get the required loan, the deal fell through, the commission was never earned, and the said note was wholly without consideration. Allen then made efforts to get the note back from Moore. He phoned to him at Moro from Redmond, in Crook county, and after a strenuous effort he arranged for a meeting with him in Portland, but Moore was sick and unable to come, and the next day or the day following Allen read of Moore's death. Moore and Harbke had been associated together for many years in various business undertakings, part of the time as partners. Harbke and Sink were also closely associated and connected in business deals, sometimes holding themselves out as partners. They used the same office and equipment, their business cards bore the inscription "Harbke & Sink," with their office address, and Sink kept some of his most valuable papers in Harbke's safe, particularly Harbke's own note for \$27,000.

Upon the trial there was a verdict and judgment for defendant, from which plaintiff appeals.

L. B. Crouch, of Portland, for appellant.
C. J. Bright, of The Dalles (Bright, Bryant & Ellis) and R. R. Butler, all of The Dalles, on the brief, for respondent.

McBRIDE, J. (after stating the facts as above). [1] This case having been tried before a jury, it follows that, if there is any substantial evidence tending to support the defense interposed, the verdict, in the absence of error of law, is conclusive, and a discussion of the comparative weight of the evidence is therefore unnecessary.

[2-4] It seems clear to us that Moore perpetrated a cruel fraud upon a confiding old friend in obtaining the note. Allen received nothing for it whatever, and it was put into circulation in violation of Moore's solemn promise not to so use it. All the evidence indicates that Allen was inexperienced in business, that he relied upon Moore as an old and confidential friend to guide and assist

him in the deal, and that the execution of the written contract was hurried up by Moore with a view to prevent Allen from observing that an important stipulation in the contract had been omitted. Under the circumstances Moore could never have enforced payment of the note, and, if Harbke was not a purchaser in good faith and without notice of the infirmity of the note, he and plaintiff, to whom he transferred it without indorsement, are in no better position. Moore's fraud being shown, the burden of proof to show the good faith of Harbke was upon the plaintiff. *Owens v. Snell*, 29 Or. 483, 44 Pac. 827; *Brown v. Feldwert*, 46 Or. 363, 80 Pac. 414.

[5, 6] It is contended that the court erred in admitting evidence of fraud upon the part of Moore in obtaining the note before the defendant had shown that Harbke took it with notice of the defenses which defendant had against it, and the case of *Drelling v. First National Bank*, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126, is cited in support of this proposition. The case merely holds that under the particular circumstances there disclosed the court had the right to determine the order of proof, and that it did not err in requiring the defendant to introduce evidence of plaintiff's bad faith before attempting to show fraud in the execution of the note. As there observed, the order of proof is a matter largely in the discretion of the court, and in the case at bar the court, in the exercise of a like discretion, allowed proof of the original fraud to be first introduced. In this case the natural course of inquiry would seem to direct itself to the following propositions: (1) Was the note procured by fraud and without consideration? (2) Did the indorsees of the note have knowledge of such circumstances as should have put them upon inquiry as to any fraud in the procurement of the note? The first proposition is too clearly proved to admit of doubt. Was there any evidence to sustain the second? While the evidence might not satisfy the members of this court sitting as triers of the fact, yet, if from the whole case there was any evidence tending to support defendant's contention, we are bound by it; and we think there is such evidence. It tended to show that Harbke and Moore were partners in the real estate business, and that Harbke was present when the original negotiations were broached with Springer. A few days afterwards the note turns up in the bank at Moro as security for a partnership note of Moore & Harbke. It is inconceivable under the circumstances that Harbke did not know that no sale had been effected by Moore for defendant, and incredible that he did not know that the note was given for commission not yet earned, and which any business man ought to know would probably never be earned. He says that later he paid off the partnership note and it was turned over to him, but his testimony indicates that he considered himself

only a part owner until he and Moore dissolved partnership, whereupon finding, as he says, that the plaintiff would take it, he turned it over to him without indorsement and received credit upon an alleged \$27,000 note which he had given plaintiff, but which he kept in his own safe. In addition to this, there is evidence tending to show that Harbke and Sink were doing business as partners, and that their relations were very intimate. From these and other circumstances the jury probably concluded that Harbke and Moore were partners in the attempt to swindle defendant in the first place by getting him to enter into an impossible deal and giving a note for which there was no honest consideration, and that plaintiff was merely helping Harbke to play the game. They had the witnesses before them, and could observe their appearance and manner of testifying. While courts should be slow to question the validity of negotiable paper, they should be vigilant to protect the ignorant and unwary from the machinations of those who by transactions such as these have brought much discredit upon the real estate business in this state and who are the bane of those who are legitimately and honestly conducting it. The judgment is affirmed.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

(79 Or. 88)

BREWSTER v. SPRINGER, County Judge, et al.

(Supreme Court of Oregon. Jan. 18, 1916.)

1. NEW TRIAL ⇐27—GROUNDS—ERROR OF LAW.

Under L. O. L. § 548, providing that an order setting aside a judgment and granting a new trial for purposes of review shall be deemed a judgment or decree, the right of a circuit court to set aside a judgment and grant a new trial can be exercised only when in the trial of a cause an error has been committed so prejudicial to the defeated party that the judgment against him would if allowed to stand be reversed on appeal.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 40, 41; Dec. Dig. ⇐27.]

2. APPEAL AND ERROR ⇐648—BILL OF EXCEPTIONS—AMENDMENT.

Notwithstanding an appeal from a judgment has been taken and perfected, jurisdiction of the cause is retained by the trial court sufficient to empower it at any time before the appeal is heard and determined to amend the bill of exceptions to make it conform to the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2803-2806; Dec. Dig. ⇐648.]

3. APPEAL AND ERROR ⇐440—EFFECT OF APPEAL—VACATION OF JUDGMENT—FINDINGS—RE-ENTRY OF JUDGMENT.

A trial court may within the time limited therefor set aside a judgment and amend the final determination by making and filing findings of fact and of law and render judgment thereon, notwithstanding an appeal may have been taken, but not heard, and it is its duty to do so to save the expense of an appeal, which

without such amendment would necessarily result in a reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2198-2201; Dec. Dig. ⇐440.]

Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action by George H. Brewster against G. Springer, County Judge, and J. F. Blanchard and another, County Commissioners. Judgment for plaintiff, and defendants appeal. Dismissed.

M. R. Elliott and Willard H. Wirtz, both of Prineville, for appellants. Jay H. Upton, of Prineville, for respondent.

MOORE, C. J. The plaintiff, George H. Brewster, by consideration of the circuit court of the state of Oregon for Crook county, obtained a judgment against the defendants, G. Springer, as county judge of that county, and J. F. Blanchard and H. J. Overturf, as county commissioners thereof, and they appealed. Thereafter, but during the term of court at which the judgment was rendered, an order was made by the trial judge setting aside the judgment on the ground that no findings of fact or of law had been made. Thereupon such findings were made and filed, and predicated thereon judgment was given as in the first instance, and the defendants again appealed. The plaintiff's counsel moves to dismiss the first appeal, because the judgment thus undertaken to be reviewed has been vacated. The defendants' counsel resist the application, contending that, the first appeal having been duly perfected, the trial court thereby lost jurisdiction of the cause, and was powerless to set aside the judgment.

[1] In *Smith Typewriter Co. v. McGeorge*, 72 Or. 523, 525, 143 Pac. 905, 906, in referring to section 548, L. O. L., it is said:

"Under the provisions of this statute, the right of a circuit court to set aside a judgment and grant a new trial can be exercised only when in the trial of a cause an error has been committed which is so prejudicial to the defeated party that the judgment rendered against him would, if allowed to remain in force, be reversed on appeal. When the trial court, within the time allowed, discovers that such a mistake of law has been made, it may sua sponte, or on motion, correct the error by setting aside the judgment and granting a new trial, thereby avoiding the necessity of and the expense that would be incurred by an appeal."

To the same effect, see, also, *Rudolph v. Portland Ry., L. & P. Co.*, 72 Or. 560, 144 Pac. 93; *Frederick & Nelson v. Bard*, 74 Or. 457, 145 Pac. 669.

[2, 3] Notwithstanding an appeal from a judgment may have been taken and perfected, jurisdiction of the cause is retained by the trial court sufficient to empower it, at any time before the appeal is heard and determined, to amend the bill of exceptions so as to make it conform to the facts. *State ex rel. v. Estes*, 34 Or. 196, 51 Pac. 77, 52

Pac. 571, 55 Pac. 25; Bloch v. Sammons, 37 Or. 600, 55 Pac. 438, 62 Pac. 290; McGregor v. Oregon R. & N. Co., 50 Or. 527, 93 Pac. 465, 14 L. R. A. (N. S.) 668; Ferrari v. Beaver Hill Coal Co., 54 Or. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016; McCann v. Burns, 73 Or. 167, 136 Pac. 659, 143 Pac. 916, 1099. Analogous to the rules thus established in this state, it must follow upon principle that a trial court may, within the time limited therefor, set aside a judgment and amend the final determination by making and filing findings of fact and of law and render judgment thereon, and that it is not only within the power of that court to make the correction, notwithstanding an appeal may have been taken and not heard, but that the duty devolves upon it to do so, in order to save the expense of an appeal, which without such amendment must necessarily result in a reversal of the judgment.

The first appeal should be dismissed; and it is so ordered.

(79 Or. 91)

MCGILCHRIST v. PORTLAND, E. & E. RY. CO.

(Supreme Court of Oregon. Jan. 18, 1916.)

1. APPEAL AND ERROR \S 690, 701—BILL OF EXCEPTIONS—EVIDENCE.

When an exception is taken to the trial court's ruling upon the admission or exclusion of evidence, so much of the testimony as will enable the appellate court fully to understand the question involved must be copied in the bill of exceptions; but, if an exception relates to the giving of an instruction which under the pleadings would have been an improper application of the rules of law to the case under any view that might be taken, the error will be reviewed on appeal, though no testimony is incorporated in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2897-2899, 2902-2904, 2906, 2908, 2933-2935; Dec. Dig. \S 690, 701.]

2. EXCEPTIONS, BILL OF \S 16—INCORPORATING EVIDENCE.

When a trial court settles and allows a bill of exceptions, and therein gives a brief synopsis of all the testimony received, such statement is adequate to a proper review of the correctness of the giving or refusal of instructions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. \S 16, 17; Dec. Dig. \S 16.]

3. CARRIERS \S 280—PERSONAL INJURY—NEGLIGENCE.

A common carrier owes to its passengers the highest degree of care, prudence, and foresight consistent with the practical operation of its road, or the utmost skill and care consistent with its business, in view of the instrumentalities employed and the danger naturally to be apprehended.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. \S 280.]

4. NEGLIGENCE \S 97—COMPARATIVE NEGLIGENCE.

In Oregon the doctrine of comparative negligence does not obtain, except in cases in which the relation of employer and employé exists.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 93, 162; Dec. Dig. \S 97.]

5. TRIAL \S 260—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.

In an action against a street railroad for injury while alighting from its car after invitation because of the negligent starting of the car throwing plaintiff to the ground, a charge that, if defendant opened the gate, and if plaintiff was exercising ordinary care in alighting, even though the car was moving, yet, if by reason of its sudden jerk he was thrown to the ground, defendant would be guilty of negligence, and plaintiff might recover, unless plaintiff was guilty of contributory negligence, fairly expressed plaintiff's requested instruction that, if the car was slowed down so that an ordinarily prudent person would have thought it safe to alight, and plaintiff, while attempting to alight, was thrown by a sudden starting of the car, he might recover, so that its refusal was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 651-659; Dec. Dig. \S 260.]

6. CARRIERS \S 347—ALIGHTING FROM CAR—CONTRIBUTORY NEGLIGENCE.

A passenger attempting to leave a street car moving at a high rate of speed is chargeable with contributory negligence defeating his recovery for a resulting injury, but it is not negligent as a matter of law to alight from a moving car, but the circumstances and the speed of the car make it a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. \S 347.]

7. CARRIERS \S 348—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

In a passenger's action for personal injury by the sudden starting of a street car as he was about to alight in a public highway at a place not defective, except that the street had been made slippery by rain, where the plaintiff claimed there was an electric light near the place of the accident, and the defendant claimed that it was dark, an instruction that, if it was so dark as to render it obviously dangerous for one to alight at that point while the car was in motion, plaintiff would be guilty of contributory negligence, was not objectionable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1403-1405; Dec. Dig. \S 348.]

8. APPEAL AND ERROR \S 273—SUFFICIENCY OF EXCEPTION—INSTRUCTIONS.

In such action an instruction failing to inform the jury that plaintiff's alighting from the moving car must have been the direct and proximate cause of his injury in order to defeat his recovery would not be held erroneous, where the exception was general, and called the court's attention to no legal principle insisted upon on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. \S 273.]

Department 2. Appeal from Circuit Court, Marion County; J. W. Hamilton, Judge.

Action by George McGilchrist, a minor, by William McGilchrist, his guardian ad litem, against the Portland, Eugene & Eastern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action to recover damages for a personal injury. The complaint alleges, in effect, that the plaintiff, George McGilchrist, is a minor 18 years old, and his father, William McGilchrist, is his duly appointed guardian ad litem; that the defendant, the Portland, Eugene & Eastern Railway Company, is

a corporation and engaged as a common carrier in operating electric street cars at Salem, Or.; that on September 17, 1913, the plaintiff paid the regular transportation charge and was a passenger on one of its cars from the state fair grounds to a point on the public highway south of and beyond the corporate limits of that city, and opposite the house of his father, where the plaintiff then lived; that the defendant's agents and servants, knowing where he desired to get off the car, slackened its speed when nearing that place, opened the door of the car, and invited the plaintiff to alight, pursuant to which solicitation he stepped down upon the lower stair, and while in the act of getting off the defendant's agents and servants carelessly and negligently increased the speed of the car before the plaintiff had an opportunity to alight, by reason whereof he was thrown to the ground with such force as to fracture the femur at the hip, thereby permanently injuring him to his damage in the sum of \$10,000.

The answer admits the defendant is a corporation, and that at the time stated the plaintiff was a passenger upon one of its cars from which he stepped when it was in motion and sustained an accident, but all the other averments of the complaint are denied. For a further defense it is alleged, in substance, that on September 17, 1913, the plaintiff was a passenger on one of the defendant's cars, and when it approached McGilchrist street he left his seat, went to the rear, and gave a signal to stop the car, and while the speed was being diminished he carelessly and recklessly, and while the car was in motion before it had stopped, leaped to the ground, thereby sustaining an injury which resulted from his own negligence, and was not caused or contributed to by any carelessness of the defendant or of its agents or servants.

For a second defense the allegations of time, place, and circumstances as hereinbefore stated in the answer are repeated, and it is averred that, while the speed of the car was being retarded, the plaintiff carelessly and recklessly, and while the car was in motion, voluntarily leaped to the ground, and thereby assumed the risk of injury.

The reply controverted the allegations of new matter in the answer, and the cause, having been tried, resulted in a verdict and judgment for the defendant, and the plaintiff appeals.

John Bayne and John A. Carson, both of Salem, for appellant. John F. Reilly, of Portland (W. D. Fenton and R. E. Moody, both of Portland, and Geo. G. Bingham, of Salem, on the brief), for respondent.

MOORE, C. J. (after stating the facts as above). No transcript of the testimony given at the trial has been brought up. The bill of exceptions, however, states that evidence was received tending to substantiate all the con-

troverted allegations of the complaint and to the effect that the speed of the car had been lowered to about two or three miles an hour for the plaintiff to alight, and when he was doing so the car was suddenly started, causing the injury charged, and that, when he was hurt, there was on the porch of his home, near where he was injured, an electric light which illuminated such place; that testimony was also introduced tending to prove all the disputed averments of the answer and to the effect that the plaintiff was hurt at the usual place of receiving passengers upon and discharging them from the defendant's cars; that he was injured about 9:30 or 10 o'clock at night when it was raining; and that at such place there was then no light.

The court modified an instruction requested by the plaintiff's counsel as here indicated, to wit:

"The defendant being a common carrier of passengers for hire, it owes to its passengers the highest degree of care, prudence, and foresight consistent with the practical operation of its road, or the utmost skill, diligence, care, and foresight consistent with (the practical operation of its road, or the utmost skill, diligence, care, and foresight consistent with) the business, in view of the instrumentalities employed and [the] danger naturally to be apprehended [and such carrier is held responsible for the slightest neglect against which skill, diligence, care, and foresight might have guarded]."

Additions were made to the instruction, as denoted by the words embraced within parentheses, and that part of the language requested was omitted from the charge given, as indicated by the words included within brackets so displayed.

The following requested instructions were also denied:

"If you find that the car on which the plaintiff was a passenger was so nearly stopped that an ordinarily prudent person would have deemed it safe to alight therefrom, and while attempting to alight the plaintiff was thrown to the ground by the motorman in charge of the car suddenly starting it before the plaintiff had safely alighted, the plaintiff would be entitled to recover damages for the injury sustained, and your verdict should then be for the plaintiff for such sum under the evidence as you may deem the plaintiff entitled to in order to compensate him for the injury."

"The court further instructs you that it is not necessarily contributory negligence for a passenger to alight from a moving street car, and in considering the question of contributory negligence in this case, if you find that the defendant's car was slowed down to a slow rate of speed, such as an ordinarily prudent person would deem safe to alight from, and the plaintiff then attempted to alight from such car, he would not be guilty of contributory negligence."

Exceptions were severally taken to the court's refusal to give the instructions so requested. An exception was also saved to a part of the general charge which reads:

"I instruct you that, if the place at which plaintiff alighted from defendant's car, if you find that plaintiff did alight from said car, was so dark as to render it obviously dangerous for a person to attempt to alight at said point from said car while the same was in motion, then plaintiff would be guilty of contributory negligence in so attempting to alight, which would bar any recovery by him in this action."

It is contended that errors were committed in the respects mentioned. It is argued by defendant's counsel that, under the bill of exceptions herein, the alleged errors so assigned should not be considered unless it can be legally asserted that the requested instructions which were denied were essential, and that the part of the charge which was challenged was an improper expression of the law under any view of the case.

[1] In *Raiha v. Coos Bay Coal & Fuel Co.*, 149 Pac. 940, in discussing this matter, it is said:

"When an exception is taken to the ruling of a trial court upon the admission or exclusion of evidence, so much of the testimony as will enable the appellate court fully to understand the question involved must be copied in the bill of exceptions. If, however, an exception relates to the giving of an instruction which under the pleadings would have been an improper application of the rules of law to the case under any view that might be taken, the error will be reviewed on appeal, though no testimony is incorporated in the bill of exceptions."

To the same effect, see, also, *Parker v. Montelth*, 7 Or. 279; *State v. Jancigaj*, 54 Or. 361, 103 Pac. 54; *Willis v. Horticultural Fire Relief*, 69 Or. 293, 137 Pac. 761; *State ex rel. v. Rider*, 152 Pac. 497.

[2] It will be kept in mind that the bill of exceptions sets forth a brief summary of the testimony received. Such statement of the evidence was evidently relied upon by the respective parties, and it is sufficient to illustrate the legal principles involved. A bill of exceptions would become a very cumbersome affair if it were essential to set forth therein all the evidence received in order to determine the sufficiency of instructions the giving or refusal of which had been challenged by proper exceptions. The rules of law do not require the performance of vain things, and when a trial court in settling and allowing a bill of exceptions gives therein a brief synopsis of all the testimony received, such statement is adequate to a proper review of challenged instructions that have been given or denied.

[3, 4] Considering the exceptions in the order hereinbefore stated, the first requested instruction is evidently predicated upon the language of Mr. Justice Straup in *Paul v. Salt Lake City R. Co.*, 30 Utah, 41, 83 Pac. 563, 565. If the court had given that part of the language so requested which reads, "And that the carrier is held responsible for the slightest neglect against which such skill, diligence, care, and foresight might have guarded," the question of plaintiff's alleged contributory negligence would have been wholly eliminated. However careless the defendant may have been, as alleged in the complaint, if the plaintiff's heedlessness conducted to his injury, it would bar a recovery of damages for the hurt he sustained, for in this state the doctrine of comparative negligence does not obtain, except in cases in which the relation of employer and employee exists. As that relation did not obtain in

the case at bar, no error was committed in modifying or refusing to give in its entirety the first requested instruction.

[5] The bill of exceptions contains all the instructions given. In one part of the charge, the court, referring to the plaintiff, said to the jury:

"If the defendant invited—if you should find from the facts in the case that he was to get off there, the gate was thrown open, and he was exercising ordinary prudence in getting off, even though the car was moving, if by reason of the quick and unexpected jerk of the car of the defendant he was thrown to the ground, not in the exercise of care which is required by the defendant as a carrier, and to which I shall call your attention—then the defendant would have been guilty of negligence in the act, and the plaintiff would be entitled to recover some damages at your hands."

It will be seen from the language last quoted that it fairly expresses the second requested instruction. When a court clearly announces a rule of law as a guide to the jury to enable them, from a consideration of the facts relating to a branch of the case, to determine an issue, it is unnecessary to give a requested instruction, though it may not contain the exact language of a part of the general charge. No error was committed in denying this request.

In another part of its general charge the court told the jury:

"You are instructed that, if you find that the defendant, through its servants and agents, knowing the place at which the plaintiff desired to alight, opened the door of its car and slowed its car down to a slow rate of speed and invited the plaintiff to alight, while the plaintiff was in the act of alighting from the defendant's car, pursuant to such request and invitation, and the defendant, by its servants and agents, carelessly and negligently increased the speed of said car before the plaintiff had an opportunity of alighting safely, and that the plaintiff, by reason of the careless and negligent increase of the speed of the said car, received the injury alleged in the plaintiff's complaint, then you will find a verdict for the plaintiff in such sum as will compensate the plaintiff for such injuries sustained, unless you shall find by a preponderance of evidence that plaintiff was guilty of contributory negligence under the law as I shall explain it to you."

[6] An author, in discussing the danger incident to endeavors to alight from a car in motion, observes:

"If a passenger attempts to leave a moving car running at a high rate of speed, the attempt will be so obviously dangerous that he cannot recover for an injury occasioned thereby. It cannot be said, however, as a matter of law, that it is negligent to alight from a moving car or to board it while in motion. The circumstances attending the act and the speed of the car make it a question of fact for the jury. Neither is the passenger bound to know that the place where he does alight is safe." *Nellis, Street Railroad Accident Law*, 190.

The rule thus announced is recognized by the court in the part of its charge last quoted. It does not appear from the pleading or from the summary statement of the testimony set forth in the bill of exceptions that the plaintiff was ill, infirm, or burdened with impediments of any kind, and, being 18 years old, his attempt to alight from a car

moving at the rate of speed of only two or three miles an hour would not have been negligence per se, as inferentially admitted by the court. *Neillis, Street Rys.* (2d Ed.) § 363. If the attempt to alight, under such circumstances, is made in the daylight, or at a place which is sufficiently illuminated at night, the rule stated would undoubtedly obtain. The part of the charge last repeated sets forth so much of the third requested instruction as was applicable to the issues and evidence involved, and no error was committed in denying such request.

[7] The pleadings admit that the plaintiff was injured by falling upon a public highway. So far as disclosed, there was no defect in the place where the accident happened, except that it may reasonably be inferred that the street had been rendered slippery by the rain. The theory of the plaintiff was that an electric light on his father's porch near the street illuminated the place where the accident happened, while the defendant maintained that it was then dark at such place, and that the night was dark and rainy. It will be remembered that in the part of the general charge to which an exception was taken the court, referring to the place where the injury occurred, told the jury:

If it "was so dark as to render it obviously dangerous for a person to alight at said point from said car while the same was in motion, then plaintiff would be guilty of contributory negligence."

The phrase "obviously dangerous," as thus employed, imports a greater degree of hazard than would appear to a person of ordinary prudence. It is believed the extent of peril so indicated, as being manifest from an attempt to alight from a moving car, under the attending circumstances adverted to, renders the part of the charge so challenged unobjectionable to the plaintiff on that ground.

[8] Complaint is made because in the part of the charge under consideration the jury were not instructed that the plaintiff's alighting from the moving car must have been the direct and proximate cause of his injury, in order to defeat a recovery. The fourth exception is general, and did not call the court's attention to the legal principle now insisted upon. No error was committed in giving the instruction thus challenged.

It follows from these considerations that the judgment should be affirmed; and it is so ordered.

BEAN, BENSON, and HARRIS, JJ., concur.

(79 Or. 101)

GIBSON v. PAYNE.

(Supreme Court of Oregon. Jan. 18, 1916.)

1. WEAPONS — ACTIONS — EVIDENCE.

Where the complaint of one who claimed he was negligently shot averred that defendant carelessly cocked a shotgun in his hands, defendant is entitled to rebut such claim by testi-

mony that when he received the gun it was already cocked.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 34, 35; Dec. Dig. ¶18.]

2. NEGLIGENCE — PROVINCE OF JURY — DISPUTED QUESTIONS OF FACT.

Where the facts are such that reasonable men may differ whether there was negligence, they should be submitted to the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. ¶136.]

3. WEAPONS — ACTIONS — JURY QUESTION.

In an action for damages for injuries received when he was struck by shot from a gun discharged by defendant, the question of defendant's negligence held for the jury.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 34, 35; Dec. Dig. ¶18.]

4. WEAPONS — ACTIONS — INSTRUCTION.

In an action by plaintiff who was shot while out hunting, the court charged that plaintiff was bound to establish by the greater weight of evidence that defendant carelessly and negligently shot him; that members of a hunting party must use the care and caution such as any reasonably prudent man would exercise under the circumstances; that the law charges them with knowledge that a loaded shotgun is dangerous and that it was for the jury to determine whether plaintiff, by going in front of the party, was careless or negligent. Held, that the instructions did not place upon plaintiff the burden of proving a want of contributory negligence; the instructions specifically stating, after referring to defendant's claims, that he was bound to establish them by the greater weight of evidence.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 34, 35; Dec. Dig. ¶18.]

5. APPEAL AND ERROR — REVIEW — HARMLESS ERROR.

Errors in instructions on the measure of damages are harmless, where plaintiff, who was shot while hunting, recovered no damages.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. ¶1068.]

6. WEAPONS — CARE — SUFFICIENCY OF CARE.

An instruction, in an action by one shot while out hunting, that a loaded shotgun was a dangerous weapon which would produce bodily injury when discharged, and that the law charged each member of a hunting party with such knowledge, and that it is the duty of each to use that degree of care such as any reasonably prudent man would use under the circumstances, correctly states the degree of care which persons are bound to use, the law requiring persons having possession of firearms to exercise the utmost care that harm may not come to others, the degree of care being commensurate with the dangerous character of the weapon.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 34, 35; Dec. Dig. ¶18.]

7. WEAPONS — ACTIONS — CONTRIBUTORY NEGLIGENCE.

In an action by one shot while out hunting, the question whether he was contributorily negligent in preceding the hunting party into a field held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. §§ 34, 35; Dec. Dig. ¶18.]

Department No. 2. Appeal from Circuit Court, Yamhill County; Webster Holmes, Judge.

Action by John H. Gibson against C. J.

Payne. From a judgment for defendant, plaintiff appeals. Affirmed.

M. W. Seitz, of Portland (Seitz & Clark, of Portland, and R. L. Conner, of McMinnville, on the brief), for appellant. W. T. Vinton and James E. Burdett, both of McMinnville (McCain, Vinton & Burdett, of McMinnville, on the brief), for respondent.

BEAN, J. It appears from the record that on the day of the accident complained of plaintiff and a party of friends went to defendant's farm and requested the privilege of hunting birds thereon, which was granted. At their solicitation the defendant accompanied them for the purpose of showing them the hunting grounds, but not to engage in the sport himself. After one division of the party, consisting of plaintiff, defendant, and two others, had searched in one field, they proceeded for a short distance along a county road and were entering an inclosure on the other side, Mr. Gibson having advanced into the field about 15 or 20 feet ahead of the others. At this time Mr. Dobie, one of the party, having had poor luck, urged Mr. Payne to take his gun and shoot some game. Finally, the latter consented, and Dobie passed him a double-barreled breech-loading gun with visible hammers, loaded and fully cocked. Payne, noticing that one of the hammers was raised, proceeded to lower it, when the other barrel was discharged, hitting Gibson in the hip and leg and injuring him severely. Payne exclaimed to Dobie: "What in the devil did you hand me a cocked gun for?"

The charge of negligence is as follows:

"That the discharging of said gun and the injuries to the plaintiff as herein stated were caused wholly by the carelessness and negligence of the defendant, in this, that the defendant was careless and negligent in cocking said gun and permitting the hammer thereof to remain cocked and in holding said gun in such a manner and position that the plaintiff became injured when said gun was discharged; and that the defendant was further careless and negligent in carelessly and negligently discharging said gun and in holding the same in such manner and position that the same was discharged."

The defendant denies this charge, and pleads contributory negligence on the part of the plaintiff in advancing in front of the other members of the party, and in knowingly permitting Dobie to carry a loaded shotgun with both hammers up; and that the accident was an unavoidable one.

[1] In order to show the condition of the gun when handed to defendant, and also as tending to show plaintiff's opportunity for knowing the same, defendant introduced evidence of the position of the hammers when Dobie was carrying the gun along the county road. After the questions eliciting this testimony were answered, defendant interposed an objection, but made no motion to strike out the answer. By the complaint Payne was charged with carelessly cocking the gun, and, to refute this, it was competent for him to prove the condition of the weapon immediate-

ly before it was passed to him. Payne asserts that he did not know that the hammers were raised when he received the weapon; that upon discovering that one barrel was cocked he at once took the precaution to lower the hammer in order to lessen the danger. Plaintiff did not undertake to show in what manner the gun was discharged, whether by a jar in handling, or in some other manner. Plaintiff states that if he had been aware that the gun was being carried while cocked he would have left the hunting party very quickly. The jury failed to find that the injury was caused by defendant's negligence without a contributory fault of the part of plaintiff.

[2-4] When the facts are such that reasonable men may differ as to whether there was negligence, the determination of the matter is for the jury. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. We think this case is one for the special consideration of the jury, and that it was decided by them upon the facts, a portion of which have been referred to, without any misdirection on the part of the trial court. Plaintiff complains of the charge given to the jury and of the refusal of the court to instruct as requested by his counsel. In a general way the circuit court called the attention of the jury to the issues or claims of the respective parties, as set forth in the pleadings, and informed that body that it was its duty to determine the facts from the evidence. Plaintiff complains that in the preliminary statement the court did not define contributory negligence, nor state that in order to preclude the plaintiff from recovering he must have "negligently" contributed to his own injury by placing himself in a dangerous position. This point seems to be fully explained by the charge. The court gave the following instructions, among others:

"Now the plaintiff, in order to recover at all, must establish by the greater weight of his evidence in this case, to your satisfaction, that this defendant did carelessly and negligently shoot him with a shotgun. It isn't contended he did it purposely, or intentionally, but merely that he was careless and negligent in the handling of the shotgun."

Further, that the members of a hunting party "must use the care and precaution such as any reasonably prudent man would under the circumstances, and the law makes them know that a shotgun loaded is a dangerous weapon to life and limb, and that applies, as I have said, to each member of the party."

That "it is for you to determine whether or not that position, if you find he was in the position as has been testified to, was one that would be carelessness or negligence on his part in getting out in front, if he did so, and you so find it from the evidence."

Error is predicated upon the claim that the instructions placed the burden upon the plaintiff to prove a want of contributory negligence, but we think the charge dispels any doubt in this respect. After referring to the claims of the defendant, among which was that of contributory negligence, the court said to the jury:

"And the defendant having alleged these matters which I have mentioned, he must establish them by the greater weight of the evidence, to your satisfaction, not by his own witnesses alone, if there should be any, but by all of the evidence in the case."

See *Walsh v. Or. Ry. & N. Co.*, 10 Or. 250, 253; *Grant v. Baker*, 12 Or. 329, 7 Pac. 318.

[5] Plaintiff also assigns error in the instructions as to the measure of damages. The jury not having found in favor of the plaintiff, it is unnecessary to examine this portion of the charge.

[6] Counsel requested the court to instruct the jury as follows:

"The jury are instructed that, as firearms when loaded are extremely dangerous, it is the duty of one handling them to use the very highest degree of care possible to avoid injuring others in the immediate vicinity. It is no defense that the act occurred through inadvertence or without the wrongdoer's intending it. It must appear, in order to relieve the wrongdoer of the charge of negligence, that the injury was utterly without any degree of fault on his part."

It is urged on behalf of plaintiff that the degree of care mentioned in this requested instruction should have been stated to the jury. The court, however, charged in effect that a loaded shotgun is a dangerous weapon and will produce serious bodily injury when discharged at another person either accidentally or otherwise, and the law makes each member of a hunting party know that fact, and that it is the duty of each to use, and each must use, that degree of care and precaution in order to avoid injury "such as any reasonably prudent man would use under the circumstances." The modern doctrine is stated in 8 *Thompson on Neg.* § 780, as follows:

"Persons having control and possession of firearms must exercise the utmost caution that harm may not come to others from such weapons. The degree of care is commensurate with the dangerous character of the weapons. The care is such as ordinarily cautious and prudent persons would exercise under similar circumstances."

See, also, *O'Barr v. United States*, 3 Okl. Cr. 319, 105 Pac. 988, 139 Am. St. Rep. 959; *Winans v. Randolph*, 169 Pa. 606, 32 Atl. 622.

The court admonished the jury that the weapon was dangerous to life and limb, and that the defendant was presumed to know it, and in effect charged that the care and precaution necessary on his part in order to avoid injury was commensurate with the danger. The rule of more than ordinary care was invoked, and in substance the law was given the jury as quoted above.

[7] All the circumstances were explained by the evidence to the jury. There were several in the hunting party, of whom some were young men. As some of the evidence tended to show, Dobie, after missing a bird, carried his gun ready to be discharged, and passed it in that condition over a gate to Payne. Whether Gibson by going in front of the others proceeded into the hunting

grounds with such a party in the orderly manner in which he should have done was properly submitted to the jury. Under all the evidence, it was not reversible error to submit to the jury the question of contributory negligence on the part of the plaintiff. Each case must be governed by its own peculiar facts, and a rational rather than distinctively legal conclusion must usually be drawn from them. In *Moebus v. Becker*, 46 N. J. Law, 41, 45, it was stated:

"In no case is it said that, where persons are gunning voluntarily together, each may be held responsible for every accident or mishap that may occur to the other while thus engaged; or that it is necessarily negligence to carry a gun cocked when in pursuit of game, or that in passing through brush, crossing ditches, climbing fences, or resting upon them, the gun must be uncocked."

The requested instruction quoted above and several others as asked by plaintiff precluded the question of contributory negligence.

A careful examination of the testimony and the whole charge to the jury leads us to believe that the case was fairly presented to that body, and that they decided it upon the evidence, and that there was no reversible error in refusing to give the instructions in the exact language requested.

Finding no error in the record the judgment of the lower court is affirmed.

MOORE, C. J., and HARRIS and BENSON, JJ., concur. EAKIN, J., absent.

(79 Or. 489)

JAKEL v. SEECK et al.

(Supreme Court of Oregon. Jan. 25, 1916.)

1. JUDGMENT \S 621 — CONCLUSIVENESS — EQUITABLE DEFENSES.

In an action at law a party may rely upon his legal defenses without being precluded from thereafter setting up his equitable title in an original suit against which the judgment in the action at law is no bar.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1135; Dec. Dig. \S 621.]

2. ESTOPPEL \S 70 — FAILURE TO ASSERT RIGHT.

Where the grantee accepted a deed with knowledge that it did not contain a covenant in his favor which he claimed was omitted through fraud, and held possession for several years, he cannot thereafter attack the deed on that ground.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 183-187; Dec. Dig. \S 70.]

3. DEEDS \S 211 — COVENANTS — ACTIONS.

In a suit to reform a deed, providing that the property should revert in case livery business was carried on upon the premises granted, and to restrain a judgment of ejectment procured by the grantors, evidence held insufficient to show that the grantors were guilty of fraud in the execution of the deed, or that they fraudulently entrapped plaintiff into allowing livery business to be carried on upon the premises.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 637-647; Dec. Dig. \S 211.]

Department 1. Appeal from Circuit Court, Linn County; Wm. Galloway, Judge.

Action by A. Jakel against F. W. Seeck and another. Judgment for plaintiff, and defendants appeal. Reversed, and suit dismissed.

This is a suit to reform a deed and to restrain the enforcement of a judgment. The substance of the complaint is that on June 29, 1907, the defendants were the owners of two separate pieces of real property in the city of Lebanon, upon one of which, known herein as the Grant street property, they were conducting a livery business, and upon the other a feed business. On the date mentioned, defendants sold to plaintiff the property upon which the feed business was being conducted for the sum of \$3,000. The conveyance being, in form, a warranty deed, contained the following:

"Forfeiture Clause.—The above-described real property shall revert back to the grantors without any cost or expense if any person or persons shall conduct or allow to be conducted any livery business in or on said described premises unless by quitclaim deed or written consent of the grantors of this deed."

It is then alleged that the actual agreement and understanding of the parties was that in consideration of plaintiff's refraining from conducting a livery business upon the premises, purchased by him, the defendants would refrain from conducting a feed business upon their Grant street property, and that, if they should thereafter conduct a feed business thereon, then the plaintiff should be permitted to conduct a livery business at the feed barns purchased by him; that plaintiff is an illiterate person of German descent, unable to read or write in any language, and unable to make himself clearly understood in the English language; that by reason of such limitations he was compelled to rely largely upon the honesty of those with whom he dealt, and that these conditions were well known to the defendants; that, for the purpose of defrauding and cheating plaintiff, defendants failed to have inserted as a part of the "forfeiture clause" the following:

"Except that if F. W. Seeck or H. J. Seeck or their heirs or assigns shall conduct or operate upon their Grant street property, situated between Main and Park streets in the city of Lebanon, any feed business, then this forfeiture clause shall be null and void and of no effect, the same being based upon the sole consideration that the grantors herein or their heirs or assigns shall refrain from conducting upon said Grant street property any feed business."

It is then alleged that by reason of plaintiff's illiteracy he did not know that the portion of the agreement just quoted had been omitted from the deed and did not discover such omission for some time thereafter; that as soon as he learned of the fraud he demanded that defendants correct the writing by inserting the remainder of the agreement therein, but that defendants, taking advantage of his ignorance, induced him to accept a collateral written agreement which was so worded as to be of no value whatever; that

for several years thereafter plaintiff conducted a feed business upon the property so purchased by him and refrained from conducting a livery business thereon; that about December 1, 1911, the defendants, for the purpose of further defrauding and cheating plaintiff, and in order to entrap him into such a position that they could recover the property for a violation of the "forfeiture clause," connived, planned, and did procure one A. J. Newman to lease the premises from plaintiff and thereafter to conduct a livery business thereon; that plaintiff did lease the same and deliver possession thereof to Newman without any restriction as to the nature of the business to be conducted on the property, and that Newman did conduct a livery business thereon in disregard of the terms of the deed; and that defendants thereupon began and conducted to a successful termination an action in ejectment, whereby they obtained a judgment awarding them the possession of the property. Then follow allegations to the effect that plaintiff, by reason of his educational limitations, was unable to make his attorneys clearly understand the nature of his defense, and that therefore no cross-bill in equity was filed therein and no effort made in that action to reform the deed; that at the time of the trial of such action he did not know that defendants had conspired with Newman to secure a lease of the property for the purpose of accomplishing a breach of the condition expressed in the deed; that the defendants in the year of 1908 began to conduct a feed business on their Grant street property, and have done so continuously since that time; and that plaintiff has always understood that such acts of defendants constituted a waiver of the condition subsequent in the deed and authorized him to conduct a livery business upon his property.

The defendants in their answer, after general denials, pleaded the judgment in the ejectment action in bar of this suit. A reply having been filed thereto, a trial was had resulting in a decree in favor of plaintiff, from which this appeal is taken.

M. V. Weatherford, of Albany (Weatherford & Weatherford, of Albany, and N. M. Newport, of Lebanon, on the brief), for appellants. M. Vernon Parsons, of Eugene, for respondent.

BENSON, J. (after stating the facts as above). [1] There are some 26 assignments of error, but we do not regard it necessary to consider more than 1 or 2 of them, as practically every question of law involved in the consideration of the case has already been passed upon by this court in the case of *Seeck v. Jakel*, 71 Or. 35, 141 Pac. 211, 53 L. R. A. (N. S.) 679. There is no merit in the plea that this suit is barred by the action at law, since this court has repeatedly held that, under the statute which allows an equi-

table defense by cross-bill in actions at law, a party may rely upon a legal defense in an action without thereby being precluded from afterward asserting his equitable title in an original suit. *Hill v. Cooper*, 6 Or. 181; *Spaur v. McBee*, 19 Or. 76, 23 Pac. 818; *South Portland L. Company v. Munger*, 36 Or. 457, at page 462, 54 Pac. 815, 60 Pac. 5; *Bowsman v. Anderson*, 62 Or. 431, 123 Pac. 1092, 125 Pac. 270.

[2, 3] We are therefore to consider the evidence in the case. It is voluminous and hopelessly conflicting. However, if we confine ourselves to the testimony submitted by the plaintiff, we discover that he was not misled as to the contents of the deed. It was read to him by the scrivener, and he then noted the fact that the writing was silent as to any restriction upon the grantors in conducting a feed business upon their Grant street property. In answer to a question by his attorney, he says:

"Well, when the deed was read to me I objected a little about it on account of it being just that in alone and not putting the others in, on account of the feed proposition. Q. What did they tell you? A. He told me, he says, 'Well, you are protected,' and then I left it go at that, I thought it was all right, I didn't say any more."

The evidence further discloses that on the same day that the deed was executed plaintiff gave defendants his note for \$500 as payment on the purchase price of the property, and the deed was then placed in escrow in a local bank, and nothing further was said or done by either party until October 1st, at which time plaintiff demanded from defendants some written assurance that they would not conduct a feed business at their Grant street property, and such a writing was then executed, which, through a blunder on the part of the scrivener, was so phrased as to be valueless, and on the next day the full purchase price was paid and the deed delivered and recorded. After about 4½ years had elapsed, during which time the plaintiff conducted a feed business on the premises in controversy, he entered into a written lease of the property with Newman, in which there were no restrictions as to the nature of the business to be conducted thereon. Newman, shortly after taking possession, began to do a livery business, and about six months later defendants began their action to recover possession of the property.

We find no evidence in the record which establishes plaintiff's contention that defendants conspired fraudulently to get Newman to lease the premises in order to bring about a forfeiture of the title. The only evidence upon this point is that of Newman himself, who says:

"I asked him if he would lease barn and sell his rolling stock. He said he would sell his rolling stock, but he asked me such a price that I couldn't afford to pay it. I told him that I could not pay that, it was too much money. He asked me why I didn't go lease the feed barn

down at the depot. I told him that I had saw Jakel and tried to lease the barn, and he wanted \$45 a month rent, and I was about to make the deal with him and he backed out. Then, two or three days later, I saw him again, and we was talking, and he wanted \$50 per month, so I just laid \$50 in his hand and tied him up."

We are unable to find in this testimony any evidence of fraudulent purpose. Nor are we able to find in the record evidence that there was ever any agreement between the parties to the effect that conducting a feed business by the defendants upon their Grant street property should render the forfeiture clause in the deed void. It follows that the plaintiff has failed to make a case entitling him to the relief for which he prays. If this conclusion works a hardship upon the plaintiff, he has only himself to blame. He accepted the deed with full knowledge of its contents and conditions. He acquiesced in these conditions for several years without complaint, and, when he permitted the conducting of a livery business upon the premises, he knew the hazard he was incurring. The courts cannot make new contracts for parties, nor relieve them from obligations deliberately assumed.

The decree of the lower court is reversed, and the suit dismissed.

MOORE, C. J., and McBRIDE and BURNETT, JJ., concur.

(79 Or. 541)

CITY OF RAINIER v. MASTERS et al

(Supreme Court of Oregon. Jan. 18, 1916.)

1. DAMAGES \S 85—LIQUIDATED DAMAGES—BREACH—CONSTRUCTION.

A stipulation in a contract for the improvement of streets that if the work was not completed by September 15, 1909, the contractor should forfeit the sum of \$10 for each day, Sundays excepted, elapsing after the expired time to date of completion, provided that if in the engineer's opinion the delay was unavoidable, the city council might extend the time for completion, secured by the bond of a surety company conditioned for the contractor's performance of the contract, was limited to the time between September 15, 1909, and the completion of the improvement, and contemplated a fulfillment of the contract, and not a breach by abandonment, and showed an intention that it should not apply to general damages, but only to mere delay.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 179-181, 183-187; Dec. Dig. \S 85.]

2. DAMAGES \S 150—LIQUIDATED DAMAGES—ACTION—SUFFICIENCY OF COMPLAINT.

In the city's action on such bond, begun April 21, 1913, alleging that there was no cause for delay and no extension of time, its demand on the contractor and surety to complete the contract and their refusal to do so, and damages at \$10 a day from the specified time of completion, not showing the completion of the contract so as to fix the termination of the period of forfeiture to which the damages might be applied, was bad on demurrer.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. \S 150.]

3. DAMAGES \S 76—LIQUIDATED DAMAGES—FORFEITURES.

Forfeitures are to be strictly construed, and one who would avail himself of them must bring himself precisely within the letter of the contract authorizing them.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 154, 155; Dec. Dig. \S 76.]

4. DAMAGES \S 79—LIQUIDATED DAMAGES—GROUNDS.

In general damages are limited to compensation that the injured party may be made whole, and it is only where it is difficult or impossible to calculate the actual damages that the previous stipulation of the parties for liquidated damages will be enforced.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 164-169; Dec. Dig. \S 79.]

Department 2. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Action by the City of Rainier against Charles Masters and another. Judgment for defendants was set aside on plaintiff's motion, and defendants appeal. Reversed and remanded, with directions to enter judgment for defendants on the verdict.

It appears by the complaint that the plaintiff city determined by ordinance to improve certain streets within its boundaries; that it let contracts for two separate improvements to the defendant Masters, for whom the other defendant gave in each case a bond conditioned thus:

"Now, if said contractor shall well and faithfully perform all the covenants and conditions in said contract mentioned, and shall indemnify and save harmless the city of Rainier against all claims or liens for labor, work, or material on account of all subcontractors, materialmen, laborers, and mechanics furnishing labor or material under said contract, then this obligation shall be void, otherwise to remain in full force and virtue."

The contract was to be completed by September 15, 1909. The complaint states that Masters began performance, but that both he and his surety "failed and neglected to complete said contract in any manner by September 15, 1909, or otherwise or at all, and said contract remains uncompleted to this day, and it will take a good many thousands of dollars to complete this contract." It is also averred that:

"It was further provided in said contract that should the work under this agreement not be completed within the time specified, which was September 15, 1909, the contractor should forfeit the sum of \$10 for each and every day, Sunday excepted, which should elapse after the expired time to date of completion, provided, that if in the opinion of the engineer the delay was on account of unavoidable causes, the council may extend the time for the completion of the work."

Pleading that there was no cause for delay and no extension of time, and demands of the contractor and surety to complete the contract, which both have failed and refused to do, plaintiff alleges that it has been damaged in the sum named on each cause of action, being \$13,226.20 on one contract, and \$3,532.20 on the other. The complaint was filed April 21, 1913. A general demurrer to

it was filed, the disposition of which does not appear in the abstract. The answer of each defendant admits all the allegations of the complaint, except the assignment of the breach of the contract and the performance by the plaintiff on its part, both of which are denied. A jury trial resulted in the following verdict:

"We, the jury, in the above-entitled matter, find for the defendants."

"We, the jury, find that the council of the city of Rainier did extend the time for the completion of road district No. 1."

"We, the jury, find that the contract for road district No. 1 was substantially completed on the 1st of November, 1910."

"We find that the council of the city of Rainier did extend the time for the completion of road district No. 2."

"We, the jury, in the above-entitled cause, find that the contract was substantially completed on the 1st of November, 1910."

A judgment for the defendants on this verdict was afterwards set aside by the court on motion of the plaintiff on the grounds of the insufficiency of the evidence, disregarded by the jury of the instructions of the court, mistakes in admission of evidence, and erroneous charge to the jury. The defendants appeal.

R. C. Wright, of Portland, for appellant Masters. R. C. Nelson, of Portland, and Beach, Simon & Nelson, of Portland, for appellant United States Fidelity & Guaranty Co. W. H. Cooper, of St. Helens, and R. R. Duniway, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] The complaint declares an abandonment of the contract after the commencement of performance. At what stage of the work this occurred is not stated. The effort of the plaintiff is to apply to such a breach the stipulation for the allowance of \$10 a day for delay in completing the undertaking. We note that by the provisions of the agreement itself this per diem forfeit is not to be applied for an indefinite period in the discretion of the plaintiff. On the contrary, the stipulation is limited to time "which should elapse after the expired time to date of completion." In other words, the term for which the amercement is to be allowed is bounded in the beginning by September 15, 1909, and is ended at the completion of the improvement. The pleadings fail to disclose such latter date. Indeed, the plaintiff virtually states that there is no such date in that it says the enterprise was never finished. The manifest intention of the parties was, not to apply this clause to general damages, but only to mere delay. The stipulation on that point contemplates a fulfillment of the contract although belated, and not a breach by abandonment. It is plain that if the contractor had finished his work in a defective manner by September 15, 1909, the covenant in question would not have been the standard by which the dam-

ages to the city would have been measured. It can only apply where he has done the work in every respect as agreed upon so far as structure and materials are concerned, and yet has been behind time. Clearly the provision for damages must be applied to an apposite breach. The principle is thus aptly stated in the note to *Moses v. Autuono*, 56 Fla. 499, 47 South. 925, 20 L. R. A. (N. S.) 350:

"It seems to be generally held that, where a contract provides for the payment of stipulated damages for a particular breach, such stipulation is applicable only to the breach provided for; and, upon the abandonment or repudiation of the entire contract, the injured party, if his actual damages are the greater, is not limited to the stipulated damages, or vice versa, if the latter are the greater, he is limited to the actual damages."

Other cases illustrating the principle are *Oakland Electric Co. v. Union Gas & Elect. Co.*, 107 Me. 279, 78 Atl. 288; *Muehlbach v. Mo. & K. I. Ry. Co.*, 166 Mo. App. 305, 148 S. W. 453; *Bedford v. Miller*, 212 Fed. 368, 129 C. C. A. 44; *Ward v. Haren*, 183 Mo. App. 569, 167 S. W. 1064; *Murphy v. U. S. F. & G. Co.*, 100 App. Div. 93, 91 N. Y. Supp. 582; *Gillette v. Young*, 45 Colo. 562, 101 Pac. 768.

[2-4] Forfeitures are to be strictly construed, and he who would avail himself of them must bring himself precisely within the letter of the contract authorizing them. It was not the intention of the parties, as manifested by their agreement, to create a perpetuity of per diem forfeiture bounded only by the statute of limitations or the rapacity of the plaintiff. In general, damages are limited to compensation to the end that the injured party may be made whole, and it is only where it is difficult or impossible to calculate the actual damage that the previous stipulation of the parties for liquidated damages will be enforced. Such is the teaching of *Wilhelm v. Eaves*, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297, and kindred cases decided by this court. The complaint does not portray any condition to which the drastic remedy of liquidated damages is applicable. It was at least the duty of the pleader to show a completion of the contract, and thus establish the termination of the period of forfeiture. Failing to do so, he has not stated in any event a breach to which can be applied the measure of damages he invokes. For aught that appears, the contract may have been completed, except for a few trifling particulars which might be easily and quickly remedied. The measure of damages in such a case in justice and good conscience would be the difference between the contract price and the greater cost of completing it, but no situation of the kind is presented by the pleadings. The plaintiff's case was bad on demurrer. The verdict of the jury reached the same conclusion, and should not have been disturbed. The cause is reversed and re-

manded, with directions to enter judgment for the defendants on the verdict.

BENSON and HARRIS, JJ., concur. EAKIN, J., did not take any part in the consideration of this case. BEAN, J., concurs in the result.

(79 Or. 123)

STATE v. BROWNELL.

(Supreme Court of Oregon. Jan. 25, 1916.)

1. CONTEMPT — § 72 — PUNISHMENT — IMPRISONMENT AND FINE — STATUTE.

L. O. L. § 670, provides in part that any unlawful interference with the process or proceedings of a court is a contempt. Section 671 provides that every judge has power to punish contempts by fine or imprisonment, or both, not exceeding \$300 or six months, and that when the contempt is not of the classes mentioned in sections 670 and 959, subd. 1, which relate to acts committed in the presence of a judicial officer, it must appear that the right of a party to a proceeding was prejudiced before the contempt can be punished otherwise than by a fine not exceeding \$100. Defendant, attorney for one charged with rape, procured the latter's wife and children to leave the state that they might not testify against him, and, in contempt proceedings, the affidavit not showing that the right or remedy of a party was prejudiced by his action, was sentenced to serve three months in jail and pay a fine of \$250. Held that the punishment was excessive, and should be limited to a fine of \$100.

[Ed. Note.—For other cases, see Contempt. Cent. Dig. §§ 249-256, 273; Dec. Dig. § 72.]

2. CONSTITUTIONAL LAW — § 56 — ENCROACHMENT ON JUDICIARY — PUNISHMENT OF CONTEMPT — STATUTE PRESCRIBING — CONSTITUTIONALITY.

L. O. L. § 671, providing that every judge has power to punish contempts by fine or imprisonment, but that such fine shall not exceed \$300 or the imprisonment six months, and when the contempt is not one of those mentioned in section 670, subds. 1, 2, or section 959, subd. 1, it must appear that the right or remedy of a party to a proceeding was prejudiced before the contempt can be punished otherwise than by fine not exceeding \$100, is not inoperative because the Legislature cannot limit the inherent power of constitutional courts to punish for contempt, since the statute does not limit the power, but merely prescribes the procedure for its exercise.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 62-65; Dec. Dig. § 56.]

Department 2. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Howard M. Brownell was sentenced upon a plea of guilty to a charge of contempt of court, and he appeals. Judgment modified.

On April 3, 1915, the district attorney for Lane county filed in the circuit court for such county an affidavit in the following language:

"I, Desta Carter, being first duly sworn, say: That I am the wife of one Elzia Carter and the mother of Monneita Carter and Gertrude Carter; that an information was filed in the office of J. E. Wells, justice of the peace for Eugene justice district, Lane county, Oregon, charging Elzia Carter with the crime of rape with and upon Monneita Carter, who was the daughter of said Elzia Carter, and that thereafter a preliminary hearing was held before said court

and the said Elzia Carter by order of said court was bound over to appear before the grand jury of Lane county, state of Oregon, a certified copy of which said commitment is hereto attached and made a part hereof. That thereafter, to wit, on the 2d day of October, A. D., 1914, one — Hawk, deputy sheriff of Linn county, Or., served affiant and the said Gertrude Carter and Monneita Carter with subpoenas, commanding the said persons to appear before the grand jury of Lane county, state of Oregon, on the 12th day of October, 1914; that on the 26th day of September, Howard M. Brownell, who represented himself to me to be the attorney for Elzia Carter, asked an interview with me, and when the same was refused, he persisted in talking and requested me at that time to take the said Monneita Carter and leave the state with her so that we would not be here to testify against Elzia Carter. I refused at that time to comply with his request, and informed him that we were state's witnesses and could not participate in anything of the kind, or comply with his request or suggestion. Thereafter, on the 1st day of October and again on the 2d day of October, he came to our residence in Harrisburg, Or., and urged that I take all the children, including Monneita Carter, and leave the state. He said that he would see that we got the money, that he would see that I got a divorce from Elzia Carter, and that I would be paid fifty dollars per month as alimony, and that the children would be put in school. On Friday night, October 2d, he came again to our place in Harrisburg, Or., accompanied by Elzia Carter, and persuaded us to leave the state and go to Seattle, Wash. On that same evening Elzia Carter and Howard M. Brownell assisted in preparing the baggage, and assisted in getting it to the Oregon Electric Station in Harrisburg, and Elzia Carter gave Gertrude Carter sufficient money to pay our railroad fares to Portland. That Elzia Carter and Howard M. Brownell accompanied us on the train, to Portland. That at their suggestion we got off the said train at the Jefferson Street Station in Portland. That Elzia Carter advised us repeatedly to follow the advice and instructions of Howard M. Brownell and to do everything as he directed, and that everything would come out all right. That at the instance and suggestion and under the direction of Howard M. Brownell we took the street car in Portland for Vancouver, and we were taken and directed to a hotel in Vancouver, at which place we were instructed by Howard M. Brownell to register under the name of Mrs. Smith and family from some point in California. That after eating dinner at Vancouver, the said Howard M. Brownell purchased tickets for the said persons named herein for Seattle, Wash., and directed us to take the train for said place, he taking the same train and under an agreement and understanding that he would direct us in Seattle where to leave said train and where to go. That at Seattle the said Howard M. Brownell assisted us off the train and took us to a hotel, where he registered us as coming from a point in California. That he rented a small cottage out about five miles distant from the main portion of the city, in a secluded spot, and paid the rent for a month on said cottage, and told the party from whom he rented the house that our names were Wilson, and he introduced us as the Wilson family. That he procured a cord of wood for us, and took Gertrude Carter to a business school in Seattle and there enrolled her as Gertrude Wilson, and said that he had paid her tuition for one month. That upon his leaving Seattle he gave me \$15 in money, and stated that as soon as he reached Eugene he would send more money. That during some of the conversations relative to our leaving the state, I informed him that we were subpoenaed before the grand jury as witnesses, and he stated that those subpoenas amounted to nothing; that we

did not have to appear to testify, and he requested us to give him the subpoenas, which we did, and he stated at that time that he would take care of that matter. When we reached Vancouver he said: 'Now we are free, and there is no law in the state of Oregon which can bring you back,' and before leaving us in Seattle he said, 'If any one comes here to arrest you or bring you back, you must absolutely refuse to go, for there is no law by which you can be returned to Oregon,' and he stated, further, that should any one inquire for him or ask if he had been up there, for us to emphatically declare that we had not seen him and did not know anything about him, and he said, further, 'It will not hurt you to lie, so you must lie like everything, for if this is ever found out, I will be disbarred and not allowed to practice again in any state in the Union.' He left positive instructions with us that we were not to write to any one, and that our mail, if any came, would come in the name of Wilson.

"I state further that I had absolutely no intention of leaving the state or of concealing evidence with reference to the commission of the said crime until influenced so to do by said Howard M. Brownell, and I would not have gone had it not been for his solicitation, advice, and assistance. He stated that to remain here and go through the trial would mean the conviction of Elzia Carter and the disgrace of my whole family, and he continually talked about and emphasized the character of the case and the disgrace which it would bring upon us, until he finally persuaded us to leave. He stated at the time that if we stayed and appeared as witnesses in the case, it was absolutely certain that the said Elzia Carter would be convicted, and for that reason he wanted us to leave."

On May 24, 1915, the defendant appeared in open court and entered a plea of guilty to the charge set out in the affidavit. Thereupon the court entered judgment as follows:

"It is hereby ordered and adjudged that said defendant Howard M. Brownell be, and he is hereby sentenced to serve three months in the county jail of Lane county, Or., and that he pay a fine of (\$250) two hundred and fifty dollars."

From this judgment defendant appeals.

Lark Bilyeu, of Eugene (Woodcock, Smith & Bryson, of Eugene, on the brief), for appellant. J. M. Devera, Dist. Atty., of Eugene, for the State.

BENSON, J. (after stating the facts as above). [1] The entire record in this contempt proceeding consists of the affidavit, the plea of guilty, and the judgment of the court. Appellant's sole contention is that the sentence is in excess of the power of the court to provide for a contempt of this character. Section 670, L. O. L., in part, reads as follows:

"The following acts or omissions, in respect to a court of justice, or proceedings therein, are deemed to be contempts of the authority of the court:

"1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding;

"2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

"9. Any other unlawful interference with the process or proceedings of a court."

Section 671, L. O. L., reads thus:

"Every court of justice and every judicial officer has power to punish contempt by fine or imprisonment, or both; but such fine shall not exceed \$300, nor the imprisonment six months; and when the contempt is not one of those mentioned in subdivisions 1 and 2 of the last [mentioned] section, or in subdivision 1 of section 959, it must appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced thereby before the contempt can be punished otherwise than by a fine not exceeding \$100."

It is obvious that the acts charged in the affidavit are not the ones mentioned in subdivisions 1 and 2 of section 670, L. O. L., nor are they mentioned in section 959, L. O. L., which relates to acts committed in the presence of a judicial officer.

[2] It has been urged that, since constitutional courts have inherent power to punish for contempt, the Legislature has no power to limit their action in this respect. We do not regard section 671, L. O. L., as limiting their power to punish for contempt, but merely as prescribing the procedure for exercising such power. The only record upon which the judgment of the trial court is based is the affidavit, and it does not appear therein that the right or remedy of a party was defeated or prejudiced thereby. It follows that the judgment of the lower court is modified so that the punishment is limited to a fine of \$100, the defendant to be committed to the county jail of Lane county until the fine is paid, the commitment not to exceed 60 days in duration.

MOORE, C. J., and BEAN and BURNETT, JJ., concur.

(79 Or. 128)

STATE v. WALLACE.

(Supreme Court of Oregon. Jan. 25, 1916.)

1. SEDUCTION ~~§~~32—SEDUCTION OF DIVORCEE —"UNMARRIED FEMALE."

A divorced woman is within the contemplation of the statute denouncing the offense of seduction under promise of marriage and providing that if any person under promise of marriage shall seduce any "unmarried female," such person, upon conviction, shall be punished.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 54½–55½; Dec. Dig. ~~§~~32.

For other definitions, see Words and Phrases, First and Second Series, Unmarried.]

2. SEDUCTION ~~§~~46—CRIMINAL RESPONSIBILITY—CORROBORATIVE EVIDENCE.

In a prosecution for seduction under promise of marriage, letters alleged to have been written by the defendant to prosecutrix, not identified or proved to be his letters except by her testimony, did not afford evidence corroborating her testimony.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83–86; Dec. Dig. ~~§~~46.]

Department No. 2. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Charles L. Wallace, the defendant, was indicted for the crime of seduction under

promise of marriage, and, having been convicted and sentenced thereon, prosecutes this appeal. Reversed and remanded.

L. Bilyeu, of Eugene (W. B. Dillard, of Eugene, on the brief), for appellant. J. M. Devers, of Eugene, for the State.

BENSON, J. [1] It is contended by appellant that, since it appears conclusively from the record that at the time of the commission of the alleged crime the prosecutrix was a divorced woman, she was not "an unmarried female" within the meaning of the statute, and that therefore the defendant was entitled to an instructed verdict of acquittal. The statute under which the prosecution is maintained provides that:

"If any person, under promise of marriage, shall seduce and have illicit connection with any unmarried female of previous chaste character, such person, upon conviction, shall be punished," etc.

Our attention has been called to but one reported case directly in point, namely, *Jennings v. Commonwealth*, 109 Va. 821, 63 S. E. 1080, 21 L. R. A. (N. S.) 265, 132 Am. St. Rep. 946, 17 Ann. Cas. 64, in which it was held, under a statute practically identical with ours, that the phrase "an unmarried female" should be construed to mean a woman who has never been married, and that the seduction of a divorced woman is not a violation of the law. In *Pratt v. Mathew*, 22 Beav. Rep. 323, it is said that the word "unmarried" does not necessarily mean "without having been married," and that no fixed meaning can be assigned to it, but it must be determined according to the circumstances of the case. This authority has been cited with approval by many of the courts, and indeed is approved in the case of *Jennings v. Commonwealth*, supra, in which case the court argues that since a divorced woman has necessarily had experience in the lecherous ways of men, she is immune from their wiles and does not need the protection of the law. We cannot agree with this interpretation, however, for the spirit of the law does not and cannot take into consideration the wisdom and experience of those whom it undertakes to protect from wrong. We entertain the view that law is intended for the safeguarding of the virtue of the chaste widow just as much as for that of the woman who has never been a wife.

[2] Upon the trial the defendant requested the court to charge the jury as follows:

"That the letters alleged to have been written by the defendant to prosecutrix were not identified or proved to be letters of the defendant except by the prosecutrix's testimony; hence they do not afford evidence corroborating prosecutrix's testimony."

This instruction was refused, and such refusal is assigned as error. The record discloses that certain letters were introduced in evidence which, according to the testimony

of prosecuting witness, were written by the defendant and received by her through the mails. No other evidence was offered as to the identity of the missives, and they were relied upon by the state to corroborate the prosecutrix as to the essential elements of the crime charged. We have found but few cases which discuss the question thus presented, but all of those to which our attention has been called support defendant's contention. In a case similar to the one under consideration the Court of Criminal Appeals of Texas says:

"The prosecuting officers evidently relied on the letters said to have been written by appellant and introduced in evidence. Miss Harrison testified that the letters were written by appellant, and this rendered them admissible in evidence; but could they be used to corroborate her, when she alone testified that they were written by appellant? Eliminate her testimony, and the letters go with it. If it was desired to use the letters as corroborative testimony, some evidence, other than that of Miss Harrison, should have been introduced, tending to show that appellant wrote the letters. An accomplice cannot corroborate herself. And no testimony she gives can be so used. * * * This charge should have been given." *Bishop v. State*, 151 S. W. 821.

To the same effect are the cases of *Smith v. State*, 58 Tex. Cr. R. 106, 124 S. W. 919; *Rogers v. State*, 101 Ark. 45, 141 S. W. 491, 49 L. R. A. (N. S.) 1198; *Carrens v. State*, 77 Ark. 16, 91 S. W. 30; *James v. State*, 72 Tex. Cr. R. 155, 161 S. W. 472. We conclude, then, that the court erred in refusing to give the instruction as requested, and the judgment is reversed, and the cause remanded for a new trial.

MOORE, C. J., and BURNETT and McBRIDE, JJ., concur.

(79 Or. 109)

DECKER et al. v. JORDAN et al.

(Supreme Court of Oregon. Jan. 18, 1916.)

1. VENDOR AND PURCHASER ⇐76 — CONTRACTS—CONSTRUCTION.

Where a contract for the sale of land, part of the payments to be made on installment, required the vendors to execute their warranty deed and to deposit it, together with an abstract showing good title to the property, in escrow, upon the purchasers making first payment after execution of the contract, the vendors were bound to furnish an abstract showing clear title in themselves prior to the maturity of deferred payments, though time was not expressly made part of the agreement.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 117, 119; Dec. Dig. ⇐76.]

2. PLEADING ⇐180—REPLY—DEPARTURE.

Before a party can enforce an executory contract relating to the sale of land, he must plead and prove performance or show waiver by the other party, and it is insufficient to allege in the complaint a general performance, and, when that is disputed, to set up a waiver in the reply.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 358-384; Dec. Dig. ⇐180.]

3. VENDOR AND PURCHASER ⇐58 — CONTRACTS—CONSTRUCTION.

Where a contract for the purchase of land required the purchasers to make deferred payments at fixed dates under penalty of forfeiture and obligated the vendors to execute a warranty deed and deposit it, with the abstract showing good title, in escrow, for the benefit of purchasers, the two obligations are correlative and, where neither party performs, neither is entitled to enforce the contract or to rescind.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 88; Dec. Dig. ⇐58.]

In Banc. Appeal from Circuit Court, Josephine County; F. M. Calkins, Judge.

Suit by Frank W. Decker and another against Clifford L. Jordan and others. From the decree dismissing the cause without prejudice to either party, both appeal. Affirmed.

This is a suit by the seller against the buyer and his assignee to foreclose an executory contract for the sale of land. It was admitted that on May 21, 1910, plaintiffs and the defendant Clifford L. Jordan covenanted with each other in writing, whereby the former agreed to sell to the latter certain real estate in Josephine county for \$10,000, \$1,000 of which was paid at the execution of the agreement leaving \$5,000 to be paid by June 15, 1910, and the remaining \$4,000 in equal annual installments beginning November 15, 1911, with interest at 7 per cent. per annum, payable annually. It was stipulated that upon the payment of \$5,000 as stated, Jordan should be allowed to take possession of the property, and that he should thereafter pay all taxes of every kind upon the premises and keep the same clear of liens on his own account. The contract contains the usual stipulation to the effect that in case of default in making any payment the seller may re-enter and take possession of the estate, the second party waiving notice to quit, and that in such event a forfeiture in favor of the other party shall result as to all sums paid upon the purchase price, the same to be considered as rental for the use and occupation of the premises. The agreement also contains this clause:

"It is further agreed and understood between the parties hereto that upon the second party making the payment of \$5,000 within the time and manner herein provided, that thereupon first parties shall execute their warranty deed of the lands herein described conveying said premises unto second party and Julia E. Jordan, his wife, which deed shall be placed in the First National Bank of Grants Pass, together with an abstract of title to all of said property showing a good title thereto, which deed and abstract shall be held in said bank in escrow, and said bank shall deliver same to second party or order upon payment of the purchase price for said property at the time and in the manner herein provided, but in case of default in any of said payments then said bank shall return said deed and abstract unto parties of the first part or order."

It is stated that the plaintiffs have fully complied with all the terms and conditions of their contract to be kept and performed by them. They aver that the defendants

Dale, husband and wife, claim some interest in the property through the defendants Jordan, but that the same is subject to the title of the plaintiffs and terms and conditions of the contract. They also assert that after the Dales took possession, a valuable barn on the premises burned, and the insurance on the same was collected by them; and that a large amount of personal property on the tract at the time of making the contract, and which was included in the purchase, has been disposed of and the proceeds retained by the defendants or some of them. Alleging a demand for the possession of the land and a refusal thereof, the plaintiffs pray for a decree adjusting the rights of the parties; for a sale of the premises to satisfy a decree for the remainder of the purchase price; for a receiver; and for an injunction against the defendants interfering with the property. All the defendants answered, the Dales in one, and the Jordans in another. The admissions and denials in both answers are substantially the same, but are not intelligible on the printed abstract because they refer to certain paragraphs of the complaint by numbers, and no numbers appear there as the paper is set out in the printed abstract. The answer also alludes, in denial, to words in certain lines of the complaint evidently referring to the typewritten or manuscript copy of the original, and hence gives no information on the printed abstract. The Dales claim by assignment from the Jordans to Mrs. Dale, and assert that the plaintiffs have neglected and refused to deliver an abstract of title to the property although frequently requested to do so, and that they are not the owners in fee simple of the lands in question. Various other statements are made in the answer about what the Dales are willing to do, and they claim to have fully complied with all the terms of the contract, except making the payment due November 15, 1911. No actual tender of that or any other installment is alleged in the answer. The reply denies most of the answer of the Dales, and recites some transactions occurring after the execution of the contract, and the payment of the \$5,000 whereby the title of the plaintiffs was perfected, and rehearses certain conduct of the defendant John A. Dale as agent for his wife, which the plaintiffs claim amounts to a waiver of the condition requiring an abstract. After a hearing, the circuit court made findings of fact and conclusions of law to the general effect that neither party had complied with the terms of the contract so that the plaintiffs might be entitled to foreclose or the defendants to rescind, and rendered a decree dismissing the cause without prejudice to either party and without costs in favor of either of them. Both parties appeal.

W. C. Hale, of Grants Pass, for plaintiffs.
O. S. Blanchard, of Grants Pass, for defendants.

BURNETT, J. (after stating the facts as above). [1] The testimony clearly shows that when the \$5,000 payment was made on June 15, 1910, the plaintiffs did not have a marketable title to the property, and in addition thereto, the same was incumbered by an unpaid mortgage, and that although they deposited their deed in the bank, as required by the contract, with an abstract, yet the latter document did not show at that time a merchantable title in the plaintiffs. The agreement does not specify that time is considered by the parties as of the essence thereof, though it is manifest from a fair consideration of its terms that plaintiffs were bound to furnish with their deed an abstract showing clear title in themselves prior to the maturity of any deferred payment. Supplying this document was as much one of the conditions of the covenant as furnishing the deed itself. This is the doctrine taught by *Kane v. Rippey*, 22 Or. 296, 23 Pac. 180, Id., 22 Or. 299, 29 Pac. 1005. It is not that an abstract is necessary to prove title, but the furnishing of one is a term of the contract to be observed the same as any other stipulation thereof.

[2, 3] It is common learning that before any one can enforce an executory contract he must himself first plead and prove that he has fully accomplished the things to be performed by him or a waiver thereof on the part of the other contracting party. All this must appear in his complaint. It is not sufficient for him to allege in his primary pleading a general performance, and when this is disputed by the answer to return in his reply and allege a waiver. *Cranston v. West Coast Life Ins. Co.*, 63 Or. 427, 442, 128 Pac. 427. The defendants, operating as the other contracting parties, are subject to the same rule, and before they can claim relief they themselves must show full performance, a valid offer to perform met by a refusal by the opposite party, or a waiver. Neither of the litigants, although pleading the same, has been able to prove that he has conformed to this rule of law. The testimony shows plainly that the plaintiffs did not have marketable title when the \$5,000 payment was made; that they did not deposit an abstract at the time showing title in themselves; and that it was not until after the suit was commenced that they pretended to furnish such an instrument. On the other hand, as already stated, the defendants have not proven performance of or any valid offer to perform the agreement on their part, and hence are not in any position to demand rescission of the contract. On the part of the plaintiffs the suit was premature, and the defense is without merit.

It was proper for the court to enter the decree which it did. It is affirmed.

EAKIN, J., absent. HARRIS, J., took no part in the consideration of this case.

(39 Wash. 337)

GAREY v. CITY OF PASCO. (No. 12782.)
(Supreme Court of Washington. Jan. 25, 1916.)

1. JURY ⇐13—TRIAL BY JURY—RIGHT.

Under Const. art. 1, § 21, providing that the right to trial by jury shall remain inviolate, only trials which were properly before a jury on the adoption of the Constitution are required to be by jury, but equitable causes need not be so tried.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 85-88; Dec. Dig. ⇐13.]

2. ACCOUNT ⇐14—ACTION—HOW TRIABLE.

An action for an accounting is one of equitable cognizance.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 71; Dec. Dig. ⇐14.]

3. ACCOUNT ⇐14—ACTION—PLEADING.

Pleadings examined, and held to present numerous and complicated items of mutual demand, raising the question of an accounting cognizable in equity.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 71; Dec. Dig. ⇐14.]

4. DAMAGES ⇐86—RESCISSION OF CONTRACT—EFFECT AS TO LIQUIDATED DAMAGES.

Where a contractor sued a city on his contract to construct a building for it, and the city sought recovery on its counterclaim for failure to complete the contract, the city could not, having terminated the contract on a certain date, collect after that date liquidated damages agreed upon in the contract, for failure to complete the contract within the time specified.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 182; Dec. Dig. ⇐86.]

5. CONTRACTS ⇐305—LIQUIDATED DAMAGES FOR BREACH—ESTOPPEL.

Where a contractor agreed with a city to construct a building for it, the contract providing that no certificate for payment during the progress of the work should be construed as an acceptance thereof, the city was not estopped by making payments to the contractor to claim liquidated damages from him for delay and failure to complete the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398-1400, 1463, 1464, 1467-1475; Dec. Dig. ⇐305.]

6. TRIAL ⇐68—REOPENING CASE—DISCRETION OF COURT.

Opening up the case, while the parties rest and while the court has it under advisement, for the purpose of taking further evidence, is a matter of discretion with the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 158-163; Dec. Dig. ⇐68.]

Department 2. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge.

Action by A. R. Garey against the City of Pasco, in which the defendant filed a cross-complaint. From a judgment for the defendant on its cross-complaint, the plaintiff appeals. Reversed in part, and remanded, with directions.

Charles W. Johnson, of Pasco, for appellant. Edward A. Davis, of Pasco, for respondent.

PARKER, J. This action was commenced in the superior court for Franklin county by A. R. Garey against the city of Pasco to recover a balance claimed to be due him upon a

contract and for extras furnished for the construction of its city hall. The city denied that any sum was due to Garey upon the contract price or for extras and set up by way of affirmative defense and cross-complaint numerous items of set-off and counterclaim, and prayed for an accounting and an affirmative judgment thereon against Garey for a large sum. Trial before the court without a jury resulted in judgment in favor of the city and against Garey for the sum of \$4,353.74, rendered on January 5, 1915, from which he has appealed to this court.

[1, 2] Counsel for appellant, Garey, made timely demand for trial of the cause before a jury and tendered the statutory fee therefor. The trial judge, being of the opinion that the case was triable before the court without a jury as a suit in equity for an accounting, denied appellant's demand for a jury trial and proceeded with the hearing of the case upon the merits without a jury as for an accounting. This ruling is complained of by counsel for appellant as erroneous, in that it denied him the constitutional right of trial by jury. There is therefore presented the question of whether this is a case triable by jury as a matter of right within the meaning of section 21, art. 1, of our Constitution, providing that "the right of trial by jury shall remain inviolate." It hardly needs argument or citation of authorities to show that this constitutional guaranty does not entitle a party to a jury trial in a case of a class which has always been recognized as being within the jurisdiction of courts of equity, since such cases never were triable by jury as a matter of right. This guaranty means no more than that the right of trial by jury shall continue as it existed at the time of the adoption of our Constitution. 24 Cyc. 101. It seems equally plain that an action for an accounting, properly maintainable as such, is one of equitable cognizance. 1 R. C. L. 222.

On August 1, 1911, appellant, Garey, entered into a contract with the city of Pasco by the terms of which he agreed to furnish all of the material and labor for the construction of a city hall for the city; it agreeing to pay him therefor the sum of \$27,492. He was to construct the building according to plans and specifications prepared therefor by C. Lewis Wilson, an architect, and under his direction. The city reserved the right to furnish certain brick for the building and to deduct the cost thereof from the contract price. The city also reserved the right to make changes in the work, and the contract price was to be deducted from or added to accordingly. The city also reserved the right to enter upon the premises and complete the building upon the failure of the appellant to perform the contract, deducting the cost thereof from the contract price, and if such cost exceeded the unpaid balance of the con-

tract price such excess was to be repaid by appellant to the city. Appellant was to be liable to the city for any damages because of the failure to perform his contract, the amount of such damages to be deducted or repaid in the same manner. Appellant was also liable to the city for liquidated damages in the sum of \$25 per day, to be deducted from any balance due appellant upon the contract for each day consumed in his completion of the building after December 31, 1911; that being the time fixed by the terms of the contract for the completion of the building. Appellant, however, was to be allowed extra time for certain unavoidable delays, and also for delays resulting from the fault of the city. As the work progressed, appellant was paid from time to time sums upon the contract price aggregating \$23,368.20. He claims an additional sum for numerous extras furnished, and claims a balance of \$6,438 due to him from the city. The foregoing facts appear in the allegations of the complaint, a copy of the contract being attached thereto as an exhibit.

In its answer and cross-complaint the city denies that any balance is due to appellant, and sets up by way of affirmative defense and cross-complaint numerous items of set-off and counterclaim. It prays for an accounting between itself and appellant, and claims a balance due to it from appellant of \$12,433. These claims of the city made against the appellant consisted of numerous items, for failure to complete the building within the time agreed upon, for damages resulting to the city by failure of the appellant to place proper material in the building as agreed, according to plans and specifications, for money expended by the city in completing the unfinished portion of the building as it was left by appellant, for deductions because of changes in the plans and specifications lessening the cost of the building, and in effect for repayment by appellant to the city of excess payments made to him during the progress of the work.

Appellant by his reply denies all of the affirmative allegations of the city's answer and cross-complaint.

[3] Looking to all of the allegations of these pleadings we cannot escape the conclusion that they raise issues determinable as for an accounting by a court of equity. These items are numerous and complicated, and consist of mutual demands made by the parties, each against the other. In the text of 1 C. J. 613, we read:

"The basis of equity jurisdiction over matters of account has often been discussed, and while it is said that the necessity for a discovery was originally the foundation of the court's jurisdiction, it is no longer restricted to cases of that description, and the best considered authorities put the equitable jurisdiction upon three grounds, to wit: The need of a discovery, the complicated character of the accounts, and the existence of a fiduciary or trust relation."

The ground of "complicated character of accounts" may of itself be subject to some

qualification in several jurisdictions; but, when that ground is accompanied with the element of mutuality of accounts, it seems to be agreed by all the authorities that the determination of the balance due from one party to the other becomes a proper subject of equity jurisdiction. This view is supported by the text and numerous authorities cited in 1 C. J. 618. That these items claimed by each of the parties against the other are items of mutual account, in a legal sense, seems plain, when we remember that by the very terms of the contract above noticed it was manifestly contemplated that such claims, so far as they are just and valid, should be regarded as mutual; that is, that they should be offset in favor of each party against the other for the purpose of determining any balance due from either party to the other. In Black's Law Dictionary (2d Ed.) 17, mutual accounts are defined as follows:

"Accounts comprising mutual credits between the parties, or an existing credit on one side which constitutes a ground for credit on the other, or where there is an understanding that mutual debts shall be a satisfaction or set-off pro tanto, between the parties."

See 1 R. C. L. 205; 1 C. J. 598.

We conclude that the nature of the issues raised by these pleadings, involving as they do the settlement of mutual and complicated accounts, are such as to call for the trial of the case by a court of equity, and that appellant was not entitled to a trial by jury.

[4] As to the merits of the case, the record is very long and the facts much involved. Our review of the evidence leads us to the conclusion that it preponderates in favor of the conclusions reached by the trial court in so far as the questions of fact are concerned, except as to one item allowed by the trial court in favor of the city, which we are unable to assent to as a proper allowance to the city. It is an item of \$875 allowed to the city as damages under the \$25 per day liquidated damage provision of the contract. The trial court was evidently of the opinion that the city was not entitled to any substantial allowance under this provision of the contract for delay prior to the time the city took possession of the building and proceeded with the completion thereof itself. We agree with the view that the delays up to that time were waived by the architect, or were as much the fault of the city as of appellant. It results, therefore, that almost all of this item of \$875 demurrage is being allowed the city for time following its taking the building away from appellant and proceeding itself with the completion thereof. We are not sure that this is exactly the interpretation that should be given to the trial court's views; but, looking at the record as a whole, we think that the city was not entitled to any demurrage up until the time it actually took possession of the building and proceeded with its completion. By the alle-

gations of the city in its answer we are informed that it "terminated said contract," and "that said building was taken away from the said A. R. Garey," on September 24, 1912. The city could not terminate the contract and at the same time claim under the contract the liquidated damage contracted for in case of delay, though, of course, it could claim actual damages, as to which there is no evidence. This question was considered by the Supreme Court of Alabama in *Fidelity & Deposit Co. v. Robertson*, 136 Ala. 379, 411, 34 South. 933, 944, Justice Sharpe, speaking for the court, said:

"On the proof in this record damages for delay in building, if the plaintiff should be found entitled to recover such damages, should be estimated according to the loss actually sustained on that account by the fault of Adams, Wright & Gossett, rather than by the stipulation in their contract on that subject. Apparently that stipulation was intended to be effective only in the event of those contractors continuing in the work under the contract beyond the time it fixed for their delivery of the house. The plaintiff, having before that time declared the contract forfeited and treated it so by ousting Adams, Wright & Gossett from its further performance, cannot maintain that the contract was thereafter continuing, so as to bind them to such further performance. As bearing on this question, though not strictly in point see *Lennon v. Smith*, 124 N. Y. 578 [27 N. E. 243]."

See 30 Am. & Eng. Ency. of Law (2d Ed.) 1263.

[5] Some contention is made that certificates by the architect and payments made thereon to appellant from time to time by the city, especially the last one, so given and honored, estops the city from claiming its items of set-off and counterclaim. Plainly no certificate was ever given which amounted to a final acceptance of the building by the city. The contract provides that no certificate given or payment made during the progress of the work shall be construed as an acceptance of the work. We think the city is not estopped by these certificates as to any of the claims it makes, other than as to its liquidated damage claim.

[6] Some contention is made in appellant's behalf that the court erred in opening the case some time after the parties had rested and while the court had it under advisement for further evidence offered by the city. This was clearly a matter of discretion as to which we see no abuse. However, even if all the new evidence so received be rejected, the result would have been the same as the record seems to disclose the views of the trial judge. We agree with this view.

We conclude that the city is not entitled to any allowance under the liquidated damage provision of the contract, and that the judgment rendered against appellant is excessive in the sum of \$875, which was allowed to the city as liquidated damages. In all other respects the judgment is affirmed. The cause is remanded to the superior court, with direction to correct the judgment so that it

will be for the sum of \$4,353.74, less the sum of \$875, to wit, \$3,478.74. When so corrected, the judgment shall be deemed entered as of January 5, 1915, so as to bear interest from that date.

Appellant, having obtained a substantially more favorable judgment in this court than the judgment appealed from, is entitled to his costs incurred in this court.

MORRIS, C. J., and MAIN and ELLIS, JJ., concur. BAUSMAN, J., took no part in the consideration of this case.

(39 Wash. 384)

STATE v. CAVELERO. (No. 12973.)

(Supreme Court of Washington. Jan. 20, 1916.)

CRIMINAL LAW — 730 — TRIAL — ARGUMENT OF COUNSEL — PREJUDICIAL EFFECT.

Argument by the prosecutor that accused knew of or was a party to inducing a witness, whose name was indorsed on the information, to leave the state is not, where the jury were promptly instructed to disregard the statement, so palpably prejudicial that it could not be cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. ¶ 730.]

Department 2. Appeal from Superior Court, Snohomish County; Guy O. Alston, Judge.

Tony Cavelero was convicted of misdemeanor, and he appeals. Affirmed.

Coleman & Fogarty, of Everett, for appellant. O. T. Webb and Percy Gardiner, both of Everett, for the State.

PARKER, J. The defendant, Tony Cavelero, was convicted in the superior court for Snohomish county of the commission of a misdemeanor, and has appealed to this court from the judgment rendered against him thereon.

Contention is made in appellant's behalf that his rights were prejudiced upon the trial by remarks made by the prosecuting attorney in his argument to the jury as follows:

"Members of the jury, you will notice that the name of Mabel Pixley is indorsed upon the information as one of the state's witnesses. You will also remember that she was not called as a witness for the reason that she is now out of the state, and, if the truth were known, the defendant knows of her whereabouts and why she was not present at the trial."

The trial judge immediately, at the request of appellant's counsel, instructed the jury to disregard these remarks. We do not, by any means, commend the making of these remarks in argument by the prosecuting attorney as proper. We do not think, however, that they were so palpably prejudicial to the rights of appellant that the error in making them could not be cured by a proper instruction of the court, timely given, as was done in this case. We think that these remarks constituted no greater impropriety on the

part of the prosecuting attorney than those considered by us in *Bunck v. McAulay*, 84 Wash. 473, 480, 147 Pac. 33, and which we held were not such as to call for a new trial, in view of the court's instruction to the jury to disregard them.

The judgment is affirmed.

MORRIS, O. J., and BAUSMAN, HOLCOMB, and MAIN, JJ., concur.

(89 Wash. 379)

RYAN v. HANNA et al. (No. 12850.)

(Supreme Court of Washington. Jan. 25, 1916.)

1. CONTRACTS ¶9—ENFORCEMENT—REQUISITES.

An action will lie on an instrument promising to pay a given sum on the happening of a contingency, on the theory that the only uncertain element in the contract, that of time, has been rendered certain by the happening of the event.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20; Dec. Dig. ¶9.]

2. CONTRACTS ¶9—ENFORCEMENT—REQUISITES.

A contract whereby the plaintiff architect was to be given the privilege of drawing plans and superintending the construction of a building for the defendants, if at any time in the future the defendants should desire to erect a building, was too indefinite and uncertain to be enforced.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-20; Dec. Dig. ¶9.]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by H. Ryan against S. E. Hanna and another. From a judgment of dismissal on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Douglas, Lane & Douglas, of Seattle, for appellant. McClure & McClure, and Walter S. Osborn, all of Seattle, for respondents.

MORRIS, O. J. Action for breach of contract. Appeal from a judgment of dismissal upon the sustaining of a demurrer to the complaint.

The complaint recited that prior to January 25, 1909, Ryan and the defendant Hanna entered into an agreement whereby Hanna employed Ryan as architect for a building which she contemplated constructing in Seattle; that in accordance with the agreement plans were prepared and other services performed by Ryan of the value of \$1,800; that in procuring these services Hanna and the Sampson Investment Company acted jointly, in fact, the Sampson Investment Company is Hanna incorporated; that subsequently respondents determined to postpone the erection of the building, and in order to effect a settlement with Ryan made and entered into the following agreement with him:

"Seattle, Wash., January 25, 1909.

"The undersigned, Mrs. S. E. Hanna, does hereby declare as follows: That she employed Mr. H. Ryan, of Seattle, as architect for a building which she contemplated erecting at West-

lake avenue and Stewart street, in Seattle, and that said Ryan prepared plans which were acceptable to her, but that she was unable to procure a loan upon satisfactory terms, and therefore concluded that she would not erect a building according to said plans. But in consideration of a settlement made this day with said Ryan, the undersigned does now hereby agree that, if she should at any time desire to erect a building in any place in Seattle or Everett, she will employ said Ryan as her architect to prepare plans and to superintend the construction of such building. And further she does now hereby expressly declare that she has absolute confidence in the integrity of said Ryan as an architect in every respect. S. E. Hanna.

"Witness: Fred H. Peterson."

It is then alleged that respondents breached the agreement and employed one Dow as architect and contractor to erect a building on Pike street, Seattle; that said building was completed prior to July, 1913, at a cost of not less than \$12,000. It is further alleged that by reason of the breach of the contract in failing to employ appellant as architect and superintendent of the building he has been damaged in the sum of \$600.

[1, 2] We think the demurrer was well taken. It is clear, as contended by appellant, that an action will lie upon an instrument containing a promise to pay a given sum upon the happening of some contingency, like a promise to pay a given sum of money upon the sale of certain land, as in *Schweitzer v. Schweitzer* (Ky.) 82 S. W. 625, or the sale of a mine, as in *Noyes v. Young*, 82 Mont. 226, 79 Pac. 1063; this upon the theory that the only uncertain element in the contract, that of time, has been rendered certain by the happening of the event. But this is not such a contract. If the contract contained a promise to pay a given sum upon the erection of a building in Seattle or Everett, and the building had been erected, the cause would be like those relied upon by appellant. The only uncertainty would have been removed. This contract has too many uncertainties, which neither time nor any other contingency can supply, save the making of a new contract between the parties. It fails to state on what terms the employment is to be entered upon, whether appellant or respondent is to name the terms and conditions, or whether they are to be determined mutually. Suppose appellant refuses to accept terms satisfactory to respondent; is the erection of the building to be deferred until he is satisfied with the terms offered him? Or suppose he is unable to proceed; must the erection of the building be deferred to suit his convenience?

Many other like deficiencies suggest themselves, rendering this contract too uncertain to be enforced. The court can supply some elements in a contract, but they cannot make one; and when the language in a contract is too uncertain to gather from it what the parties intended, the courts cannot enforce it. As was said in *Weldon v. Degan*, 86 Wash. 442, 150 Pac. 1184:

"The so-called contract is no more than an agreement for an agreement, or, in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete and to which any one of the parties might object if proposed."

Many other observations in the Weldon Case are applicable here, and our decision may safely rest upon what is there said.

The demurrer was properly sustained, and the judgment is affirmed.

MOUNT, FULLERTON, ELLIS, and CHADWICK, JJ., concur.

(39 Wash. 301)

J. I. CASE THRESHING MACH. CO. v. WILEY et al. (No. 12856.)

(Supreme Court of Washington. Jan. 15, 1918.)

1. HUSBAND AND WIFE ⇐268—COMMUNITY PROPERTY—SURETYSHIP.

Where defendant signed a note as surety for another, it was not error to refuse to enter a deficiency judgment against the community of defendant and his wife, in the absence of a showing that he was to receive a consideration for his signature, so as to create a benefit to the community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 953-967; Dec. Dig. ⇐268.]

2. EVIDENCE ⇐168—BEST EVIDENCE RULE—LETTERS.

Since proof of a fact must be made by the best evidence possible, a letter, unless otherwise accounted for, must be introduced to prove its contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 558; Dec. Dig. ⇐163.]

8. EVIDENCE ⇐183—BEST EVIDENCE—SEARCH—DILIGENCE.

Evidence held insufficient to show diligent search for a letter; so that it was not error to exclude evidence as to its contents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. ⇐183.]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the J. I. Case Threshing Machine Company against H. E. Wiley and others. From judgment denying a deficiency judgment against the community composed of defendant C. T. Dearborn and his wife, the plaintiff appeals. Affirmed.

Shorett, McLaren & Shorett, of Seattle, for appellant. Chas. M. Fouts, of Seattle, for respondents.

MAIN, J. On September 19, 1912, one H. E. Wiley purchased from the plaintiff an automobile for \$1,800. Of this purchase price \$100 was paid at the time of the sale, and notes were given for the balance, secured by a chattel mortgage upon the automobile. One C. T. Dearborn signed the notes with Wiley, but did not sign the mortgage. The notes not being paid as they became due, an action was brought, and a judgment of foreclosure entered. The automobile was

sold under the decree, but did not bring a sufficient sum to pay the balance due upon the purchase price. The plaintiff sought a deficiency judgment against Wiley and wife and Dearborn and wife, and also an individual judgment against Wiley and Dearborn. The court declined to enter a deficiency judgment against the community composed of Dearborn and wife. From this judgment, the plaintiff appeals.

[1] It is claimed that the court erred in refusing to enter a judgment against the community composed of Dearborn and wife. Whether such a judgment should have been entered depends upon whether when Dearborn signed the notes he was engaged in a transaction for the benefit of the community. It is claimed by the appellant that Dearborn was to receive a commission of \$50 when the purchase price of the automobile should be fully paid. The evidence as to whether or not Dearborn was to receive a commission was conflicting. The trial court found that Dearborn signed the notes as surety only, and that the transaction was not for the benefit of the community composed of himself and wife. After a careful consideration of the evidence, no good reason appears why the finding of the trial court should be disturbed. If Dearborn signed the notes as surety merely, and was to receive no commission, the transaction was not for the benefit of the community, and no community liability would result. *Way v. Lyric Theater Co.*, 79 Wash. 275, 140 Pac. 320.

[2, 3] During the trial of the case the appellant sought to prove by secondary evidence the contents of a letter claimed to have been written by Dearborn's attorney to an agent of the appellant. This evidence was rejected because no proper foundation had been laid. While the agent of the appellant who claimed to have received the letter was testifying, he was asked the question whether he had received such a letter, and answered that he had. He was then asked if he had made a search for it, and replied:

"A. Yes, sir; I searched for the letter to-day. Of course, I did not know that I was going to be on this case until last night at 8 o'clock. Q. Well? A. I searched for the letter through my desk to-day, but did not find it. I presume I had it in the file."

Thereupon he was asked to state the contents of the letter. Objection was interposed and sustained upon the ground that the proper foundation had not been laid. At the conclusion of the trial the appellant requested the trial court to leave the case open for a day or so "until Mr. Wilson could make a search for that letter," stating:

"He has, no doubt, got that letter, and it seems to me it is very material."

It is a mandate of the law that proof of a fact must be made by the best evidence obtainable. Secondary evidence of the contents of a letter can only be admitted when

it is made clearly to appear that diligent search has been made for the primary evidence, and that it cannot be found or produced. *State v. Erving*, 19 Wash. 435, 53 Pac. 717; *Kennedy v. Canadian Pac. Ry. Co.*, 151 Pac. 252.

In this case it did not appear that diligent search had been made for the letter, and that it could not be produced. The request to the trial court to keep the case open for a day or so until a search could be made for the letter would seem to negative the idea of a previous diligent search.

Finding no error, the judgment will be affirmed.

MORRIS, O. J., and PARKER, HOLCOMB, and BAUSMAN, JJ., concur.

(39 Wash. 347)

AUWARTER v. KROLL. (No. 12694.)

(Supreme Court of Washington. Jan. 20, 1916.)

1. PRINCIPAL AND AGENT §122—EVIDENCE—ACTIONS AGAINST PRINCIPAL—DECLARATIONS OF AGENT.

Where it was sought to charge a principal and there was independent evidence that the agent had power of attorney to contract, evidence of the agent's declarations is admissible to show that he had entered into the contract, though a principal cannot be bound by his agent's declarations as to agency.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 416-419; Dec. Dig. § 122.]

2. APPEAL AND ERROR §1058 — REVIEW — HARMLESS ERROR.

Error in the court's refusal to allow a witness to testify as to who was the real owner of corporate stock is harmless, where he detailed the facts concerning the ownership, for the jury could determine ownership.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.]

3. PRINCIPAL AND AGENT §120—POWERS OF AGENT—POWER OF ATTORNEY.

Where defendant gave his son a general power of attorney which did not prohibit the son from entering into contracts with respect to subsequently acquired property, defendant cannot, as against a stranger, testify that the power of attorney was not intended to be applicable to after-acquired property, for the stranger is entitled to be governed solely by the instrument itself.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 402-412; Dec. Dig. § 120.]

4. PRINCIPAL AND AGENT §116—SECRET INSTRUCTIONS TO AGENT—EFFECT.

Secret instructions to an agent having a general power of attorney are not binding as against persons who contracted with him without knowledge.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.]

5. TRIAL §242 — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

Where the issues were clearly stated to the jury and they were told that they must find for defendant, unless they found by a preponderance of the evidence that defendant's agent did in

fact make the contracts relied on as agent for defendant, an instruction that if, under the evidence, verdict should be for plaintiff, verdict should be for the amounts prayed for in the two causes of action, to wit, \$365 and \$1,200, was not objectionable on the ground that it did not permit the jury to find separately on each cause of action.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 569-576; Dec. Dig. § 242.]

6. APPEAL AND ERROR §1001 — REVIEW — VERDICT.

A verdict supported by substantial evidence is conclusive on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by C. Auwarter against William Kroll. From a judgment for plaintiff, defendant appeals. Affirmed.

Cannon & Ferris and D. W. Henley, all of Spokane, for appellant. Voorhees & Canfield, of Spokane, for respondent.

FULLERTON, J. The respondent, plaintiff below, brought this action against the appellant, setting up three causes of action; the first upon a promise to pay a sum certain in consideration of the transfer of a certificate of sale of the property of a mining corporation; the second, for a balance due on an account for labor and services performed by the respondent for the appellant between July 21, 1908, and September 30, 1909; and the third for labor and services performed by the respondent for the appellant between September 30, 1909, and September 30, 1910. After issue had been joined on the complaint a trial was had before a jury, which returned a special verdict on each cause of action, finding for the respondent on each of them. The trial court entered judgment on the verdict in favor of the respondent on the first cause of action, and judgment notwithstanding the verdict for the appellant on the second and third causes of action. Both parties appealed from the judgment as entered, and this court affirmed it as to the first cause of action, and reversed and remanded it for a new trial as to the second and third causes of action. *Auwart v. Kroll*, 79 Wash. 179, 140 Pac. 326. After the cause was remanded it was tried as to the second and third causes of action, resulting in a verdict and judgment in favor of the respondent for the sums demanded. This appeal is from the last-mentioned judgment.

The assignments of error first to be noticed relate to the admission of evidence. To an understanding of the questions involved a brief review of the facts is necessary. In 1907, a corporation known as Silver Lead Mining Company owned certain mining claims, a mill, certain mill machinery, ap-

pliances, tools, and other personal property, all situate in this state. In July of the year named Arthur H. Kroll, a son of the appellant, purchased some 5,000 shares of the treasury stock of the mining company, paying \$500 therefor. In November of the same year he contracted to purchase some 95,000 additional shares, agreeing to pay therefor \$9,500 at such times as the corporation might need the money in the prosecution of its mining enterprises. Later on the contract was consummated; Kroll borrowing from his father \$5,000 of the money necessary for that purpose. After the purchase of the stock Arthur H. Kroll was elected secretary of the company. The mining company was then largely indebted, some \$12,500 of which was secured by mortgages on the company's property. These mortgages were taken up by the appellant in February, 1908, and about this time, perhaps a little later, the appellant advanced some \$3,000 more for the use of the company, taking a combined chattel and real mortgage on the property of the company as security therefor. At about this time, also, the power of attorney quoted in the opinion in the case on the prior appeal was executed.

The respondent first met Arthur Kroll in March, 1908. The respondent was looking for an investment for some idle money that he then had, and, meeting Kroll, was induced to invest it in the corporation stock. As a part consideration for the purchase he was given the option to withdraw his money with interest at 10 per centum at any time within one year thereafter in case he should within that period become dissatisfied with the investment. As a further part consideration for the contract of purchase he was promised work at the mine, and immediately thereafter, on March 28 or 29, 1908, he went to the mine and worked therein for the corporation until July 17, 1908, when the mine was closed for want of funds to operate it. At this time the Krolls, father and son, had a large sum invested in the mine, in part in its capital stock, and in part for money loaned it and advanced to its use. There was also owing at that time by the corporation considerable sums to laborers, among whom was the respondent, whose claims were lienable against the corporation's property, and a number of such liens were filed, including one by the respondent. These liens were purchased by Arthur Kroll and assignments thereof taken from the several claimants.

Shortly after procuring the assignments for these labor claims Arthur H. Kroll began an action thereon in his own name to foreclose the same. Included in the action were other large sums which the mining company was obligated to pay him, and which were likewise a lien upon the property of the company. The appellant, William Kroll, at the same time began actions in foreclosure upon the mortgages held by him.

There was also an action begun in the respondent's name to recover upon the contract to refund the money paid by him for corporate stock, he having elected within the year to rescind the contract of purchase. These actions were prosecuted to judgments, the property of the mining company sold thereunder, and, after the time for redemption had expired, namely, August 20, 1910, a sheriff's deed to the property was executed to the appellant, William Kroll.

The services rendered by the appellant, which are the subject of controversy in this action, were performed at the mines between the time mining operations ceased therein and a time some ten days later than the date on which the appellant received the sheriff's deed to the mining property. There was no question that the services were performed as alleged by the respondent, but the contract of hire was made with Arthur H. Kroll, and the question was whether it was made on his own behalf solely, or on behalf of himself and his father, the appellant. Aside from the facts recited showing the interests of the parties in the mining property, the respondent introduced in evidence the power of attorney executed by the appellant to Arthur H. Kroll, and the statements and declarations of Arthur H. Kroll as to the persons by whom the respondent was employed. These statements and declarations were admitted over the objection of the appellant, and the action of the court in so doing constitutes the first error assigned on this appeal.

[1] If we have correctly gathered the appellant's first contention with regard to the admissibility of the questioned evidence, it is that the respondent has sought to prove the agency of Arthur H. Kroll by the declarations of the agent himself. If this were the purpose of the evidence then clearly it was inadmissible, as the rule is universal that the declarations of a supposed agent are inadmissible to prove the fact of agency. But it seems to us that the admissibility of the evidence has a much better foundation. The agency of the younger Kroll, and his power to make such a contract, were sought to be established by independent evidence, first, by the power of attorney which preceded the contract of employment, and, second, by the fact that he had acted as the representative of his father in all of his father's dealings with the mining property. But the pleadings raised the question, not only as to the fact of agency, but whether or not the alleged contract was in fact made by the agent. On this latter question the evidence was clearly admissible, and such was our holding in *Lemcke v. Funk & Co.*, 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D, 23. In that case we said:

"It is, of course, elementary that the fact of agency cannot be proved by the acts and declarations of the alleged agent without the knowledge of the principal. A review of the author-

ities cited to that point would be coals to Newcastle. But where, as in this case, there was independent evidence tending to show the fact of agency and that the principal knowingly permitted the agent to hold himself out as manager of its farm lands department and to carry its business cards bearing that legend, then the acts and declarations of the agent were admissible on the issue as to whether in fact he did so hold himself out and did make the contract in question as the contract of the principal. There being other evidence to establish his authority to bind the principal, this evidence was admissible as showing that he in fact attempted to do so. * * * Moreover, it has often been held that, if the fact of agency be otherwise prima facie established, the acts and declarations of the alleged agent become admissible in corroboration. 'Any declaration of the agent as to his authority would be admissible, when other evidence had been shown from which authority to do the thing may be inferred; or, if the trial court improperly admitted declarations of the agent, the error would be cured by evidence subsequently introduced from which authority might be inferred, and in case such evidence was introduced the question of authority would become one of fact for the determination of the jury.' *Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 South. 663. See, also, *Kelly v. Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321; *Ham v. Brown Bros.*, 2 Ga. App. 71, 58 S. E. 318; *Singer & Talcott Stone Co. v. Hutchinson*, 184 Ill. 169, 56 N. E. 353; 31 Cyc. 1655."

Counsel for the appellant further say:

"The alleged agent could not in any event bind appellant by admissions concerning the question as to whether he was contracting in behalf of himself or in behalf of appellant. He could not bind appellant by any admission of appellant's ownership where the question to be determined was as to whether that particular property was owned by the agent or by his alleged principal. It requires but a casual consideration of the dangers of such testimony to show that it should be rejected. The rule is that one cannot sue an agent where the principal has been disclosed at the time of the transaction involved in the suit, and if the agent's admission to the effect that he represented his principal in transaction where he in fact was representing his own separate interest, were admissible then, he might, under such rule, bind his principal and thereby relieve himself from liability. Such a rule would make it hazardous to appoint agents, and profitable for agents to procure appointments."

But as we read the record this evidence was not offered to show, nor admitted for the purpose of showing, that the appellant had an interest in the mining property. This was shown by independent evidence, competent under all circumstances. It was shown that the appellant had purchased outstanding mortgages upon the corporation's property, and had made advancements to it, taking a combined chattel and real mortgage on such property as security therefor; that the company had ceased mining operations, and that its property needed protection pending foreclosure proceedings which were then contemplated by the appellant. His interest on the property being thus established, and it being shown that the agent had a general power of attorney to contract with reference to the appellant's concerns, the evidence objected to was admissible to show, as we say, that he had contracted in the appellant's behalf with respect to the particular property.

In other words, the respondent did not attempt to establish the appellant's interests in the property by the declarations of the agent, but only that the agent had contracted in behalf of his interests in reference thereto. And herein the case differs from the case of *Coldwater National Bank v. Buggie*, 117 Mich. 416, 75 N. W. 1057, principally relied upon by the appellant. In the trial of that case the declarations of the agent were received to show the interests of the alleged principal, and court on appeal held the evidence inadmissible for such purpose. Without inquiry into the correctness of the rule announced, we are clear that the question decided is not the question presented here.

[2] Arthur H. Kroll, while on the witness stand, testified concerning his purchases of stock in the mining corporation, saying in substance (we quote from the abstract):

"I became interested in this Spokane Silver Lead Mining Company about November, 1907. I first became interested in it in a small way in July, 1907, but went into it further in 1907. My July interest was \$500, represented some stock, issued to myself. In November, 1907, I purchased under contract 95,000 shares of stock to be issued and paid for as the company needed the money; we paid \$9,500."

He was then asked the question: "Whose stock was that in fact?" To this question an objection was interposed on the ground that it called for a conclusion. The objection was sustained by the trial court, and the ruling is assigned as error. But the witness was permitted to state in detail all of the circumstances concerning the purchases, as well as the subsequent disposition made of the stock. The jury were thus made acquainted with the facts and were competent themselves to draw conclusions as to its ownership. The error in refusing to permit the witness to answer the particular question, if error at all, was not so far prejudicial as to require a retrial of the action.

[3] Error is also predicated on the ruling of the court refusing the appellant's offer to testify that at the time the power of attorney given to the son was executed he had no interest in the mining property; in refusing to permit the appellant to testify to the facts and circumstances in relation to giving the power of attorney; and in refusing to permit the appellant to testify that he had forbidden his son to enter into the contract in question. But we think the evidence was properly rejected on the ground of immateriality. Whether the appellant owned an interest in the mining property at the time the power of attorney was entered into could not affect the agent's right to contract with reference thereto in the appellant's behalf after the appellant had acquired such an interest. The power was general; it related to all business of the appellant, and was as applicable to after-acquired interests as those existing at the time it was executed. One dealing with the agent with reference to particular property on the strength of the pow-

er of attorney could not be affected by the circumstance that the principal acquired his interests in the property subsequent to the time the power of attorney was executed. Indeed, he would rather have the right to suppose that it was executed in anticipation of a subsequent acquisition of such interests. So with the circumstances surrounding the execution of the power of attorney. The effect of such evidence could be only to limit the agent's authority thereunder, and the agent's authority, as between the agent and a stranger thereto, must be determined by the contents of the instrument itself, it cannot be affected by extraneous agreements.

[4] The ruling of the court rejecting the offer of the appellant to show that he had forbidden his son to make the contract in question with the respondent, is justified on the principle that a principal cannot limit his agent's general authority by secret instruction. The power of attorney was recorded. To this the respondent had access, but he could not know of instructions limiting the general authority contained in the recorded power, not communicated to him, and no evidence was offered to show that they were so communicated.

[5] Among the instructions given by the court are the following:

"If, under the evidence and these instructions, your verdict is in favor of the plaintiff, your verdict will be for the amounts prayed for in the two causes of action, to wit, the sum of \$350, with interest thereon at the rate of 6 per cent. per annum, from the 30th day of September, 1900, on the first cause of action; and the sum of \$1,200 with interest thereon at the rate of 6 per cent. per annum from the 30th day of September, 1910, on the second cause of action. If, upon the other hand, your verdict is in favor of the defendant, your verdict will be simply for the defendant."

It is objected that these instructions did not permit the jury to find separately upon each cause of action, but required them, if they found either cause of action proven, to return a verdict in favor of the plaintiff regardless of what might be their opinion on the other, and it is argued that there was evidence in the record which might induce the jury to find in favor of the plaintiff on the last cause of action stated, which was inapplicable to the other. If there had been no other instructions concerning the issues involved, we think it may be questioned whether the instruction bears the interpretation the appellant puts upon them. The instructions, however, as a whole were not misleading. There was, it is true, no specific instruction on the particular point, but the issues were clearly stated to the jury, and they were told that they must find for the appellant, unless they found by a preponderance of the evidence that the agent did in fact make the contracts with the respondent as the agent of, and for and on behalf of, the appellant, William Kroll. Indeed, it

seems to us, as the respondent argues, that the instructions were more objectionable from his point of view than from the point of the appellant, but we are not constrained to adopt either theory. We think the jury were no in way misled.

[6] Lastly, it is contended that the evidence was insufficient to justify the verdict. We think, however, it would not profit to enter upon a further review of the evidence. Upon all of the controverted issues there was substantial evidence in support of the respondent's contention. The jury's findings thereon are therefore conclusive.

The judgment is affirmed.

MORRIS, C. J., and MAIN and ELLIS, JJ., concur.

(89 Wash. 304)

BARNHART v. CHICAGO, M. & ST. P. RY. CO. (No. 12866.)

(Supreme Court of Washington. Jan. 15, 1916.)

1. NEGLIGENCE \Leftrightarrow 33—USE OF PROPERTY.

As a general rule a private owner of land is not liable to strangers who come thereon without any invitation, express or implied, and receive an injury from some agency on the premises.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. \Leftrightarrow 33.]

2. NEGLIGENCE \Leftrightarrow 39—USE OF PROPERTY—ATTRACTIVE NUISANCE.

Damages are recoverable from the owner of land for the death or injury of a child of tender years, even though technically a trespasser, who has been attracted to the place of the accident thereon by dangerous agency in the nature of an attractive nuisance.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. \Leftrightarrow 39.]

3. NEGLIGENCE \Leftrightarrow 39—USE OF PROPERTY—ATTRACTIVE NUISANCE—POND.

A pond upon the right of way of defendant railroad, formed in a depression between the meeting of a grade and a hill, in which surface water or flood waters of a river were impounded, and 8 or 10 feet deep at its deepest point, was not such a dangerous agency as was likely or would probably result in injury to children attracted to it, and would not subject the railroad to liability for damages for the death of a boy of eight years, attracted to the pond for the purpose of play and drowned by falling from a raft.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. \Leftrightarrow 39.]

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by Fred Barnhart against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, and cause remanded, with directions to dismiss.

Geo. W. Korte, of Seattle, for appellant. M. J. McGuinness, of Snohomish, for respondent.

MAIN, J. The plaintiff brought this action for the purpose of recovering damages for

the death of his son, a child eight years of age. The cause was tried to a jury. At the conclusion of all the evidence the defendant challenged the sufficiency thereof, and moved for a directed verdict. This motion was denied. The jury returned a verdict for the plaintiff in the sum of \$650. Judgment being entered upon the verdict, the defendant appeals.

The facts briefly stated are: During the latter part of the year 1911, the appellant railway company was completing the construction of its branch line from Cedar Falls to Everett. This line passed through the city of Snohomish. Where the line passed through this city it was upon low lands adjacent to the Snohomish river, and a considerable embankment or fill was made upon which the rails and ties were laid. About 1,200 feet from the west boundary of the city the railroad grade met a hill which was to the north of the grade. The hill had an elevation of approximately 25 feet, upon the side of which grew brush or small trees. The meeting of the grade and the hill at this point left a depression between the two in which either surface water, or flood waters of the river, were impounded and created a pond. The pond was entirely upon the right of way of the railway company. On the bank or hill to the north there was an old picket fence through which there were a number of openings. Above this hill was what is known as Second avenue. Before the embankment was constructed the flood waters from the river would at times form a pond in the same vicinity as the pond in question, but a little further south, to which boys would resort for the purposes of play, as they did upon this pond. After the pond in question had been formed, the boys of the neighborhood were accustomed to gather for play, and had constructed a raft out of old railroad ties, or other timbers. The water in the pond was from 8 to 10 feet deep at the deepest point. In reaching the pond it was necessary for the boys to go upon and across the private property of the railway company. On February 3, 1912, the two sons of the respondent, respectively 8 and 6 years old, were upon the raft upon the pond, at play, when the older of the two fell into the water and was drowned. This action, as already indicated, was brought by his father.

[1] It is claimed that the railway company was negligent in failing to drain the pond. The controlling question in the case is whether the owner of the property upon which a pond is formed, where the boys of the neighborhood resort for play, is guilty of negligence in failing, either to drain the pond, or fence his property against such intrusion. The general rule, of course, is that the private owner of land is not liable to strangers who come thereon without any invitation, express or implied, and receive an injury from some agency upon the premises.

[2] An exception to this general rule is

made by what is known as the doctrine of the turntable cases. According to this doctrine damages may be recovered from the owner for the death or injury of a child of tender years even though technically a trespasser, and who has been attracted to the place of the accident by a dangerous agency which is in the nature of an attractive nuisance. *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Clark v. Northern Pac. Ry. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. The turntable doctrine has been adopted by the courts of last resort in a considerable number of states, and rejected by almost an equal number. There is a tendency generally on the part of courts which have approved the doctrine to limit, rather than extend, its application. *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847; *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858, 35 L. R. A. (N. S.) 440, Ann. Cas. 1913A, 1025. In the case last cited will be found a review of the cases which support the statement as to the tendency to limit the doctrine.

[3] The question here presented is not whether the owner of property may be liable: (a) By reason of a trap or pitfall upon his property which may produce the death or injury; (b) a hidden or concealed danger; or (c) a dangerous agency in close proximity, or so near a highway that in the use of the highway an accident may occur—but is whether a pond of water is a dangerous agency such as will subject the owner of the property to liability for damages for the death of a child of tender years, attracted to the pond for the purpose of play. The turntable doctrine makes the owner liable because the dangerous agency was attractive to children of tender years, and in playing about or with such agency accident or injury would probably result. That a pond of water is attractive to boys for the purposes of play, swimming, and fishing no one will deny. But its being an attractive agency is not sufficient to subject the owner to liability. It must be an agency such as is likely, or will probably, result in injury to those attracted to it. That many boys every year lose their lives by drowning is a matter of common knowledge. But the number of deaths in comparison to the total number of boys that visit ponds, lakes, or streams for purposes of play, swimming, and fishing is comparatively small. It would be extending the doctrine too far to hold that a pond of water is an attractive nuisance, and therefore comes within the turntable cases. There are a number of analogous cases which would support the holding that an owner is not liable for the death of a child drowned in a pond. But in this case it is not necessary to support the holding by analogous cases when there is ample direct authority upon which it may be rested. *Emond v. Kimberly-Clark Co.*, 159 Wis. 83, 149 N. W. 760; *Sullivan v.*

Huldekoper, 27 App. Cas. (D. C.) 154, 5 L. R. A. (N. S.) 263, 7 Ann. Cas. 196; Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106; Thompson v. Ill. Cent. R. Co., 105 Miss. 636, 63 South, 185, 47 L. R. A. (N. S.) 1101; Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597. Those cases are all from courts that approve the turntable doctrine. In each of them a boy had lost his life by drowning, the youngest of which was 4, and the oldest 11, years; and in each of them it was held that there was no liability for the death of a child that occurred in an artificial pond. In the Peters Case it was said:

"It is not contended by appellant that the rule of the turntable cases has ever been applied to facts like those in the case at bar; his contention is that the reasoning and philosophy of the rule ought to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing as in ponds and lakes, or running as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land, the danger of drowning in it is an apparent open danger, the knowledge of which is common to all, and there is no just view consistent with recognized rights of property owners, which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall."

In the Sullivan Case, after reviewing the authorities, it was said:

"Without citing other authorities, we are persuaded that the conclusions in the cases cited and the reasoning upon which they are based are correct, and that in a case such as the one at bar it would be unjust to hold the landowner liable for the death of, or injury to, a child of 10 years of age. We do not consider that the appellee was negligent in not taking steps to prevent the trespassing upon her land by boys of such age as plaintiff's intestate. To hold landowners responsible under such circumstances would be to impose upon them an oppressive burden, and shift the care of children from their parents to strangers. Every man who has been brought up with the freedom allowed to American boys knows that you might as well try to dam the Nile with bulrushes as to keep boys away from ponds, pools, and other bodies of water."

The case of the City of Pekin v. McMahon, Adm'r, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114, in its reasoning is out of harmony with the cases above cited; and it is the only case, so far as our information goes, which would sustain liability. That case could have been rested upon a different ground and brought within one of the classes in which it is well recognized that liability exists. It is not, however, so rested.

The respondent relies upon the case of Bjork v. Tacoma, 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. (N. S.) 331. That case, however, is distinguishable from this. There a child 3 years old was drowned by falling into an opening in a flume which was 24 inches square. The flume, other than this particular opening, was covered. This was

a dangerous agency which was attractive to children, and in the event a child should fall into the flume, death by drowning was inevitable. It was not of the same nature as a pond where children are accustomed to play, and where comparatively few lose their lives by drowning. In the Bjork Case, City of Pekin v. McMahon, Adm'r, supra, was cited as analogous; but in citing that case, it was not the intention of the court to adopt all of the reasoning contained in the opinion. To hold that a pond is an attractive nuisance within the doctrine of the turntable cases would be an extension of that rule beyond its proper limitations.

The judgment will be reversed, and the cause remanded, with directions to dismiss.

MORRIS, C. J., and BAUSMAN, PARKER, and HOLCOMB, JJ., concur.

(89 Wash. 376)

GERMAN-AMERICAN STATE BANK v.
SEATTLE GRAIN CO. (No. 12851.)
(Supreme Court of Washington. Jan. 24,
1916.)

1. CHATTEL MORTGAGES ⇨275—FORECLOSURE—PARTIES.

In an action to foreclose a chattel mortgage on a crop, defendant to whom the mortgagor had delivered part of the crop in payment of a previous indebtedness, and whose possession was known to the mortgagee prior to the commencement of the action, while a proper, was not a necessary, party thereto.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 562; Dec. Dig. ⇨275.]

2. CHATTEL MORTGAGES ⇨170—ACTS CONSTITUTING CONVERSION—GRAIN IN WAREHOUSE.

Where a chattel mortgage upon a wheat crop gave the mortgagee a lien of which defendant had notice through the public records, defendant's taking of part of the crop and commingling it with its own wheat was an act of conversion.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 305; Dec. Dig. ⇨170.]

3. CHATTEL MORTGAGES ⇨136—DEFICIENCY JUDGMENT—ACTION AGAINST PARTY CONVERTING PROPERTY.

The lien of mortgagee of a crop of wheat was not lost by seeking judgment on its debt and obtaining a foreclosure resulting in a deficiency judgment, and the mortgagee might proceed against one who had converted a part of the wheat.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 220-226; Dec. Dig. ⇨136.]

4. CHATTEL MORTGAGES ⇨136—JUDGMENT—SECURITY.

In such proceeding, the judgment for the debt operated neither as a waiver nor a release of the security.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 220-226; Dec. Dig. ⇨136.]

5. CHATTEL MORTGAGES ⇨138—LIEN—EQUITIES.

The rights of the holder of a chattel mortgage on a crop were superior to any equities in one who had received a part of the crop in

payment of an indebtedness for sacks furnished the mortgagor the previous year.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228-236; Dec. Dig. § 138.]

Department 2. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by the German-American State Bank against the Seattle Grain Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wakefield & Witherspoon, of Spokane, for appellant. G. E. Lovell, of Ritzville, for respondent.

MORRIS, C. J. Respondent was the holder of two chattel mortgages upon the wheat crop of one Setters, an Adams county farmer, the amount secured by these mortgages being \$9,500. After the wheat was harvested Setters delivered approximately 1,000 bushels of the grain to appellant in payment of an indebtedness of \$666.40 for sacks furnished the previous year. Appellant, upon receiving the grain, placed it in its warehouse in a common mass with other grain of like quality purchased by appellant from other farmers. This fact coming to the knowledge of respondent, it began a foreclosure of its mortgages, making Setters only defendant. A decree of foreclosure was entered, the property in Setters' possession sold, and a deficiency judgment entered against Setters in the sum of \$1,656.60. Thereupon respondent commenced this action against appellant to recover the value of the wheat obtained by it from Setters claiming a conversion. Judgment was entered in its favor, and the grain company appeals.

[1-3] It is contended first that the foreclosure action is a bar to this action. The argument supporting this claim is that, it appearing that respondent knew prior to the commencement of the foreclosure proceeding that appellant was in possession of a portion of the wheat, it was a necessary party to the foreclosure proceeding if respondent intended to hold it liable for the value of the wheat in its possession. This contention is not sound. Appellant was a proper, but not a necessary, party to the foreclosure suit. The mortgages gave respondent a lien upon the wheat, of which appellant had notice through the public records. When, therefore, it took the wheat from Setters and commingled it with its own, it was an act of conversion. The lien of the mortgages still existed, and these liens were not lost when the bank sought judgment on its debt together with a foreclosure of its security. The foreclosure proceeding resulted in a deficiency judgment against the mortgagor, and when the security failed to extinguish the debt the mortgagee had the right to proceed against any person who had converted any part of the security, and this right was in nowise dependent upon whether the one so converting was or was not

a party to the foreclosure proceedings. *La Rue v. St. Anthony & D. Elevator Co.*, 17 S. D. 91, 95 N. W. 292; *Boydston v. Morris*, 71 Tex. 697, 10 S. W. 331.

[4] The judgment for the debt in the foreclosure action operated neither as a waiver nor a release of the security. *Muncie National Bank v. Brown*, 112 Ind. 474, 14 N. E. 358.

[5] The second contention is that respondent was equitably bound to pay the sack account due appellant upon which the wheat obtained was credited. In the face of respondent's lien and its right to proceed against either the property or the person wrongfully appropriating it, it is needless to discuss any equities resting in appellant. Whatever its rights may have been they were subject to those evidenced by respondent's liens.

The judgment is affirmed.

BAUSMAN, MAIN, PARKER, and ELLIS, JJ., concur.

(39 Wash. 316)

RODGERS v. FIDELITY & DEPOSIT CO.
OF MARYLAND. (No. 12894.)

(Supreme Court of Washington. Jan. 15, 1916.)

STATES § 101 — PUBLIC WORK — SURETY ON CONTRACTOR'S BOND — SUFFICIENCY OF NOTICE.

Under Rem. & Bal. Code, § 1161, giving a right of action for labor and material furnished upon a public work as against the contractor's bond if, within 30 days after the completion of the contract with and acceptance of the work by the public, the person performing labor, etc., shall present to the public board, council, etc., a notice in writing that he has a claim in a certain amount against the contractor's bond, signed by the claimant, the filing of such notice of claim is an absolute prerequisite to a right of action on the bond; and a paper filed by one who had furnished labor and material to the contractor for a state hospital, addressed to the state board of control, inclosing a statement of an unsettled balance due, was insufficient as a notice of claim, and, as the surety has a right to know what claims are made against it, it was not liable to an action on the bond.

[Ed. Note.—For other cases, see States, Cent. Dig. § 98; Dec. Dig. § 101.]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Charles W. Rodgers, doing business as the Charles W. Rodgers Company, against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals. Reversed.

Trefethen & Grinstead, of Seattle, for appellant. Alfred Gfeller, of Seattle, for respondent.

PARKER, J. The plaintiff, Charles W. Rodgers, seeks recovery upon a bond executed by the defendant, Fidelity & Deposit Company of Maryland, under the provisions of sections 1159-1161, Rem. & Bal. Code, relating to security for labor and materials furnished upon public works. The trial was before the superior court without a jury, and

resulted in findings and judgment in favor of the plaintiff, from which the defendant has appealed.

In August, 1911, T. Strauser & Son, contractors, entered into a contract with the state of Washington for the construction of a building for the Northern Hospital for the Insane. Appellant became surety upon the contractors' bond, the bond being conditioned as prescribed by section 1161, Rem. & Bal. Code. Respondent furnished labor and material to the contractors in the construction of the building. In December, 1912, the building being completed, it was accepted by the state board of control. About the time of the completion and acceptance of the building respondent filed with the state board of control a paper which he claims was sufficient notice of his claim against the bond as required by section 1161, Rem. & Bal. Code. The paper so filed with the board of control by respondent reads as follows:

"Seattle, Nov. 29, 1912.

"State Board of Control, Olympia, Wash.—Gentlemen: Inclosed we hand you statement of unsettled balance due us on labor and material furnished T. Strauser & Son for the Northern Hospital for Insane, Sedro Woolley, Wash., that proper precautions may have been taken.

"Yours respectfully,

"Chas. W. Rodgers Co.,

"By A. P. Robinson.

"P. S.—Will you please let us know with what bonding company this company is bonded on this work? Inclosed find stamp for reply.

"R."

"Chas. W. Rodgers Co., Jobbers and Contractors,
"Seattle, Nov. 27, 1912.

"T. Strauser & Son, Spokane, Wash.

"Aug. 28. Balance.....\$1001.69.

"Balance due on labor and material furnished them in Northern Hospital for Insane, Sedro Woolley, Wash.

"To State Board of Control, Olympia Wash."

The only question we are called upon to consider is as to the sufficiency of this communication to the board of control as a notice of claim against the bond executed by appellant as surety entitling respondent to sue appellant as surety upon the bond. This is to be determined from the provisions of section 1161, Rem. & Bal. Code, which, so far as we need here notice them, read as follows:

"* * * All such persons mentioned in said section 1159 shall have a right of action in his, her, or their own name or names on such bond, for the full amount of all debts against such contractor, or for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements: Provided, that such persons shall not have any right of action on such bond for any sum whatever, unless within thirty days from and after the completion of the contract with and acceptance of the work by the board, council, commission, trustees, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or subcontractor, or materialman, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, shall present to and file with such board, council, commission, trustees or body acting for

the state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows:

"To (here insert the name of the state, county or municipality or other public body, city, town or district):

"Notice is hereby given that the undersigned (here insert the name of the laborer, mechanic or subcontractor, or materialman or person claiming to have furnished labor, materials or provisions for or upon such contract or work) has a claim in the sum of — dollars (here insert the amount) against the bond taken from — (here insert the name of the principal and surety or sureties upon such bond) for the work of — (here insert a brief mention or description of the work concerning which said bond was taken).

"(Here to be signed) ———.

"Such notice shall be signed by the person or corporation making the claim or giving the notice; and said notice, after being presented and filed, shall be a public record open to inspection by any person."

In view of the language of section 1161, above quoted, that "such persons shall not have any right of action on such bond for any sum whatever" unless they "shall present to and file with such board" the prescribed notice of claim, it seems that argument is hardly necessary to demonstrate that the filing of such notice of claim is an absolute prerequisite to the claimant's right to sue the surety upon the bond. *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112; *Crane Company v. Aetna Indemnity Co.*, 43 Wash. 516, 86 Pac. 849.

It seems equally plain to us from the language of the statute above quoted that the claimant must, as a prerequisite of his right to sue the surety upon the bond, state in his notice, at least in substance, that he "has a claim * * * against the bond," designating it by naming the principal and sureties, and that it is not sufficient that he make a statement in his notice of claim that amounts to nothing more than a statement of his claim against the contractor, his original debtor. *The sureties upon such bonds have a right to know what claims are being made against them*, by timely filing of the required notice. It is not enough that the claimant makes some claim against the contractor, his debtor, or against funds which may be due the contractor. This is the substance of our holding in *Robinson Manufacturing Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382.

Counsel for respondent call our attention to and rely upon our decisions in *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106, and *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 508, 106 Pac. 158. These decisions, however, as pointed out in *Robinson Mfg. Co. v. Bradley*, *supra*, deal with notices which in fact did make a plain statement of claim against the bond, and they are therefore not out of harmony with the conclusion we here reach. We are of the opinion that the paper filed with the state board of control by respondent is not such a notice of claim as is required by the provisions of section 1161, Rem. & Bal. Code, above quoted, in that it

fails to contain any statement by respondent that he makes a claim against the bond.

Finding respondent's notice of claim insufficient, we conclude that he has no right to recover against appellant as surety upon the bond and that therefore the judgment must be reversed. It is so ordered.

Respondent, Rodgers, has given notice of and prosecutes a cross-appeal, claiming error of the trial court in disallowing him certain claimed costs and disbursements. In view of our disposition of the appeal of Fidelity & Deposit Company, the cross-appeal of Rodgers need not be further noticed.

Appellant, Fidelity & Deposit Company, will recover its costs both in the superior court and in this court.

MORRIS, C. J., and BAUSMAN, HOLCOMB, and MAIN, JJ., concur.

(89 Wash. 366)

NORTH AMERICAN LUMBER CO. v. CITY OF BLAINE et al. (No. 12847.)

(Supreme Court of Washington. Jan. 20, 1916.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — ASSESSMENT — TIDELANDS.

A lumber company, which in its own behalf had brought an action to enjoin assessments for a public improvement upon its leasehold interests in a harbor area and upon its tidelands, after obtaining an injunction against the proposed improvement on the ground that the leasehold interests were not assessable, had no right to question assessments levied upon tidelands other than those belonging to it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1188-1193, 1195-1206; Dec. Dig. § 513.]

2. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — INJUNCTION — JURISDICTION OF MUNICIPALITY.

Where a lumber company was assessed for a public improvement upon its leasehold interests in a harbor area and upon its tidelands, and no objection was made to the assessment on the tidelands or any appeal taken therefrom, the fact that the lumber company was seeking an injunction by appeal to the Supreme Court from the dismissal of its case in the superior court did not deprive the city of jurisdiction to proceed to the completion of the improvement and to assess property assessable for local improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1188-1193, 1195-1206; Dec. Dig. § 513.]

3. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENT — PROPERTY LIABLE — TIDELANDS.

Tidelands owned by private persons are assessable as any other private property to pay the cost of local improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1028; Dec. Dig. § 422.]

4. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — PROPERTY LIABLE — PUBLIC PROPERTY.

A leasehold interest in a harbor area leased from the state is not assessable to pay the cost of local improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1035-1037; Dec. Dig. § 426.]

5. MUNICIPAL CORPORATIONS — CONFIRMATION OF ASSESSMENT — EFFECT.

Where a city, having jurisdiction of the subject-matter, assessed tidelands for a public improvement and gave due notice of the confirmation of the assessment roll by the city council, and plaintiff lumber company, the owner of tidelands assessed, presented no objection to the confirmation and took no appeal therefrom, such confirmation was a final determination, binding upon all owners of tidelands, including the company.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1091-1093, 1160-1165; Dec. Dig. § 493.]

6. MUNICIPAL CORPORATIONS — ASSESSMENT — PUBLIC LANDS — STATUTES.

Laws 1915, p. 363, subjecting all leasehold interests and rights of private persons in or to harbor areas within the limits of an incorporated city, etc., to assessment for public improvements, had no effect upon a city's prior assessments on such interests for local improvements.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1035-1037; Dec. Dig. § 426.]

Department 2. Appeal from Superior Court, Whatcom County; Ed. M. Hardin, Judge.

Action by the North American Lumber Company against the City of Blaine and others. Judgment for plaintiff, and defendants appeal. Reversed in part, and affirmed in part.

George D. Montfort, of Blaine, for appellants. Walter B. Whitcomb, of Bellingham, for respondent.

PARKER, J. The plaintiff, North American Lumber Company, commenced this action in the superior court for Whatcom county, seeking to enjoin the city of Blaine and its officers from constructing a local street improvement and levying local special assessments to pay for the same. The trial resulted in denial of the relief prayed for and dismissal of the action by the superior court, from which the plaintiff appealed to this court, and secured a reversal of the judgment of the superior court and the remanding of the cause to the superior court. "with instructions to enjoin the improvement as proposed." The decision of this court is reported in 81 Wash. 13, 142 Pac. 438. The cause is again before us upon appeal taken by the city from the judgment entered by the superior court upon the going down of the remittitur, which it is insisted is not the proper judgment to be now rendered, in view of the fact that the improvement was fully constructed, the special assessments levied and confirmed, and bonds issued against the special fund so created, and delivered to the contractor in payment of the improvement, before the rendering of the decision of this court, and while there was no restraining order or injunction in force preventing the city from so proceeding. It will be conducive to clearness to summarize all the controlling facts here, though it will in a meas-

ure be a repetition of facts appearing in our former decision.

On January 20, 1913, the city council of Blaine declared its intention to improve that portion of E street lying within the harbor area and the tidelands in the city and to assess the cost thereof against the property benefited thereby, defining the proposed local improvement district, including the property to be assessed. This proposed district included certain portions of the harbor area, which the lumber company held under lease from the state, and also certain tidelands owned by the lumber company. On February 17, 1913, after due notice furnishing property owners an opportunity to protest against the making of the proposed improvement, the council duly passed Ordinance No. 428, finally providing for the construction of the improvement and for the creation of a local improvement district, including that portion of the harbor area upon which the lumber company held a leasehold interest from the state, and also the lumber company's tidelands, with other property to be charged by assessment with the cost of the improvement, and for the issuance of local improvement bonds against the special fund to be created by such assessments to pay for the improvement. On March 12, 1913, this action was commenced by the lumber company in the superior court for Whatcom county, praying for an injunction restraining the city from proceeding with the proposed improvement and assessments and for general relief. The lumber company sued as a general taxpayer of the city, as the owner of a leasehold interest in the harbor area to be assessed, and as the owner of certain tideland blocks to be assessed. The lumber company rested its right to an injunction upon the theory that the harbor area was not subject to assessment to pay for local improvements and that the city could not lawfully make provision for the payment of the deficiency which would be caused by its inability to assess the harbor area, because of the fact that it was indebted far beyond the limit prescribed by the state Constitution. Reference to our former decision will show that this is in substance the ground upon which it was held that the lumber company was entitled to relief. It will also be noticed that the only instruction to the superior court touching the nature of the relief it should grant the lumber company is contained in these concluding words of the decision:

"The judgment is reversed, and the cause remanded, with instructions to enjoin the improvement as proposed." *North American Lumber Co. v. Blaine*, 81 Wash. 13, 18, 142 Pac. 438, 439.

When the remittitur went down to the superior court for entry of final judgment in accordance with our decision, both the city and the lumber company brought to the attention of that court by affidavits facts occurring since the original trial of the cause

in that court which rendered it plain that whatever relief the lumber company was entitled to by virtue of our decision could not be then effectually granted in the terms of an injunction as originally prayed for, since all of the acts of the city which the lumber company had sought to have enjoined had been fully performed by the city. These new facts necessary to be here noticed are the following: Immediately on the judgment of the superior court being rendered in favor of the city, it entered into a contract for the construction of the improvement at a cost of something less than \$12,000, which was the original estimated cost of the improvement. The improvement was completed according to the contract and as originally contemplated by the resolution and ordinance providing therefor. Local improvement bonds against the district were by the city issued and delivered to the contractor in payment of the improvement. An assessment roll was made up in the usual manner, assessing the cost of the improvement against the property within the district, apportioning approximately \$2,000 thereof against the harbor area, and \$10,000 thereof against the tidelands, within the district. The portion of the harbor area held under lease by the lumber company was assessed \$346.92. The tidelands owned by the lumber company were assessed \$1,796.83. Due notice was given, as the law directs, of hearing before the council upon the question of the confirmation of this assessment roll, and, no objection being made thereto by any one, the council by ordinance duly confirmed the same. All of this occurred before the rendering of our former decision holding that the lumber company was entitled to relief, and at a time when there was no restraining order or injunction in force against the city from so proceeding. After the rendering of our former decision, the city officials seeing that it was without authority to assess the harbor area, the council adopted a resolution canceling all assessments made upon the harbor area and directed the city treasurer to cancel the same upon the assessment roll of the district. These new facts being brought to the attention of the superior court by affidavits filed in behalf of both the city and the lumber company, as to which facts there seems to be no serious dispute, the question was presented to the superior court as to the nature of the judgment it should enter, to the end that the lumber company should have such relief as it was entitled to in the light of our former decision. The matter being thus presented to the superior court, it entered a judgment annulling each and all of the assessments made upon the property within the district, adjudging and decreeing:

"That each and every of the said assessments is canceled and the defendants, and their successors in office and all persons acting or to act by, through, or under them, be and they are hereby perpetually enjoined from enforcing or

collecting the said assessments or any part thereof."

Counsel for the city contends that the lumber company is in no event entitled to any greater relief, at this time, than the cancellation of the assessment upon the harbor area and the prevention of the city's satisfying any deficiency caused by such cancellation by making the same a charge upon its general fund, and that since all of the assessments upon the harbor area have been voluntarily canceled by the city, and the city disclaims all intention of satisfying the deficiency so resulting, by causing the same to be made a charge upon its general fund, it becomes of no consequence whether the city be enjoined to this extent or not. Counsel for the city also contends that the lumber company is not entitled to any relief as against the assessment levied upon its tidelands because of its failure to make any objection thereto to the city council when the assessment roll was before the city council upon due notice for confirmation, and also contends that in no event has the lumber company any right to have canceled the assessments made against the other tidelands within the district in which it has no interest. Counsel for the lumber company contends that it is entitled to relief to the full extent granted by the final judgment of the superior court from which this appeal is taken. These contentions, we understand from the record before us, were also made in the superior court.

Counsel for the lumber company invoke the general rule, as stated in the text of 22 Cyc. 966, as follows:

"The decree may afford complete relief as to injuries that have been consummated since the suit was begun; for, even though no temporary injunction was obtained, defendant acts at his peril in doing pendent lite the acts sought to be enjoined."

For present purposes we may assume that the lumber company is entitled to have the assessments upon the harbor area canceled, and also to have the city enjoined from charging its general fund with any portion of the cost of the improvement, since the city is not here insisting that it has the right to have such assessments enforced, or to so charge its general fund. But the question of the power of the court to now cancel and enjoin the collection of the assessments which have been regularly levied against the tidelands upon due notice, and not appealed from to the courts, is quite another matter.

[1] In so far as the assessments levied upon the tidelands other than those belonging to the lumber company are concerned, we do not see that it has any right whatever to question such assessments. It is true it originally brought proceedings looking to the enjoining of the construction of the improvement; but it brought this action only in its own behalf, so manifestly it cannot complain of assessments upon lands in which it has no interest. Such assessments may be un-

impeachable because of their being regularly levied upon due notice and remaining unchallenged by the owners of the property so assessed. Indeed, such seems to be their status as shown by the record.

[2] The more serious question here presented is: Has the lumber company the right to now have canceled the assessment levied upon its tidelands? Now, we have seen that all of these assessments against the lumber company's tidelands were also levied upon due notice; that no objection was made thereto by the lumber company or any one, nor was appeal to the courts taken therefrom; and that this was all done at a time when there was no restraining order or injunction in force preventing the city from so proceeding. Manifestly, the fact that the lumber company was then seeking an injunction by appeal to this court from the dismissal of its case in the superior court, to prevent the city from so proceeding, did not deprive the city of jurisdiction in the premises. The irregularity occurring in the inception of the local improvement proceedings by inclusion of the harbor area in the assessment district may have been sufficient to then entitle the lumber company, as a taxpayer and also as the owner of property to be assessed, to have the court "enjoin the improvement as proposed," as was held in our former decision; but that did not deprive the city of jurisdiction to proceed with the improvement and assessments in so far as it was seeking to charge by assessment property which was assessable for local improvements.

[3-5] Now, plainly the tidelands owned by private persons, as these lands are, are assessable as any other private property, to pay the cost of local improvements, while, as held in our former decision, harbor area and leasehold interests therein are not assessable to pay the cost of local improvements. Hence the city had jurisdiction of the subject-matter of assessing such tidelands, while it did not have jurisdiction over the subject-matter of assessing harbor areas or leasehold interests therein. That the city's jurisdiction was complete as to the tidelands, so far as the assessment proceedings and notice of hearing before the council upon the question of confirmation of the roll is concerned, seems plain from this record. Indeed, that such notice was given as the law directs is not here questioned. It is also plain that no objections to any of the assessments were presented to the council, nor was any appeal taken to the courts from the confirmation of the roll. Why, then, is not the confirmation of this assessment roll a final determination binding upon all owners of tidelands, including the lumber company, so assessed? The reason that it is not binding upon the owners of leasehold interests in harbor area is because the city had no jurisdiction over the subject-matter of assess-

ng harbor areas or leasehold interests therein.

Section 23, page 455, Laws of 1911, of the general local improvement law, under which the city proceeded, reads:

"Whenever any assessment roll for local improvements shall have been confirmed by the council or other legislative body of such city or town as herein provided, the regularity, validity and correctness of the proceedings relating to such improvement, and to the assessment thereof, including the action of the council upon such assessment roll and the confirmation thereof, shall be conclusive in all things upon all parties, and cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll in the manner and within the time provided in this act, and not appealing from the action of the council in confirming such assessment roll in the manner and within the time in this act provided. No proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment, or any certificate of delinquency issued therefor, or the foreclosure of any lien issued therefor: Provided, that this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds (1) that the property about to be sold does not appear upon the assessment roll, or (2) that said assessment has been paid."

This court has repeatedly held that such a determination by the city council, had upon due notice under previously existing statutes similar to this, became final as to all owners of property so assessed, unless the assessment was attempted to be levied under such circumstances that the city was exceeding its jurisdiction over the subject-matter. This question is reviewed at some length in *Rucker Brothers v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582, where our former decisions are noticed. The doctrine was adhered to in *Grandin v. Tacoma*, 151 Pac. 254, involving an assessment under this statute. All of these assessments upon lands, including those belonging to the lumber company, other than the harbor area, being made and confirmed upon due notice, no objection thereto being made by any one, and no appeal taken to the courts therefrom, we are of the opinion that such assessments became binding and conclusive upon the lumber company as well as upon all other owners other than those owning leasehold interests in the harbor area, and that in the light of facts occurring since the original trial of this case in the superior court, our former decision should not now be construed as impairing the validity of any of the assessments so made and confirmed, other than those assessments made against the harbor area, as to which the city had no jurisdiction.

It is worthy of note here that these assessments were levied and apportioned against all of the lands within the district, including the harbor area, as if all the lands were assessable for local improvements. Assuming that the assessments were equitably apportioned, as we must, in view of the fact that

they were confirmed without objections, in so far as lands other than harbor area are concerned, it would follow that the lumber company's tidelands are bearing no more than their just proportion of the costs of the improvement. Therefore it is difficult to conceive of any wrong resulting to the lumber company, viewing it only as the owner of these tidelands. The same may be said of all other owners of lands within the district, other than the harbor area. It seems plain that the rights of the lumber company as owner of the tidelands, which are assessable for local improvements, must be viewed apart from its rights as a general taxpayer and as owner of a leasehold interest in the harbor area. Its rights in the latter respect it is entitled to have protected by the final judgment of the court, if such rights are not already sufficiently protected by the attitude voluntarily assumed by the city towards the assessments against the harbor area and the protection of the city's general fund. But, viewing the lumber company as the owner of the tidelands, its complaint here amounts to no more than that the assessments are void because of irregularities occurring on the inception of the proceedings taken by the city. This, however, we have seen does not go to the jurisdiction of the city over the subject-matter, and due notice having been given of hearing upon the confirmation of the assessment roll and the same having been confirmed without objection, all prior irregularities were thereby cured, and the assessment became final against the lumber company as to its tidelands, as well as against other owners of lands in the district other than the harbor area.

[8] Our attention is called to the act of the Legislature found in Session Laws of 1915 at page 363, providing that all leasehold rights and interests of private persons in or to harbor areas within the limits of an incorporated city or town are subject to assessment to pay the cost of local improvements. We do not regard this act as having any controlling force in this cause, in view of its enactment subsequent to the making of these assessments. We express no opinion at this time touching the power of the city of Blaine to charge by reassessment or supplemental assessment any deficiency in the local improvement fund against leasehold interests in the harbor area which may be benefited by this improvement.

The judgment of the superior court is reversed, in so far as it cancels and enjoins the collection of any of the assessments levied upon lands within the district, including the lands of the lumber company, other than those assessments levied upon the harbor area. In all other respects the judgment is affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and HOLCOMB, JJ., concur.

(39 Wash. 320)

HARDIN et al. v. OLYMPIC PORTLAND CEMENT CO., Limited. (No. 12918.)

(Supreme Court of Washington. Jan. 15, 1916.)

1. TRIAL \S 295—ACTION FOR DAMAGES—INSTRUCTION—PERMANENT DAMAGES.

In an action for damages to plaintiff's trees, crops, etc., and for permanent damages to his realty, an instruction that, if the plaintiff's land had been seriously and permanently damaged by the operation of defendant's cement plant, the measure of damages to the land was the difference between its market value immediately before it was damaged and its market value at the time of bringing the action, more than a year later, could not have misled the jury into awarding double permanent damages, when taken in connection with another instruction for defendant limiting the jury's consideration to the damages to the trees, crops, etc., and another as to such items stating the measure of damages as the difference between the market value of the crops at the time of the injury and their market value at the time the injury was received.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 703-717; Dec. Dig. \S 295.]

2. NUISANCE \S 3 — QUESTION FOR JURY—"NUISANCE PER SE."

A "nuisance per se" is an act, thing, omission, or use of property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances; but, since there must be some place where every lawful business may be lawfully located or carried on, a lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances, such as location in an inappropriate place, or conduct in an improper manner, in which case it is a nuisance in fact, and the determination is a question of fact.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. \S 4, 5, 9-25; Dec. Dig. \S 3.]

For other definitions, see Words and Phrases, First and Second Series, Nuisance Per Se.]

3. NUISANCE \S 50 — PRIVATE INJURY—LIABILITY.

One has no right to carry on a lawful business which injures another, except such injury as the public must suffer in order to permit the carrying on of lawful business, without compensating such other for the damages actually sustained, and, where the injury and damage are established, the measure of damages should be that most beneficial to the injured party, as he is entitled to have the benefit and enjoyment of his property intact.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. \S 118-127; Dec. Dig. \S 50.]

4. JUDGMENT \S 606—MERGER AND BAR—SUCCESSIVE ACTIONS—TEMPORARY AND PERMANENT NUISANCE—FORM OF ACTION—EFFECT.

An action for temporary damages by reason of injury to and loss of crops, trees, etc., and for permanent damages to the freehold, resulting from the operation of defendant's cement plant, was brought on the theory that it was intended to cover every injury and the enforcement of every remedy which plaintiff had or could have against the defendant, and the permanent injury to the freehold, except a resort to equity to enjoin the plant, and precluded any further legal or equitable relief for any future damage to the freehold.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1120; Dec. Dig. \S 606.]

5. NUISANCE \S 50—PERMANENT NUISANCE.

In such action, where the pleadings admitted that it was the defendant's intention to continue the operation of the cement plant, and where all the evidence tended to show that the

business was more or less permanent, the award of permanent damages to plaintiff's realty was proper; as, if it was its intention to discontinue the maintenance of the plant and show that it was only temporary, it was a matter for proof by defendant.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. \S 118-127; Dec. Dig. \S 50.]

6. JUDGMENT \S 606—SUCCESSIVE ACTIONS—BAR—PERMANENT INJURY.

Plaintiff, whose freehold was damaged by the operation of defendant's cement plant, intended to be permanent, was entitled to recover in one action permanent actual damages from the operation of the plant, and was thereafter estopped to claim in any form of action any other or additional permanent relief against its operation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1120; Dec. Dig. \S 606.]

Department 2. Appeal from Superior Court, Whatcom County; William H. Pemberton, Judge.

Action by Ed. E. Hardin, and Ed. E. Hardin, executor of the will and estate of Victoria Hardin, deceased, against the Olympic Portland Cement Company, Limited. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hadley, Hadley & Abbott, of Bellingham, for appellant. Hurlbut & Neal, of Bellingham, and Romaine & Abrams, of Bellingham, for respondents. Ed. E. Hardin, in pro. per.

HOLCOMB, J. Respondents own 15 acres of land near Bellingham, Wash., and the appellant owns a tract of land lying immediately southerly of, and contiguous to, the lands of respondents. Prior to May 1, 1913, appellant constructed upon its land a large plant for the manufacture of Portland cement, and on or about that date began the manufacture of Portland cement in its plant, and has from that time continued such manufacture to a greater or less degree.

Respondents' complaint proceeds upon the theory that appellant owns in fee the site of the cement plant and large deposits of clay and limestone used in the manufacture of cement sufficient to supply its plant and operate it at its full capacity for more than 50 years, and that the capacity of the plant at present is about 1,600 barrels of cement per day. It is alleged that appellant intends to continue to manufacture, handle, and dispose of cement at its plant as it now is. It is alleged that in the process of the manufacture and in the handling and disposing of the cement noxious fumes and gases and particles of cement materials and cement were thrown out from the plant and carried by the prevailing winds in, over, and upon respondents' premises, penetrating the dwelling house and rooms, and injuring and destroying vegetation, and that respondents' premises are no longer desirable, comfortable, or valuable as residence property, that they have been greatly depreciated in value, and that by reason of the things alleged in the complaint this depreciation is permanent.

Appellant by answer admits that it owns in fee the deposits of clay and limestone, and is taking and using in its cement plant raw materials used in the manufacture of cement; that it has deposits sufficient to supply materials for the operation of the plant at its full capacity for more than 50 years; that it now manufactures about 800 barrels per day; that its present capacity is about 1,600 barrels of cement per day; and that it intends so to continue the manufacture of cement. It denies the allegation that large bodies of cement and the constituent elements thereof were blown by the prevailing winds in, over, and upon the premises of respondents, and deposited thereon, denies the injury to the crops, shrubs, trees, fruits, and grasses of respondents, as alleged, and denies generally the allegations of damage in the complaint.

[1] 1. Complaint is made of the tenth instruction given by the court to the jury as follows:

"You are further instructed that, if you find from the evidence by a fair preponderance thereof that the plaintiffs' land in the complaint described has been materially damaged by the operation of its cement plant in the manner alleged in the complaint, and that such damage is permanent in character, then I instruct you that, in estimating the plaintiffs' damages to their said land, the measure of such damages is the difference between the market value of the land as it was immediately before it was so damaged and the market value of the same in its damaged condition at the time of the bringing of this action, to wit, August 6, 1914, as a result of the operation of the defendant's cement plant."

Appellant contends that the giving of this instruction was error, for the reason that it incorrectly states the measure of damages in cases of permanent nuisance; that the proper rule in case of permanent nuisance is the difference in market value before and immediately after the injury—citing *Hunt v. Johnson* (Tex. Civ. App.) 129 S. W. 879, and *Missouri, K. & T. R. Co. v. Dennis* (Tex. Civ. App.) 84 S. W. 860. The theory on which this contention is based is that the instruction resulted in permitting the jury to assess double damages. Respondents sued to recover \$175 as temporary damage by reason of the injury to and loss of crops, as well as for the sum of \$2,824.99 for permanent damages to their freehold. Respondents do not question the correctness of the rule contended for by appellant, but insist that the instruction complained of is the equivalent of an instruction numbered 6 by the court which was given as requested by appellant, which limited the consideration of the jury of the question of damages to the fruits, trees, grass, shrubbery, etc., and instruction No. 7 given by the court as to such items of the damage, stating the measure of damages to be the difference between the market value of the crops at the time of receiving the injury and their market value in the injured condition at the time the injury was received. We think there is no merit in the contention that the jury could have been misled

into awarding double damages by reason of that instruction, in so far as this one contention is concerned, taking it in connection with the other instructions given by the court, some of them at the request of appellant.

2. A more serious difficulty is presented by appellant's claim that the eleventh instruction of the court was erroneous, in that the facts specified by the court to the jury as establishing the plant as a nuisance per se do not in law constitute a permanent nuisance nor warrant the application of the measure of damages allowed in the case of permanent nuisance.

By the portions of that instruction which are complained of the jury was told that if: (a) The character of its construction and equipment is modern; (b) the machinery and appliances are so placed and adjusted as to function properly and are properly and skillfully operated; (c) under such conditions the prevention of injury and damage upon which the instruction is predicated is not had; (d) such fumes, etc., are carried upon respondents' property by the prevailing winds, and settle and interfere with the comfortable enjoyment of the property, or materially damage the same; and (e) in the careful and skillful operation of the plant as so constructed and at its present capacity, it will necessarily continue to throw off such gases, etc., and that the same will be carried over and upon and injure respondents' property—then, as a matter of law, appellant's plant would be a nuisance per se, and that, as a matter of law, any damages to respondents' land resulting in the depreciation of the value of the land would be permanent, and it would be the duty of the jury to assess damages for such permanent depreciation of the value of the land not exceeding the amount sued for.

[2] "A nuisance per se is an act, thing, omission, or use of the property which in and of itself is a nuisance, and hence is not permissible or excusable under any circumstances." 21 Am. & Eng. Ency. Law (2d Ed.) 683.

The court in the instruction criticized may have used the term "nuisance per se" inappropriately; for there is much apparent conflict of authority on the question whether or not a lawful business or erection can be a nuisance per se, but the instruction is not vitiated by such definition. Since there must be some place where every lawful business may be lawfully located or carried on, the better rule would seem to be that a lawful business is never a nuisance per se, but may become a nuisance by reason of extraneous circumstances such as being located in an inappropriate place, or conducted or kept in an improper manner. 21 Am. & Eng. Ency. Law (2d Ed.) 684; *Wood, Nuisances*, §§ 529, 530. In such case it is a nuisance in fact, and the determination is a question of fact. A smelting plant is not a nuisance per se, but may be located so as to be one in fact to other property owners. *Sterrett v. Northport Min-*

ing & Smelting Co., 30 Wash. 164, 70 Pac. 266.

[3] No one has a right, however, to pursue a lawful business, if thereby he injures his neighbor (except such injuries as the public must suffer in common in order to permit lawful enterprises to operate) without compensating such for the damages actually sustained. *Sterrett v. Northport, etc., Co.*, supra. In such case, when the injury and damage are established, the measure thereof should be that most beneficial to the injured party, as he is entitled to have the benefit and enjoyment of his property intact. 28 Am. & Eng. Ency. Law (2d Ed.) 543; *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442.

[4] Appellant contends, however, that respondents could not recover permanent damages unless a nuisance constituted a nuisance per se, and that it was upon that theory that they presented the case and upon which the court submitted it to the jury, and, further, as we understand, that unless a nuisance were a nuisance per se, it would not constitute a permanent nuisance, and that the jury were not entitled to award damages on the theory of a permanent nuisance. Respondents, on the contrary, contend that the question of whether it is a nuisance per se is not determinative of the question of whether permanent damages may ensue from its maintenance and operation, and further maintain that, unless permitted to sue once for all for damages to the freehold, they would be denied a legal remedy, and would be obliged to resort to equity for an injunction closing the industry; that it is the policy of this state and of the law not to enjoin the operation of an industry unless the necessity be great and redress at the hands of the court and jury would be inadequate—citing *Woodard v. West Side Mill Co.*, 43 Wash. 308, 86 Pac. 579, 29 Cyc. 1226-1228.

In *Richards' Appeal*, 57 Pa. 105, 98 Am. Dec. 202, it was said:

"* * * The chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear, he will refuse to enjoin."

In *Owen v. Phillips*, 73 Ind. 284, it was said:

"It is important to keep in mind the fact that the business of milling does not belong to that class which constitute nuisances per se. It is also important to sharply mark the distinction between suits for injunction and actions for damages. In the latter class the remedy is an ordinary one; in the former the extraordinary powers of the court are invoked. It is not every injury which will support an action for damages that will entitle the complainant to relief by injunction. * * * A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one. Damages may be paid by the author of the nuisance and the business not be stopped, but, if injunction issues, then the right to conduct the business is at an end. The necessity which will au-

thorize the granting of the writ of injunction to restrain the carrying on of a business lawful in itself must be a strong and imperious one."

It would seem, therefore, that the respondents had recourse to that remedy which was least onerous and harsh upon appellant, and that the complaint of the respondents was based upon the theory that they intended to cover every injury and every remedy which they had or could have against appellant for the maintenance and operation of the cement plant and the permanent injury to their freehold, except the stopping of its maintenance and operation. Of course, there may be temporary injuries and damage, such as injuries to crops and the like, arising in the future, but the framing of respondents' action precludes any further legal or equitable relief for any injury or damage in the future to respondents' real estate and the enjoyment thereof by the lawful operation of appellant's plant.

[5] Appellant says, however, that a nuisance which may be discontinued is not a permanent one. It was admitted by the pleadings that it was the intention of the appellant to continue the operation of this plant, but appellant claims that this admission was not intended to admit that appellant would continue the operation of its plant indefinitely, and that the admission was made prior to the recovery of a verdict for respondents, or, in other words, prior to a judicial determination against its defense. This means, of course, that it having been judicially determined that the appellant is conducting in a proper manner a lawful business in a place that renders it a nuisance in fact to a neighbor, appellant may discontinue it hereafter. But all the evidence tends to show that its business is more or less permanent; that it has a substantial plant erected, a large amount of money invested, and a large amount of materials suitable for its manufacture at hand. If it were its intention to discontinue the maintenance of the plant and show that it was of a temporary character, then it was the subject of proof. *Remsberg v. Iola Portland Cement Co.*, 73 Kan. 66, 84 Pac. 548.

During the progress of the trial objection was made to certain testimony offered by respondent, and thereupon inquiry was made by counsel for appellant of counsel for respondents as to the theory upon which respondents were proceeding. Respondents' attorney thereupon stated to the court and counsel that respondents were proceeding on the theory that they had suffered temporary and permanent damage and were seeking to recover for the damage they had suffered by reason of the alleged nuisance, including both temporary and permanent damages, and, if they recovered permanent damages, such damages as they would suffer in the future would be included therein; that the temporary damages were confined to the

damage to crops for two years such as had been sustained up to the time of the filing of the complaint, and the balance of the claim proceeded from a permanent injury to the freehold. Appellant's counsel thereupon stated that appellant withdrew its objection under the statement of counsel.

It is difficult to see why counsel for appellant now insist that the respondents were not proceeding upon the theory that they were recovering upon one cause of action for the temporary damages for injuries to and destruction of crops for the preceding two years, and upon the other cause of action for the permanent injuries to the freehold, which would include all damages of every possible nature to the freehold, for injury, deterioration, and depreciation thereof, which had been suffered by reason of the alleged nuisance up to the time of the commencement of the suit. The case of *Cleveland, C. & St. L. R. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875, is cited and quoted as follows:

"During the progress of the trial objections were made to certain testimony offered by the appellee. 'After said objection was made by the defendant, the court thereupon requested plaintiff to state the theory of her complaint, whether she was seeking to recover for a permanent injury to property or for a continuous wrong. Plaintiff's attorney thereupon stated to the court and counsel for defendant that the theory of the complaint was for permanent damages to plaintiff's property. The court thereupon announced that it would be so considered and treated, and he would so instruct the jury. Defendant's counsel thereupon stated that they were satisfied if that was the theory of plaintiff's case and would not object to the testimony.' To the theory thus announced appellee must be held. *Louisville, etc., R. Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *Cleveland, etc., R. Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238, and authorities there cited. It follows that the question presented is: Does the evidence show a permanent nuisance? Where the injury is of a permanent character, that is, one that cannot be discontinued, there is a permanent injury. If the evidence fails to show a permanent injury, the theory of the complaint is not supported, and the verdict must be contrary to law. *Louisville, etc., R. Co. v. Renicker*, supra; *Equitable Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623. The pond in question was not constructed by appellant. The evidence does not show that the pond itself constituted a nuisance. The injury was caused by throwing filth into the water. The question is not here presented whether upon proper complaint appellee could recover damages for injuries during the existence of the nuisance and up to the time of the commencement of the action, but whether she can recover upon proof of temporary injury. A nuisance which may be discontinued is not a permanent one."

The circumstances shown in that case are not such as those shown here. In that case it was said that the evidence of injury was that the injury was caused by throwing filth into the water of a pond; that the question was not there presented whether upon proper proof appellee could recover damages for injuries during the existence of a nuisance and up to the time of the commencement of the action, but whether she could recover

permanent damage upon proof of temporary injury. A nuisance which may be discontinued is not a permanent one. It is obvious in the present case that the proofs proceeded upon the exact theory which the court in that case stated it did not, and it was evident in that case that the nuisance was one which might easily be discontinued at any time, and was therefore not a permanent one.

In the instant case we think it was incumbent upon the appellant to show, if it desired, that it was its intention to discontinue the nuisance complained of, in case it should be determined a nuisance, and that, if it did not so show, it must be assumed to be a permanent nuisance as to the respondents.

[6] But it must also be held and determined that respondents are now estopped to claim in any form of action any other or additional permanent relief against the operation of appellant's plant. Respondents were entitled to recover permanent actual damages occasioned by the creation and operation of a permanent, existing nuisance in one action. All questions of damages are settled. We do not consider, therefore, that the instruction numbered 11 given by the court was prejudicial, but think that it properly defined the respective rights of respondents and appellant, and submitted the same to the jury for consideration as to the facts.

There was evidence tending to support the recovery of a very substantial sum on the theory of permanent injury to the freehold and permanent depreciation of its value, and the verdict of the jury is supported by such evidence.

Judgment affirmed.

BAUSMAN, PARKER, and MAIN, JJ.,
concur.

(39 Wash. 331)

PAUL v. CITY OF VANCOUVER.
(No. 12941.)

(Supreme Court of Washington. Jan. 15, 1916.)

1. ASSIGNMENTS ⇐48—EQUITABLE ASSIGNMENT.

Though a city was not, under a supplemental contract for the completion of a street improvement, which required the contractor to pay the debts of his predecessor, entitled to pay the claims itself, yet the city, by paying valid claims, became the owner thereof by equitable assignment.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. § 133; Dec. Dig. ⇐43.]

2. ASSIGNMENTS ⇐100—EFFECT—CLAIMS.

Where plaintiff, contracted to complete a public improvement and agreed to pay claims against his predecessor which were proven in a given manner, such claims were not negotiable, and the city, which, by paying the claims, became an equitable assignee, could not cut off any defenses which plaintiff may have made against the claim.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 177, 180; Dec. Dig. ⇐100.]

3. ASSIGNMENTS \S 100—EFFECT—CLAIMS.

Where a public contractor was allowed to present all defenses to claims good as against his predecessor, payment of which he had assumed, he is not harmed by reason of the fact that the city paid the claims and deducted the amounts from the contract price.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. \S 177, 180; Dec. Dig. \S 100.]

Department 2. Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Action by William Paul against the City of Vancouver. From a judgment for defendant, plaintiff appeals. Affirmed.

M. M. Connor and Geo. O. Davis, both of Vancouver, for appellant. Geo. B. Simpson, of Vancouver, for respondent.

PARKER, J. The plaintiff, William Paul, seeks recovery of the sum of \$500 from the city of Vancouver, which he claims as a balance due him upon a street improvement contract entered into between himself and the city. Trial was had in the superior court, resulting in findings and judgment in favor of the plaintiff for the sum of \$27 only, and awarding costs to the city because of tender by it of that sum to the plaintiff. From this disposition of the cause the plaintiff has appealed.

In June, 1911, Rector & Daly entered into a contract with the city for the construction of a street improvement. They executed a bond with sureties to secure the faithful performance of the contract. Thereafter this contract was assigned by Rector & Daly to E. Schelling, with the consent of the city, who proceeded as if he were the original contractor. E. Schelling abandoned the contract before full performance thereof, assigned to appellant, William Paul, all sums due under the contract and left numerous debts incurred in his part performance of the contract unpaid. Thereafter, in September, 1911, appellant entered into a contract with the city agreeing to complete the construction of the improvement according to the original contract, the city agreeing to pay him therefor all sums due and to become due under the original contract. This new contract between appellant and the city contained, among other stipulations, the following:

"Said second party (appellant) hereby further agrees to pay all just claims against said E. Schelling, which are proven, either by the O. K. of the purchaser or a sworn statement of the claimant. Said unpaid claims to be paid 50 per cent. out of the estimate now in the hands of the city clerk as soon as same is turned over to said Wm. Paul and the balance out of the next estimate received."

Appellant executed a bond for the faithful performance of this contract, conditioned as follows:

"The conditions of the above bond are such that whereas the above bounden Wm. Paul has entered into a contract with the said city, by the terms whereof he undertakes and agrees to take up and complete the unfinished contract of

one E. Schelling, assignee of Rector & Daly, for the improvement of Ninth street in said city, and to pay all creditors of the said E. Schelling for debts contracted in the city of Vancouver, Wash.:

"Now, therefore, if the said principal shall well and truly perform the said contract and shall pay all claims against the said E. Schelling as above set out and all claims for material and labor used on the said street, then this bond shall be null and void, otherwise to remain in full force, virtue, and effect."

The construction of the improvement was thereafter completed by appellant and accepted by the city, when there remained a balance due thereon from the city to appellant of \$500, subject, as claimed by the city, to deductions on account of claims against Schelling filed with and paid by the city, amounting to \$473, leaving a net balance due appellant of \$27 only, which the city tendered to him and which he refused. Thereupon he commenced this action.

Prior to the tender several of the creditors of E. Schelling had filed with the city their claims, duly verified by sworn statement of each claimant, as it was agreed such claims should be proven, by that provision of the contract between appellant and the city above quoted. This the city decided was sufficient to warrant it paying the claims, aggregating \$473, and deducting that sum from the balance of \$500 due appellant upon his contract. The city set up these claims and the payment thereof by it as an affirmative defense, claiming its right and duty to so pay the claims under the terms of the contract, and claiming to be the owner of the claims as against appellant.

[1-3] The testimony given upon the trial, aside from the sworn statement of each claimant attached to the several claims, we think leads to the conclusion that they are all valid claims of indebtedness incurred by E. Schelling in his part performance of the contract, and that they are such claims as appellant agreed to pay, by the terms of his contract and bond, above quoted. Appellant was heard in the trial of this case upon the merits of these claims as fully as if he were being sued thereon by the claimants themselves. His defense thereto was not impaired in the least by the fact that the city was asserting its ownership of and the justness of the claims as against appellant in its affirmative defense to his claim of balance due upon his contract.

It is contended by counsel for appellant that the city had no right under the contract with appellant to pay the claims, and that it could acquire no right as against him by so doing. It is possible that a technical construction of the contract between appellant and the city would not call for payment of the claims by the city; but that does not argue, as we view the situation, that the city may not have become the owner of the claims by equitable assignment. We are inclined to agree with counsel's contention in so far

that the city could not, by merely paying these verified claims, impair in the least any defense that appellant might have to any of them. They, of course, were not negotiable in the sense that defenses thereto could be cut off by assignment, however innocent the assignee might be. We have noticed that appellant was not deprived of any defense he might have to any of the claims. We think the circumstances were such that the city became the owner of all the claims by equitable assignment in any event, and that as such owner it had the right to set them up by way of affirmative defense, but that it took the chances of being able to prove them to be valid claims and also the chance of any defense appellant might have against any of them as against E. Schelling, the same as any assignee thereof would have to take. Since appellant was not deprived of any defense he might have against any of the claims, we are unable to see that he has any cause to complain of the fact that he was called upon to defend against them in the hands of the city instead of in the hands of the original claimants. We think the city was not a mere volunteer in view of its interest in the contract calling for the payment of the claims, in the sense that it could not be regarded as the equitable owner of the claims.

As to the merits of the claims we conclude that the evidence was sufficient to establish them as valid claims for the payment of which appellant was liable under his contract and bond to the original claimants. Being so liable he is now liable to the city, the present owner of the claims.

The judgment is affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and HOLCOMB, JJ., concur.

(89 Wash. 286)

JARVIS et al. v. IRELAND et al.

(No. 12748.)

(Supreme Court of Washington. Jan. 15, 1916.)

1. APPEAL AND ERROR \S 895 — TRIAL DE NOVO—FACTS AND LAW.

In an action to rescind a sale of property on the ground of defendant's fraudulent representations, the Supreme Court on appeal must try the cause de novo upon the facts and the law, whether or not the grounds of the trial court's decision were correct or sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3645-3648; Dec. Dig. \S 895.]

2. FRAUD \S 50—EVIDENCE—PRESUMPTION.

Fraud must not be presumed or conjectured.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. \S 50.]

3. EXCHANGE OF PROPERTY \S 3—FRAUD.

In an action to rescind a sale for fraud of the defendant concerning the price paid by him for stock transferred to plaintiff and of pending cash offers for such stock, where the evidence showed that defendant could, in good faith, have

sold it for the sum he represented he could sell it for any representation as to the price defendant paid for it is immaterial.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 7; Dec. Dig. \S 3.]

4. EXCHANGE OF PROPERTY \S 8 — LIMITATION OF ACTIONS \S 100—FRAUD—ACTION TO RESCIND—LIMITATION—LACHES.

Such action was barred by limitation, as well as by equitable laches, when plaintiff, after its discovery in November, 1910, did nothing and brought no action until February, 1914.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. \S 8; Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. \S 100.]

5. FRAUD \S 13—REPRESENTATIONS—FALSITY—KNOWLEDGE.

Fraud may consist in the vendor's representing as true that which he does not know to be true, and which is not, in fact, true, but his representation that he had no personal knowledge of the facts stated, and asserted them upon information received from other parties, would not make him liable for any false representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. \S 13.]

6. EXCHANGE OF PROPERTY \S 3 — FRAUDULENT REPRESENTATIONS — EVIDENCE — RELIANCE ON REPRESENTATIONS.

Where a vendor transferring stock in a land company to his purchaser in exchange for land, made representations as to the value of the stock and the land owned by the company without knowing them to be false, and without any reason to doubt the sources of his information, and the purchaser, without relying thereon, made inquiry as to such matters and purchased upon information so obtained, the vendor was not liable for fraud.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 7; Dec. Dig. \S 3.]

7. EXCHANGE OF PROPERTY \S 8 — RESCISSION—FRAUD—EVIDENCE.

Evidence in an action to rescind a sale of plaintiff's land to defendant in consideration of certain shares of stock in a land company, on the ground of the defendant's fraudulent representations as to its value and as to the land owned by the company held to sustain a judgment for defendant.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 14-18; Dec. Dig. \S 8.]

Department 2. Appeal from Superior Court, Whitman County; Edward C. Mills, Judge.

Action by Frank M. Jarvis and another against Thomas A. Ireland and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

S. P. Domer and Skuse & Morrill, all of Spokane, for appellants. Neill & Burgunder, of Colfax, for respondents.

HOLCOMB, J. Appellants sued to rescind a contract and sale entered into between the husband and respondent, Thomas A. Ireland, on October 25, 1910. Under the contract appellants conveyed a certain lot and a brick block thereon in Chewelah, Wash., and respondents in payment therefor transferred to appellants 5,000 shares of common stock of the Skeena Valley Land Company, paid \$250 in cash, and assumed a mortgage

of \$1,100 on the Chewelah real estate. The grounds for rescission are alleged false and fraudulent representations made by respondent Thomas A. Ireland for the purpose of inducing appellants to enter into the contract and sale and which were so relied upon. The representations of fraud are these:

(1) Statements of fact made by respondent Thomas A. Ireland to appellant Frank M. Jarvis concerning the price paid by respondent for the common stock of the Skeena Valley Land Company transferred to appellants and of cash offers made to respondent for the purchase thereof then pending.

(2) That the Skeena Valley Land Company was then and there the owner of approximately 10,000 acres of land in the Skeena river valley, British Columbia, adjacent to the town of Hazelton.

(3) That such lands were first-class, level, agricultural lands, susceptible of cultivation and adapted to the raising of good crops of grain and fruit.

(4) That the 5,000 shares of stock entitled the holder thereof to select from the lands above mentioned and have conveyed to the holder of such stock 517 acres of first-class, level, agricultural land in the Skeena river valley, which were similar to adjoining lands then selling for \$50 per acre.

It is further alleged that the lands were over 1,000 miles from where the contract was made, and could not be examined by appellants, and they had no means of ascertaining the truth or falsity of the statements and representations made by respondent, but relied upon the statements so made.

[1, 2] The trial court found for the respondents chiefly upon the grounds of the laches of appellants, based upon the incontrovertible facts disclosed that appellants discovered, if it were true, as early as November 23, 1910, that respondent's representation as to cash offers for his stock was false, and that therefore the statute of limitations operated as a legal bar to that ground of rescission; that appellants knew as early as the early part of 1912, that the land company did not own the land represented, but did not then take any steps to rescind; that at that time the land company had a large sum of money that could have been used in completing the acquisition from the British Columbia government of the lands for which the company had purchased options; that afterwards the secretary and treasurer of the land company, one Callahan, embezzled the funds of the company and absconded, after which occurrence appellants took steps to rescind. Whether or not the grounds of the court's decision were correct or sufficient, we must now try the cause *de novo* upon the facts and the law. It is a well-established principle here and elsewhere that fraud must not be presumed nor conjectured. *Nath v. Oregon R. & Nav. Co.*, 72 Wash. 664, 131 Pac. 251; *Pierce v. Seattle Electric Co.*, 78 Wash. 167, 138 Pac. 666.

[3] 1. As to the first charge of misrepresentation, on November 23, 1910, Jarvis wrote a letter to Ireland stating, among other things, that one Mahoney, one of the men respondent had referred to as having been willing to buy his stock for about \$7,300, had denied it to Jarvis, and that Ireland had placed a value of \$7,000 on the stock, and that he did not feel right about it. At the trial Mahoney denied that he had made any such statement to Jarvis, and further stated that in October, 1910, he would have paid Ireland \$1.50 per share for his stock, and that he then owned 20,333 shares of the stock. Another witness, one Cornelius, testified in behalf of respondent that he did, in fact, about October 1, 1910, offer \$1.50 per share to respondent for his stock, but that respondent wanted \$2 per share. Whatever price Ireland may have represented that he paid for his stock became immaterial when it was shown that he could in good faith have sold it for the sum he represented he could have sold it for.

[4] This testimony fully disproves the first charge of misrepresentation; but, if it did not, its discovery in November, 1910, and nonaction by appellant until February, 1914, when this action was commenced, fully bars any action upon that discovery of fraud by the legal limitations as well as by equitable laches.

[5] It is conceded that the rule is that fraud may consist of the vendor representing as true that which he did not know to be true and which was not, in fact, true; but, if the vendor represented to the vendee that he had no personal knowledge of the facts, but asserted them upon information received from other parties, he would not be liable for any false representations. *English v. Grinstead*, 12 Wash. 670, 42 Pac. 121; *Davidson v. Jordan*, 47 Cal. 351.

2. The most important particularization of fraud is that concerning the location, quality, and value of the Skeena river valley lands; for they were very remote from the location of the parties, and it would be assumed that the vendee had no opportunity then to investigate them, and might rely upon the express representations of the vendor. This false inducement, if made, was the most material, and includes the second, and part, at least, of the third and fourth charges of misrepresentation and fraud. We therefore examine the record carefully for the purpose of ascertaining what those representations, if any, were.

The case presented is somewhat similar to that of *Romaine v. Excelsior, etc., Gas Co.*, 54 Wash. 41, 103 Pac. 32. We are not disposed to say that the elements of laches exist as completely in this case as in that. Possibly the rights of no "other people" became involved in this case, except the rights of other and subsequent purchasers of stock in the company which appellant aided in controlling after he became a shareholder. Ap-

proximately the same time elapsed after Jarvis discovered, or should have discovered, the alleged worthlessness of the company, as in the Romaine Case.

Every case for rescission of a contract for actionable fraud depends largely upon the particular facts of the case. In this case we cannot escape the conclusion that the facts and the logical inferences deducible therefrom greatly preponderate in favor of respondents.

[6, 7] As to the representations themselves, the evidence for respondents outweighs that for appellants. After reading the entire evidence carefully, it convinces us that Ireland's representations were not positively made, nor with intentional deceit. We find nothing tending to show that he knew them to be false, or that he did not honestly believe them to be true, or that he had reason to doubt or disbelieve the sources of his information. Ireland was not a promoter of the enterprise. On Jarvis' own showing it is plain that Ireland had never been, or professed to have been, on the land, and therefore had no personal knowledge of it save its very general location, but made his statements upon reports received from others, of which Jarvis well knew. By his own showing also Jarvis telephoned to Callahan, the secretary, general manager, and chief promoter of the company, to come out from Spokane, where he had his place of business, to Hillyard, a suburb, where Jarvis lived, and talked the company's assets and prospects over very fully, and said he believed the statements made by Callahan. He also went to see and consulted with a Mr. Crane to whom Ireland referred him twice, and with Mr. Beck, Mr. Finley, and Mr. Ratcliffe, other stockholders, before he closed the transaction with Ireland. All this fully corroborates Ireland's testimony and that of his witness Chapman that Ireland told Jarvis that he had not seen the land of the company and knew nothing about it (except the general character and climate of the country) other than what Callahan had told him and Crane reported in writing to the stockholders, and to go see them and the other stockholders mentioned. Hence it is obvious that Jarvis, so far from believing and relying upon the representations of Ireland as to the value of the stock and assets of the company, did not do so, but interviewed other parties, between whom and Ireland not the slightest collusion is shown, to ascertain what value they placed upon the stock of the company and its holdings; and, so far as he made his purchase upon a belief in the existence of certain facts, he acted upon the information he got from others, rather than any he got from Ireland, before he would enter into the transaction. Under such circumstances the vendor is not liable for actionable fraud and deceit. Humphrey

v. Merriam, 32 Minn. 197, 20 N. W. 138; Moore v. Scott, 47 Neb. 346, 66 N. W. 441.

In addition to the above circumstances, it is clear, as stated by the trial judge, that Jarvis knew, in the latter part of 1911 or early part of 1912, by reason of his being a director of the company, that the company had only options to purchase the land which it was supposed to own. He also knew that payments of cash of considerable amount and notes to a larger amount had been taken by this corporation for subscriptions to its capital stock, and that it was the intention of the company that the funds thus raised, and to be raised, were to be used in completing the purchase of the lands; yet he took absolutely no steps, as director, to see that these funds were so applied, and took no steps to rescind the contract with respondent at that time nor for a long time thereafter. Long prior to the commencement of this action he attended a stockholders' meeting at which the question was considered whether an offer for the options of the company should be accepted at a price which would have netted him at that time considerably more than he had considered the stock worth when he made the trade, and at that time he voted to refuse to make such sale, evidently relying upon the assets that were from time to time in the hands of the corporation being applied by the officers towards the acquisition of the title to the lands, until such time as the secretary and general manager had absconded and embezzled the funds of the company, and thus made his stock worth considerably less than it would otherwise have been when he brought this action.

The foregoing reasoning and deductions of the trial judge are correct. Appellants should not recover.

Judgment affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and PARKER, JJ., concur.

(39 Wash. 310)

HUBBARD v. JOHNSON et al. (No. 12875.) (Supreme Court of Washington. Jan. 15, 1916.)

1. CHATTEL MORTGAGES — 138 — SALE OF PROPERTY BY MORTGAGEE — LIEN OF LABORER — STATUTE.

Rem. & Bal. Code, § 1188, provides that, during the year in which farm labor is performed, the laborer shall have a lien upon all crops raised on the land, superior to all other liens, including a prior chattel mortgage. Section 1190 requires the claim of lien to be filed with the county auditor within 40 days after the close of the work; section 1190a gives all lienholders for farm labor the rights secured to lienors on logs as specified in section 1181, providing that any person eluding or rendering it difficult, uncertain, or impossible to identify any sawlogs upon which there is a lien, without the express consent of the lienholder, shall be liable for damages to the amount secured by the lien, and that on a showing to the court in the action to enforce the lien the court shall enter a personal judgment against such person

if a party to the action, and that all the damages may be recovered by a civil action against such person. Plaintiff performed farm labor in 1912-1913, and in 1913 a lien therefor was adjudicated in his favor, and the grower had it put in a public grain warehouse and commingled with other wheat and negotiable warehouse receipts issued to the defendant, mortgagee, who sold the wheat and delivered the receipts to the purchaser. *Held* that as its identification as the wheat from the land on which plaintiff had labored was made difficult, uncertain, or impossible, he might recover damages of the defendant.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 228-236; Dec. Dig. ☞ 138.]

2. LIS PENDENS ☞ 25—LITIGATION—RIGHTS OF PURCHASER.

A purchaser of real or personal property, pending litigation concerning the title or the validity of a lien thereon, takes the property subject to the rights of the plaintiff as settled by the final decree or judgment.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 47-57; Dec. Dig. ☞ 25.]

Department 2. Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Glenn Hubbard against R. H. Johnson and Gardner, & Co. Judgment for defendants, and plaintiff appeals. Reversed, and cause remanded, with instructions to enter judgment for plaintiff.

Herbert C. Bryson and John A. Metcalfe, both of Walla Walla, for appellant. Sharpstein, Pedigo, Smith & Sharpstein, of Walla Walla, for respondents.

HOLCOMB, J. Appellant brought this action against the respondents for damages for the eolignment and conversion of a quantity of wheat, consisting of 2,460 sacks, grown by one Lonneker and wife, upon whose crop appellant had performed farm labor between November 1, 1912, and May 31, 1913, and upon which, on June 13, 1913, he filed his claim of lien for his labor, which was adjudicated in his favor on October 29, 1913, by a judgment of the superior court of Walla Walla county. Upon issue being joined in this case and a trial had, the court made findings, in substance, as follows: That on June 12, 1913, plaintiff had a lien by reason of labor performed upon a quantity of wheat consisting of 2,460 sacks, being the same wheat referred to and described in the complaint, which lien was, at the time of the trial of this action, a subsisting valid lien in the sum of \$271.96; that the wheat was grown by one August Lonneker upon a farm situated in Walla Walla county near Clyde, and that the defendants had a mortgage upon the crop executed by Lonneker to secure indebtedness due defendants, and, as far as appears from the evidence, neither of the defendants had any knowledge of the pendency of the foreclosure action on lien; that the wheat was harvested by Lonneker and, after being harvested, was moved by him to a public grain warehouse at Clyde, and that nei-

ther of the defendants had anything to do with the removal of the wheat from the field; that upon the same being removed to the warehouse, negotiable warehouse receipts therefor were caused to be issued by Lonneker to the defendants herein, which warehouse receipts were thereafter delivered to the defendants; that so far as appears from the evidence, the defendants had nothing to do with the issuance of the warehouse receipts; that thereafter, and while the wheat was in the warehouse, the defendants sold the wheat to Dement Bros. Company and Jones-Scott Company, both incorporated, and indorsed and delivered to the purchasers the warehouse receipts, which warehouse receipts were negotiable in form; that if the wheat was thereafter removed from the warehouse or from Walla Walla county, or commingled with other wheat, so far as appears from the evidence, neither of the defendants had anything to do with such acts further than the sale of the wheat and the indorsement of the warehouse receipts. Upon these findings the court concluded that the action should be, and it was, dismissed.

[1] 1. The only question presented for consideration upon this appeal is whether respondents are liable to the appellant under section 1181, Rem. & Bal. Code. Section 1188 of the Code is as follows:

"Any person who shall do labor upon any farm or land, in tilling the same or in sowing or harvesting or threshing any grain, as laborer, contractor, or otherwise, or laboring upon, or securing or assisting in securing or housing any crop or crops sown, raised, or threshed thereon during the year in which said work or labor was done, such person shall have a lien upon all such crops as shall have been raised upon all or any of such land, for such work or labor."

Section 1190 of the Code provides that a claim of lien shall be filed with the auditor of the county within 40 days after the close of the work or labor. Section 1190a of the Code secures to all lienholders for farm labor the same rights and privileges as are secured to holders of liens on logs under the provisions of chapter 7 of the Code. Under that chapter, section 1181 provides:

"Any person who shall eolign, injure or destroy, or who shall render difficult, uncertain or impossible of identification any sawlogs * * * upon which there is a lien as herein provided, without the express consent of the person entitled to such lien shall be liable to the lienholder for the damages to the amount secured by his lien, and it being shown to the court in the civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment * * * against the said person, provided he be a party to such action, or the damages may be recovered by a civil action against such person."

The trial court seems to have based his conclusion and decision in this case upon the case of *Lohman v. Peterson*, 87 Wis. 227, 58 N. W. 407. In that case it appeared that, under a statute of Wisconsin, any person who concealed or transported out of the

state logs on which there was a lien should be liable as for a conversion. There was nothing in that statute, so far as appears, rendering any person liable except the person concealing or transporting the liened logs out of the state. The defendant had sold the ties on which the lien was attempted to a railroad company, and the railroad company had transported the ties from the state. The action was brought against the original owner of the logs, as for conversion for having "caused the removal of the logs from the state." It was held, therefore, that the defendant had not transported the logs from the state, and was not liable. It was also held that "the railroad company took them subject to any claim which the plaintiff had against them," under the statute providing for a lien against such logs for labor performed upon them. It is expressly provided in the section of the statute providing for actions upon a lien (section 1181, *supra*) that any person eloining, etc., or rendering difficult, uncertain, or impossible of identification any logs upon which there is a lien, etc., shall be liable to the lienholder for damages to the amount secured by his lien. It is also provided that, in a civil action to enforce the lien, the party so eloining or rendering difficult or uncertain of identification may be made a party to the action, and a personal judgment entered against him, or, if he is not a party to the lien action, damages may be recovered by a civil action against such person. So it was held in *Peterson v. Sayward*, 9 Wash. 503, 37 Pac. 657, that damages may be awarded for the destruction of logs in the action to enforce the lien thereon, or they may be recovered in a separate action. See, also, *Singer v. Wallace*, 8 Wash. 576, 36 Pac. 466. Under section 1177, Rem. & Bal. Code, the statute relating to liens upon logs, etc., it is provided that:

"It shall be conclusively presumed by the court that a party purchasing the property liened upon within thirty days given herein to claimants wherein to file their liens, is not an innocent third party, nor that he has become a bona fide owner of the property liened upon, unless it shall appear that he has paid full value for the * * * property, and has seen that the purchase money of the * * * property has been applied to the payment of such bona fide claims as are entitled to liens upon the * * * property under the provisions of this chapter, according to the priorities herein established."

Under section 1188 relating to liens for farm labor, it is provided that the lien given to laborers for working upon and growing farm crops is superior to all other liens thereon, including that of a prior chattel mortgage; and this was upheld in *Sitton v. Dubois*, 14 Wash. 624, 45 Pac. 303. It appears to us that the court misconstrued the decision in the Wisconsin case cited, and that his construction of the law in this case was not in harmony with our statutes and decisions.

2. Respondents maintain that at any rate there was no eloinment shown in this case as eloinment has been defined by us in the case of *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 363. In that case it was said:

"But the new law introduces a new ground of damage, viz., 'eloinment,' and it was to the charge of eloinment alone that there was any testimony in the case against appellant. To 'eloin' is to take away beyond the jurisdiction, or to conceal, so that under the new law it is possible that the construction would be that the mere removal of logs under lien from the county would cause the right of action for damages to accrue. * * *"

The construction of the word "eloinment" or removal or concealment of the liened chattel is immaterial here, for the reason that there are other acts and conditions under the statute which render third persons liable to the lienor as conversioners, viz., rendering difficult, uncertain, or impossible of identification.

[2] 3. The evidence shows that both Lonneker and the defendants instructed the warehouseman where the wheat was hauled to issue receipts therefor to defendants. The wheat, accordingly, as fast as it came in, was commingled with other wheat in the warehouse, and not marked or identified as the wheat of Lonneker taken from the land and crop upon which appellant performed the labor, but marked and identified as the wheat of defendants. It would be hard to see how anything could be done to render the wheat raised by Lonneker upon which appellant's lien existed more difficult, uncertain, or impossible of identification. Appellant had an adjudicated lien upon the wheat at the time of the transaction between Lonneker and the respondents. It is common learning that a purchaser of real or personal property, pending litigation concerning the title or the validity of a lien thereon, takes the property subject to the rights of the plaintiff as settled by the final decree or judgment of a court. *Bergman v. Inman*, 43 Or. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771.

"The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset." *Tilton v. Cofield*, 93 U. S. 163, 23 L. Ed. 858.

It can make no difference in this respect whether the action is to foreclose the lien or to recover damages under the statute for destroying or confusing the identity of the property covered by it. *Bergman v. Inman*, *supra*.

There is no doubt, therefore, in our opinion, that appellant is entitled to recover. The judgment is reversed, and the cause remanded, with instructions to enter judgment for appellant.

MORRIS, C. J., and BAUSMAN, PARKER, and MAIN, JJ., concur.

(89 Wash. 238)

UNITED IRON WORKS v. WAGNER.

(No. 12761.)

(Supreme Court of Washington. Jan. 15, 1916.)

1. CONTRACTS — 208 — PERFORMANCE — DELIVERY.

Where a ranch owner contracted for the installation of a pump at a well distant 250 or 300 feet from a river up a steep and rocky bank from the owner's landing, where the pump and its heavy machinery were delivered, there was no sufficient delivery to call for payment of the first installment of the price under the contract providing for payment upon delivery on plaintiff's land.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 929-935; Dec. Dig. — 208.]

2. CONTRACTS — 308 — PERFORMANCE — FURNISHING PLANS.

Where a ranch owner, contracting for the installation of a pump at his well, agreed to put in a foundation, the installing company to furnish the plans therefor, which it failed to do, exhibiting to him merely a rough pencil sketch without dimensions to show the connection between the foundation and the machinery, the owner's failure to install the requisite foundation was not an excuse, on the ground that strict compliance with the contract was prevented thereby, for the installing company's failure to deliver the machinery at the well, since the provision for the furnishing of plans called for intelligible and workable plans.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409-1443; Dec. Dig. — 303.]

3. CONTRACTS — 319 — SUBSTANTIAL PERFORMANCE — REDUCTION OF RECOVERY.

Recovery against a ranch owner by a company which had contracted to install a pump for him of the full contract price for the installation on the ground of substantial performance only was improper, since the recovery on a contract of a party who has performed substantially and whose deviations were not willful or done in bad faith is nevertheless reducible by the amount of damages caused by the deviations.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493-1507; Dec. Dig. — 319.]

4. CONTRACTS — 323 — DELIVERY — WAIVER — QUESTIONS FOR JURY.

In an action by a corporation which had contracted with a ranch owner to install a pump at his well for the price of the installation, the questions whether or not there had been a substantial delivery of the machinery, and whether or not substantial delivery had been waived by the owner, held questions of fact for the jury under the circumstances.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1311, 1349, 1466, 1543-1548, 1827, 1827½; Dec. Dig. — 323.]

5. CONTRACTS — 175 — ACTION FOR BREACH — EVIDENCE — REASONABLE TIME FOR PERFORMANCE.

In an action by a corporation which contracted with a ranch owner for the installation of a pump at his well for the price of the installation, defendant's evidence, showing that the question of the time of the installation and delivery was discussed and considered by the parties at the time of making the contract, silent as to the time for performance, was admissible to show what was a reasonable time within which to make delivery of the machinery, a question of fact for the jury for submission upon competent evidence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. — 175.]

6. EVIDENCE — 442 — PAROL EVIDENCE VARYING WRITING.

Where a contract in suit is complete on its face, failing only to expressly state the time for performance, parol testimony that a particular time was expressly agreed upon at the time of execution is inadmissible under the rule that parol evidence of a prior or contemporaneous oral agreement is not competent to vary, alter, contradict, or add to the terms of a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1897; Dec. Dig. — 442.]

Department 2. Appeal from Superior Court, Chelan County; E. K. Pendergast, Judge.

Action by the United Iron Works against E. Wagner. From a judgment for plaintiff dismissing defendant's counterclaim, the latter appeals. Judgment reversed and remanded for new trial.

W. O. Parr, of Wenatchee, for appellant.
B. B. Adams, of Spokane, and Williams & Corbin, of Wenatchee, for respondent.

HOLLOMB, J. Respondent contracted in writing on April 20, 1910, for the furnishing and installation by it of a pumping plant on appellant's ranch on the Columbia river some 18 miles north of Wenatchee and near Orondo. The time when the installation should be completed is not fixed by the contract. The contract is in the form of a letter or proposal and an acceptance thereof by appellant. A long list of articles of machinery, apparatus, and appliances is set forth in the contract to constitute the pumping plant, and the contract contains the following provisions:

"All agreements are contingent upon strikes, accidents, or other causes beyond our control. All orders and contracts are taken subject to approval of the main office, and quotations are for immediate acceptance and subject to change without notice."

"The above outfit to be installed complete on your ranch near Orondo, with the understanding that you dig the pit and trench and furnish one man and team to help on the installation, and that you build the foundations after plans furnished you by us. The above for the net sum of sixteen hundred and ninety-four dollars (\$1,694.00). Terms, \$130.00 with the order, \$400.00 when the machinery is delivered on your ground, and the balance thirty days after the plant is complete and tested, provided that the test is not delayed through any cause, which is not our fault."

The respondent alleged that it had performed its part of the contract in all respects except, as it had been hindered and prevented from doing so by the failure of appellant and his neglect to dig a pit and trench of sufficient and adequate size to build foundations, as provided for in said contract; and the complaint prays for the entire sum remaining unpaid on the contract.

Appellant answered, admitting the execution of the contract, but asserting that the same was not all of the contract between the parties, inasmuch as no time was named therein within which the installation was

to be made, and alleged that the plant was to be installed within a reasonable time, to wit, within 30 days, and within time for the irrigation of the crops for the season of 1910; and appellant denied each and every other material allegation in the complaint. He also set up a counterclaim in which he sets out the contract and alleges failure of the respondent to erect the pumping plant within a reasonable time or at all, and alleged that by reason of such failure his fruit crops for 1910 and 1911 were damaged in the total sum of \$10,000. He alleged that the respondent had full knowledge of the extent of appellant's orchard, the purposes for which the pumping plant was to be used, the necessity of receiving water from this particular source, and the probable damage that would be caused by a failure to install the plant as required.

Respondent replied, putting in issue material allegations of the counterclaim, and further alleging that the pump referred to in the contract was one of special manufacture, and had to be manufactured after the contract was executed; that the delay, if any, was caused by an accident occurring on the railroad at Wenatchee in which the plant was injured. The appellant replied, putting in issue the affirmative matter of the answer to appellant's counterclaim.

The cause was brought on for trial before a jury, and, after the evidence was all in, including the rebuttal evidence of respondent, the court, on motion of respondent, discharged the jury and rendered a judgment in favor of respondent on the contract for the full amount unpaid thereon, including interest and costs, and dismissed the counterclaim of appellant. Appellant unsuccessfully moved for a new trial.

[1] The evidence in the case shows that the goods were shipped by steamboat from Wenatchee up the Columbia river and discharged on a gravel bank near Wagner's ranch at what is known as Wagner's landing. The machinery was shipped at different times. Part of it arrived at Wagner's landing about June 10, 1910, but the pump frame, a large steel frame about 30 feet long intended to be set in the well or pit, and which had been injured in the wreck at Wenatchee, did not arrive at Wagner's landing until about July 17, 1910. It also was unloaded from the steamboat upon this gravel bar between ordinary high and low water mark, and never thereafter moved by either party. The well on Wagner's ranch where this machinery was required was distant about 250 or 300 feet up a very steep and rocky bank from the place where the pump and machinery were deposited. The contract provided that the machinery was to be installed complete on appellant's ranch, and it also provided that the first payment of \$400 was to become due when the machinery was delivered "on your ground." The evidence

shows that the pump frame alone weighed 2,785 pounds. There was considerable other machinery and apparatus. Respondent contended, and the trial court took the view, that the delivery as made was a substantial delivery, being at or near respondent's ranch; and that, in case it was not, the failure of appellant to object to such delivery waived exact compliance with the terms of the contract. Under the contract as made by the parties, this machinery was to be installed and placed in the well by respondent. In referring to delivery upon the ground of appellant, the contracting parties could have provided that the first installment of the purchase price should be made upon delivery at the landing of the boat company on the bank of the Columbia river at Wagner's landing or near Wagner's land. But their contract did not so provide. In fact, it was specific that it was to be installed as a pumping outfit upon appellant's land, and must therefore have necessarily contemplated that it was to be installed where it could be used, that is to say, in appellant's well, and that the first installment should be paid when delivered upon appellant's land.

[2] Respondent, on the other hand, contends that the strict compliance with this feature of the contract was prevented by reason of the failure of appellant to put in a foundation as required by the contract. The evidence of appellant is that he dug the pit and trench; that he procured a supply of timbers for the purpose of building the foundation at the pit or well; that respondent failed to furnish any definite plans for the construction of the foundation; and that, if definite plans had been furnished, or if respondent had proceeded with the installation of the pump, he could have built the foundation in one day. A paper was introduced in evidence as Respondent's Exhibit 5, upon the supposition that it was the plan for the foundation. Respondent's principal witness later admitted, however, that it was merely given to appellant to show the connection between the steel frame which respondent was furnishing and the wood frame which appellant was to erect. This was a mere pencil drawing or a sketch of the proposed structure. There were no details upon it, and it was not drawn to scale. The respondent's principal witness excuses his failure to deliver plans for the foundation upon the ground that appellant said he did not require plans, that he was a carpenter and bridge builder, and that he could build a foundation. Appellant, however, denied this, and testified that the plans were so incomplete that, although he was a carpenter and bridge builder of considerable experience, he was unable to complete the foundation without additional information, for the reason that the plan contained no scale and nothing to indicate the size or the distance apart of the timbers. He was required by the con-

tract to build upon plans to be furnished by respondent. This, of course, meant intelligible and workable plans. In fact, upon every issuable fact involved in the case, except that a written contract was entered into between the parties, and that nothing but \$130 had been paid, there was a conflict of evidence between them.

[3] Respondent, however, insists that, as to the law of the case, a substantial performance was shown by undisputed testimony, and that the modern rule permits recovery without a strict and literal performance if there has been a substantial performance, and the contractor has attempted in good faith to perform the contract, citing 3 Page on Contracts, § 1385, and *Taylor v. Ewing*, 74 Wash. 214, 132 Pac. 1009. But the same authority (Page) contains a further statement of the law:

"If a contract has been performed substantially, and deviations from the contract have been made, but not willfully or in bad faith, the party so performing can recover the contract price, less the amount of damages caused by such deviation. The amount of such damages is usually the expense of completion according to the contract."

In the case at bar respondent sued to recover, and was permitted to recover, the entire amount of the contract according to his own theory, upon mere substantial performance of the contract, and not literal performance; while appellant insists that the delay was willful and inexcusable on the part of respondent.

[4] Respondent further insists that appellant by his acts and conduct waived complete performance of the contract, and that therefore it is entitled to recover upon the entire contract. There is nothing whatever in the evidence that we can see by which it can be rightfully contended that appellant waived the strict performance of the contract. On the contrary, there is evidence that at numerous times he requested to know when respondent would complete its installation of the pumping plant. This, to be sure, is contradicted, but that merely constitutes a conflict in the evidence and was for the jury to pass upon. He did not consider that the machinery had been delivered to him according to the contract; and it would seem that, under some circumstances and under some contracts, the delivery of goods, wares, or merchandise at a distance of 250 or 300 feet down a very steep hill would be practically equivalent to delivery under other contracts and under other circumstances and conditions of goods, wares, and merchandise at a wharf or landing a great distance away. If he moved this heavy machinery, he did so at some risk of injuring it, and also he would then have been considered as accepting such delivery, and that before installation by respondent. We are therefore satisfied that the questions of whether or not there had been a substantial delivery of the ma-

chinery, and whether or not substantial delivery thereof had been waived by any acts or conduct of appellant, either should have been resolved as questions of law in favor of appellant, or were questions of fact to be determined by the jury. We consider that, under the conditions and circumstances pleaded and shown, they were questions of fact.

[5, 6] Another question is raised by appellant which we consider necessary to pass upon. It is contended that the court erred in refusing to permit appellant to introduce evidence showing that the question of the time of delivery and installation was discussed and considered by the parties at the time of making the contract, for the purpose of showing what was a reasonable time within which to make delivery. It was contended by appellant and attempted to be shown on the trial below that it was considered by the parties that the delivery and installation of the pumping plant should be within 30 days, or by May 20, 1910, or, at any rate, in time for the irrigation of appellant's orchard within June, July, or August of that year.

The contract is complete upon its face, lacking only the element of time, and parol testimony that a particular time was expressly agreed upon is generally excluded under the familiar rule that parol evidence of a prior or contemporaneous oral agreement is not competent to vary, alter, contradict, or add to the terms of a written contract. Numerous cases are cited to sustain this proposition, among others that of *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163. In that case it was said, in consonance with the weight of authority, that:

"It is elementary that, if a contract specifies no time, the law implies that it shall be performed within a reasonable time. 9 Cyc. 611. It is also well established that the legal effect of a written contract, though not stated in terms in the writing itself, but left to be implied by law, can no more be contradicted, changed, or explained by extrinsic evidence than if the legally implied effect had been expressed in the written terms. 'The legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence as its language'"—citing many cases.

The situation here, therefore, is that, inasmuch as the contract was silent as to the time of performance, the law implies a reasonable time to perform the contract, and what was or is a reasonable time under the circumstances and within the contemplation of the parties was a question of fact to submit to the jury upon competent evidence, and not a question of law. The case cited by respondent, *Kleeb v. Long-Bell Lumber Co.*, 27 Wash. 648, 68 Pac. 202, to the point that it is a question of law for the court to determine what was a reasonable time, is not in point here, for the reason that in that case it was merely held by the court that a reasonable time had elapsed for the defendant to

object to the quality or manner of delivery of the lumber, owing to the peculiar circumstances in that case. There are frequently cases where the court may safely rule that the time elapsed wherein a party should do or should not do a certain thing is unreasonable, for the reason that under some circumstances and conditions the passage of an unreasonable length of time must be conclusively presumed against the party. In general, however, the question of what is a reasonable time is one of fact and to be determined as such.

For these reasons the judgment is reversed, and the cause remanded for new trial.

MORRIS, C. J., and BAUSMAN, PARKER, and MAIN, JJ., concur.

(89 Wash. 279)

DUFUR v. LEWIS RIVER BOOM & LOGGING CO. (No. 12692.)

(Supreme Court of Washington. Jan. 15, 1916.)

1. LOGS AND LOGGING \Leftrightarrow 13—DRIVING LOGS—LIABILITY OF BOOMING COMPANY—STATUTES.

Under Laws 1889-90, p. 470, providing for the organization of corporations for catching, booming, sorting, rafting, and holding logs and other timber products, and under Laws 1895, p. 128, providing for the organization and incorporation of companies to clear out and improve rivers and streams and for driving logs and other timber products therein, as amended by Laws 1905, pp. 108, 232, and Laws 1909, p. 816, the duty is not imposed upon a booming corporation to catch and boom all logs that may be driven, or which may float, down the river on which its booming works are constructed, as the statutes predicate a duty to care for the logs on the facts, either that the owner of the logs requested the defendant to boom them, that the logs came to the boom not in charge of the owner, that the river was a stream not capable of floating logs by nature and that defendant had made it floatable, that the logs were delivered to defendant, or that the owner and defendant made a contract obligating the latter to catch and boom them.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 31-35; Dec. Dig. \Leftrightarrow 13.]

2. PLEADING \Leftrightarrow 8—CONCLUSION.

In an action by the owner of logs against a booming company for failure to account for logs sent down a river, the complaint, alleging merely that it became the duty of defendant to catch such logs, failing to allege any facts upon which the statutes predicate a booming company's duty to care for logs, was demurrable, since the only allegation seeking to charge defendant with the duty to boom was a mere conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. \Leftrightarrow 8.]

Department 2. Appeal from Superior Court, Cowlitz County; William T. Darch, Judge.

Action by George C. Dufur against the Lewis River Boom & Logging Company. From a judgment dismissing his action, plaintiff appeals. Affirmed.

B. L. Hubbell, of Kelso, for appellant. Miller & Wilkinson, of Vancouver, for respondent.

FULLERTON, J. The appellant brought this action against respondent, stating his cause as follows:

"I. That the defendant is now, and was at all times hereinafter alleged and mentioned, a corporation doing business under and by virtue of the laws of the state of Washington, and was at said times a public service corporation, organized for the purpose of driving, sacking, sorting, rafting, and booming logs and other timber products, and was engaged in operating a boom at the mouth of the Lewis river in the county of Cowlitz and state of Washington at the confluence of said Lewis river with the Columbia river.

"II. That during the times herein mentioned the Kalama Lumber, Log & Timber Company was a corporation, organized and doing business under and by virtue of the laws of the state of Washington, and engaged in lumbering in Cowlitz county, Wash.

"III. That between the 1st day of September, 1907, and the 23d day of February, 1912, the said Kalama Lumber, Log & Timber Company placed in the Lewis river and floated to the rafting and booming grounds of defendant, at the mouth of the said Lewis river, 3,855,454 feet of logs.

"IV. That it became and was the duty of defendant to catch and hold, assort and raft, said logs, and to account therefor to the owners thereof; that defendant rafted and accounted for 2,223,068 feet of said logs so floated to said rafting grounds by the said Kalama Lumber, Log & Timber Company.

"V. That of said 3,855,454 feet of logs so floated to the rafting and booming grounds of defendant said defendant failed to catch and hold, assort, boom, and raft 1,632,386 feet, and has utterly failed to account therefor, though demand has been made therefor; that said logs were of the value of \$9 per thousand feet, and plaintiff is damaged by defendant's failure to so catch and hold, assort, boom, and raft said 1,632,386 feet, in the sum of \$14,688.61.

"VI. That plaintiff has no knowledge or belief as to what disposition was made of said logs by defendant, and is unable to allege whether said logs were converted by defendant or lost; that plaintiff has been informed and believes that defendant failed to catch and hold a portion thereof, and allowed a portion thereof to escape from its booms, but plaintiff is not informed as to what amount defendant failed to catch and hold, and what amount was allowed to escape from defendant's booms, and is unable to allege said amounts; that defendant has informed plaintiff that it has none of said logs in its possession.

"VII. That heretofore, to wit, on the 4th day of January, 1912, the said Kalama Lumber, Log & Timber Company duly assigned the said claim and cause of action against defendant to plaintiff herein."

To the complaint the respondent interposed a demurrer on the grounds: (1) That the complaint did not state facts sufficient to constitute a cause of action; and (2) that the action was not commenced within the time limited by law. At the hearing had upon the demurrer the trial court sustained the same, entering a general order to that effect without specifying upon which of the grounds stated in the demurrer the order was rested, and granting to the appellant 10

days within which to amend his complaint. Thereafter the appellant gave notice that he refused to plead further, and that he elected to stand upon the complaint, whereupon the court entered a judgment against him, dismissing his action, with costs. This appeal is from the judgment so entered.

[1] The action, it will be observed, is founded upon the so-called booming and driving statutes of the state. The statute of 1889-90 provides for the organization of corporations for the purposes of catching, booming, sorting, rafting, and holding logs and other timber products, and empowers such corporations, when so organized, to go upon any of the "waters of the state or the dividing waters thereof," and to construct and maintain the necessary booms and other works for the purposes mentioned. It further provides that when such works are constructed the corporation shall catch, boom, sort, raft, and hold the logs and timber products of all persons requesting such service, and, when the works are erected at the mouth of any river, the logs and timber products which shall come to the works not in charge of the owner, without such request; reasonable tolls being provided for the services. Laws 1889-90, p. 470. In 1895 (Laws 1895, p. 128) the Legislature provided for the organization and incorporation of companies for the purposes of clearing out and improving rivers and streams and for driving logs and other timber products thereon. The act empowered any such corporation to enter upon any of the rivers and streams of the state, or the dividing waters thereof, and remove jams, roots, snags, and rocks therefrom, straighten the channel of such streams, build wing dams and sheer booms thereon, and construct dams with gates for storing water with which to create artificial freshets therein. It made it the duty of such corporations, after the construction of such works, to sluice, sack, and drive all logs and lumber products which the owner should request to be so sluiced, sacked, and driven, and all logs and lumber products without such request which lay in such position as to obstruct or impede a drive, empowering it to charge tolls for such service not exceeding a certain maximum. The act also provided that boom companies theretofore incorporated might also become driving corporations by filing amended articles of incorporation embodying the provisions of the act. Each of these acts providing that any corporation acting under and in accordance with their provisions should be liable to the owner of logs or timber products for all loss or damage resulting from neglect, carelessness, or unnecessary delay on the part of such corporations. The act of 1895 was twice amended by the Legislature in 1905. Laws 1905, pp. 108, 232. In the one act the provisions of the corporation were somewhat

more definitely defined and limited, and in the other it was empowered to operate upon streams tributary to the stream on which its original works were constructed. It was again amended by the Legislature of 1909. Laws 1909, p. 816. It is there provided that when such a corporation comes upon a stream which was theretofore navigable, it may exact tolls for all logs and timber products which it drives at the request of the owner, or which it drives without such request when commingled with other logs, or lay in such a position as to obstruct or impede a drive, and also upon all logs and timber products which are driven or floated down a stream which was not theretofore navigable, but which is made so by the act of the corporation in driving out the obstructions originally therein. It is further provided that if such driving corporation is also a booming corporation, and maintains booms upon the stream, it may exact booming charges for all logs and lumber products for which it is permitted to exact driving charges.

From the foregoing epitome of the several legislative enactments it is clear that the statute does not impose upon a booming corporation the duty of catching and booming all logs that may be driven or which may float down the river on which its booming works are constructed. Prior to the amendment of 1908, its duty and right in that respect was limited to logs which the owner requested to be so caught and boomed, or logs which come down the stream not in charge of the owner, regardless of the nature of the stream; that is, whether the stream was by nature capable of floating logs, or whether it had been made so by the acts of the corporation. Nor after that amendment did it owe the duty to catch and boom all logs coming to its works in rivers navigable prior to the time it entered upon the river. As to rivers made navigable by the corporation acting as both a booming and driving company, it may owe that duty, since it is empowered to collect both driving and booming tolls on all logs driven or floated down such a stream, whether by the company itself, or whether with or without the aid of some other person. A complaint to state a cause of action for a breach of duty on the part of either of the corporations permitted to be organized by the statutes must allege facts sufficient to show that the duty arose; that is to say, that the logs reached the boom of the company in some one of the ways which under the terms of the statute gave rise to a duty on the part of the company to catch and boom the logs, and that the company failed and neglected to perform that duty.

[2] Turning to the complaint, we find it alleged that the respondent is a booming and driving company operating a boom at the

mouth of the Lewis river; that between certain dates the appellant's assignor placed in the river and floated to the boom of the respondent a certain quantity of logs; "that it became the duty of defendant to catch and hold, assort and raft, said logs," and to account therefor to the appellant's assignor; and that it failed in the performance of that duty. No fact is alleged showing that the duty to boom the logs arose from the operation of the statute. It is not alleged that the owner of the logs requested the respondent to boom them; it is not alleged that the logs came to the boom of the respondent not in charge of their owner; it is not alleged that Lewis river is a stream not capable of floating logs by nature, and that the respondent had made it so floatable. Nor is it alleged that the logs were delivered to the respondent, or that the owner of the logs and the respondent had entered into a contract by which the respondent was obligated to catch and boom the logs. The only allegation which seeks to charge the respondent with a duty is the one above quoted. But this is not an allegation of fact. It is but the conclusion the court would draw from the pleadings were some fact alleged showing that the duty arose. In other words, it is a conclusion of law, not an allegation of fact upon which the other party may take issue.

The appellant cites and relies upon the case of *Chesley v. Mississippi & Rum River Boom Co.*, 39 Minn. 83, 38 N. W. 769, but we cannot think the case in point on the question here presented. In the part of the opinion specially relied upon the court was discussing the question of the burden of proof. The trial court charged the jury that if the logs were delivered to the defendant, and not received back again, there was a prima facie case of negligence until the receiver of the logs showed that it was not negligent. The court held the charge to be without error. But here there is neither an allegation of delivery, nor the allegation of any fact from which delivery can be inferred. Had there been such an allegation, the case would be in point on the question whether the other allegations in the complaint charged a neglect of duty on the part of the respondent, but, as we have attempted to show, the primary question before us is not that, but is, rather, Does the complaint show that the respondent owed the appellant the duty of catching and holding the logs?

Our conclusion is that the complaint fails to state a cause of action, and that the judgment must be affirmed upon the first ground stated in the demurrer. This renders it unnecessary to discuss the second. The judgment is affirmed.

MORRIS, C. J., and ELLIS, and CHADWICK, JJ., concur.

(39 Wash. 356)

ROCKWOOD v. TURNER. (No. 12787.)

(Supreme Court of Washington. Jan. 20, 1916.)

1. APPEAL AND ERROR ⇐580 — ABSTRACT — NECESSITY.

Where the statement of facts on appeal comprises but 37 pages, motion to strike parts of appellant's abstract of the record will be denied, as there is no real necessity for an abstract of such a record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2574; Dec. Dig. ⇐580.]

2. APPEAL AND ERROR ⇐586 — ABSTRACT — SUFFICIENCY.

Where the statement of facts on appeal comprises but 37 pages, an abstract without appropriate references by pages to the transcript or statement of facts is sufficient on account of the brevity of the statement of facts and transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595-2597, 2600-2605; Dec. Dig. ⇐586.]

3. APPEAL AND ERROR ⇐154 — ESTOPPEL TO APPEAL.

In an action to quiet title against a tax foreclosure, where defendant respondent included in the judgment first signed by the court a tract of land which he had no right so to include, and plaintiff appellant moved for and obtained an amendment of the judgment, he was not thereby estopped to appeal from it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957-969; Dec. Dig. ⇐154.]

4. TAXATION ⇐796 — REDEMPTION — ACTION TO REDEEM—PROOF OF TITLE.

In an action to quiet title against a tax foreclosure, where defendant objected to the deed record of title offered by plaintiff, including the land involved, on the ground that it described other property than the land involved, reserving the right to cross-examine plaintiff with the abstract which his counsel used, which cross-examination defendant thereafter waived, defendant also waived strict documentary evidence of plaintiff's title as shown by the deed record.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1578-1581; Dec. Dig. ⇐796.]

5. TAXATION ⇐708 — PROCEEDINGS FOR JUDGMENT AGAINST REALTY—NOTICE TO OWNER—STATUTES.

Under Rem. & Bal. Code, § 9245, providing that when a certificate of delinquency is foreclosed, notice to the owner of the property described in such certificate is necessary, and section 9257, providing that the names of the person or persons appearing on the treasurer's rolls as the owner or owners of the property shall be treated as such owners, the inclusion, in the summons and foreclosure of a delinquency certificate, only of the name of the owner shown by the assessment rolls for 1908, and not of the owner shown for 1909, was sufficient, where the certificate, covering taxes for both 1908 and 1909, was originally issued for 1908, and merely had the additional amount for 1909 added to it, and it was foreclosed only for the 1908 taxes, those for 1909 having been paid by the holder.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. ⇐708.]

6. TAXATION ⇐708 — FORECLOSURE OF DELINQUENCY CERTIFICATE—PROOF OF SERVICE OF SUMMONS—STATUTE.

Under Rem. & Bal. Code, § 237, subd. 3, providing that proof of service of summons by publication shall be by affidavit of the printer, publisher, foreman, principal clerk, or business

manager of the newspaper, proof of service of summons by publication in a foreclosure suit on a tax delinquency certificate by one describing himself as cashier of the newspaper was insufficient.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.]

7. **TAXATION** § 708—**FORECLOSURE OF DELINQUENCY CERTIFICATE—PRESUMPTION.**

In suit to quiet title against foreclosure of a tax delinquency certificate, where the record in the foreclosure proceeding affirmatively showed that service of summons upon the owner was not proved as required by statute, there was no presumption that the jurisdictional fact of service was duly made to appear to the court, since when it appears from the record that such a fact was made to appear by certain means, there is no presumption that it was also made to appear otherwise, or by additional means.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Charles Rockwood against H. H. Turner. From a judgment for defendant, plaintiff appeals. Reversed, and cause remanded, with instructions.

Cannon & Ferris and Peacock & Ludden, all of Spokane, for appellant. Cordiner & Cordiner, of Spokane, for respondent.

HOLCOMB, J. The appellant in this action attacks the validity of a tax judgment and tax sale upon two grounds: First, because notice of foreclosure of the delinquency certificate was not served upon all persons who appeared upon the roll of the county treasurer as owners of the land for the years 1908 and 1909; and, second, because the proof of service of the published summons is defective.

[1, 2] 1. Respondent first moves to strike certain parts of appellant's abstract of the record, and to dismiss the appeal, and to strike appellant's brief from the record, and affirm the judgment. The first of these motions is without merit, for the reason that the statement of facts in this case comprises but 37 pages, and there is no real necessity for an abstract of such a record. At any rate the abstract is sufficient without "appropriate references by pages to the transcript or statement of facts" because of the brevity of the statement of facts and transcript. Respondent could not have been in any wise prejudiced or have suffered any hardship by the failure complained of. The same reasoning applies to respondent's motion to strike appellant's brief from the record, and it also is without merit. Both motions are denied.

[3] 2. Respondent also contends that appellant is estopped from appealing from the judgment entered by the superior court, for the reason that appellant moved for and obtained an amendment of the judgment that was first entered by the superior court, and is therefore bound by the amended judgment.

It appears that the respondent included, in the judgment which was first signed by the court, a tract of land which he had no right to include in the judgment, and upon a showing thereof by appellant, the judgment was amended and corrected to exclude that tract. We have little patience with a contention by counsel based upon a proceeding necessitated by counsel for respondent's own wrong. Of course, appellant invited the amendment, but he had a right to insist that the court should not include any more of his land in a judgment in an action to quiet title against a tax foreclosure proceeding than was involved therein. Upon the showing made therefor, if the trial court had not in all fairness corrected the judgment as it did, it would have been a gross inequity and wrong, and this court would have corrected it if brought properly before us.

[4] 3. It is further contended by respondent that appellant did not prove that he had any interest in or to the land involved in this controversy; that the only evidence offered by appellant was parol evidence that he was the owner of the land; that respondent objected and excepted to the introduction of such evidence on the ground that parol evidence is incompetent to prove title to real estate. This contention also is not borne out by the record, since the statement of facts and abstract show that appellant offered the record of the county auditor's office of Spokane county showing the record of a deed from one Cushing and wife, dated March 31, 1902, recorded in Book 123 of Deeds at page 335, and including the land described in this proceeding, as shown by an abstract which he had in court, and read the same into the record; that respondent objected to the description of any other additional property than that described in this proceeding; that respondent made no other objection, but reserved the right to cross-examine plaintiff with the abstract which counsel for plaintiff had just used and which cross-examination he thereafter waived. He therefore waived the strict documentary evidence as shown by the deed record, and his contention is purely technical.

[5] 4. Upon appellant's first contention the facts are substantially these: The assessment roll of Spokane county for the year 1908 showed the owner of the lands described in appellant's complaint to be Charles Rockford. During that year Charles Rockwood was in fact the owner of the tract in question. The tax for that year was not paid. In 1909 the assessment roll showed that one May Mallette was the owner of the property involved. On July 18, 1910, a certificate of delinquency naming Charles Rockwood as owner covering the delinquent tax for 1908 upon the land was issued to one A. J. Cuttell. This certificate was for \$69.05, and included the taxes due on the land for the year 1908, and also,

as an easy method of bookkeeping, instead of issuing a separate receipt to the purchaser of the delinquency certificate for the tax on the land for the year 1909, the amount thereof (excepting for an error made by the treasurer) was added to and included in the certificate of delinquency for 1908, thus making the total of the certificate \$69.05. The holder of the certificate continued to pay taxes thereafter until 1913. In July, 1913, the holder of the certificate began foreclosure proceedings in the superior court of Spokane county, and, upon a showing therefor, made or attempted to make service by publication of the summons therein, the summons being directed to "Charles Rockford et al." On October 17, 1913, the attorney for the certificate holder made a showing for default upon such published summons, the default was granted on October 20, 1913, and on the same day a judgment and decree of foreclosure of the tax delinquency certificate was made and entered by the superior court of Spokane county. An order of sale was issued thereon, and the land was subsequently sold to respondent. Appellant contends that the case is controlled by our decision in *Radeliff v. Hughes*, 82 Wash. 167, 143 Pac. 980. In that case we said:

"Section 9245, Rem. & Bal. Code, provides, that when a certificate of delinquency is foreclosed 'notice to the owner of the property described in such certificate' is necessary. Section 9257, Rem. & Bal. Code, * * * provides that 'the names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this chapter shall be considered and treated as the owner or owners of said property.' * * * The respondent claims that the words 'names of the person or persons appearing on the treasurer's rolls as the owner or owners,' means the names so appearing at the time of the commencement of the action to foreclose. * * * This is not now an open question in this state. The view has been announced and adhered to that the names of the person or persons appearing upon the treasurer's rolls as owner or owners means the person or persons appearing as such on the rolls when the certificate is issued and who are described in such certificate as the owner or owners. * * * 'The statute only requires notice to be given to the owner described in such certificate.'"

But we think this case is against appellant's contention. It is true that the certificate of delinquency in this case issued in 1910, after the name of May Mallette appeared on the assessment roll as owner of the property; but the certificate of delinquency was for the tax of 1908, which under our statute became delinquent June 1, 1909. Rem. & Bal. Code, § 9219. A certificate of delinquency could not be issued therefor until one year after delinquency. Rem. & Bal. Code, § 9252. The unpaid taxes for 1909 were, however, paid by the holder in 1910 at the time the certificate was issued, and thereafter he paid all the subsequent taxes assessed against the land. This was not, therefore, a foreclosure of a certificate of delinquency for 1909, but originated upon the delinquent taxes of 1908. The name ap-

pearing upon the assessment roll as owner of the land at that time was Charles Rockford. It was not necessary, therefore, under our decisions, to include the name of May Mallette in the summons and foreclosure. See, also, *Preston v. Cox*, 50 Wash. 451, 97 Pac. 493; *Williams v. Pittcock*, 35 Wash. 271, 77 Pac. 385; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Shipley v. Gaffner*, 48 Wash. 169, 173, 93 Pac. 211.

[6] 5. The record affirmatively shows that the only summons served in the foreclosure action was served by publication. Subdivision 3 of section 237, Rem. & Bal. Code, provides that proof of service of summons by publication shall be by "the affidavit of the printer, publisher, foreman, principal clerk or business manager of the newspaper," etc. The proof filed in the foreclosure suit is not by either printer, publisher, foreman, principal clerk, or business manager, but is made by a person who describes himself as the cashier of the newspaper. In *Neff v. Pennoyer*, 3 Sawyer, 274, Fed. Cas. No. 10,083, the United States Circuit Court for the District of Oregon, per Deady, J., passing upon a similar statute of the state of Oregon, providing for summons by publication and for proof thereof, said:

"* * * Section 69 of the Code of Civil Procedure [of Oregon] requires that the service of the summons shall be proved, in case of publication by the 'affidavit of the printer or his foreman or his principal clerk.' As appears from the affidavit to the publication it was made by Henry C. Benson, the 'editor' of the paper. The statute is imperative and admits of no proof of service but the affidavit of the printer or his foreman or his principal clerk. The reason is obvious. The persons described are the only ones who, as a rule, are likely to have personal knowledge of the fact, by virtue of their relation to the subject. It may be in some cases that the editor has such knowledge also, * * * but if it were so it should have been stated. But as a rule the contrary is probably true. One of the elementary rules of evidence is that a fact shall be proven by the best evidence of which, in its nature, it is susceptible. For very cogent reasons this rule ought to be rigidly applied to the proof of jurisdictional facts where the proceeding is *ex parte*. An editor does not know by virtue of his employment as such, that a summons has been published in all the numbers of the paper he edits, put in circulation during a certain period of time. But the printer may be reasonably presumed to. Therefore the editor's affidavit is not the best evidence of the matter. * * * For these very sufficient reasons, as it appears to me, the Legislature has required that the service by publication shall be proven by the best evidence of which the case is susceptible—the affidavit of the printer, his foreman or principal clerk. This being so, no court is authorized for any reason to assume that the affidavit of an editor or other person, not the printer of a paper, is legal evidence of a publication therein."

The Supreme Court of Oregon, with reference to the same statute as that referred to in *Neff v. Pennoyer*, has repeatedly held that, in case of publication, proof by any one other than one of the persons referred to in the statute, viz., the printer or his foreman or his principal clerk, is not sufficient,

and that a judgment based thereon is void. *Odell v. Campbell*, 9 Or. 298; *Rafferty v. Davis*, 54 Or. 77, 102 Pac. 305; *Osburn v. Maata*, 66 Or. 558, 135 Pac. 165.

The proposition is similar to a case where a statute should require personal service to be made by a sheriff or his deputy, who should make return thereof. If personal service were made by some other officer of a summons otherwise correct in form and if properly served conferring jurisdiction upon the court, yet a return made by some other officer or person than the one prescribed by statute would be ineffectual and confer no jurisdiction upon the court.

[7] It is contended, however, by respondent that the recital of the judgment in a foreclosure proceeding imports absolute verity, citing *Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118, and *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018. If the record of a court is silent as to a jurisdictional fact for the purpose of upholding the judgment, it will be presumed that the fact was duly made to appear to the court. But when it appears from the record that such fact was made to appear by a certain means, it will not be presumed that it was also made to appear otherwise or by additional means. *Neff v. Pennoyer*, supra.

Here the record shows that the proof of service was by the affidavit of the cashier of the newspaper, and there is no other proof of service, and a motion for default by the attorney for the plaintiff was based upon the affidavit of such cashier and the affidavit of the attorney and upon publication of summons only. The order of default made by the court merely recited that the defendants had been "duly and regularly served with summons and notice herein, as required by law, and that more than 60 days have elapsed since the day of said service, and that said defendants, and each of them, are now in default."

The findings of fact, conclusions of law, and judgment in the foreclosure case merely referred to the order of default, and made no other recital of service. The record affirmatively shows that the service was not proven as required by law. The affidavit of the cashier of the publication of a summons was not the affidavit required by statute, and conferred no jurisdiction upon the court in the foreclosure proceeding based thereon. It was therefore void.

Respondent further contends that in a cross-complaint, which he made in connection with his answer to appellant's amended complaint, he alleged that appellant now is, and for more than 3 years prior to the commencement of this action was, a nonresident of the state of Washington, and that respondent, prior to the commencement of this action was, and now is, the owner in fee simple of the land, and that appellant does not

deny these allegations. This contention is not borne out by the record. Appellant admitted in his reply that he is a nonresident of the state of Washington, but denies all the other affirmative allegations in respondent's further affirmative answer and cross-complaint.

The judgment is reversed, and the cause remanded, with instructions to enter a decree in favor of appellant, upon his complying with the tender alleged in his amended complaint, quieting title in appellant.

MORRIS, C. J., and BAUSMAN, PARKER, and MAIN, JJ., concur.

(171 Cal. 649)

PEOPLE v. MILLER. (Cr. 1972.)

(Supreme Court of California. Jan. 3, 1916.)

1. CRIMINAL LAW §789—DEFENSES—INSANITY—DEGREE OF EVIDENCE REQUIRED.

In a prosecution for murder, it was error to require the defendant to establish his defense of insanity by a preponderance of the evidence, at the same time defining "preponderance of the evidence" as that degree of evidence which proves to a moral certainty and produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds, since that definition is in effect a definition of proof beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. §789.]

2. CRIMINAL LAW §561—EVIDENCE—DEGREE OF PROOF—"REASONABLE DOUBT."

A "reasonable doubt" is not a mere possible doubt, but is the absence of an abiding conviction to a moral certainty of the truth of the charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1267; Dec. Dig. §561.

For other definitions, see *Words and Phrases*, First and Second Series, *Reasonable Doubt*.]

3. CRIMINAL LAW §560—"PREPONDERANCE OF THE EVIDENCE."

"Preponderance of the evidence" means only that the evidence on one side outweighs the evidence on the other, not necessarily in number of witnesses or quantity, but in its effect.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1266; Dec. Dig. §560.

For other definitions, see *Words and Phrases*, First and Second Series, *Preponderance*.]

4. CRIMINAL LAW §789—EVIDENCE—DEGREE OF PROOF REQUIRED—STATUTES.

Code Civ. Proc. §§ 1826, 1835, defining certain degrees of evidence, have no application to the question as to what is meant by an instruction placing upon the defendant the necessity of establishing his defense of insanity by a preponderance of the evidence, since those sections relate only to the character of evidence sufficient to sustain a verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. §789.]

5. CRIMINAL LAW §1180—APPEAL AND ERROR—REVERSAL.

Where the court required the defendant in prosecution for murder to establish his defense of insanity beyond a reasonable doubt, the error was not such that the decree could be affirmed in accordance with Const. art. 6, § 4½, pro-

hibiting reversal on account of errors in procedure or misdirection of the jury unless the court is of the opinion that the error prejudiced the defendant, where the evidence was such that the jury might reasonably have found for the defendant under a proper instruction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.]

6. CRIMINAL LAW §1066 — RECORD ON APPEAL—CONTENTS.

On appeal the record should not contain the arguments of the counsel on questions of law arising during the trial, since they serve no useful purpose, and their insertion is not required by law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2770, 2772, 2794; Dec. Dig. § 1086.]

In Bank. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Thomas Miller was convicted of murder in the first degree, and he appeals. Reversed and remanded for new trial.

John W. Heaney, of San Francisco, and W. C. Gammlil, of Santa Barbara, for appellant. U. S. Webb, Atty. Gen., and E. W. Squier, of Santa Barbara, for the People.

ANGELLOTTI, C. J. The defendant, charged with murder in the unlawful killing of one Clarence A. Baker, was convicted of murder in the first degree, and adjudged to suffer death. We have an appeal by him from the judgment.

The only defense was that defendant was insane at the time he killed the deceased. The court correctly instructed the jury, in substance, in view of the settled law of this state, that while it was essential to a conviction that the guilt of the defendant be established to their satisfaction beyond all reasonable doubt, except on the single question of insanity, that as to insanity the burden of proof was on defendant, and that it was incumbent on him to show insanity by a preponderance of the evidence before he could be acquitted on that ground. The jury were explicitly and correctly instructed that it was not necessary for defendant to show his insanity beyond all reasonable doubt, but only by a preponderance of evidence, as in civil cases, and also that the proof must be such in amount that, if the single issue of sanity or insanity of the defendant should be submitted to a jury in a civil case, they must find him insane; that, in other words, insanity may be established "by a preponderance of evidence merely." But, having so fully and correctly instructed the jury, the learned trial judge gave a further instruction as to what was meant by the term "preponderance of the evidence," which, so far as we can find, was the only instruction given on the subject. This was as follows, viz.:

"Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced

mind, regardless of the number of witnesses from whom it proceeds."

The court refused to give an instruction requested by defendant reading in part as follows, and being in all other respects a correct statement of the law:

"Then what is the term 'preponderance of the evidence'? By preponderance of evidence is meant the greater and superior weight of evidence; and, if the evidence of insanity preponderates in the slightest degree in favor of the defendant, you must find him not guilty."

[1] Defendant's main contention on this appeal is that the instruction given was erroneous, and we are satisfied that this contention is well based. It is plain to us that the definition thus given by the court was substantially the same as that of proof beyond a reasonable doubt, and that certainly a jury of laymen could find no possible distinction. It is clear that our law contemplates, as does the law generally, a material distinction between the two terms. Always has it been the established rule in this state that proof of guilt beyond all reasonable doubt is essential to the conviction of one of a crime, while a mere preponderance of evidence is sufficient in a civil case, and this rule is expressly stated in section 2061 of our Code of Civil Procedure. The existence of this distinction was fully recognized by the trial judge in this case, who advised the jury as to the necessity of proof of guilt beyond all reasonable doubt, and that defendant was required to prove his insanity only by a preponderance of evidence.

[2] The term "reasonable doubt" was fairly enough defined by him, in accord with the definition thereof given by Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. (59 Mass.) 320, 52 Am. Dec. 711, which has been adopted by the courts of this and practically all other states as the best definition, viz.:

"It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * The evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it."

In instructing the jury as to the meaning of the term "proof beyond a reasonable doubt," the trial judge, in line with this definition, expressly told the jury that "moral certainty only is required or that degree of proof which produces conviction in an unprejudiced mind"; and again that "the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously

upon it." Clearly the jury was thus given substantially the same definition of both the terms "preponderance of evidence" and the term "proof beyond a reasonable doubt," thus making it essential for the defendant to establish his defense of insanity by evidence showing the same to the satisfaction of the jurors beyond a reasonable doubt. That such is the effect of the instruction given is shown by what is said in *People v. Wreden*, 59 Cal. 393, and *People v. Wells*, 145 Cal. 142, 78 Pac. 470, where it is held that an instruction declaring that insanity "must be clearly established by satisfactory proof" is the full equivalent of one making it incumbent on a defendant to establish insanity beyond a reasonable doubt.

[3] No such definition of the term "preponderance of the evidence" as that given by the trial judge is sanctioned by the authorities. The term simply means what it says, viz.: That the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. As good a definition as we have found is that given in *Hoffman v. Loud*, 111 Mich. 156, 69 N. W. 231, where it is said:

"In civil cases a preponderance of evidence is all that is required, and by a 'preponderance of evidence' is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."

In *Parker v. Hull*, 71 Wis. 368, 37 N. W. 351, 5 Am. St. Rep. 224, it is said that to say that the evidence of one party must be more weighty, convincing, and satisfactory than the proof adduced by the other party is simply to state the rule of preponderance. In *French v. Day*, 89 Me. 441, 36 Atl. 909, it was held that an instruction requiring a "clear preponderance of evidence and convincing proof" was erroneous, and that a party was only required to prove his case "by a preponderance of the evidence," not by a "clear preponderance and by convincing proof." In *Anderson v. Chicago Brass Co.*, 127 Wis. 273, 106 N. W. 1077, the term is held to be properly defined as the greater convincing power of evidence, and it is said that on a trial that side has furnished the preponderance of evidence which has produced evidence of greater convincing power in the minds of the jury than that produced by the other side.

[4] Of course, these definitions do not mean that the "burden of proof" resting on a party to prove a particular fact, as in this case the burden of proof resting on defendant to prove insanity and thus rebut the presumption of sanity which the law declares, is lifted by the mere fact that he has produced a preponderance of evidence, for, as was well said in *Ergo v. Merced Falls, etc., Co.*, 161 Cal. 339, 119 Pac. 103, 41 L. R. A. (N. S.) 79:

"The evidence tending to prove a fact might be so slight that it would fail to satisfy the

jury of the existence of the fact, and yet it might be of greater weight than other evidence introduced which would tend to disprove the fact," and that "in such case the fact could not be said to be proven either by a preponderance of the evidence or at all."

The same idea was expressed in *Anderson v. Chicago Brass Co.*, supra. The party on whom rests the burden to prove an alleged fact must produce evidence sufficient in quantity and character to warrant a jury in finding the fact to exist, in the absence of opposing evidence. The question what that evidence must amount to in order to legally support a conclusion by the jury has nothing at all to do with the question what is meant by the term "preponderance of the evidence." The party on whom rests such burden having produced sufficient evidence to support a conclusion in his favor, opposing evidence may also have been introduced, and then only does the question of preponderance of evidence arise. The situation may then be that, in view of the opposing evidence, the jury is in doubt, and not at all satisfied or convinced. In such a situation the decision must be based on the preponderance rule. If in the opinion of the jury the testimony preponderates in favor of the one on whom the burden of proof does not lie, or is equally balanced, the decision must be in his favor, and, if it preponderates ever so slightly in favor of the other party, he is entitled to a verdict. So that in civil cases a party may have established an essential fact by a preponderance of the evidence, although, in the light of all the evidence pro and con, the jury may not be satisfied to a moral certainty of the existence of the fact, and the whole evidence may not be such as to produce conviction in their minds. Under such circumstances, as said in *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866, 54 Am. St. Rep. 365:

"The weight of evidence or preponderance of probability is sufficient to establish a fact in a civil case."

The question is not whether, in view of all the evidence, pro and con, the jury are satisfied to a moral certainty of the truth of the fact, or whether conviction as to that fact exists in their minds, but whether there is a preponderance of evidence in favor of the existence of the fact. We cannot avoid the conclusion that the instruction given on this matter most vital to defendant, the only instruction given on the subject, advised the jury that they could not find in his favor on the issue of insanity unless they were satisfied by the evidence, as a whole, "to a moral certainty" that he was insane at the time of the homicide, and "convinced" that such was the case, and we are satisfied that it could have been understood by the jury in no other way.

[4] The error of the learned trial judge in this connection was doubtless induced by certain rather carelessly drawn provisions contained in our Code of Civil Procedure enacted in an attempt to satisfactorily de-

fine or declare the degree of proof essential to the establishment of a fact by evidence. See sections 1826 and 1835, Code Civ. Proc. Manifestly these provisions are not in accord with other provisions of law in all respects, even on the subject to which they relate. For instance, in section 1835 it is attempted to declare what is "satisfactory evidence," defining it as that evidence "which ordinarily produces moral certainty or conviction in an unprejudiced mind," providing that such evidence alone will justify a verdict, and declaring that all other evidence is "slight evidence." Yet by other sections of the same Code it is declared that a presumption is evidence, and that it is a deduction which the law expressly directs to be made from particular facts, and many presumptions, conclusive and prima facie, are stated, and it is expressly provided that as to a prima facie presumption the jury is bound to find according to the presumption unless it be controverted. Of course, also, it is bound to find in accord with a conclusive presumption. See sections 1957, 1959, 1961, 1962 and 1963. All this is true, although the presumption may not be such as to ordinarily produce moral certainty or conviction of the fact presumed in an unprejudiced mind. But whatever force may be attributed to these sections and whatever they may be held to mean, they have no application to the question here involved, viz.: What is meant by the term "preponderance of evidence"? They purport to do no more than to attempt to declare what character of evidence will sustain a verdict, and even in that, as we have seen, when considered in connection with other provisions of law, they are not entirely correct. The instruction given in *Ergo v. Merced Falls, etc., Co.*, supra, relied on by the Attorney General, was one given at the request of the defendant, which was complaining of another incorrect instruction given at the request of the plaintiff, and it was simply held that the instruction so given at the request of the complaining defendant was of such a nature that the court would not be justified in holding the other instruction sufficiently injurious to justify a reversal. The instruction was not upheld as a correct statement of the law.

[6] We regard the error thus made as one most substantially affecting the rights of defendant. In effect, as we have said, the jury was instructed that he could not be acquitted on the ground of insanity unless he established the fact of insanity to their satisfaction beyond a reasonable doubt. We have carefully examined the evidence in order to determine whether, in view of the provisions of section 4½ of article 6 of the Constitution, the judgment should be affirmed notwithstanding such error, and we are satisfied that the evidence was of such a nature that such a conclusion may not fairly be reached. In saying this we do not desire to be understood as intimating that it is our

opinion that the jury should have concluded that the preponderance of evidence was in favor of the theory of insanity. The evidence elicited on the trial was of such a nature that a jury might reasonably find therein basis for a conclusion that insanity on the part of the defendant, within the meaning of our law, had not been shown by a preponderance of evidence. But, according to the record, the case made for defendant on this issue was a substantial one, and the evidence tending to show insanity was such that a jury might reasonably have found therein sufficient basis for a conclusion that the preponderance of the evidence was in favor of the theory of insanity. For aught we know, the jury did so conclude in this case, finding against the defendant on that issue solely because of the erroneous instruction. It is not suggested by the learned Attorney General that, if the instruction be erroneous, the facts nevertheless are such as to warrant an affirmance in view of the rule declared by the provision of the state Constitution referred to.

In view of our conclusion on the point discussed, it is unnecessary to consider any other point made for reversal.

[6] We find on an examination of the reporter's transcript of the proceedings at the trial that the same includes all arguments made by counsel to the court on questions of law arising during the trial. In the aggregate many pages of the transcript are devoted to this use. The incorporation of such arguments in a transcript for use on appeal serves no useful purpose. To the contrary, it not only impedes the examination of the record by an appellate court, but it also unnecessarily adds to the cost of the transcript to the county. The law does not require the insertion of any such matter in a transcript of the evidence to be used on appeal, and the trial judge should see that such a transcript is not unnecessarily lengthened by the incorporation of superfluous matter.

The judgment is reversed, and the cause remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

HENSHAW, J. I concur in the foregoing opinion of the Chief Justice. Section 1835 of the Code of Civil Procedure, like section 1826 of the same Code, is dealing exclusively with evidence in criminal cases. The difficulty is entirely cleared if to the sentence in section 1835, "Such evidence alone will justify a verdict," there be added "of conviction." That these sections have applicability solely to criminal cases is made manifest, not only by the history and development of the law governing criminal trials, but from two additional facts, each equally convincing. The one fact is that, if those sections were made to apply to trials by jury in civil cases, it is within bounds to say that 99 such cases out

of 100 would necessarily result in perpetual mistrials. The evidence in civil cases upon either side is most rarely of so convincing a character as to produce "moral certainty or conviction," and, if it be only such evidence in a civil case as "will justify a verdict," then it must result that no verdict can be rendered. As pointed out by the Chief Justice, this distinction is itself noted by our law in section 2061 of the same Code. In subdivision 5 of that section criminal cases and civil cases are put in immediate juxtaposition, and courts are advised to instruct their juries that in civil cases their "decision must be made according to the preponderance of evidence," while "in criminal cases guilt must be established beyond a reasonable doubt." The second fact, equally conclusive, is shown by the history of these two sections, derived from the notes of the codifiers and commentators. Every word of those notes establishes that the codifiers are dealing with the sufficiency of evidence in criminal cases. Thus, in the note to section 1826 it is said:

"The principal difference to be remarked between civil and criminal cases with reference to the modes of proof by direct or circumstantial evidence is, that in the former where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment than in the latter case which affects life and liberty."

While in the note to section 1835 it is said:

"To acquit upon light, trivial, and fanciful suppositions and remote conjectures, is a virtual violation of the juror's oath, and an offense of great magnitude against the interests of society, directly tending to the disregard of the obligations of a judicial oath, the hindrance and disparagement of justice, and the encouragement of malefactors. On the other hand, a juror ought not to condemn unless the evidence excludes from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he is so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests."

In their note to section 1835 the codifiers cite Starkie on Evidence, and Starkie's discussion then may well be quoted. This is what that learned author says:

"Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent in favor of the particular fact."

"The distinction between full proof and mere preponderance of evidence is in its application very important. In all criminal cases whatsoever it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact to the exclusion of all reasonable doubt."

"But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale."

(171 Cal. 658)

WILLIAMS, Superintendent of Banks, v.
CARVER et al. (No. L. A. 3852.)

(Supreme Court of California. Jan. 4, 1916.
Rehearing Denied Feb. 3, 1916.)

1. STATUTES \S 161—CONSTRUCTION.

Where there is an apparent conflict between two statutes touching the same subject, they should be construed, if possible, to give force and effect to each, as the law does not favor repeals by implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. \S 161.]

2. BANKS AND BANKING \S 49—STOCKHOLDER'S LIABILITY—ENFORCEMENT BY SUPERINTENDENT OF BANKS—STATUTE.

St. 1909, p. 87, entitled "An act to define and regulate the business of banking," in section 136 providing that the superintendent of banks shall collect all debts due it, and may, if necessary to pay its debts, enforce individual liability of the stockholders, does not authorize the superintendent to enforce the constitutional liability of the stockholder to the creditor fixed by Const. art. 12, § 3, declaring that each stockholder of a corporation shall be liable for such proportion of its liabilities as his stock bears to the whole, since the constitutional right is personal to the creditor, enforceable by him under Civ. Code, § 322, and, not being a debt due the bank, is not enforceable by it or the superintendent.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. \S 49.]

3. BANKS AND BANKING \S 49—STOCKHOLDER'S LIABILITY—ENFORCEMENT BY SUPERINTENDENT OF BANKS—STATUTE.

St. 1909, p. 87, entitled "An act to define and regulate the business of banking," in section 136 providing that the superintendent of banks shall collect all debts due it, and may, if necessary to pay its debts, enforce the individual liability of the stockholders, only authorizes the superintendent to enforce against stockholders their liability due the bank, arising upon assessments or nonpayment of subscriptions to the corporate capital, constituting a common fund out of which to pay the cost of administration and corporate debts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. \S 49.]

4. STATUTES \S 107—TITLE—CONSTITUTIONALITY.

Under Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, St. 1909, p. 87, entitled "An act to define and regulate the business of banking," by section 136 providing that the superintendent of banks may enforce the individual liability of stockholders, if it authorize him to enforce the liability of stockholders to creditors under Const. art. 12, § 3, is unconstitutional.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. \S 107.]

In Bank. Appeal from Superior Court, Kern County; J. D. Murphy, Judge.

Action by W. R. Williams, as Superintendent of Banks, against L. J. Carver and others. From a judgment for defendants on their demurrers, plaintiff appeals. Judgment affirmed.

H. W. Johnson, Jr., of San Francisco, and A. A. De Ligne, of Sacramento, for appellant. Corbet & Selby, of San Francisco (Frederick B. Lathrop, of counsel), for respondent L. J. Carver. E. L. Foster, of Bakersfield, for respondents R. McDonald and others. C. C. Cowgill, of Sonoma, for respondent Sarah L. Conner. Thomas Scott, of Bakersfield, for respondent R. E. White.

VICTOR E. SHAW, Judge pro tem. This is an equitable action, brought by plaintiff, as superintendent of banks, to recover from the stockholders of the Kern Valley Bank upon their constitutional liability to the creditors thereof. To the first amended complaint defendants interposed demurrers upon both general and special grounds. Their demurrers were sustained by the court, which refused to allow plaintiff to further amend. Judgment followed, from which plaintiff appeals.

It appears that on May 12, 1911, plaintiff, as superintendent of banks, declared the Kern Valley Bank insolvent, for which reason and the fact that it was then unsafe and inexpedient for it to continue its banking business, he took possession of all its property and business for the purposes of liquidation, as provided by law. It is alleged:

"That the conditions and affairs of said Kern Valley Bank are such that, in order to pay the debts thereof, it has become and is necessary to enforce the individual liability of the stockholders of said bank, as provided for by the Constitution and other laws of the state of California, and by virtue of the authority vested in him by said Bank Act of the state of California plaintiff brings this action on behalf of all the creditors of said Kern Valley Bank."

There is attached to the complaint a list of the names of some 1,500 persons, to all of whom it is alleged the bank, within three years prior to the filing of the complaint, became indebted in the aggregate sum of \$832,502.54; that by offsets said sum of \$832,502.54 has been reduced to \$717,574.48, upon which there has been paid, by the superintendent of banks, in the liquidation of its affairs, dividends in the sum of 40 per cent. upon the principal of said indebtedness, and that there remains due to said creditors the sum of 60 per cent. of the whole principal of said indebtedness; that the value of all assets of the bank now in the hands of the plaintiff do not exceed \$107,636.10, which sum is—

"probably insufficient to pay the expenses necessary for the completion of the liquidation of the affairs of said bank and an additional dividend of not more than 15 per cent. of the principal of said original indebtedness."

The names of the stockholders, with the number of shares owned by each during the time when said indebtedness is alleged to have been incurred by the bank, together with the proportionate liability of each in the aggregate to all of the depositors based upon the number of shares so owned by each stockholder, are set out in the complaint.

The prayer of the complaint is for judgment against each of said defendants in the several amounts specified as being the proportion of all the debts of the bank as the stock held by each bore to the entire subscribed capital stock of the bank, less the deduction which each defendant shall be entitled to by reason of the dividends theretofore paid, or which might thereafter be paid by plaintiff to said creditors.

[1] Plaintiff asserts right to maintain the suit under and by virtue of an act entitled "An act to define and regulate the business of banking" (Stats. 1909, p. 87), section 136 of which, in so far as material to the discussion, is as follows:

"The superintendent of banks shall collect all debts due and claims belonging to it, and upon the order of the superior court may sell or compound all bad or doubtful debts, and on like order may sell all real and personal property of such bank on such terms as the court shall direct; and may, if necessary to pay the debts of such bank, enforce individual liability of the stockholders by action to be brought within three years after the date of his taking possession of the affairs of such bank."

He insists that the "individual liability of the stockholders" therein mentioned, and which he is authorized to enforce, is the constitutional liability of the stockholder to the creditor fixed by section 8, art. 12, of the Constitution, which declares that:

"Each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation."

Section 322 of the Civil Code, after re-enacting this constitutional provision, provides, among other things, that:

"Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each."

The Bank Act makes no reference to this section, nor to section 359, Code of Civil Procedure, which specifies the time when the maintenance of such action by the creditor shall be barred. The position of appellant with reference to these sections is that they "still provide such remedy in all cases except where a bank has been taken over by the superintendent of banks for the purpose of liquidation," in which case the constitutional right of the creditor to pursue the stockholder is, ipso facto, terminated, and the enforcement of the payment of his debt committed to the will of the superintendent of banks, who, if it be "necessary to pay the debts of such bank," may, notwithstanding the claim is barred under section 359, Code of Civil Procedure, bring an equitable action to recover the specific sum due from each stockholder to each creditor, and, when collected, pay to each creditor the sum so collected in his behalf. The law does not favor repeals by implication, and where there is an apparent conflict between two statutes touching the

same subject, the construction should be such as to give force and effect to both, if possible.

[2-4] The subject of the legislation, as expressed in its title, is "the business of banking." The constitutional liability of the stockholder to the creditor, as to which no mention is made in the act, is distinct and separate from such business; it constitutes no part of the assets or business of the bank. Two sources exist to which the creditor may look for the payment of his debt: One, the assets of the bank the affairs of which, if in liquidation, are controlled by the superintendent of banks; the other the stockholder therein, as to whom and his direct and primary liability to the creditor neither the bank nor the superintendent of banks has anything to do. Being distinct and separate claims, though based upon the same debt, the creditor may, so long as the bank is a going concern, pursue his remedy against either or both bank and stockholder, or waive it as to either or both. When the superintendent takes possession of a bank for purposes of liquidation, he succeeds to all the rights and property of the bank; but since the stockholder's liability to the creditor is no part of such property or assets, he has no power to act for or on behalf of the creditor in pursuit of his claim for such source. The right to do this is a personal right of the creditor, and, under the Constitutional provision, he not only possesses the right to enforce the same in an action at law in the manner provided by section 322 of the Civil Code, but may insist upon having the proceeds collected applied in liquidation of his debt, free from any depletion due to the intervention of another, or to the extravagance, mismanagement, or expense of the administration of such fund by any other person. Since it is not a debt due to the bank, neither it nor the superintendent of banks as its successor is concerned with the enforcement of such constitutional liability. The "individual liability of the stockholder" which the superintendent of banks is authorized to enforce, since it is not declared to be the constitutional liability due to the creditor, must be construed to be that due to the bank and arising upon assessments made, or nonpayment of subscriptions to the corporate capital, constituting a common fund out of which to pay the cost of administration and corporate debts. So construed, there is no conflict between the Bank Act and section 322, Civil Code; whereas, if we accept appellant's interpretation, the inconsistency is irreconcilable, and the creditor is deprived of his constitutional right to enforce the liability of the stockholder, upon whom additional burdens are imposed, since in the form of action here adopted the chances of all creditors, hundreds of whose claims in the case at bar are less than \$5, suing to enforce the same, are largely augmented thereby. Moreover, if the provision be con-

strued as authorizing the superintendent of banks to enforce the constitutional liability of stockholders to the creditors, then it is void as being obnoxious to the provisions of section 24, art. 4, of the Constitution, which provides that every act shall embrace but one subject, which shall be expressed in its title. As stated, the subject of the legislation, as shown by its title, is to "define and regulate the business of banking." The constitutional liability of the stockholders of a corporation to its creditors and the enforcement of such liability is no part of the business of banking. Hence, the subject of the legislation, if its purpose be to deprive the creditor of the right to enforce such liability and confer upon the superintendent of banks the power to act for and on behalf of the creditor in the collection thereof, is not embraced in the title. Indeed, there is absolutely nothing in the title indicating such a purpose on the part of the Legislature.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

Mr. Justice VICTOR E. SHAW, of the District Court of Appeal of the Second Appellate District, acted in this case under appointment by this court, in place of Mr. Justice LORIGAN, of this court, who was unable to act.

(29 Cal. A. 49)

O'REILLY v. ALL PERSONS, etc.

(Civ. 1432.)

(District Court of Appeal, Third District, California. Nov. 27, 1915.)

1. TAXATION \S 831—TAX TITLES—RIGHTS OF TAX PURCHASER.

As the primary object in selling land for taxes is to enable the state to recover the amount due, a tax purchaser is a mere volunteer as to the amount paid on competitive bidding in addition to the taxes due, and, the tax title being invalid, he cannot recover such amount from the owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1645; Dec. Dig. \S 831.]

2. APPEAL AND ERROR \S 171 — THEORY OF CASE—CHANGE.

Where the case was tried below on the theory that an issue was whether defendants were bound to compensate plaintiff for the amount paid for his tax title in excess of the amount due for taxes, it could not on appeal be contended that no such issue was presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1063-1063, 1066, 1067, 1161-1165; Dec. Dig. \S 171.]

3. APPEAL AND ERROR \S 1177 — REVIEW — FINDINGS.

Where, in a proceeding to establish title to land, it was found that plaintiff's tax title was invalid, the appellate court, no finding having been made, should not determine what amount plaintiff paid for his tax title on competitive bidding above the amount of taxes due, but the cause should be remanded for that purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4597-4604, 4606-4610; Dec. Dig. \S 1177.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by P. J. O'Reilly against All Persons, and especially against Josephine E. Hopkins and another, to establish title to two parcels of land. From the judgment, the named defendants appeal. Reversed and remanded, with directions.

Samuel M. Shortridge and T. J. Sheridan, both of San Francisco, for appellants. Frank J. Hennessy, of San Francisco, for respondent.

BURNETT, J. The action was brought under the McEnerney Act to establish title to two parcels of land. Appellants in their answer denied that plaintiff was the owner or in the actual possession of parcel A of the said real estate, and averred that they are and were at the beginning of the action, and had been long prior thereto, the owners of said parcel in fee simple absolute as tenants in common and in the possession thereof, and prayed that plaintiff take nothing as to said parcel, but they did not ask for affirmative relief. No question was raised as to plaintiff's ownership of the other parcel, and it is not involved in this appeal.

At the trial it developed that plaintiff claimed said parcel A under a tax title, and it was admitted that, if said tax title was invalid, then appellants were the owners of said tract, as claimed in their answer. The court found that the said defendants were at the time of the said tax sale, and ever since have been, the owners in fee simple absolute of said real property, and, further, that the said tax sale and the said tax deed executed pursuant to said sale and purporting to convey said property were and are invalid. These findings have not been questioned; the plaintiff not having moved for a new trial or appealed. The court further found, however:

"That the said plaintiff purchased said property from the state of California at a tax sale held on the 7th day of February, 1912, and paid for said property at said sale the sum of \$740 in gold coin of the United States of America, and that said plaintiff has since said tax sale aforesaid expended the sum of \$15.43 in the payment of taxes regularly levied upon said property."

And the court thereupon decreed that plaintiff have judgment against said defendants for the sum of \$740, and interest, the further sum of \$15.43, and that said judgment be a lien upon said parcel of real property, and that said defendants be directed to pay the same within 60 days, and in the event of their failure so to do that plaintiff be entitled to have a writ of execution to enforce the same, and that until said payment be made the judgment in favor of defendants be of no force and effect. The court did not find the amount of the taxes, penalties, interest, and costs which were chargeable up-

on said lands at the time of the said tax sale, but it was conceded at the trial that the amount of the same was \$45.82.

Appellants appeal from the portion of said judgment requiring of them the payment of the said purchase price of said parcel of land, and they state in their brief that:

"The substantial dispute between respondent and appellants is whether plaintiff is entitled to the excess of the sum bid and paid by him over and above the taxes, interest, penalties, and costs justly chargeable upon the lands at the time of the invalid tax sale, and that is the sole question presented by this appeal."

[1] That question, it may be said, has been settled by a decision of this court, a petition for hearing in the Supreme Court being denied, and it is sufficient to quote the following from *Cordano v. Kelsey*, 151 Pac. 391:

"We do not think that the owner should be required to pay whatever competitive bidders may choose to offer for the land in addition to what the law makes it the duty of the owner to pay. The primary object of the state in selling the land is to recover the taxes, penalties, costs, etc., and this is indicated by the requirement of the law that the land must be sold for an amount not less than these enumerated charges. Whoever pays more at the sale does so as a volunteer and at the risk of the proceedings being found invalid. The rule contended for by appellants would relieve the purchaser of all risk, and make it possible for him to invest his money safely by purchases at tax sales at 7 per cent. interest, regardless of any infirmity in his title, and regardless of the amount he might bid for the property. This, we think, would crowd the rule off from its equitable foundations."

[2, 3] The only remaining question is whether upon the record as presented here this court can direct a modification of the judgment so as to require appellants to pay to plaintiff only the amount chargeable for taxes, penalties, and costs. Strictly speaking, no such issue was presented by the pleadings; each of the parties claiming the absolute title. The finding, therefore, as to the \$740 was beyond the scope of the pleadings, but we find from the record brought up that evidence as to such payment and also as to the amount actually paid for taxes, penalties, and costs was received without objection, and, indeed, there is no controversy as to said amounts. Hence it could properly be said that the trial was had upon the theory that such consideration was involved in the issues submitted for decision, and neither party at this time could justly disclaim it.

There is no finding, though, as to the amount paid for taxes prior to said sale, and to pursue the course suggested by appellants would be for us to make a finding for the trial court, which, of course, would be a departure from a well-established rule. It is probably true that, if we should direct a modification as requested by appellants, it would be without prejudice, as was the case in *Campbell v. Canty*, 162 Cal. 382, 123 Pac. 266. However, the more orderly course, we think, and one no more burdensome, would be to direct the lower court to make the ad-

ditional finding in the usual manner. Indeed, appellants recognized the propriety of such action in their motion for a new trial.

It is therefore ordered that the judgment be vacated, and the order denying the motion for a new trial be reversed, and the cause is remanded for a new trial as to one issue alone, that is, the amount paid by respondent for taxes, penalties, and costs, and upon the determination and finding of said amount, with interest, it is ordered that judgment be entered requiring appellants to pay said amount and that upon the payment of said amount their title to said parcel of real property be established and quieted.

We concur: CHIPMAN, P. J.; HART, J.

(29 Cal. A. 59)

TERRY v. RIVERGARDEN FARMS CO.
et al. (Civ. 1413.)

(District Court of Appeal, Third District, California. Nov. 29, 1915.)

1. VENUE \Leftrightarrow 36—CHANGE OF—NATURE OF ACTION.

The nature of the action on a motion for change of venue is determined from the allegations of the complaint and character of the judgment which may be rendered on default.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 54, 55; Dec. Dig. \Leftrightarrow 36.]

2. VENUE \Leftrightarrow 40—CHANGE OF—PERSONAL ACTION.

Where the complaint sought rescission of a contract for the purchase of land and return of the purchase money, and no lien was claimed upon any property nor any interest in real property sought to be adjudicated, the action is personal in its nature, the cancellation of the contract being incidental merely to the principal relief; hence defendants are entitled to have the venue changed to the county of their residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 61; Dec. Dig. \Leftrightarrow 40.]

3. VENUE \Leftrightarrow 5—CHANGE OF—REAL ACTIONS.

An action will not be considered a real action for the purpose of determining its venue unless title or interest in real property is involved.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4-11; Dec. Dig. \Leftrightarrow 5.]

4. VENUE \Leftrightarrow 5 — CHANGE OF — RIGHT TO CHANGE.

Though plaintiff joined with a personal action an action involving title to real property, which, under Code Civ. Proc. § 892, should be tried in the county where it was located, such joinder does not deprive defendant of its right to have the personal action tried in the county of its residence.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 4-11; Dec. Dig. \Leftrightarrow 5.]

5. VENUE \Leftrightarrow 40 — CHANGE OF — RIGHT TO CHANGE.

Where an action seeking a cancellation of a contract for the purchase of land was purely personal as to one of the defendants, the only relief sought being a money judgment for fraudulent representations, such defendant is entitled to have the venue changed to the county of its residence, though the title to real property be involved.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 61; Dec. Dig. \Leftrightarrow 40.]

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by J. B. Terry against the Rivergarden Farms Company, a corporation, and Stine & Kendrick. From an order granting defendants change of venue, plaintiff appeals. Affirmed.

A. G. Bailey, of Woodland, for appellant. Arthur O. Huston and Harry L. Huston, both of Woodland, for respondents.

BURNETT, J. [1] This appeal is from an order of the superior court of Yolo county granting a motion for a change of venue to the city and county of San Francisco. Appellant's attack upon the order is based upon the assumption that the action is for the determination of some right or interest in real estate within the meaning of section 392 of the Code of Civil Procedure. Manifestly, the nature of the case is determined from the allegations of the complaint and the character of the judgment which might be rendered upon default. *McFarland v. Martin*, 144 Cal. 771, 78 Pac. 239.

[2-4] It appears from the complaint that the action is one of rescission based upon the ground of fraud. Attached to the complaint is a copy of a contract entered into between the defendant Rivergarden Farms Company and the plaintiff, Terry. It seems that Stine & Kendrick, the other defendants, executed the said contract as attorney in fact for their codefendant. The contract is in the usual form for the sale and purchase of real estate.

The complaint sets forth that certain false and fraudulent representations as to the character and condition of the land were made by the defendants, and it concludes with this prayer:

"That the said contract of sale between plaintiff and defendants for the purchase and sale of said farms Nos. 603 and 604 aforesaid be canceled and declared to be not binding on this plaintiff; that it be adjudged that defendants repay plaintiff the sum of \$2,172.12 cash gold coin of the United States, with interest thereon from the said month of November, 1913, at the legal rate; that plaintiff have his costs herein accrued; and for such other relief as may be proper and equitable in this cause."

As is apparent, the specific relief prayed for is the cancellation of the contract and a money judgment against the defendants. It is equally apparent that the main relief is the recovery of the sum of \$2,171.12 in money; the cancellation of the contract being merely incidental to that consideration. No lien is claimed upon any property, nor is any right or interest in real property sought to be adjudicated. Manifestly, the judgment will not in any way affect the title to real property. To constitute a real action it must, of course, appear that title or interest in real property is involved. *Clark v. Brown*, 83 Cal. 184, 23 Pac. 289; *Hammond v. Ocean Shore Development Co.*, 22 Cal. App. 167, 133

Pac. 978. Moreover, if we should admit that the action does concern real property in the sense of said section 392 of the Code of Civil Procedure, it is entirely clear that to the extent at least of said money judgment demanded it is a personal action, and, when a real and personal action are joined, the case may be transferred to the residence of the defendant. *Smith v. Smith*, 88 Cal. 572, 23 Pac. 356; *Warner v. Warner*, 100 Cal. 11, 34 Pac. 523; *Donohoe v. Rogers*, 168 Cal. 700, 144 Pac. 958. In the last of these it is said:

"The language that we have quoted from section 392 of the Code of Civil Procedure is very broad, and there can be no question as to its including an action to declare a trust in real estate, where land is the exclusive subject-matter of the litigation. See *Booker v. Aitken*, 140 Cal. 471, 74 Pac. 11; *McFarland v. Martin*, 144 Cal. 771, 78 Pac. 239. The cases cited by defendants in this regard are all cases in which real and personal actions were joined, and it is well settled that a plaintiff cannot deprive a defendant of his right to a trial of a personal action in the county of his residence, by uniting in his complaint a cause of action for the recovery of or the determination of an interest in real property."

The cases cited by appellant are easily distinguished, as is made apparent by a brief recital of the important facts therein.

Sloss v. De Toro, 77 Cal. 129, 19 Pac. 233, was an action in which a decree revesting the title was sought. The cancellation of a fraudulent sale was demanded and the reinvestment of the title to the land in plaintiff.

In *Franklin v. Dutton*, 79 Cal. 605, 21 Pac. 964, the plaintiff prayed for a reformation of a written contract of sale, and it was decided that the action was "for the determination of a right or interest in real estate." There is a palpable difference between an action to reform a contract of sale of real estate, and thus continue it in operation as a claim against the property, and where such relief is the only judgment sought and an action like this to rescind such contract and to recover back the consideration paid.

In *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139, it was not decided whether the action was a real action, it being declared by the Supreme Court:

"An action to set aside a deficiency judgment improperly rendered in another county, in a foreclosure suit upon ex parte application, after the right thereto had been lost by the decree, is within the equity jurisdiction of the superior court of the county in which the improper deficiency judgment was levied upon the land of the plaintiff. If such action is a real action, under section 392 of the Code of Civil Procedure, it is brought in the proper county; and, if not, the jurisdiction of the court is not affected by the right of the defendant to change the place of trial, and, if he fails to demand the transfer, he waives objection to the venue."

The local nature of the action of Grocers', etc., *Union v. Kern, etc., Co.*, 150 Cal. 466, 89 Pac. 120, is clearly set forth in this quotation:

"An action by a purchaser for a specific performance of a contract for the sale of land, and to compel a conveyance under an allegation that the purchase price has been paid, pursuant to agreement, from the proceeds of sales of fruits and lands made by defendant, for which proceeds an accounting is sought, with judgment for a surplus alleged, is in its nature an action to determine a right or interest in real property under subdivision 1 of section 392 of the Code of Civil Procedure, which, wherever commenced, must be tried, upon demand by the defendant, in the county where the land is situated. The accounting of profits to determine payment of the purchase money and to obtain judgment for any surplus is merely incidental to the real cause of action and relief sought, and does not change the nature of the action."

Hannah v. Canty, 1 Cal. App. 225, 81 Pac. 1035, had for "its sole object to establish and enforce a trust in land," and, of course, was a local action.

Robinson v. Williams, 12 Cal. App. 515, 107 Pac. 705, was "an action to cancel a contract of purchase for nonpayment as provided, and to declare the payments made to belong to the plaintiff, and to have it determined that defendant has no right, title, or interest in and to any of the lands and premises described in the contract, and that plaintiff is the owner and entitled to the possession thereof," and was therefore correctly held to involve the determination of a right or interest in real property.

Bartley v. Fraser, 16 Cal. App. 560, 117 Pac. 683, did not call for a determination of the question whether the action was local or personal, since, as the court said, "in either event it was properly transferred to Mariposa county for trial."

[5] There is this further to be said that, as far as the action against *Stine & Kendrick* is concerned, it is clearly one for a money judgment in consequence of fraudulent representations. They were not a party to the contract of sale, and the action against them is not remotely connected with any interest in real property.

Assuming, then, for the sake of argument, that the action against the other defendant involves an interest in real estate, the plaintiff cannot thereby deprive *Stine & Kendrick* of their right to a trial of a personal action in the county of their residence. *G. & S. Co. v. M. & H. F. C. Co.*, 107 Cal. 378, 40 Pac. 495. And the fact is that the change of the place of trial was made upon the motion of said *Stine & Kendrick* and to the place of their residence.

For additional authority we may cite *Samuel v. Allen*, 98 Cal. 406, 33 Pac. 273; *Gallup et al. v. Sacramento & San Joaquin Drainage District*, 151 Cal. 1142; *Anaheim O. F. Hall Ass'n v. Mitchell*, 6 Cal. App. 431, 92 Pac. 331.

We think the order was correctly made, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(56 Okl. 183)

MADILL STATE BANK v. WEAVER.
(No. 3732.)(Supreme Court of Oklahoma. April 13, 1915.
Rehearing Denied March 7, 1916.)*(Syllabus by the Court.)***1. BANKS AND BANKING** ¶134—CHECKS —
CHARGE AGAINST DEPOSIT.

A bank may charge to the account of a depositor the checks of a third party, not purporting to be drawn in behalf of such depositor nor against such account, only upon the actual direction of the depositor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. ¶134.]

2. PRINCIPAL AND AGENT ¶163—ACTS CA-
PABLE OF RATIFICATION.

The rule as to "ratification" is applicable only where the act alleged to have been ratified by another purported to have been for or in behalf of such other.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 619-621; Dec. Dig. ¶163.]

3. ESTOPPEL ¶55—ESTOPPEL IN PAIS—SI-
LENCE.

Only where the conduct of one who kept silent when he should have spoken has misled or prejudicially affected another's conduct may the latter successfully plead an estoppel in pais against the former.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 138-141; Dec. Dig. ¶55.]

Commissioners' Opinion, Division No. 1. Error from District Court, Marshall County; A. H. Ferguson, Judge.

Action by Lula J. Weaver against the Madill State Bank. Judgment for plaintiff, and defendant brings error. Affirmed.

Plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court. This case was tried to a jury, and resulted in a judgment for plaintiff for \$500.

On January 28, 1911, plaintiff, in her own name, deposited \$1,581.50 of her own money in defendant bank, which was then entered in a passbook then furnished her by the bank. On February 1, 1911, her husband deposited for her and procured to be entered in her passbook the additional sum of \$4,913.43 of her own money, making a total of \$6,494.93, which was all of her own money ever deposited to her credit in the defendant bank. On February 27, 1911, her husband deposited of his own or of the money of himself and business partner the further sum of \$2,410.22 to her credit in defendant bank, making a total of \$8,905.15 deposited to her credit up to and including said date, which was all that was so deposited until after March 3,

1911. But her husband and his business partner thenceforth made numerous deposits of their own money to her credit in this account until July 5, 1911, when the account was closed, and her husband kept her passbook, which she did not see after March 3, 1911, until the account was closed. Plaintiff drew checks to the amount of \$3,021.24 against said account, the greater part of same having been drawn before March 3, 1911. Commencing in February, 1911, her husband and his business partner each drew checks upon defendant bank in the name of her husband and in no way purporting to be against her account, which the defendant bank charged to her account as it did her own. On March 3, 1911, her passbook having been balanced on that date, she examined the same and the canceled checks that had been charged to her account, which showed, as she observed, that her husband's checks, as she had otherwise known since some time in February, and his partner's checks in her husband's name, of which she was not before aware, had been charged to her account with her own checks. At this time, the aggregate amount of the checks charged to her account was \$6,485.19, including more than \$500 represented by checks drawn by her husband's partner as aforesaid, so that the balance then to her credit in the account was \$2,419.96. And she then protested to her husband against permitting his partner to draw any more such checks to be charged to her account. Her husband then assured her, and she thenceforth believed, that no more such checks would be drawn or charged to her account. She made to her husband no other objection to the act of the bank in charging other than her own checks to her account, and made no objection whatever to the bank. The defendant bank unsuccessfully contended and produced evidence, denied by the plaintiff, that at the time of plaintiff's first deposit she informed it that either or both herself or husband would check against her account; and, apparently relying upon this contention, the defendant bank made no effort to prove that in charging other than her own checks to her account it was in any instance influenced by her silence or knew or believed she had been apprised of the facts in this regard. So far as appears, defendant's course of conduct in respect to this account was not caused nor affected by plaintiff's knowledge and failure to object, but was wholly independent of her. The defendant did not ask plaintiff for authority to charge other than her own checks to her account nor require her husband or his partner to so much as assert authority to draw against the same by signing her name to the checks. Nor is there any direct evidence that either her husband or his partner so much as attempted to authorize the bank to so charge their checks to her account;

and the defendant's conduct in this regard is wholly unexplained, except by its unsuccessful contention that she informed it at the time of her first deposit that she or her husband or both would draw against the account, and by circumstantial evidence tending to show that, within its knowledge, except as to the two deposits of her own money, the funds deposited belonged to her husband or to himself and partner. Although she brought this action for the \$6,494.93 deposited by her, less \$3,021.24 as the aggregate amount of her individual checks, plus \$1,200 her husband drew out of bank and, at her request, applied to the payment of her note, in her testimony at the trial she disclaimed any purpose to complain of the action of the defendant in charging the checks drawn by her husband against her account; and we therefore may assume that the verdict of the jury, which was for only \$500, was for that amount of her deposit drawn out by her husband's partner prior to March 3, 1911, when she first discovered that such checks had been charged to her account, and these checks only are now regarded as the subject of controversy.

Kennamer & Coakley, of Madill, and McReynolds & Hay, of Sherman, Tex., for plaintiff in error. Franklin & March, of Madill, for defendant in error.

THACKER, C. (after stating the facts as above). [1] A bank may charge to the account of a depositor the checks of a third party, not purporting to be drawn by such depositor nor against such account, only upon the actual direction of the depositor. *Seaboard National Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. (N. S.) 499; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529.

[2] The defendant bank could not prevail in this case upon the ground of a "ratification," for the obvious reason that there is no evidence whatever so much as tending to prove that plaintiff's husband or his partner acted or pretended to act as the agent or representative of the plaintiff in respect to the checks drawn by his partner or to the charging of the same to her account. *Virginia Pocahontas Coal Co. v. Lambert*, 107 Va. 368, 58 S. E. 561, 122 Am. St. Rep. 860, 13 Ann. Cas. 277; *Linn v. Alameda Min. & Mill Co.*, 17 Idaho, 45, 104 Pac. 668; *Stanton v. Granger*, 125 App. Div. 174, 109 N. Y. Supp. 134; *Austin v. Jones*, 148 Ala. 659, 41 South. 408; *Backhaus v. Buells*, 43 Or. 558, 72 Pac. 976, 73 Pac. 342.

[3] The defendant bank does not appear to have known nor to have assumed that plaintiff was apprised of its practice of

charging the partner's checks to her account; and it cannot prevail upon the ground of estoppel because it was not misled nor affected by her silence, but apparently acted independently of her knowledge and silence. *Bragdon v. McShea*, 26 Okl. 35, 107 Pac. 916; *Rogers v. Portland & B. St. Ry.*, 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574; *Dye v. Crary*, 13 N. M. 439, 85 Pac. 1038, 9 L. R. A. (N. S.) 1136; *Williams v. Neely*, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; *Richards v. Shepherd*, 159 Ala. 663, 49 South. 251.

For the reasons stated, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(29 Cal. A. 63)

RAGAN v. RAGAN. (Civ. 1422.)

(District Court of Appeal, Third District, California. Nov. 29, 1915.)

1. DEEDS — DELIVERY — EVIDENCE.

Evidence in a suit involving the question of delivery of a deed held sufficient to support a finding of delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 625-632; Dec. Dig. ¶ 208.]

2. APPEAL AND ERROR — REVIEW — FINDINGS ON CONFLICTING EVIDENCE.

In case of a finding on conflicting evidence, the appellate court must be controlled by that favorable thereto, there being no inherent improbability therein.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3723, 3762-3771; Dec. Dig. ¶ 931.]

3. HUSBAND AND WIFE — COMMUNITY PROPERTY — CONVEYANCES.

Under Civ. Code, § 172, providing that the husband cannot convey community property without a valuable consideration, unless the wife consent, her consent is unnecessary to his conveyance for a valuable consideration.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 896, 929-938; Dec. Dig. ¶ 267.]

4. EVIDENCE — CONCLUSION — AMOUNT PAID.

The question, "What is your estimate of the amount of money you paid?" appearing to be one calling for the best recollection of witness, and to be so understood by him, he having stated that he had no memorandum of what he paid, and could not state it exactly, but that he had it in his mind, was not objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2140-2185; Dec. Dig. ¶ 471.]

5. EVIDENCE — ADMISSIBILITY.

Sustaining an objection to the question "You thought it would be better to record the C. deed?" was not error; what witness thought of it being no consequence, aside from the fact that it was quite apparent from her conduct that she did think it was better to record that deed.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 424, 426-428; Dec. Dig. ¶ 143.]

Appeal from Superior Court, Kings County; W. B. Wallace, Judge.

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 148 Ala. 669.

Action by C. K. Ragan against Chase S. Ragan. Judgment for defendant, and plaintiff appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant.
John G. Covert, of Hanford, for respondent.

BURNETT, J. Plaintiff is the son, and defendant the brother, of one C. K. Ragan. Shortly after the birth of plaintiff, his mother obtained a divorce from his father, and the latter remarried in the year 1877. The father had no children by his second marriage, and he died intestate, on May 27, 1910, in the county of Kings, this state, leaving as his only heirs his widow, Mary E. Ragan, and plaintiff.

The complaint alleges that C. K. Ragan and his wife, after the year 1891, and prior to the 21st of November, 1906, acquired certain community property, including the land in controversy in this action, consisting of 80 acres of the value of \$8,000; that on the 21st day of November, 1906, C. K. Ragan signed an instrument purporting to be a deed conveying to the defendant said 80 acres of land. It is alleged, on information and belief, that said deed was never delivered, that there was no consideration for it, that it was in the nature of a gift and was signed without the consent of the wife of said C. K. Ragan and with the intention on his part to defraud his wife and his son of their rights in the property. The complaint further alleged that plaintiff has been the owner of an undivided one-half interest in this real property since said 27th day of May, 1910. The prayer was for a decree quieting plaintiff's said title and canceling said pretended deed. The answer put in issue the material allegations of the complaint, and the findings and judgment were in favor of defendant.

In his reply brief appellant declares:

"It will be noticed from an inspection of these specifications (in the bill of exceptions) that the real question at issue was whether or not the deed under which defendant claims title was ever in fact delivered by plaintiff's intestate, C. K. Ragan. Plaintiff also specifies certain errors of law occurring at the trial and excepted to by him, consisting largely of rulings of the court in the admission of testimony."

[1] As to the sufficiency of the evidence to support the finding of delivery, we can perceive no possible doubt. The law is, of course, as quoted by appellant from *Hayden v. Collins*, 1 Cal. App. 263, 81 Pac. 1120:

"But it is absolutely essential to the validity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee, beyond any power in the grantor to recall or revoke it. The grantor must clearly and unequivocally evidence an intent and purpose to part with the possession and control of the deed for all time. In short, the delivery and transfer must be irrevocable."

The question of escrow, however, need not be considered, as there is a sufficient showing to support the finding that:

"Said deed was thereafter, to wit, on or about the 25th or 26th of April, 1910, duly and regularly delivered by said C. K. Ragan to said de-

fendant, Chase S. Ragan, at the home of said Chase S. Ragan."

Witness Charles Tomer testified:

"I visited C. K. Ragan frequently during his illness and talked with him about various matters. I remember a conversation with him about two weeks before his death; I remember the substance of what was said at that time about a deed to Chase S. Ragan of that land. Mrs. Chase Ragan was present. I can state the substance of the conversation. He said he had sold Chase Ragan that place, and he had paid for it and he had given him a deed."

Defendant testified:

"I bought the ranch and was to pay for it yearly. The agreement was oral. C. K. Ragan said that I could have this piece of land if I would pay him at the rate of 8 per cent. interest a year as long as he lived, providing he didn't live over ten years, if I would pay him \$320 a year, and I spoke about not having the money then and he said he would let me have \$500 the same as he did the ranch if I would pay him 8 per cent. on it, so I bought it under those conditions. * * * I told him I would take the ranch under those conditions and I took possession of the ranch; I don't know just exactly the day of the month, but it was in 1906; I came here to town and of course we talked it over and we had made the bargain for the ranch. * * * He handed me this deed; he says, 'Here, Chase, is the deed to your piece of land out there,' and he says, 'You take it and look at it and see that it is all right,' so I says, 'I don't know whether it is right or not,' and if my memory serves me right I took the deed over to Frank Hight and I think that Frank Hight found some little mistake in the deed and corrected it and I took it back and gave it to C. K. Ragan and asked him what he was going to do with it; he said he was going to put it in escrow; I didn't pay any attention to it; * * * I took him out to my house and looked after him; * * * he said if he died before the payments were made I was to have my deed and the place was paid for."

The witness further stated that he took possession of the land in pursuance of his agreement with C. K. Ragan, and, furthermore, that he put improvements upon the land of the value of \$2,500, and that two or three weeks before his brother died—

"my wife and me was sitting by his cot; he was quite sick and he had that little tin box and was looking over his papers, and we sat there and he come to that deed and he handed it to me and he says: 'Chase, here is the deed to your place, and I told Judge Ferguson to take this deed in and have it recorded with the rest of them.' * * * and I saw him a day or two later and paid him for recording the deed."

There is other corroborative testimony, but from the foregoing it is certainly a rational conclusion that, about three weeks before he died, the grantor delivered to said grantee the deed with the intention that the title should vest absolutely in the latter, whatever doubt may be entertained as to the sufficiency of the first manual tradition of the deed to constitute a legal delivery.

[2] Of the contention that decedent had executed a prior deed of the same premises to Ida M. Ragan, the wife of defendant, and therefore had no title to convey to respondent, it is sufficient to say that there is sufficient evidence to support the theory that said deed was never delivered, and, if delivered, that it was subsequent to the de-

livery of said deed to respondent. It is hardly necessary to add that we must be controlled by the evidence favorable to respondent's contention rather than that which seems to support appellant's view. Extended consideration is devoted in the briefs to the question of the credibility of the evidence in support of the findings, but it is not of moment here, since we discern no inherent improbability therein.

[3] The second point made by appellant is that the deed to respondent was and is void because in contravention of that portion of section 172 of the Civil Code providing that the husband "cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto." There would seem to be force in the contention of respondent that this provision was enacted for the sole benefit of the wife, and that no other person could or would have a right to complain of its violation, and that since she was not a party to the action or directly or indirectly interested therein, the objection cannot be considered. However, the soundness of this view need not be asserted, as there is an answer to appellant's contention that cannot be gainsaid. The court found on sufficient evidence that the husband conveyed the property not only for a valuable, but for an adequate, consideration. This unquestionably he had a right to do, under said section 172, without the consent of his wife. The evidence in support of this finding is set forth in the brief of respondent, and need not be repeated here. The court being of the opinion—and that opinion being legally supported—that the husband had conveyed the property for a valuable consideration, it was, of course not erroneous to sustain an objection to the offer to show that the wife's consent to the transfer was not obtained. This consideration, as well as the question whether said land was community property, was rendered immaterial by the finding and evidence already mentioned as to the sale for a valuable consideration.

[4] An objection as calling for the conclusion of the witness was made by appellant to this question asked of defendant:

"Well, what is your estimate of the amount of money you paid, Mr. Ragan?"

The context, however, shows that counsel was calling for the best recollection of the witness, and the question was so understood. He had stated that he had no memorandum of the amount he had paid and he could not state it exactly, but he had it in his mind: The evidence was somewhat uncertain, but we think it was admissible for what it was worth.

[5] We can see no error in sustaining an objection to the following question asked of Mrs. Ragan:

"And you thought it would be better to record the Chase S. Ragan deed?"

What she thought in reference to it was of no consequence, and, besides, it was quite apparent from her conduct that she did think it was "better" to record that deed. It may be said, also, that she substantially answered the question subsequently.

Two other alleged errors in ruling upon the admissibility of evidence are suggested, but they seem so inconsequential as not to merit specific attention. Indeed, in view of the theory of the case adopted by the trial court, it could not be held that any or all of the rulings upon the admission of evidence, if technically erroneous, resulted in any prejudice.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(29 Cal. A. 37)

GLINDEMANN v. EHRENPFORT.

(Civ. 1580.)

(District Court of Appeal, First District, California. Dec. 1, 1915.)

1. FRAUD ~~§~~58—VALUE AT TIME OF SALE—NECESSITY OF EVIDENCE.

Judgment for plaintiff in an action for fraud in the sale of stock cannot stand, absent evidence of its value at time of sale.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. ~~§~~58.]

2. FRAUD ~~§~~58—VALUE AT TIME OF SALE—STOCKS—DIVIDENDS—EVIDENCE.

Failure to pay dividends on stock is not evidence, in an action for fraud in its sale, that it had no value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. ~~§~~58.]

3. FRAUD ~~§~~59—MEASURE OF DAMAGES.

The damages for fraudulent representations in the sale of stock is the difference between its value at the time and what it would have been had the representations been true.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. ~~§~~59.]

4. LIMITATION OF ACTIONS ~~§~~179—FRAUD—COMPLAINT.

Relative to the statute of limitations, the allegation of the complaint, in an action for fraud, that it was not known or discovered by plaintiff till a certain day, is insufficient to excuse delay in bringing action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 668, 669; Dec. Dig. ~~§~~179.]

Appeal from Superior Court, City and County of San Francisco; Adolphus E. Graupner, Judge.

Action by William Glindemann against William Ehrenpfort. From an adverse judgment and order, defendant appeals. Reversed.

Liess & Sweasey, of San Francisco, for appellant. James M. Hanley, of San Francisco, for respondent.

LENNON, P. J. This action was brought to recover damages alleged to have been suffered by plaintiff, William Glindemann, by reason of certain alleged false and fraud-

ulent representations made by defendant concerning the value of certain shares of corporate stock, and the interest or dividends that such stock paid, whereby plaintiff was induced to purchase said stock from the defendant. The case was tried with a jury, which rendered a verdict in favor of the plaintiff for the sum of \$420, and this appeal is from the judgment rendered thereon and from the order denying the defendant a new trial.

It is insisted by the appellant that there is no evidence upon which the verdict and judgment can be sustained.

The facts leading up to the transaction, briefly stated, are these: In February, 1906, the defendant purchased ten shares of the capital stock of the Central Trust Company for the sum of \$1,100. One month thereafter he received a semiannual dividend of \$25 from profits earned by the stock prior to his purchase, the rate of dividend being approximately 5 per cent. per annum. Shortly thereafter the fire of 1906 occurred in the city and county of San Francisco, causing a suspension of the dividends upon the stock. On January 3, 1907, ten months after defendant had received the dividends referred to, he sold said ten shares of stock to the plaintiff herein for the sum of \$1,100; said sum being the exact amount that defendant had paid for the stock eleven months previously. The following day plaintiff resold the stock to his sister-in-law, a Mrs. Schweitzer. No dividends were declared on said stock during the succeeding years of 1907 or 1908, or until July 1, 1909, when a dividend of \$3 per share was paid, followed semiannually by similar dividends up to the time of the trial in March, 1914. In February, 1911, at a point of time four years and over subsequent to the date of the sale and transfer of the stock to Mrs. Schweitzer, the Central Trust Company and the Anglo-California Trust Company became merged. At the time of the merger Mrs. Schweitzer delivered up her shares, and received in exchange therefor six shares of Anglo-California Trust Company stock, and the sum of \$80, which sum was the equivalent of a fractional two-thirds share of said stock. On February 1, 1913, six years after the sale of the stock to the plaintiff, he was informed that his sister-in-law, Mrs. Schweitzer, felt bitter towards him on account of his having sold her the stock; and upon interviewing her upon the subject she informed him that she had not received any dividends on the stock until July, 1909, and also that he had misrepresented the value of the stock to her, and that it was not worth the sum of \$110 per share at the time of her purchase. Thereafter plaintiff claims he paid to Mrs. Schweitzer the sum of \$420. This sum, it appears, was the difference between \$800, which was the value that the plaintiff and Mrs. Schweitzer determined the stock to be worth, and the sum of \$1,100, the price

paid to plaintiff by Mrs. Schweitzer for the stock; and it seems this sum was sufficient to include interest from the date of the investment. On May 16, 1913, six years and four months after the sale by defendant to the plaintiff of the stock, and four years subsequent to the resumption of the payment of regular dividends thereon, plaintiff filed his complaint herein alleging fraud in the procurement of the sale.

[1] Plaintiff alleged in his complaint, as a basis for his cause of action, that, at the time of the sale by defendant to plaintiff, the defendant represented to him that said stock was worth the sum of \$1,100, being \$110 per share, and was bearing interest at the rate of 6 per cent. per annum. The evidence in support of this allegation shows that defendant informed plaintiff that he had paid the sum of \$110 per share for the stock. With reference to the alleged representations of defendant concerning the interest, the evidence is not clear upon the point as to whether or not the defendant represented that the stock was paying 5 or 6 per cent. at the time of its transfer from the defendant to plaintiff. However that may be, the judgment cannot stand for the reason that there is absolutely no evidence in the record of the value of the stock either at the time of its transfer from the defendant, or at the time of its transfer from the plaintiff to Mrs. Schweitzer. The only evidence relating in any way to that phase of the case consisted of the testimony of Mr. Ouer, a witness for the plaintiff, who is the cashier of the Anglo-California Trust Company, and who was the assistant cashier of the Central Trust Company during the years 1906 and 1907. His testimony was to the effect that the nonpayment of dividends would not necessarily indicate a decrease in the actual value of the stock, and that the stock would really be worth more by the nonpayment of dividends, providing the company was doing a profitable business. He also testified that the stock was not a listed one; that he could not give its actual value in January, 1907; and that its value depended entirely upon supply and demand. From this testimony counsel for plaintiff argues that it follows that the stock was worthless at the date of both sales, and only became valuable at the time of the merger of the Central and Anglo-California Trust Companies, four years thereafter, at which time the damages became crystallized and fixed, and that therefore the date of the merger is the only date possible at which damages could be assessed in view of the plaintiff's alleged excusable delay in the discovery of the alleged fraud.

[2, 3] While the payment of dividends and the amount thereof are elements affecting the value of corporate stock, it by no means follows that such stock has no value because of the failure to pay dividends thereon. *Wegener v. Jordan*, 10 Cal. App. 362, 365, 101

Pac. 1066. In cases of this character the measure of damages is the difference between the value of the stock at the time of the transaction if the alleged representations had been true, and what it was then actually worth. However, the amount of the verdict was undoubtedly based upon the compromise agreement made between plaintiff and his sister-in-law six years after the transaction took place; and that this is so is evident from the fact that the verdict is for the exact amount claimed to have been paid to her by the plaintiff. Conceding that this sum represented the difference in value of the stock between the time of sale and the date when the merger of the companies took place, it by no means affords a criterion of the value of the stock at the time of the sale. We conclude therefore that, there being no evidence of the value of the stock at the time of the transfer, there is absolutely no basis upon which a verdict could be predicated.

[4] Defendant also invokes the statute of limitations as a shield to the action. As before stated, the complaint was filed six years and four months after the alleged fraud. No facts are pleaded showing why the alleged fraud was not sooner discovered. The complaint contains the mere statement that the fraud was not known or discovered by the plaintiff until about the 1st day of February, 1913. Such an allegation is insufficient to excuse the delay in bringing the action. *People v. San Joaquin, etc., Ass'n*, 151 Cal. 797, 91 Pac. 740; *Truett v. Onderdonk*, 120 Cal. 581, 589, 53 Pac. 26.

The judgment and order denying a new trial are reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(29 Cal. A. 68)

PERKINS v. PERKINS. (Civ. 1773.)

(District Court of Appeal, Second District, California. Nov. 29, 1915.)

1. DIVORCE ⇨150 — TRIAL — FINDINGS OF FACT.

Finding in a divorce suit, that the evidence does not prove extreme cruelty and is insufficient to warrant a divorce, is insufficient as a finding of facts.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 490-508; Dec. Dig. ⇨150.]

2. DIVORCE ⇨150 — FINDINGS OF FACT — NECESSITY—"AS IN OTHER CASES."

The words "as in other cases," in Civ. Code, § 131, providing that in actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted final judgment must thereupon be entered accordingly, refer to the form of the findings, and do not relieve the court of the necessity of making findings of facts, where defendant defaults, though divorce be denied.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 490-508; Dec. Dig. ⇨150.]

For other definitions, see Words and Phrases, Second Series, As In Other Cases.]

3. DIVORCE ⇨27 — GROUNDS — EXTREME CRUELTY.

A continual course of conduct of a husband, consisting of acts calculated to irritate and humiliate her and produce the exceedingly high state of nervous tension and distraction to which she is thereby finally driven, is enough to constitute extreme cruelty as ground for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-83; Dec. Dig. ⇨27.]

For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

4. DIVORCE ⇨116—EVIDENCE.

Plaintiff in divorce may testify as to specific acts of cruelty, though there can be no corroboration thereof.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 379-385; Dec. Dig. ⇨116.]

5. DIVORCE ⇨127 — EVIDENCE — CORROBORATION.

The physicians of plaintiff in divorce for extreme cruelty may, as corroboration, testify generally to the subject to which she ascribed her condition when she consulted them.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. ⇨127.]

6. DIVORCE ⇨127 — EVIDENCE — CORROBORATION.

Under Civ. Code § 130, providing that no divorce can be granted on the uncorroborated testimony of the parties, the main purpose of which is to prevent collusion, all the matters testified to by plaintiff need not be corroborated, but the cruelty alleged consisting of successive acts of cruelty, it is enough that a considerable number of them are testified to by others, or that there is other evidence strongly tending to strengthen and confirm her statements.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. ⇨127.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Emily S. Perkins against Gregory Perkins, Jr. Judgment for defendant, and plaintiff appeals. Reversed.

Hutton & Williams, Edwin A. Meserve, and Shirley E. Meserve, all of Los Angeles, for appellant.

JAMES, J. This is an appeal taken from a judgment denying the plaintiff a decree of divorce. The defendant suffered default, and the court heard testimony at great length, all of which is presented here by transcript of the reporter. The ground alleged was extreme cruelty. As described in the complaint, the facts relied upon were those which it is asserted established a course of cruel conduct practiced by the defendant against the plaintiff, and which commenced within a few weeks after their marriage in June, 1911, and continued almost uninterruptedly for a year and a half, or until the plaintiff left the defendant. At the conclusion of the testimony the court orally summed up the case as being one of incompatibility of temperament for which no divorce could be granted, and declared that the proof did not show extreme cruelty. No findings of fact were made.

[1, 2] The only purported finding of any kind is the recitation found in the judgment as follows:

"The court finds the evidence did not prove extreme cruelty, and is insufficient to warrant a decree of divorce."

This finding, if it was intended as a finding of fact, and if written findings are required to be made in divorce actions, was wholly insufficient. *Franklin v. Franklin*, 140 Cal. 607, 74 Pac. 155. One of the claims of appellant is that the judgment should be reversed, because it is unsupported by findings which it is argued are required to be made under the provisions of section 131, Civil Code. This contention presents for consideration the question as to whether in actions for divorce, where the adverse party has made default, the court is required to express its decision in the form of findings of fact. Section 632, Code of Civil Procedure, requires the court generally, where a trial of a question of fact is had, to give its decision in writing. In the case of *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147, it was held that in a divorce case where no answer was filed there was presented no issue of fact, strictly speaking, to be determined by the court. And in *Waller v. Weston*, 125 Cal. 201, 57 Pac. 892, considering the requirement of section 632, Code of Civil Procedure, it was said:

"It is contemplated by our law that findings of fact shall be made only upon issues joined by the pleadings under section 590 of the Code of Civil Procedure. * * *"

At the time these decisions were rendered section 131 of the Civil Code did not contain the provision requiring the court to make its decision in divorce cases on the questions of fact in form as in other cases. That section in its first provision is as follows:

"In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. * * *"

In construing that portion of this section which declares that in divorce actions the decision and conclusions of law shall be filed "as in other cases," we are inclined to the view proposed by the appellant, which is that the words "as in other cases" refer to the form of the findings, and should not be taken as intended to relieve the trial judge, in cases where default has been entered in a divorce case against one of the parties, from making his decision in writing. This section coming as new legislation, following the decision in the *Foley Case*, we may, we think, properly indulge the presumption that the Legislature intended to correct what it deemed to be a deficiency in the law. Moreover, it seems to us not to be correct to say that there are no issues to be tried in divorce actions, when the law requires strict proof to be made of a plaintiff's cause of action. Section 130, Civ. Code. In this view we are in strict accord with the reasoning of the court in the case of *Nelson v. Nelson*, 18 Cal. App. 602, 123 Pac. 1099, where the court, by Justice Burnett, said:

"Ordinarily, there would be no 'trial of a question of fact' where the fact is admitted by the failure to deny it, but where the asserted fact is the ground upon which a party relies for divorce, it must be established as though denied, since 'no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties.'"

The court in that decision takes notice of the provisions of section 131, Civil Code, and concludes that where a cross-complaint stands in an action for divorce without answer, the trial judge is not excused from making his decision in writing upon the issues of fact proposed therein. It is only fair that a party who has suffered an adverse decision at the hands of the court, based upon alleged insufficient proof, should have the benefit of a written declaration as to the particular conclusions arrived at by the court. This case most aptly illustrates the sound reason for such a requirement. For aught that appears from the judgment made by the court in this case, the trial judge may have considered that all of the facts alleged had been sufficiently proven and corroborated, but had determined from those facts that as a legal conclusion the acts complained of did not amount to extreme cruelty.

[3] If such was his conclusion, it may be unhesitatingly said, upon the complete record of the testimony as it is presented, that such a determination is not borne out by the proof. The plaintiff here relied upon a course of conduct practiced by the defendant habitually, regularly, and almost continuously from a date a few weeks after the marriage, down to the day that she finally left him. This conduct, as alleged and testified to by her, consisted in acts which were calculated to irritate and humiliate the plaintiff and produce the exceedingly high state of nervous tension and distraction to which it was shown she had finally been driven. It will serve no useful purpose to recite the evidence with great detail. In the main, the facts were: The plaintiff, at the time of her marriage to the defendant, was a widow, having two sons by a former marriage to whom she was much attached, and who were members of her household at the times they were not away at school and college; that defendant prior to his marriage represented that he had a business by which he earned about \$300 per month; that plaintiff was possessed of a considerable amount of property and an income large enough to supply all the needs of herself and family; that knowing defendant had habitually supported an invalid mother, immediately upon her marriage with him and in order to provide for the support of this mother during the time that plaintiff and her husband would be away on their wedding trip, she gave the defendant \$6,000 for the use of his mother; that thereafter she proposed and was willing to allow him several hundred dollars per month for his personal use out of her own

estate in return for very nominal services to be performed by him in connection with the management of her property; that she desired to and did retain direct charge of large property interests, and that from the beginning this attitude on her part to manage her own affairs seemed to exasperate the defendant; that he became moody, and upon many occasions shown in the testimony would become sullen and cry and refuse to mingle with the household, although he persisted in remaining in the presence of the plaintiff practically all the time, both day and night; that so persistent was he in his personal attentions that plaintiff could not even visit her bathroom without his accompanying her; that upon one occasion he removed the lock from the bathroom door in order to prevent the plaintiff from denying him access to that room while she was making use of it; that he would not allow her to telephone to her lady friends without being present and standing near the telephone and at times, if anything was said which did not particularly please him, he would take the telephone away from the plaintiff and hang it up; that in the presence of her lady friends and generally in the presence of guests he would act in a moody, sullen, and insulting manner toward her; that upon one or more occasions he insisted upon her leaving the house at a very early hour in the morning to attend communion service when she was in a sick condition, and when she desired to have a cup of coffee before starting and when the servant offered her the coffee, he rudely seized her by the arm, forced her through the door, and compelled her to go with him in her weak condition without nourishment; that when he became displeased at anything, which was a frequent and constant occurrence, he would sulk and cry and stare at plaintiff, and when plaintiff would beg him to tell her what was the matter would make no response, and would sometimes continue in that attitude for three or four days, not once speaking to the plaintiff; that the defendant on various occasions accused the plaintiff of being untruthful and treated her in an uncivil and contemptuous manner, both in the presence of her friends and strangers and privately.

This course of conduct was shown to have been quite the regular thing with the defendant. The evidence showed that plaintiff was naturally a nervous woman; that she had always dwelt in a peaceful and harmonious atmosphere and had been very happy in her family relations; that the conduct of the defendant so preyed upon her nervous organism that she became restless and sleepless, and when examined by her family physicians after having lived with the defendant for some time, was found to be in such a condition of nervous unrest as to threaten her complete prostration. These physicians had known the plaintiff prior to her mar-

riage, and were able to testify that she had always been normal, and, as one of them said, organically she was without disease. That the general course of conduct was as has been described, the plaintiff testified to fully, and in a general way all of the facts stated by her were corroborated by independent witnesses. While we think that the judgment in this case must necessarily be reversed for lack of any findings of fact, we have deemed it advisable to consider the evidence as though the law did not require such findings in default divorce cases. We do this more particularly because the question of the sufficiency of the evidence is argued in the very able brief presented by counsel for appellant, as well as certain alleged errors which the court committed in the course of the trial. To a proper end, too, this discussion may be of benefit to the trial court upon a rehearing of this matter in the event that any such is had. We may fairly surmise from the oral remarks made by the trial judge, which of course have no formal potency as indicating what his findings of fact might have been, that he did not consider that the evidence, assuming the whole truth of it and assuming sufficient corroboration, as there was, showed a case of extreme cruelty within the meaning of the definition given by the Civil Code.

In the earlier decisions of our Supreme Court, in consonance with the ancient rule, it was in effect announced that there could be no extreme cruelty as a result of mental irritation until a perceptible effect had been produced upon the body or health of the complaining party. In the case of *Waldron v. Waldron*, 85 Cal. 251, 24 Pac. 649, 9 L. R. A. 487, the court, in a majority opinion, said:

"Although the character of the ill treatment, whether it operates directly upon the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of its sufficiency, as a cause of divorce, must be its actual or reasonably apprehended injurious effect upon the body or health of the complaining party."

This was what might be called "the rule of the Puritans," and it is a cause for gratification to know that our law as it has since been established proposes no such extreme and harsh definition for extreme cruelty as it may furnish ground entitling a party to a divorce. In the *Waldron Case*, Justice McFarland, dissenting, sounded the note which resulted in a later modification of the rule announced in that decision. His words of protest may well be remembered, when he said:

"This doctrine makes legal cruelty depend, not on the misconduct of the husband, but on the endurance of the wife; not on the guilt of the wrongdoer, but on the vitality of the victim. The anguish of the mind must have eaten through the flesh and exhibited itself in bodily disease before there can be any legal evidence of cruelty. But some women, like some men, have inherited from sturdy ancestors physical constitutions so robust, with bone and blood, and

muscle and nerve, and heart and lungs, so charged with vitality, that the woes of a Lear would not wear out the machinery or obstruct the currents of healthy physical life. Must such a woman suffer on forever, and only the weak who faint at a gentle reproach be relieved?"

Our Supreme Court receded from the conclusions of the rule asserted in the Waldron Case when it considered the case of Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660. In the opinion there it was said:

"The common judgment of mankind recognizes the fact that there may be unfounded charges and cruel imputations which are not more easily borne than physical bruises, and the necessary effect of which is to cause great mental distress to the person against whom they are made. Whether in any given case there has been inflicted this 'grievous mental suffering' is a pure question of fact, to be deduced from all the circumstances of each particular case, keeping always in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party."

We cannot imagine from the proof made in this case that the trial judge was impressed with the view that the plaintiff was not a woman of great refinement of sensibility, intelligent and cultured, for the evidence tends to show nothing else. Even where the judge, prompted evidently by personal acquaintance with the parties, sought to show that the plaintiff had always been of a nervous temperament, the answers given in the affirmative would tend to add to, rather than detract from, the strength of the plaintiff's proof, in that they assisted to show that she was of such a temperament as would be more easily and deeply affected by the reprehensible conduct of the husband. In fact, upon all of the material issues presented by the complaint, there is nothing in the record which suggests a case which might be termed one of conflicting evidence.

[4] During the progress of the trial, counsel for the plaintiff, apparently to prove with exactness the disagreeable conduct of the defendant, asked the plaintiff while on the witness stand to describe exactly the acts of the defendant at the times when he would intrude himself upon her privacy, and the court interrupted and told counsel that he ought not to embarrass the witness in regard to matters that could not be corroborated, saying: "I don't pay any attention to those things." Counsel suggested, and very correctly, that all of the matters offered in proof in a divorce action did not need corroboration, but the court did not recede from the attitude expressed in the statement referred to, and counsel then desisted from further examination along that line. We think that the action of the court in this regard placed an improper restriction upon the plaintiff in the conduct of her case. As a litigant before the court she was entitled to offer and have received all competent legal testimony, and it was not for the court to prejudge the effect of this testimony and to announce or suggest in advance that that testimony, taken in connection with all of the proof made in

the case, would be of no value and would be disregarded by him. The plaintiff as a witness was being examined by her own counsel. She was "in the hands of her friends"; hence, why this extreme solicitude on the part of the court lest her own attorney should embarrass her by requiring intimate disclosures to be made? She was there under the necessity of making such intimate disclosures in order to apprise the court fully of the discomfort of the position she had occupied with the defendant and of the degree to which her mental sensibilities had been preyed upon. We agree very completely with the statement made in the brief of counsel that trial judges have not the duty in divorce cases to do anything except to see that the law is strictly and fairly complied with. A suitor in a divorce action must, as a litigant, stand in as favorable a light before the law as the plaintiff in a suit on a promissory note. Our Legislature has declared the policy of the law as it shall affect actions for divorce, and has provided that relief shall be granted to parties when certain grounds have been established. In the establishment of these grounds the complaining party has the same right as any other litigant in any other class of actions, not only to the opportunity to present fully his or her case, but to every reasonable assistance of the court to be lent in that direction. We think that the attitude of the trial judge in restricting counsel in his examination of the plaintiff as to the matter adverted to was error of a prejudicial kind. The case of Pratt v. Pratt, 141 Cal. 247, 74 Pac. 742, is in point.

[5] We think, too, that the court might properly have allowed the physicians of the plaintiff to testify generally as to the subject to which plaintiff ascribed her disturbance of mind and health when she consulted them. Not that it would have been proper to have admitted her statement in detail as to any acts committed by the defendant, but merely as tending to show that her disturbed condition was due to marital difficulties. Such evidence is admitted as corroborative in its tendency, just as in criminal actions where the charge may be rape, it is allowed to be shown that the prosecutrix made complaint of the fact that she had been raped at a time reasonably near to that of the alleged occurrence. Such testimony may, in a general though perhaps not in a strict sense, be classed as part of the res gestae.

[6] It was not necessary that all of the matters alleged and testified to by the plaintiff should be supported by corroborative evidence.

"Where the cruelty consists of successive acts of ill treatment, it is not necessary that there should be direct testimony of other witnesses to every act sworn to by the plaintiff; it is sufficient corroboration if a considerable number of important and material facts are so testified to by other witnesses, or there is other evidence, circumstantial or direct, which strongly tends to strengthen and confirm the state-

ments of the plaintiff. The main purpose of section 130 is to prevent collusion." *Andrews v. Andrews*, 120 Cal. 186, 52 Pac. 298; *Avery v. Avery*, 148 Cal. 242, 82 Pac. 967.

Our conclusion is, not only that the judgment lacks the support of sufficient findings of fact, but that the evidence does not sustain the judgment denying a divorce, and that the court committed error as to its rulings on the admission of testimony which was prejudicial to the rights of the plaintiff.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(29 Cal. A. 78)

JOHNSON v. HINKEL et al. (Civ. 1542.)

(District Court of Appeal, First District, California. Nov. 30, 1915. Rehearing Denied by Supreme Court Jan. 28, 1916.)

1. CORPORATIONS ⇐264—STOCKHOLDERS' LIABILITY—LIMITATIONS—ACCRUAL OF ACTION.

Under Code Civ. Proc. § 359, providing that the title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, but that such actions must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created, an action against corporate stockholders to enforce their liability for its breach of a lease agreement must be brought within three years from the breach, since the section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture, and in actions to enforce a liability created by law the period of limitation is three years from the creation of the liability.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1084-1098, 2274; Dec. Dig. ⇐264.]

2. CORPORATIONS ⇐264—STOCKHOLDERS' LIABILITY—INITIATION OF STATUTORY PERIOD.

For the purpose of the statute of limitations, the liability of an oil company, upon a lease agreement not to remove the casing from oil wells upon abandonment, was created, not by the execution of the agreement, but by the removal of the casing from a well. Such a liability is created by the act or omission by which it is incurred.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1084-1098, 2274; Dec. Dig. ⇐264.]

3. MINES AND MINERALS ⇐80—OIL LEASE—BREACH OF AGREEMENT—DAMAGES.

Under Civ. Code, § 3300, providing that for a breach of contract a party may recover an amount which will compensate him for all the detriment proximately caused by the breach, or which, in the ordinary course of events, would be likely to result therefrom, the lessor of desert lands, which proved to contain no oil, the agreement providing that, if oil was found in certain quantities, the lessee at his option might purchase for \$20,000, could not, for breach of the lessee's agreement not to remove casing from a well on abandonment, recover the full damages prayed for of \$22,500, irrespective of whether there was oil in the land or not, whether the well was of any value at the time of the removal of the casing, whether it would have been of any value if restored, or whether, as left, the well could have been made useful at a less cost, since, except where exemplary dam-

ages are allowable, a party cannot recover for breach of contract more than he would have received by its due performance.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 208; Dec. Dig. ⇐80.]

4. DAMAGES ⇐120—BREACH OF CONTRACT.

Except where exemplary damages are given, courts will not allow a party to a contract to recover upon its breach more than he would have received by its due performance.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 291-306; Dec. Dig. ⇐120.]

5. MINES AND MINERALS ⇐80—OIL LEASE—BREACH—DAMAGES.

Where an oil well was sunk in barren and desert land, valueless except for its oil contents, and such land contained no oil, the only damage suffered by the lessor through the lessee's breach of agreement not to remove casing from a well upon abandonment was the value of the casing when removed.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 208; Dec. Dig. ⇐80.]

6. MINES AND MINERALS ⇐80—DAMAGES—OIL LEASE—BREACH.

Where land leased for the purpose of sinking oil wells contained oil, and it was necessary that the casing of a well should be left in it for its further and proper operation, the damage sustained by the lessor by the lessee's breach of its agreement to leave the casing in a well upon abandonment was an amount which would compensate him for all injury or detriment caused by its removal, or which might result therefrom.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 208; Dec. Dig. ⇐80.]

7. MINES AND MINERALS ⇐80—OIL LEASE—VALIDITY—STATUTE.

A lease of supposed oil lands providing that the lessee should not remove the casing from wells or plug them without the written consent of the owner upon abandonment was not void under St. 1903, p. 399, requiring that upon abandonment of any oil well the owner shall withdraw the casing therefrom and fill up the well, as the statute was not designed to affect the matter, while the lessor had the right to reserve to himself the right to further prosecute the development of the land, though the lessee might conclude to abandon.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 208; Dec. Dig. ⇐80.]

8. MINES AND MINERALS ⇐80—OIL LEASE—RIGHTS OF PARTIES.

A proclamation of the President of the United States withdrawing mineral lands from entry, issued after an oil company entered upon part of such lands as lessee of the occupant and removed the casing from a well, in contravention of the lease, did not affect the right of the lessor to recover.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 208; Dec. Dig. ⇐80.]

9. LANDLORD AND TENANT ⇐61—ESTOPPEL TO DENY TITLE.

Where the lessor of oil lands was in possession thereof as a locator under the mining laws of the United States when his lessee broke its lease agreement not to remove casing from a well on abandonment, in the lessor's suit for damages the lessee could not question the lessor's title on account of a proclamation of the President withdrawing the lands from entry, the lessor's right to the land as against everybody, except the United States, being the same as though he held in fee.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 151, 152, 187-196; Dec. Dig. ⇐61.]

10. MINES AND MINERALS \S 80—OIL LEASE—ACTION FOR BREACH OF COVENANT—QUESTION NOT TO BE LITIGATED.

The validity of a proclamation of the President withdrawing mineral lands from entry could not be litigated in an action by the lessor of part of such lands for breach of the lessee's agreement not to remove casing from an oil well upon abandonment.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. \S 208; Dec. Dig. \S 80.]

11. COURTS \S 121—SUPERIOR COURT—JURISDICTION.

The superior court, in an action to enforce the liability of corporate stockholders for its breach of contract, had no jurisdiction as to defendants against each of whom damages for less than \$300 were prayed.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. \S 410, 413-426, 428, 437, 450, 452, 458, 459, 466; Dec. Dig. \S 121.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by James B. Johnson against John Hinkel and others. From a judgment for plaintiff and an order denying defendants a new trial, they appeal. Judgment and order reversed with directions to dismiss the action as to two defendants.

A. L. Well, of San Francisco, and Everts & Ewing, of Fresno, for appellants. Barbour & Cashin, and Short & Sutherland, all of Fresno, for respondent.

KERRIGAN, J. This action was brought to recover damages in the sum of \$22,500 upon a stockholder's liability against defendants, who were stockholders in the Lorene Oil Company, a corporation.

The damage claimed arose from the removal of a quantity of casing from a certain oil well which had been drilled by the Lorene Oil Company upon the plaintiff's land in the Coalinga oil fields upon the abandonment by that company of said lands and of its operations thereon under a certain lease. The action was based upon a breach of the terms of the lease, which had been entered into by the parties thereto under the following circumstances: On the 16th day of March, 1907, the plaintiff entered into a lease with one Wilcox with the object in view that the former's land should be explored for oil and developed. The agreement required Wilcox to drill a well to a depth of at least 3,000 feet, unless oil should be discovered in quantities of 25 barrels of oil per day at a less depth. If oil was discovered, the lessee was to pay to the lessor one-eighth royalty, and he was also given an option to purchase the property for the sum of \$20,000. Shortly thereafter, and during the same year, Wilcox assigned his interest in this agreement to the Lorene Oil Company, which assumed all his obligations thereunder. The company drilled a well to a depth of 3,660 feet, being 660 feet deeper than was required by the contract, and, not having made a discovery of oil, abandoned the property. The lease contained

the following provision with reference to abandonment:

"In the event oil is not found in paying quantities by the lessee on the land so leased after the compliance with the terms herein, and said lessee desires to abandon the enterprise and to be released from the terms hereof, he shall have the privilege of removing all engines, tanks, and fixtures above ground which he may have placed on said land, but shall not remove the casing from any well or plug any wells thereon without the written consent of said lessor."

Upon the abandonment of the property the company, contrary to this last-mentioned provision, removed over 10,000 feet of casing without the written consent of the lessor, and the breach of the agreement in this respect gave rise to the present controversy.

Plaintiff recovered judgment against the defendants in the sum of \$22,500, and this is an appeal from such judgment and from an order denying defendants a new trial.

The defendants make the following points for a reversal of the judgment: (1) That the action was barred by the statute of limitations; (2) errors in the instructions and in the admission of testimony concerning the measure of damages; (3) that the contract was illegal and consequently no recovery could be had thereon; and (4) that the court had no jurisdiction as to two of the defendants.

In support of the first contention it is the claim of the defendants that the action is barred by virtue of the provisions of section 359 of the Code of Civil Procedure. The action was commenced as to certain of the defendants on October 23, 1912, and additional defendants were added by an amended complaint filed March 27, 1913. It is argued that, as it appears on the face of the complaint that the damages were sustained on November 1, 1909, the demurrer should have been sustained as to the parties joined as defendants under the amended complaint; and as to the other defendants, there being a conflict of testimony, that the question should have been left to the jury as to whether the damage was done on October 6, 1909, as testified to by defendants' witnesses, or on November 10th, as stated by the witnesses produced on behalf of the plaintiff. The amended complaint upon which the case went to trial alleged that the fact upon which liability was asserted was not discovered by plaintiff until November, 1910. If the right of action accrued at this date, the statute does not operate as a shield to any of the defendants, except as hereinafter stated. It is insisted by defendants that an action against stockholders in this state is barred within three years from the time the liability is created, and the fact that discovery is not made of the liability within that time is of no consequence, the element of discovery not being a factor for consideration under the section. The trial court instructed the jury as follows:

"I instruct you that, if you find that the plaintiff commenced this action against defendants within three years after the discovery by him that the Lorene Oil Company had committed the acts complained of, and that plaintiff used reasonable diligence in the discovery of the fact that the acts complained of had been committed, and if you further find that the said acts of the Lorene Oil Company resulted in an injury for which plaintiff is entitled to damages, then each of the defendants is individually and personally liable. * * *"

It is conceded that, if counsel for the appellants is correct in his construction of section 359 of the Code of Civil Procedure, the trial court was in error in so instructing the jury, and that such error is sufficiently important to justify a reversal of the case.

[1] Section 359 reads as follows:

"This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

In support of his contention that the proper construction of the statute is that such action must be brought within three years after the liability is created, and that it does not extend to three years after the discovery of the fact creating such liability, it is argued that neither grammatically nor logically does the section warrant the construction placed upon it by the trial court, and that the appellate courts of this state have never considered this doctrine of the discovery of facts applicable to stockholders' liability, and that the phrase "discovery by the aggrieved party" refers to the facts upon which a "penalty or forfeiture attached," and does not refer to the "liability created by law"; that it refers to illegal acts of directors for which they are liable to either a penalty or forfeiture, and does not apply to the ordinary civil obligation created by law against the stockholders.

The element of discovery in actions of this character was recognized in *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670, but in the later case of *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139, it would seem that this doctrine has been rejected; for it is there said that a fair reading of the section makes the discovery the starting point of the period of limitation only in cases of actions to recover a penalty or forfeiture, and that in actions to enforce "a liability created by law" the period of limitation is three years from the creation of the liability. We conclude, therefore, that the court erred in giving the instruction complained of.

[2] It is further contended with reference to the statute of limitations that the liability was created at the time of the execution of the lease and prior to the breach thereof by the Lorene Oil Company. In this behalf it is the claim of the defendants that this is the only logical construction to be drawn from the decisions of the Supreme Court; and it

is argued that, the Lorene Oil Company having assumed all obligations under the lease in 1907, the liability of the stockholders became fixed at that time, and the statute of limitations was immediately set in motion. In *Hunt v. Ward*, 99 Cal. 614, 34 Pac. 335, 37 Am. St. Rep. 87, it was held that, whatever the character of liability might be, "it is created by the consummation of the contract, act, or omission by which the liability is incurred." The liability here claimed was not created at the time the lease was assigned to the corporation in 1907, but was so created by the act of the corporation in removing the casing from the well. Upon this question involving the statute of limitations, therefore, we conclude that the objection of the defendants is not well taken.

[3-6] As stated by counsel for both parties, the important question to be determined in the case is the correct measure of damages for the breach of the contract in removing the casing from the well. Plaintiff and defendant have quite different theories upon this subject. It is the claim of plaintiff that, the lessee not being permitted under the terms of the lease to remove any casing from the well without the written consent of the lessor, upon proof of such removal the only question of fact to be determined by the jury was the amount which it would cost to replace the well in the same condition it was in at the time the Lorene Oil Company abandoned the premises and removed the casing. The theory of the defendants was and is that the land where the well was situated was barren, desert land, and valuable only if it contained oil; that the well itself was of value only in so far as it could be used to produce oil; that no attempt had been made by plaintiff to produce oil from the property since its abandonment and up to the time of the trial, a lapse of time of some four years; that there was no oil in the well; that the Lorene Oil Company had abandoned it after having expended from \$40,000 to \$60,000 in development work; that neither the plaintiff nor any one else had any wish, desire, or intent to produce any oil from the land or to use the well for that purpose, and that consequently the well was valueless, and the plaintiff suffered no damage, no matter what was done to it. It is admitted that the Lorene Oil Company had removed some 10,000 feet of inner casing from the well, but left the well cased from top to bottom. It is also conceded that it was a practical impossibility to take the casing that had been removed from the well and put it back so as to restore the well to its former condition, and that it was less costly and far more certain in results to drill an entirely new well than to attempt to replace the casing in the old one, and that a new well would cost anywhere from \$40,000 to \$60,000. The amount of damages claimed by plaintiff was \$22,500, a sum much less than the minimum amount which, according to the evidence, it would

take to put the well in the same condition that it was in before the casing was removed from it.

The trial court adopted the plaintiff's theory that the cost of replacement was the proper measure of damages, and instructed the jury to find an amount sufficient to put the well in the condition it was before the removal of the casing. The instruction given upon this point was as follows:

"I instruct you that under the terms of the lease involved in this action the plaintiff, as lessor, was entitled to have any well drilled by the Lorene Oil Company on the premises described in the lease left in the condition as to the casing therein in which said well was at the time said Lorene Oil Company ceased drilling said well with the intention of abandoning the same; and in this connection I charge you that the plaintiff's right to have said well so left was irrespective of the question whether oil had been discovered on said land, or whether there was reasonable ground to believe that oil would be discovered thereon. If, therefore, you find that the Lorene Oil Company did not leave the well drilled by it in the condition above described, then your verdict must be for the plaintiff in an amount sufficient to place said well in such condition, not exceeding, however, the sum of \$22,500."

Under this instruction the jury was practically told to find for the full amount of damages prayed for, regardless of whether there was oil in the land or not, or whether the well was of any value at the time of the removal of the casing, and regardless of whether the well would have been of any value if restored, or whether the well as left could have been made thoroughly useful at a less cost. We are of the opinion that the instruction was erroneous.

The instruction was based on the theory of plaintiff that he was entitled to have the casing remain in the well, for the reason that the lease so provided, and that this right was not dependent or based upon the use to which the lessor might thereafter put such well, or whether thereafter he ever used it at all; that it was enough for the corporation to know that it was "so nominated in the bond." It is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract to recover upon its breach more than he would have received by its due performance. The Civil Code, in providing for the measure of damages in the case of a breach of contract lays down the rule that a party is entitled to recover an amount which will compensate him for all the detriment proximately caused by the breach or which in the ordinary course of events would be likely to result therefrom. Civ. Code, § 3300. In the early case of *De Costa v. Massachusetts Min. Co.*, 17 Cal. 613, where the plaintiff had brought an action for damages for the digging of a ditch across a piece of land, the court below awarded sufficient damages to pay the expense of filling and restoring the land to its original condition; and the Supreme Court, in reversing the judgment, said:

"In assessing the damages the court proceeded on an incorrect basis, and, of course, arrived at an erroneous result. The plaintiff could not recover beyond the injury sustained, and it was improper to award compensation for an expense which might never have been incurred. It is possible that the cost of filling up the ditch may far exceed any injury resulting from its present condition, and in that case, it is not probable that the amount would ever be used for that purpose."

See, also, *Harvey v. Sides Silver Min. Co.*, 1 Nev. 541, 90 Am. Dec. 510.

So here defendants sought to ascertain from plaintiff whether or not he ever intended to pursue development work for oil, but upon objection by his counsel his intention was kept from the jury. Under the instruction here given, irrespective of the testimony of defendants' witnesses that the land in question was not oil land, and that therefore the leaving of the casing in the well according to the agreement would have availed plaintiff nothing, the jury was obliged to find the amount of damages claimed, based on the cost of the well, although convinced that plaintiff would have gained nothing by a full performance of the contract except the value of the casing when removed from the well. Again, by reason of the instruction the value of the casing was ignored, and by it the first cost was made the criterion, irrespective of the fact that the well was useless. Defendants introduced evidence, upon which there was a conflict, to show that in order to make the well a producing one it would be less troublesome and expensive to accomplish this purpose with the casing taken out of the well than if left in. By this instruction the latter question was eliminated from the consideration of the jury. This was a proper matter to be considered in the assessment of the damages suffered; as plaintiff is entitled, and only entitled, to recover his pecuniary loss. In our opinion, these and kindred questions are proper ones for consideration by court or jury in determining damages in cases of this kind. If the land upon which the well was situated was barren and desert land, and its only value was for its oil contents, and it could be proved that it contained no oil, then the only damage suffered by plaintiff would be the value of the casing when removed from the well. If, on the other hand, the land contained oil, and it was necessary that the casing should be left in the well for its further and proper operation, then the damage sustained would be an amount which would compensate plaintiff for all the injury or detriment caused by its removal or which might result therefrom, and no more. Here if oil had been discovered the plaintiff would have been entitled to receive the sum of \$20,000 as the purchase price of the land had the Lorene Oil Company exercised the option given it. No oil was discovered; and under the theory of the measure of damages adopted by the trial court the plaintiff by the verdict obtains a judgment

for \$22,500, even conceding the fact to be that the land contained no oil and was otherwise worthless. The law affords no such remedy.

Certain rulings of the court on the admission of testimony are claimed to be erroneous. These rulings in the main were based upon the court's theory of the measure of damages, and it is unnecessary to discuss them in view of what we have already stated upon that subject.

[7] Defendants further contend that, by reason of the fact that the complaint contains an allegation that the land in question is oil land, the provision in the contract that the lessee should not remove the casing therefrom or plug any wells without the written consent of the lessor, makes the contract void upon its face, and that the demurrer to the complaint should have been sustained upon that ground. The basis of this contention is that such provision is violative of the act to prevent injury to oil or petroleum-bearing strata by the infiltration or intrusion of water therein (St. 1903, p. 399), and which requires that upon the abandonment of any oil well it shall be the duty of the owner to withdraw the casing therefrom and fill up such well. The statute was not designed to affect a case of this character. The lessor had the undoubted right too reserve unto himself the right to further prosecute the development of the land, irrespective of the fact that the lessee might conclude to abandon the lease for the reason that he was of the opinion that it was useless to further prosecute the work of exploration.

[8-10] And, finally, defendants call the attention of the court to the proclamation of the President of the United States withdrawing from entry certain mineral lands, including the land here in question; and they claim that by reason thereof the plaintiff had no title to this land, and therefore has no cause of action. The proclamation referred to was issued July 2, 1910. The time of the entry of the Lorene Oil Company upon the land as lessee and the time of the removal of the casing were both prior to such proclamation. Whatever rights had accrued as between the parties were not affected by it. Moreover, it is a rule of law that a tenant is not permitted to deny the title of his landlord. At the time of the breach of the covenant in the lease the plaintiff was in lawful possession of the land as a locator under the mining laws of the United States, and his right to the land as against everybody except the United States government was the same as though he held the land in fee. *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240. Then, too, the validity or invalidity of the proclamation is not a matter that could be litigated in this proceeding.

[11] As to the defendants Katharine Brennan and E. H. Pauson the prayer for damages against each of them is for less than

\$300; and it is conceded that, under the authority of *Myers v. Sierra Valley, etc.*, 122 Cal. 669, 55 Pac. 689, the superior court had no jurisdiction as to them, and a dismissal of the case as far as they are concerned is consented to.

For the reasons given, the judgment and order are reversed, with directions to dismiss the action as to Katharine Brennan and E. H. Pauson.

We concur: LENNON, P. J.; RICHARDS, J.

(29 Cal. A. 115)

COATS v. HORD. (Civ. 1729.)

(District Court of Appeal, First District, California. Dec. 4, 1915.)

1. SALES \S 261—"WARRANTY"—WHAT CONSTITUTES.

In a contract of sale of personalty, it is not necessary, to create an express warranty, that the word "warrant" or any formal words be used, but any affirmation as to the quality or condition of the goods, if so intended, and so relied upon, is a "warranty."

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 727-735; Dec. Dig. \S 261.]

For other definitions, see Words and Phrases, First and Second Series, Warranty.]

2. EXCHANGE OF PROPERTY \S 13—CONTRACTS—RESCISSION—DAMAGES.

Where plaintiff, who exchanged a horse for a jack, sued to rescind because of breach of warranty of the jack, the judgment for plaintiff for the full value of the horse should have provided for the return of the jack on satisfaction of the money judgment.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. \S 25-29; Dec. Dig. \S 13.]

3. APPEAL AND ERROR \S 1153—JUDGMENT—MODIFICATION.

In such case, the failure of the judgment to provide for the return could be corrected by judgment rendered on the appeal, without remand.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4507-4512; Dec. Dig. \S 1153.]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Action by Lee B. Coats against Warren H. Hord. From a judgment for plaintiff, defendant appeals. Judgment modified.

E. A. Bridgford and William A. Nunlist, both of San Francisco, for appellant. Walter H. Linforth and Linforth & Herrington, all of San Francisco, for respondent.

RICHARDS, J. [1-3] This is an action brought for the rescission of a contract for the exchange of a stallion for a jack mule, the plaintiff averring that the latter animal proved worthless for the purpose for which he acquired it. The cause was tried upon the issues presented by the pleadings. The court found that the exchange had been brought about through certain statements made by the defendant which amounted to

an express warranty of the foal-producing qualities of the mule and which had proven untrue. It further found that the stallion was of the value of \$500, and the court thereupon rendered a judgment in plaintiff's favor for the sum of \$500, but made no provision in such judgment for the return of the defendant's mule.

The respondent argues in support of such judgment that the finding of the court to the effect that the defendant's mule "was useless and worthless for any purpose and of no value" made it unnecessary to order its return; but we think that this finding must be read in connection with the pleadings and proofs in the case, and, so read, must be limited to the valuelessness of the animal for the uses which induced the exchange.

The appellant contends that the findings of the court with reference to the express warranty of the mule by the defendant are not supported by the evidence in the case; but in this we think he is in error, and that there is sufficient evidence in the record to sustain the findings of the court in that regard. It is not necessary, in order to create an express warranty of an article of personal property, that the word "warranty" should be employed, or that any particular or formal words of warranty should be used. Any affirmation, made at the time of the sale or exchange, as to the quality or condition of the thing sold, will be treated as a warranty if it was so intended, and if the other party acquired the property on the faith of such affirmation. *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687; *Luitweiler, etc., Co. v. Ukiah, etc., Co.*, 16 Cal. App. 198-207, 116 Pac. 707, 712. In this case we think the plaintiff acted in making the exchange upon the defendant's representations as to the foal-getting qualities of his mule, and that he was entitled to rescind, and that he did in fact rescind with sufficient promptitude to satisfy the rule as to rescission.

The appellant's next contention, however, is a more serious one. The judgment of the court, while giving to the plaintiff in the form of damages all that the evidence showed the stallion to be worth, made no provision in the judgment for the return of the defendant's property. We think the court in this respect was in error, but that it is an error which can be cured by a modification of the judgment without the necessity of another trial of the cause.

It is therefore ordered that the judgment of the trial court be so modified as to provide that the plaintiff shall return to the defendant his property upon satisfaction of the money judgment in the plaintiff's favor, and that each of the parties shall pay his own costs upon appeal.

We concur: LENNON, P. J.; KERRI-GAN, J.

(28 Idaho, 335)

MARINEAU v. HUMBIRD LUMBER CO.

(Supreme Court of Idaho. Jan. 8, 1916.)

1. MASTER AND SERVANT \Leftrightarrow 288—INJURY TO SERVANT—ASSUMPTION OF RISK—NONSUIT. Held, that the court did not err in granting a nonsuit and entering judgment of dismissal.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1068; Dec. Dig. \Leftrightarrow 288.]

2. EVIDENCE OF NEGLIGENCE.

Held, that the evidence fails to show any neglect on the part of the defendant in the construction or maintenance of its sawmill machinery.

3. ASSUMPTION OF RISK.

Held, that the plaintiff assumed the risk of injury at the time and place he was injured.

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by Arthur Marineau against the Humbird Lumber Company, a corporation. From judgment for defendant, plaintiff appeals. Affirmed.

G. H. Martin, of Sandpoint, for appellant. E. W. Wheelan, of Sandpoint, for respondent.

SULLIVAN, C. J. This action was brought to recover for personal injuries alleged to have been sustained while in the employ of the defendant corporation as a "setter" on a log carriage in defendant's sawmill. It is alleged that said injury occurred because of defendant's negligence in the construction of a roller table and shaft connected therewith, and that for that reason defendant did not furnish the plaintiff with a safe place in which to work.

The answer denied that the roller table and shaft were negligently constructed or maintained, and alleged that the same were constructed and maintained in the usual and customary manner followed by sawmill owners, and that the roller tables and shafting similarly constructed were and now are in general use in all well-equipped sawmills, and denied that there was no safe place for the defendant to work, and averred that the injury sustained by the plaintiff was the result of his own negligence.

At the close of plaintiff's testimony, defendant moved for a nonsuit. The court granted the motion, and entered judgment dismissing the action. Thereafter a motion for a new trial was made, and denied by the court, and this appeal is from the order denying a new trial.

Appellant contends that the court erred in not granting a new trial on the grounds: (1) That the evidence was sufficient to go to the jury; (2) that the defendant was absolutely negligent, and that such negligence was the proximate cause of plaintiff's injury; (3) that plaintiff did not assume the risk, and was not guilty of contributory negligence.

[1] On an examination of the evidence, we are satisfied that the court did not err in

denying said motion for a new trial. We are also satisfied that the plaintiff assumed the risk of whatever danger there was connected with said roller table and shaft.

[2, 3] The record fails to show any negligence on the part of defendant, but does show that the plaintiff assumed the risk of injury at the time and place he was injured.

Finding no error in the record, the judgment is affirmed; and it is so ordered, with costs in favor of respondent.

BUDGE and MORGAN, JJ., concur.

(28 Idaho, 321)

RABB v. NORTH AMERICAN ACCIDENT INS. CO.

(Supreme Court of Idaho, Jan. 5, 1918.)

1. JUSTICES OF THE PEACE §91—PLEADING—INSURANCE.

The complaint in this case held to be a sufficient statement of the cause of action to meet the requirements of the law relative to such pleadings in justice's courts.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-323; Dec. Dig. §91.]

2. EVIDENCE §159—PAROL—INSURANCE—NOTICE AND PROOF OF INJURY.

Where the issue framed by the complaint and answer is not as to the contents of a notice of an accident and of proof of an injury, but is as to whether or not such notice was given and such proof was furnished, parol evidence is admissible to establish the giving of the notice and the making of proof of injury, although the notice and proof are in writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471, 474; Dec. Dig. §159.]

3. INSURANCE §665 — HEALTH AND ACCIDENT POLICY—NOTICE AND PROOF OF INJURY—SUFFICIENCY OF EVIDENCE.

The evidence examined, and held to be sufficient to establish the fact that notice of the accident was given and proof of the injury was made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. §665.]

4. INSURANCE §530—HEALTH AND ACCIDENT POLICY—CONSTRUCTION—AMOUNT OF RECOVERY.

The contract of insurance and the evidence examined, and held, that the insured is not limited in his recovery to one-third of the principal sum named in the policy, therein mentioned as the amount to be paid, in lieu of any other indemnity, for the loss of one of his eyes, since it appears that, as a result of the accident whereby he lost his eye, he sustained another injury which resulted in his total loss of time and in his continuous inability to engage in any and every kind of business or labor, for which he is entitled to recover as provided in paragraph (c) of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1309, 1316, 1317; Dec. Dig. §530.]

Appeal from District Court, Shoshone County; William W. Woods, Judge.

Action by John Rabb against the North American Accident Insurance Company, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Walter H. Hanson, of Wallace, for appellant. Chas. E. Miller and J. H. Wixom, both of Wallace, for respondent.

MORGAN, J. On October 29, 1912, in consideration of \$5 paid to it by respondent and his agreement to pay \$2 per month from and after December 1, 1912, appellant issued to respondent a policy of health and accident insurance containing the following provisions material to the questions presented by this appeal:

"Accident Indemnity.

"(a) In the event the insured, while this policy is in force, shall sustain personal bodily injury, which is effected directly and independently of all other causes through external, violent, and purely accidental means and which injury causes at once total and continuous inability to engage in any and every kind of business or labor, the company will pay:

"Specific Total Losses.

"(b) If any one of the following specific total losses shall result solely from injuries described in paragraph (a), within 90 days from date of accident, the company will pay, in lieu of any other indemnity:

For loss of:

Life, one hundred dollars (the principal sum of this policy).

Both hands by severance at or above the wrist, the principal sum.

Both feet by severance at or above the ankle, the principal sum.

One hand and one foot by severance at other places, the principal sum.

Entire sight of both eyes, if irrecoverably lost, the principal sum.

Either hand by severance at or above the wrist, one-half of the principal sum.

Either foot by severance at or above the ankle, one-half of the principal sum.

Entire sight of one eye, if irrecoverably lost, one-third of the principal sum.

"If there has been no change in the beneficiary, indemnity for loss of life shall be payable to the beneficiary named in the application for this policy, if surviving, otherwise to the estate of the insured.

"Total Accident Indemnity.

"(c) For total loss of time resulting necessarily and solely from injury as described in paragraph (a) an accident indemnity of \$40 per month or at that rate for proportionate part of a month, shall be paid to the insured for such period of continuous loss of time for a period not exceeding 24 months."

The monthly payments of \$2 each were made by respondent to appellant up to and including the month of September, 1913, and on the 24th day of that month respondent, who was a miner employed in the Bunker Hill mine, met with an accident while engaged in his work, being struck by a quantity of falling rock, which accident resulted in the loss of one of his eyes and the fracture of his right leg, together with lesser injuries.

On March 2, 1914, respondent filed his complaint in the justice's court of Kellogg precinct No. 1, Shoshone county, against appellant praying for judgment in the sum of \$190, which he claimed to be then due to him under the terms of his policy. No answer was filed

in the justice's court, but the docket shows that one C. A. McKinley appeared for the defendant there. The trial resulted in a judgment for \$190 and costs in favor of respondent, from which an appeal was taken to the district court upon questions of both law and fact.

In the district court, upon order of the judge permitting him to do so, counsel for appellant filed a demurrer and an answer to the complaint. The demurrer was overruled and this action of the court is assigned as error. The complaint and demurrer are somewhat voluminous, and will not be copied or quoted from at length here.

[1] An examination of the complaint convinces us that it is a sufficient statement of the cause of action to meet the requirements of the law relative to such pleadings which, in justice's courts, may be very informal. Section 4668, Rev. Codes, is, in part, as follows:

"Pleadings in justices' courts:

"1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended."

Section 4668, Rev. Codes, provides:

"The complaint in these courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based."

The case was tried de novo in the district court by the judge, trial by jury having been waived, and resulted in judgment in favor of respondent in the sum of \$190, together with interest and costs, amounting in all to \$232.05, from which judgment this appeal was taken.

[3] The assignments of error, in addition to that relative to the ruling of the court upon the demurrer, present two contentions: (1) That the court erred in finding, as a fact, "that the plaintiff immediately duly notified the defendant company of said accident and furnished the defendant company with due notice and proof of said injury in accordance with the terms of said policy of insurance;" and (2) that the court erred in finding "that there is now due and owing the plaintiff from defendant company according to the terms of said policy of insurance, aforesaid, and for benefit accruing thereunder because of said injury whereby his leg was bruised and broken, the sum of \$190."

That respondent immediately notified appellant of the accident and furnished due notice and proof of the injury is alleged in the complaint and denied in the answer, although appellant in its answer alleges that respondent filed a claim and that prior to the commencement of the action it tendered to him the sum of \$38 in settlement as a compromise offer. The direct examination of respondent upon this issue is as follows:

"Q. Did you send in affidavits or proof of your loss by your accident, proofs of your accident? A. Yes. Q. How soon after the accident did you send them in? A. Seven days.

Q. Where did you mail them to? A. To the head office in Chicago. Q. Did you state in those proofs of loss what happened to you? A. Yes.

"Mr. Hanson: I object to that. The proofs of loss are the best evidence.

"The Court: I suppose the company has that?

"Mr. Miller: Yes; of course they have them.

"The Court: Did you give them notice to produce it?

"Mr. Miller: No; your honor. Have you those proofs of loss Mr. Hanson?

"Mr. Hanson: No; I have not seen them.

"Mr. Miller: You are unable to produce them?

"Mr. Hanson: I am at this time, not having received notice.

"Mr. Miller: Well, under the pleadings I do not think it is material."

Upon redirect examination respondent further testified:

"Q. You say you sent in proofs of loss? A. Yes. Q. After that were you ever called upon by the company or any of its agents to make further proofs? A. No."

Dr. Kenneth, a witness called on behalf of respondent, testified:

"Q. Do you know anything about proofs of the accident being sent? A. Yes; I filled out a number of papers for the North American Accident Insurance Company, I believe the name was. Q. Sent them where? A. I don't believe I sent them myself. Q. But you filled them out for him? A. Yes. Q. You were filling out those papers? A. Yes, sir."

The only evidence offered on behalf of appellant was two drafts aggregating \$38.39 in amount, which were introduced for the purpose of showing that a tender had been made by it to respondent, but no evidence controverting the testimony of respondent and his witness, Kenneth, was introduced.

[2] While it is the rule that the highest degree of proof of which the case from its nature is susceptible, must, if possible, be produced, it is said in 10 M. A. L. 365:

"Today the 'best evidence rule' means only that a party who would show the contents of a writing must produce the original writing or account in a manner legally satisfactory for its nonproduction."

And it is said in 17 Cyc. 477:

"Where the matter to be proved is simply the fact that a contract has been made, as distinct from its terms or provisions, the best evidence rule does not apply and parol evidence is admissible."

The issue framed by the complaint and answer upon this point is not as to the contents of the notice of the accident and proof of the injury, but is as to whether or not such notice was given and such proof was furnished. The testimony offered by and on behalf of respondent was competent, and, in the absence of evidence tending to support appellant's denial that respondent notified it of the accident and furnished due proof of the injury, is sufficient to establish the fact that such notice was given and such proof was made. In case of *Lampkin v. Travelers' Insurance Co.*, 11 Colo. App. 249, 52 Pac. 1040, which was an action upon an insurance policy which required that immediate written notice, with full particulars and full name

and address of the assured, was to be given to the company of any accident, it is said:

"Plaintiff could not be defeated on the ground that she had failed in this proof by reason of the fact that she said she could not remember what was contained in the proofs of loss. By her evidence that she had forwarded the proofs of loss, she made out at least a prima facie case, and, if defendant relied upon any defect in the proofs, the burden was upon it to show such defect."

[4] The remaining point in the case involves a construction of paragraphs (b) and (c) of the policy which have been heretofore quoted. The death benefit, or principal sum named in the policy, is \$100, and appellant contends it reserved the right, in case the insured should lose the sight of one of his eyes through external, violent, and purely accidental means, to pay one-third of the principal sum, or \$33.34, in lieu of any other indemnity.

Considering the part of paragraph (b) material to this contention, to wit:

"If any one of the following specific total losses shall result solely from injuries described in paragraph (a) within 90 days from the date of accident, the company will pay in lieu of other indemnity, for the loss of * * * entire sight of one eye, if irrecoverably lost, one-third of the principal sum"

—It appears to us that the construction most favorable to appellant of which that language is capable is that it limits the liability which will arise from an accidental injury which results in the loss of one of the eyes of insured to one-third of \$100, and that no additional indemnity can be successfully claimed by reason of that injury. Certainly it cannot be construed to limit the liability which may arise by reason of other injuries than that which caused the loss of the eye, although such other injuries may have been received in the same accident.

In this case it appears that one of respondent's injuries caused the loss of his eye, which was but one of the results of his accident. Another result of the same accident was the fracture of his leg, which last-mentioned injury caused the total loss of time provided for in paragraph (c) of the policy for which the claim of \$40 per month was made. The uncontradicted testimony of Dr. Kenneth upon this point is as follows:

"Well, in regard to the eye, the pupil was split open so he lost his eye. I removed the eye on September 24th, he had lacerations of the face, he had a number of contusions and bruises on the body. But the injury that laid him up the longest was a fracture of the leg (I believe it was the right leg) between the knee and ankle, and that injury laid him up for—so he was not able to work for about 8 months. It was slow uniting; that was really the cause of his disability for that length of time."

Had the loss of his eye been the only injury which respondent suffered appellant's contention would be sound, but he is not precluded from recovering the benefits provided for in paragraph (c) of the policy which are claimed by reason of loss of time due to an-

other injury than that to his eye, although both injuries resulted from one accident.

The judgment of the trial court is affirmed. Costs are awarded to respondent.

SULLIVAN, C. J., and BUDGE, J., concur.

(28 Idaho, 329)

LAWRENCE v. CORBEILLE et al.

(Supreme Court of Idaho. Jan. 8, 1916.)

1. TRIAL ~~§~~400—FINDINGS OF FACT—CONCLUSION OF LAW—DECREE—RIGHT TO MODIFY.

After findings of fact, conclusions of law, and decree have been made and filed and judgment thereon entered, they can be changed or modified by the trial court, except in respect of mere clerical errors, only by the granting of a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 949, 950; Dec. Dig. ~~§~~400.]

2. TRIAL ~~§~~400—MODIFICATION OF FINDINGS, CONCLUSIONS AND DECREE.

Where findings of fact, conclusions of law, and decree have been made and entered by the trial court, and recorded, in favor of one of the parties to the action, it is reversible error for the court, upon motion for a new trial, and of its own motion, to set aside the previous judgment entered and substitute new findings of fact, conclusions of law, and a decree in favor of the other party, without granting a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 949, 950; Dec. Dig. ~~§~~400.]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by J. G. Lawrence against Moise Corbeille and another. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions to grant new trial.

G. H. Martin, of Sandpoint, and Chas. L. Heltman, of Rathdrum, for appellant. E. W. Wheelan, of Sandpoint, for respondents.

BUDGE, J. This action was brought to quiet title to the southeast quarter of the northwest quarter and the east half of the southwest quarter and the southwest quarter of the southeast quarter of section 18, township 56 N., range 2 E., Boise meridian, and to recover possession of said land.

Defendants answered the complaint, denying all the material allegations therein, and filed a cross-complaint alleging title in the defendant Corbeille. Thereafter plaintiff filed an answer to defendants' cross-complaint denying the ownership of the defendant, but admitting that the land was owned by defendant at all times prior to January, 1907, at which time plaintiff alleged said land was assessed for taxes for the year 1907, which taxes for said year were unpaid and became delinquent in January, 1908; that said land was sold on July 10, 1908, to Bonner county; that on December 8, 1908, Bonner county sold and assigned the tax sale certificate to plaintiff; that no redemption was made from said tax sale; and that on November 8, 1912, Defenbach, the then duly

elected, qualified, and acting assessor and ex officio tax collector of Bonner county, executed and delivered to plaintiff a tax deed for said premises, which was recorded in Bonner county.

Defendants filed a demurrer to the answer to the cross-complaint, which was overruled. Thereafter defendants amended their answer by setting up the failure of the taxing officer of Bonner county to enter the extension of taxes on said land for 1908, in red ink, and the failure of the plaintiff to give notice of application for tax deed as required by section 27, chapter 8, Sess. Laws 1912; and further alleged redemption of said land from the tax sale of 1908, by payment to the treasurer of Bonner county, and an offer to repay the sums of money expended by plaintiff together with the statutory interest; and that the defendant Corbelle was at all times mentally incompetent to transact business.

Plaintiff thereupon filed an amendment to his answer to the cross-complaint, and pleaded the decision of this court in the case of *Lawrence v. Defenbach*, 23 Idaho, 78, 128 Pac. 81, which was an action brought by plaintiff against Defenbach as ex officio tax collector, requiring him to execute a tax deed as such officer to the plaintiff. To this amendment to the answer to the cross-complaint the defendants demurred, and their demurrer was overruled.

Trial was then had, and in support of his case plaintiff offered in evidence the tax deed, to which reference has heretofore been made. Defendants objected to the admission of this deed in evidence upon the ground that the proof failed to show a compliance with the provisions of section 27, chapter 8, Sess. Laws 1912, requiring service of notice upon the occupant of the land at the time the application is made for the deed. This objection was overruled and the deed admitted in evidence, whereupon plaintiff rested his case.

Defendants then offered oral and documentary evidence, and plaintiff offered testimony in rebuttal, and the cause was taken under advisement by the court.

On April 10, 1915, the court made its findings of fact and conclusions of law, and entered a decree in favor of plaintiff, which was duly recorded. On April 19, 1915, defendants filed and served motion for new trial specifying several grounds in support of the motion. On May 29, 1915, the court entered an order setting aside the findings of fact, conclusions of law, and the decree theretofore made and entered in favor of plaintiff, and, of its own motion and without granting a new trial, made and filed findings of fact, conclusions of law, and a decree in favor of defendants, quieting title in defendant Corbelle to the land in controversy. This is an appeal from the latter judgment.

Appellant presents five assignments of

error. We think, however, it will only be necessary for us to consider the first, viz., the action of the court in vacating and setting aside the findings of fact, conclusions of law, and decree in favor of plaintiff first filed and recorded on April 10, 1915, and making and filing new findings of fact, conclusions of law, and decree in favor of defendants on May 29, 1915, without granting a new trial.

The former judgment quieted title to the land in controversy in plaintiff; the latter judgment quieted title to the same land in defendant. The court did not pass upon the motion for a new trial, and for aught we know the same is still pending.

[1, 2] From the record we might be justified in reaching the conclusion that the court set aside the findings of fact, conclusions of law, and decree rendered and entered in the first instance when its attention was called, upon the motion for a new trial, to what it considered was a fatal defect in the execution of the deed by Defenbach on November 8, 1912, who, at that time, was not ex officio tax collector of Bonner county by reason of the fact that the county treasurer was ex officio tax collector under the amendment to section 6, art. 18, of the Constitution, which amendment was adopted by the electors of the state on the 5th day of November, 1912—three days prior to the execution of the deed in question. *Cleary v. Kincaid*, 23 Idaho, 789, 131 Pac. 1117.

That the court had the power to vacate and set aside the findings of fact, conclusions of law, and decree rendered and recorded in favor of plaintiff on April 10, 1915, and to grant a new trial, will not be seriously questioned, but any further action on the part of the court was beyond its jurisdiction. And when the court of its own motion made findings of fact, conclusions of law, and a decree in favor of defendants without granting a new trial, it was clearly error.

Section 4439, Rev. Codes, provides:

"The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party. * * *

"6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law."

The court having reached the conclusion that the tax deed offered in evidence by plaintiff, and relied on by him to establish his right to have title to the land in question quieted in him and to be placed in possession of the same, was executed by an officer without authority of law and insufficient in and of itself to support the judgment, it then became its clear duty to grant a new trial, for the reason that the evidence was insufficient to support the judgment. But to anticipate that the plaintiff upon a new trial would be unable to furnish additional evidence which would be sufficient to entitle him to recover and to afford him no opportu-

nity to offer such proof, is without authority of law and contrary to the rules of practice in this state.

It was held in the case of *Pico v. Sepulveda*, 66 Cal. 336, 5 Pac. 515:

"When the findings of fact by a court are erroneous in any respect, the appropriate proceeding to have them set aside is a motion for a new trial."

In the case of *Prince v. Lynch*, 38 Cal. 523, 99 Am. Dec. 427, the court said:

"We know of no provision of the Practice Act authorizing the court to re-examine the evidence upon the motion of one of the parties, after it has once filed its findings and rendered judgment, and on such re-examination to reverse its former action and substitute different findings of fact. * * * The mode provided for reviewing its former action by the same court, as to the sufficiency of the evidence to justify the finding, is by motion for new trial."

In the case of *Hawxhurst v. Rathgeb*, 119 Cal. 531, 51 Pac. 846, 63 Am. St. Rep. 142, that court held:

"After findings have been filed, and judgment entered thereon, there is but one method by which those findings can be competently changed or modified, except perhaps, in respect of a mere clerical error or misprision, and that is the mode pointed out by the statute—by the granting of a new trial. Until the findings are thus set aside, they must, under our present system, stand in their integrity as originally made."

In the case of *Wyllie v. Kent*, 152 Pac. 194, this court lays down the following rule:

"It is a well-established rule that where, through mistake, there has been a failure to enter the judgment pronounced, the court has power to correct the matter and to order the proper entry made. Clerical mistakes can be corrected in this manner, but judicial errors can only be remedied by motion for a new trial or upon appeal."

In the case of *Wunderlin v. Cadogan*, 75 Cal. 617, 17 Pac. 713, it appeared that the case was tried and findings of fact signed and filed. No judgment was entered thereon. Upon such findings all of the defendants were entitled to judgment. Subsequently, upon the consent of some of the defendants, but without notice to the others, the court set aside the findings first filed, and substituted others in their place, and the clerk was instructed not to enter judgment under the original findings, as the same were made under a misapprehension. Judgment was entered on the last set of findings in favor of the defendants who consented to the change of the findings and against those who were not notified of such change. It was said by the Supreme Court in that case:

"It is to be observed that what the court did in the first instance was not merely to supply an omission in the findings first filed, or change the direction for judgment, but was to substitute one set of findings of fact for another. This we are inclined to think the court had no power to do. * * * These rules rest upon the theory that the modes in which a decision may be reviewed are prescribed by statute, and that the court has no power to substitute other modes in their place."

Counsel for defendants in this case, after the findings of fact, conclusions of law, and

decree had been entered up in favor of plaintiff, made a motion in due course for a new trial, in which he sought to have the court vacate and set aside its findings of fact, conclusions of law, and decree theretofore entered, and to grant to the defendants a new trial, upon the various grounds set forth in the motion. The motion for a new trial did not authorize the trial court to re-examine the evidence offered by defendants in support of their defense in the trial of the cause, and upon the evidence so adduced, of its own motion, to enter up findings of fact, conclusions of law, and a decree in favor of defendant.

From what has been said it follows that the judgment of the trial court in favor of respondents must be reversed and the cause remanded, with directions to the trial court to grant a new trial; and it is so ordered. Costs are awarded to appellant.

SULLIVAN, C. J., and MORGAN, J., concur.

(28 Idaho, 461)

Ex parte WINN.

(Supreme Court of Idaho. Jan. 29, 1916.)

1. INDICTMENT AND INFORMATION ~~§ 4~~—INFORMATIONS.

Informations are of equal dignity with indictments, subject only to the limitations contained in section 8, art. 1, of the Constitution, to the effect that a defendant may be only accused by information after commitment by a magistrate, and that, "after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 3, 24-27; Dec. Dig. ~~§ 4~~.]

2. INDICTMENT AND INFORMATION ~~§ 4~~—FORM OF ACCUSATION—INFORMATION—ACTION OF GRAND JURY.

When a defendant in a criminal case has been given, or has waived, his preliminary examination, and has been by the magistrate held to answer and for trial in the district court, and, when the prosecuting attorney, at the next session thereof, no grand jury having been called nor convened, has presented, and the clerk has filed, an information charging him with the offense for which he has been so held to answer, the court acquires jurisdiction of the defendant and of the offense with which he is charged, from which it cannot be deprived by any action of a grand jury convened at a subsequent term.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 3, 24-27; Dec. Dig. ~~§ 4~~.]

Habeas corpus by Ed F. Winn. Writ quashed.

Edgington & Averitt, of Idaho Falls, for plaintiff. J. H. Peterson, Atty. Gen., D. A. Dunning and Herbert Wing, Asst. Attys. Gen., and James S. Byers, Pros. Atty., of Idaho Falls, for the State.

MORGAN, J. The record in this case discloses that on the 24th day of June, 1915, a

complaint was filed with the probate judge of Bonneville county, in his capacity as committing magistrate, charging that the petitioner, Ed F. Winn, did, on August 25, 1914, in that county, commit a public offense, to wit, a nuisance, which consisted in maintaining and assisting in maintaining and controlling a certain place within a prohibition district where intoxicating liquors were sold and otherwise disposed of in violation of law, and where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors were kept for sale and disposal in violation of law. Petitioner was arrested, brought before the magistrate, and waived preliminary examination, and was held to answer said charge in the district court.

On the 8th day of July, 1915, the prosecuting attorney in and for Bonneville county presented in the district court, which was then in session, and the clerk, under direction of the court, filed an information charging petitioner with having committed the offense above mentioned. At a subsequent term of the court, and on the 8th of November, 1915, a grand jury in and for that county was impaneled, and on the 17th of that month it completed its labors and adjourned without having, so far as the record discloses, taken any action with respect to the charge pending against petitioner. On November 9, 1915, petitioner was arraigned and moved to quash the information, which motion was overruled, and, he having refused to plead thereto, a plea of not guilty was entered for him by order of the court. On December 2, 1915, the case was tried, and resulted in his conviction and sentence that he pay a fine of \$500, and that he be confined in the county jail for a period of three months, and he was thereupon committed to the custody of the sheriff of Bonneville county. The purpose of this proceeding is to procure the issuance of a writ of habeas corpus directed to the sheriff commanding him to show cause why petitioner is being restrained of his liberty. The writ was issued, and counsel for the state, representing the sheriff in the matter, have moved to quash it, assigning as grounds of their motion that the petition does not state facts sufficient to entitle petitioner to the relief demanded, or any relief whatever.

[1] It is the contention of petitioner that, under the Constitution and statutes of Idaho, a defendant who has been held to answer by a committing magistrate cannot be tried upon the information of the prosecuting attorney when the court has convened a grand jury between the time the information was filed and the time he is arraigned and enters his plea.

Section 8, art. 1, of the Constitution provides:

"No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury

or on information of the public prosecutor, after a commitment by a magistrate: * * * Provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law: And, provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer or for trial therefor upon information of the public prosecutor."

Section 7600, Rev. Codes, provides that all public offenses triable in the district court must be prosecuted by indictment or information, except as provided in the next succeeding section, which relates to proceedings for the removal from office of certain public officials, and has no bearing upon this case. Section 7630 is as follows:

"The grand jury must inquire into all public offenses committed or triable within the county, and present them to the court, either by presentment or by indictment."

Section 7655 provides:

"The several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information for crimes, misdemeanors and offenses, to issue writs and process, and to do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments."

It will be readily seen that it was the legislative intent to make informations of equal dignity with indictments, subject only to the limitations contained in section 8, art. 1, of the Constitution, to the effect that a defendant may be only accused by information after commitment by a magistrate, and that:

"After a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor."

[2] Petitioner urges that, since the grand jury did not indict him, it must be deemed to have ignored the charge above mentioned, and that he could not, after its adjournment, be legally held to answer, or for trial therefor, upon information. A fatal defect in this contention arises from the fact that, conceding the grand jury did ignore the charge, petitioner had been theretofore, instead of thereafter, held to answer and for trial. When petitioner had been given, or had waived, his preliminary examination, and was by the magistrate held to answer and for trial in the district court, and when the prosecuting attorney, at the next session thereof, no grand jury having been called nor convened, had presented, and the clerk had filed, an information charging him with the offense for which he had been so held to answer, the court acquired jurisdiction of petitioner and of the offense with which he was charged from which it could not be deprived by any action of a grand jury convened at a subsequent term.

The motion to quash the writ of habeas corpus is sustained, and the petitioner is remanded to the custody of the sheriff of Bonneville county.

SULLIVAN, C. J., and BUDGE, J., concur.

(12 Okl. Cr. 243)

Ex parte BIRMINGHAM. (No. A-2618.)

(Criminal Court of Appeals of Oklahoma.
Jan. 31, 1916.)

(Syllabus by the Court.)

1. BAIL ~~§ 49~~ — CRIMINAL PROSECUTIONS —
BURDEN OF PROOF—CAPITAL OFFENSE.

On the hearing of an application for admission to bail after commitment for a capital offense, to determine whether or not the proof of guilt is evident or the presumption thereof great, the burden of proof is on the petitioner.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 195-208, 241, 244; Dec. Dig. ~~§ 49~~.]

2. BAIL ~~§ 49~~—ADMISSION TO BAIL—SUFFICIENCY OF EVIDENCE—CAPITAL OFFENSE.

Evidence reviewed, and held sufficient to show that petitioner is entitled to be admitted to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 195-208, 241, 244; Dec. Dig. ~~§ 49~~.]

Application of Joseph H. Birmingham for writ of habeas corpus, by which he seeks to be let to bail. Bail allowed.

Prulett, Sniggs & Tripp, of Oklahoma City, for petitioner. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. This is an application by Joseph H. Birmingham for a writ of habeas corpus, by which he seeks to be let to bail pending the final hearing and determination of a charge of murder filed against him in Payne county, wherein upon his preliminary examination he was held to answer for the murder of one Guy Phillips by shooting him with a pistol on the 14th day of October, 1915. The petitioner avers that he is now unlawfully imprisoned and restrained in the common jail of Payne county, by Henry Townsend, sheriff of Payne county, and that he is not guilty of the crime of murder charged; that the proof of his guilt is not evident, nor the presumption thereof great. Attached to said petition, and made a part thereof, is a duly certified transcript of the evidence taken on his application to the district court of Payne county for admission to bail in said case, which application was denied.

[2] The evidence for the state is somewhat weak and uncertain, although it appears several persons, both male and female, were eyewitnesses to the tragedy. The testimony taken on the part of the defendant is substantially as follows: Harry E. Stege testified that he is the superintendent of the bureau of identification of the police department at Tulsa; that he had formerly conducted a private detective agency at Oklahoma City, and knows the general reputation of the deceased there as to being a dangerous and quarrelsome and turbulent character, and that it is bad; that his reputation at Tulsa was the same; and that at Tulsa about a year ago upon his conviction in the police court he took his Bertillon measurements. E. B. McMillen testified that he was present at the

roadhouse east of Cushing, near the county line of Creek county, at the time of the shooting. That the deceased walked up to Birmingham and said, "Now is a good time to settle our troubles;" that he had a long spring-back knife in his hand, and Birmingham backed up against the wall, and as the deceased attempted to strike with the knife, he shot him; that witness then grabbed the pistol; that there was present at the time John Phillips, Lon Anderson, Cecil Messenger, Ruby Bowen, and Ruth Bradley; that the shooting occurred about 11:30 that night. The petitioner as a witness in his own behalf testified that he had known the deceased about three years and knew his general reputation in Oklahoma City and Tulsa as to being a bad and dangerous character. That he was generally known as a holdup man, and all-around tough character, who hung around houses of prostitution; that petitioner was in the oil country at the time as an employé of a law and order enforcement league to get data on the transportation and selling of whisky and to take photographs of the joints; that he had been there several days and went from Pemeta to this roadhouse that night; that he went in and asked for a glass of water; that as he reached for the glass the deceased said, "We will cut his throat now," and pushed him and kicked him; that he backed up against the wall, and the deceased came towards him with a long spring-back knife in his hand and struck at him and he drew a pistol and shot him in his necessary self-defense; that some one took the pistol from him, and the deceased struck at him again with a knife, and he pulled a second pistol; just then the knife fell from his hand as he dropped to the floor.

[1] By numerous decisions of this court it is held that upon an application for bail by writ of habeas corpus, after commitment for a capital offense by an examining magistrate, the burden is upon the petitioner to show facts sufficient to entitle him to bail, when those facts do not appear from the evidence adduced on the part of the prosecution. Ex parte Dykes, 6 Okl. Cr. 162, 117 Pac. 724; In re Fraley, 8 Okl. Cr. 719, 109 Pac. 295, 139 Am. St. Rep. 988. However, where the facts and circumstances in evidence reasonably support the issue that the accused acted in his necessary self-defense in taking the life of the deceased, the petitioner should be admitted to bail.

Upon a consideration of the testimony we are of the opinion that the petitioner herein is entitled to be admitted to bail. It is therefore ordered that said petitioner be admitted to bail upon the charge of murder now pending against him, and that his bail be, and the same is, hereby fixed in the sum of \$10,000. Bond to be conditioned as required by law, and the same to be approved by the clerk of said county.

(12 Okl. Cr. 246)

CUDJOE v. STATE. (No. A-2326.)(Criminal Court of Appeals of Oklahoma.
Jan. 29, 1916.)*(Syllabus by the Court.)***1. FORGERY** \Leftrightarrow 21—"PRINCIPAL" AND ACCESSORY.

One who is present at the forgery of a deed, knowingly aiding, abetting, or assisting such forgery, is guilty as a principal, although the act of signing the name with intent to forge the same was done by another person.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 57; Dec. Dig. \Leftrightarrow 21.]

For other definitions, see Words and Phrases, First and Second Series, Principal.]

2. CRIMINAL LAW \Leftrightarrow 742—TRIAL—QUESTIONS OF LAW AND FACT.

Where the evidence is conflicting as to whether a witness participated in committing the crime charged, the question as to whether or not such witness is an accomplice is one of fact for the jury. But where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1098, 1138, 1719-1721; Dec. Dig. \Leftrightarrow 742.]

3. CRIMINAL LAW \Leftrightarrow 510—TESTIMONY OF ACCOMPLICE—CORROBORATION.

Under Proc. Cr. § 5884, Rev. Laws, "a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense," and if two or more accomplices testify, the same corroboration is required as if there be but one: An accomplice can neither corroborate himself nor another accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. \Leftrightarrow 510.]

4. FORGERY \Leftrightarrow 44 — SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for forgery, considered and held to be sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. \Leftrightarrow 44.]

Appeal from District Court, Seminole County; Frank Mathews, Judge.

Jimmie Cudjoe was convicted of forgery, and appeals. Affirmed.

E. L. Harris, of Wewoka, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of conviction for the crime of forgery in the first degree, rendered by the district court of Seminole county, on the 28th day of January, 1914, wherein Jimmie Cudjoe, plaintiff in error, was sentenced to imprisonment in the penitentiary for the term of 7 years. The information charged Jimmie Cudjoe and Willie Barkus with forging a warranty deed, purporting to convey the following described land in Seminole county. The southeast quarter of the northwest quarter of section 11, township 5 N., of range 5 E. The deed purported to be executed by Ben Grayson to

W. E. Grisso dated March 15, 1913, acknowledged before H. A. Born, notary public, in and for Seminole county on said date.

On the part of the state the evidence tended to prove the following facts: That on the date alleged the said Jimmie Cudjoe, with one Willie Barkus, went to the drug store of one W. E. Grisso in the town of Seminole, introduced said Barkus as Ben Grayson, and stated that he wanted to sell his land; after talking the matter over Grisso agreed to buy the land, and Barkus signed the deed as Ben Grayson, and acknowledged the same before H. A. Born, a notary public. The consideration for the deed was \$250. Grisso also gave Jimmie Cudjoe \$1.

Ben Grayson testified that he had lived in Seminole county all his life; that he had known Jimmie Cudjoe for five years, that they were at school together at Mekusukey; that the land described in said deed was his homestead allotment; that he had never authorized Willie Barkus or any one else to sign a deed; that he was in possession of the land described in the Grisso deed on the 15th day of March, 1913.

H. A. Born, notary public, testified that he took the acknowledgment of the deed in question, and that Ben Grayson was not the person who signed the deed; that Willie Barkus signed the name of Grayson to the deed and Jimmie Cudjoe said at the time that he was Ben Grayson. Willie Barkus testified: That he had pleaded guilty to forgery in connection with signing this deed. That he had known Jimmie Cudjoe all his life. That on the day in question he arrived at the town of Seminole, and was going up the street when he met Jimmie Cudjoe, who said to him, "A fellow here wants you to sign a deed." And witness said, "What for?" And Jimmie Cudjoe said, "He will give me \$7 if you can write it like he says." And he said, "All right;" and went with Cudjoe to sign the deed and they gave him \$7, a check, and a paper or two; when they left he gave the papers to Jimmie Cudjoe. The defendant, Cudjoe, as a witness in his own behalf, testified: That he was in Shawnee a few weeks before the deed was signed, and a fellow walked up to him and said, "Don't you remember Ben Grayson, that boy that went to school with you?" And he said, "Jimmie, do you know where a fellow could sell any land down there where you live?" and he told him he thought he could; and he said, "I will be down there some time and see about it." That on the day the deed was signed he was standing near the depot at Seminole, when the same fellow walked up and said, "Hello, I have come down here to sell that land I was talking to you about;" and they went down to Mr. Grisso, who bought the land. That he thought Willie Barkus was Ben Grayson, who had gone to school with him at Mekusukey.

The first assignment of error is based upon the action of the court in overruling the motion for a new trial on the ground of newly discovered evidence, as set forth in the affidavit of one Bunnie Bruner. It appears that the day before the case was called for trial, upon due notice to the defendant and his counsel, the court permitted the county attorney to indorse the name of the codefendant Willie Barkus on the information. When the case was called for trial, counsel for defendant filed an application for a continuance on the ground that "neither the defendant nor his attorneys know what the testimony of Willie Barkus will be, and had no opportunity to consult with their client." The application was overruled. It is argued that the defendant was thus deprived of an opportunity to show diligence in obtaining the attendance of the witness Bunnie Bruner. Under the statute every defendant jointly indicted or informed against is charged with notice that the state may, if it so desires, use a codefendant as a witness against him. Proc. Cr. § 5879, Rev. Laws.

Willie Barkus had entered his plea of guilty, and had been sentenced prior to this trial. Bruner it appears was a neighbor of Cudjoe; his failure to learn what Bruner would testify to before the trial was a lack of diligence on his part; had the defendant exercised any diligence whatever he could have secured the attendance of this witness at the trial. A defendant must use all reasonable diligence, not only to find out what witnesses he will need, but also to secure the attendance of such witnesses at the trial. Davis v. State, 10 Okl. Cr. 169, 135 Pac. 438.

We think the motion for a new trial was properly overruled.

[1-3] The second assignment is that the court erred in giving the following instruction:

"You are further instructed that a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense. An accomplice, as the word is here used, means any one connected with the crime committed, either as principal offender, or as an accessory, or one who aids and abets in the commission of an offense; it includes all persons who are connected with the crime by unlawful acts on their parts committed, either before or at the time of the commission of the offense, and if you find that the deed set out in the information was forged and that any witness who has testified herein against the defendant was an accomplice in said forgery, then you must disregard the testimony of such witness in so far as the same is against said defendant, in so far as the same is not corroborated as herein stated. (Excepted by defendant, and exception allowed.) Frank Mathews, Judge."

The criticism made upon this instruction in the defendant's brief is as follows:

"The court ought to have included in the above instruction the further charge that if they found all of the witnesses above mentioned to be

accomplices, then that one accomplice could not corroborate another, and that before they could convict the defendant they must have other testimony corroborating that of Barkus, Grisso, and Born, tending to connect the defendant with the commission of the offense before they could find Cudjoe, the defendant, guilty."

This criticism is based upon the theory that the witnesses Barkus, Grisso, and Born were all accomplices. There was no evidence tending to prove that the witness Born was an accomplice. The testimony of Barkus, a codefendant, as to what Cudjoe said to him just before and after the forgery was committed, tends to prove that Grisso was an accomplice. Grisso's testimony tended to show that he was an innocent purchaser. When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury on the law of accomplice testimony and leave the question as to whether or not the witness is an accomplice for the determination of the jury as a question of fact. But where the facts are not in dispute, or where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. Where he is admitted to be such, or where the undisputed facts show him to be an accomplice, the court may so charge without invading the rule that the court should not comment on the credibility of any witness. Driggers v. U. S., 1 Okl. Cr. 167, 95 Pac. 612, 129 Am. St. Rep. 823; Id., 21 Okl. 60, 95 Pac. 612, 129 Am. St. Rep. 823, 17 Ann. Cas. 66. See People v. Coffey, 161 Cal. 433, 119 Pac. 901, 39 L. R. A. (N. S.) 706; Underhill on Criminal Evidence, § 69.

If two or more accomplices testify, the same corroboration is required as if there be but one; an accomplice can neither corroborate himself nor another accomplice. Whether the witness Grisso was or was not an accomplice was a question of fact for the jury. The instruction objected to was amply sufficient, and fully and fairly submitted the law applicable to accomplice testimony. This was the only instruction objected to. It appears that the case was fairly submitted to the jury in a clear, concise, and fully adequate charge.

[4] Finally it is insisted that the evidence is insufficient to support the conviction. That the deed was forgery and that the defendant was present when the name of Ben Grayson was signed thereto by Barkus with intent to defraud was undisputed. If the defendant knowingly or intentionally aided or abetted in the commission of the crime, he was guilty also, as much so as if he had forged Grayson's name himself. The testimony of Born, a disinterested witness, was sufficient to show his guilt, unless it was, as the defendant testified, a case of mistaken identity, and that he believed Barkus was Grayson. The defendant, Cudjoe, Barkus, and Grayson are Seminole negroes; and in the face of the un-

disputed facts, that the defendant and Barkus had known each other from childhood, and that both had attended school with Grayson several years, we are inclined to think the defense attempted to be made was without merit.

It would seem that the defendant, Cudjoe, was the archconspirator, and that "Barkus was willing." We think the evidence was amply sufficient for the purpose of conviction. Having reviewed the errors assigned and finding no error in the record, the judgment is affirmed.

FURMAN and ARMSTRONG, JJ., concur.

(12 Okl. Cr. 253)

RENTIE v. STATE. (No. A-2452.)
(Criminal Court of Appeals of Oklahoma. Feb. 5, 1916.)

(Syllabus by the Court.)

HOMICIDE \S 332 — APPEAL — VERDICT — EVIDENCE.

Record and evidence examined, and held sufficient to sustain a conviction for assault with intent to kill, and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 699-704; Dec. Dig. \S 332.]

Appeal from District Court, Okmulgee County; Wade S. Standfield, Judge.

Clifford Rentie was convicted of assault with intent to kill, and appeals. Affirmed.

E. M. Carter and C. L. Phillips, both of Okmulgee, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. Clifford Rentie, plaintiff in error, was convicted of assault with intent to kill T. L. Dunigan, and was sentenced to imprisonment in the penitentiary for the term of three years. From the judgment an appeal was taken by filing in this court on May 4, 1915, a petition in error with case-made. The errors assigned are:

(1) That the court erred in overruling the motion for a new trial.

(2) That the verdict is contrary to law and the evidence and is based wholly upon passion and prejudice.

(3) That the court erred in giving instruction No. 6 to the jury.

It appears that the plaintiff in error, a negro, assaulted the prosecuting witness Dunigan with a knife, inflicting nine wounds, one of which penetrated the pleural cavity.

No briefs have been filed, and when the case was called for final submission no appearance was made in behalf of the plaintiff in error. The case was thereupon submitted on the record. We have carefully examined the record, and find that it is exceptionally free of error, and we find no reason to think that the verdict was the result of passion or prejudice. No objection was made or exception taken to the instructions given by the court.

Having reviewed the errors assigned, and finding no substantial error in the record, the judgment is affirmed.

FURMAN and ARMSTRONG, JJ., concur.

HOLMES v. STATE. (No. A-2279.)
(Criminal Court of Appeals of Oklahoma. Feb. 5, 1916.)

On rehearing. Former judgment modified and affirmed. For former opinion, see 11 Okl. Cr. 715, 148 Pac. 1147.

Fogg & Bennett, of El Reno, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. Upon rehearing it is urged that the evidence introduced in this cause on behalf of the state is legally of doubtful competency. In fact, all of the direct evidence, under strict adherence to the rules of law governing the introduction of testimony, should probably have been excluded. Taken as a whole, however, and considering all the facts and circumstances introduced in the case, we entertain no doubt that the jury's verdict finding defendant guilty was just.

There are errors of law urged in the brief and argument which are of more or less merit, but sufficient prejudice does not appear to warrant a reversal of this judgment. There is no proof disclosed by the record that the plaintiff in error was ever indicted, or convicted, of a similar offense. There was no proof offered by the plaintiff in error in his defense. He chose to stand on technical errors of law.

Upon a re-examination of the record we are of opinion that the irregularities complained of tended reasonably to prejudice the jury in the matter of assessing the punishment. A fine of \$250 was imposed and a jail sentence of 90 days. A new trial in this cause would probably result in another conviction; but, if tried according to law, a lighter punishment would probably be imposed.

It is therefore the judgment of the court that the ends of justice warrant a modification of this judgment by reducing the fine from \$250 to \$150, and imprisonment from 90 days to 60 days. It is therefore so ordered.

As modified, the judgment, on rehearing, is affirmed. Mandate ordered forthwith.

(12 Okl. Cr. 253)
WINGO v. STATE. (No. A-2457.)
(Criminal Court of Appeals of Oklahoma. Feb. 5, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1172—HARMLESS ERROR—INSTRUCTIONS.

The letter and spirit of the law is that, if the defendant had had a fair trial, and if this

court is satisfied that the verdict against the defendant was not reached by error, or as the result of passion or prejudice, the conviction should be affirmed. In this case the erroneous instruction was harmless, for the reason that the evidence did not leave the guilt of the defendant in doubt. No defense was made, and no prejudice could have resulted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. *⌚*1172.]

Appeal from County Court, Grady County; R. E. Davenport, Judge.

Bud Wingo was convicted of a violation of the prohibitory law, and appeals. Affirmed.

Holding & Herr, of Chickasha, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, Bud Wingo, was convicted in the county court of Grady county on an information charging that in said county on or about the 10th day of November, 1914, he did then and there willfully and unlawfully have in his possession 360 gallons of whisky with the unlawful intent to violate provisions of the prohibitory law. Judgment was rendered on the 13th day of March, 1915, and he was sentenced to pay a fine of \$100 and to be confined in the county jail of Grady county for a period of 30 days. From the judgment an appeal was taken by filing in this court on May 10, 1915, a petition in error with case-made.

The evidence for the state shows that the defendant was found driving through the country south of Chickasha with two wagons; he driving one team and his little boy another; that in one wagon was four barrels of whisky, and in the other three barrels and a case of whisky, and, when arrested, the defendant produced what he called a bill of lading purporting to show that the whisky had been delivered to him at Wichita Falls and consigned to one John Jackson at Hope, Ark. There was no evidence offered on the part of the defense. The errors assigned are based upon the refusal of the court to give certain requested instructions, and on an exception taken to one of the instructions given.

The instructions requested were properly refused. The instruction excepted to was incorrect. Similar instructions have been condemned by this court in the case of Huff v. State, 12 Okl. Cr. —, 152 Pac. 464; Beal v. State, 12 Okl. Cr. —, 152 Pac. 808; and Sellers v. State, 11 Okl. Cr. 588, 149 Pac. 1071. However, upon a consideration of the record, we are of the opinion that on the undisputed facts of this case the defendant could not be prejudiced by the instruction complained of, for the reason that the evidence did not leave the guilt of the defendant in doubt. This court has often held, where the case is clearly made out against the defendant, and the jury has so found, the judgment will not be reversed for errors which do not affect the substantial merits of the case. Every citi-

zen, when charged with crime, is entitled to a fair trial according to the due and orderly course of the law, but he cannot be heard to complain if an error is committed that cannot operate to his prejudice. Cooper v. State, 12 Okl. Cr. —, 152 Pac. 608.

Upon the undisputed facts and the law as we understand it, the plaintiff in error was rightfully and legally convicted.

The judgment of the county court of Grady county herein is therefore affirmed.

FURMAN and ARMSTRONG, JJ., concur.

(54 Okl. 672)

MISSOURI, O. & G. RY. CO. v. DAVIS.
(No. 5444.)

(Supreme Court of Oklahoma. Nov. 30, 1915.
On Rehearing, Jan. 18, 1916.)

(Syllabus by the Court.)

1. TRIAL *⌚*200 — INSTRUCTIONS — ISSUES OF FACT.

Where the evidence raises a question of fact, for the jury to pass upon, it is the duty of the court to instruct the jury as to the law applicable to the issue of fact raised by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 471; Dec. Dig. *⌚*200.]

2. TRIAL *⌚*260 — REFUSAL OF INSTRUCTIONS COVERED.

Where the instructions given by the court clearly and fairly cover the law as to a particular phase of a case, it is not error to refuse requested instructions on the same phase of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. *⌚*260.]

3. MASTER AND SERVANT *⌚*125 — INJURY TO SERVANT—DEFECTIVE MACHINERY—LIABILITY OF MASTER.

Where an employé is injured by the breaking of defective machinery, the fact that the master purchased the machinery from a reputable dealer is only one ingredient of evidence on the question of whether he has exercised reasonable care. He should also resort to such tests as are reasonable and practicable, considering the character of the machinery and the danger connected with its operation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. *⌚*125.]

On Rehearing.

4. EVIDENCE *⌚*244—KNOWLEDGE.

Where what is called the U-bolt in a wrecking machine breaks, causing the boom pole to fall upon an employé and injure him, and there is evidence that the foreman of the wrecking crew, immediately after it had broken, remarked "that he was expecting that to break," held, that such remark by the vice principal tends to charge the employer with knowledge of the defective condition of this particular part of the machine, and that it was proper to submit this evidence, together with other evidence tending to show knowledge of this particular defect, to the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. *⌚*244.]

Commissioners' Opinion, Division No. 2. Error from District Court, Hughes County; John Caruthers, Judge.

Action by Hiram L. Davis against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed and rehearing denied.

E. R. Jones and J. C. Wilhoit, both of Muskogee (Arthur Miller, of Kansas City, Mo., of counsel), for plaintiff in error. Crump & Skinner and W. T. Anglin, all of Holdenville, for defendant in error.

BRETT, C. This action was commenced in the district court of Hughes county by the defendant in error, Hiram L. Davis, as plaintiff, against the Missouri, Oklahoma & Gulf Railway Company, as defendant, to recover damage for alleged personal injuries. The material facts are: That Hiram L. Davis, the plaintiff in the lower court, was a section hand in the employ of the defendant, and as such was called out in May, 1912, by the defendant to assist in clearing away a wreck which had occurred on defendant's read. The pleadings and evidence show that at the time the alleged injuries were received plaintiff was acting under the directions of the foreman of the wrecking crew. While doing this the wrecking machine broke, and caused the injuries complained of. Plaintiff by proper pleadings alleges that the machinery was defective, and charges negligence on the part of the defendant in furnishing dangerous and defective machinery with which to do this work. There being no question raised in this court as to the pleadings, it is unnecessary to further set them out. The cause was tried to the court and a jury. The defendant demurred to plaintiff's evidence, which was overruled, and the jury returned a verdict for the plaintiff for \$1,500, which became a judgment; and the defendant appeals from this judgment.

There are numerous assignments of error, but the only issue before this court is one of law; as the facts have been passed upon by the jury, and, there being evidence to sustain their verdict, this court, as has often been said, will not attempt to weigh the evidence.

[1, 2] The defendant (plaintiff in error) complains of a portion of instruction No. 2, given by the court. That portion of the instruction complained of is the following:

"In this case the law imposes upon the defendant company the positive duty to have used reasonable care in seeing that the derrick and boom pole and the U-bolt, and other attachments of the wrecking machinery were so constructed as to have been in a reasonably safe condition, and it was the positive duty of the defendant company to see that the machinery and appliances used were sound, and the failure of the company to provide sound machinery to do the work of clearing away the wreck and to provide reasonably safe equipments for that purpose, taking into consideration the character of the work to be performed by its employes while engaged in the service of the company, would be negligence, under the law, on the part of the defendant."

The complaint is that this portion of the instruction is inapplicable to the facts in the case; that there was no evidence as to the defective condition of the machinery offered by the plaintiff. But this contention is not supported by the record. One witness without objection testified that, immediately following the injury of the plaintiff, the foreman said:

"I told them if they did not fix that thing up, somebody would get killed. Q. What was he talking about? A. The wrecker, I reckon; said he told them fellows if they did not fix that, that it was going to kill somebody. Q. What did he say; anything else? A. Yes, sir. He said it come pretty nigh killing somebody last night."

Several other witnesses testified to these same remarks. We think this evidence clearly raised the question of the condition of the machinery, and justified the instruction complained of. But this instruction, among other precautionary admonitions, further charged the jury that:

"The railroad company is not to be held as guaranteeing or warranting absolute safety to the plaintiff, nor is it bound to furnish the safest machinery nor to provide the best methods for its operation in order to save itself from responsibility to accidents resulting from its use. If the machinery and appliances used be of ordinary safe character, properly equipped with reasonably safe appliances, and in sound repair, and such as can, with reasonable care be used without danger to its employes, that is all that is required, and when it has exercised that degree of prudence and care that an ordinary reasonable prudent man would provide in guarding against accidents or injuries himself under like circumstances, it has exercised all the duty that the law has imposed upon it to the plaintiff."

The instruction, taken as a whole, we think, was very clear, accurate, and fairly stated the law applicable to the facts in the case.

The defendant further complains of the court's refusal to give two requested instructions, which are to the effect that the defendant is not liable for latent defects, which by reasonable diligence could not be detected. But this proposition was fully and clearly covered by No. 3 of the instructions given by the court, and this contention is wholly without merit.

[3] The further complaint is that the court refused requested instruction No. 16, which is as follows:

"The court instructs the jury, as a matter of law, that a master who buys machinery, tools, appliances, or materials from a reputable maker and who also uses reasonable care in inspecting and setting the same up and putting them into use or operation is not liable to an employe for injury resulting from the negligence of the maker of the material or in his doing the work in an improper manner."

This instruction, we think, imperfectly states the law on the question, and was properly refused. The master cannot rely simply upon the reputation of the dealer from whom he purchases, and "reasonable care in inspecting and setting up the machinery and putting it into operation," but he must also resort to such tests as are practicable, and reasonable, considering the character of the

machinery, and the dangers connected with its operation. It is often the case that the mere visual inspection is insufficient, and of but little practical value. As said by Mr. Thompson:

"The fact that the master purchases the machine, tool, or appliance from a reputable manufacturer does not excuse his own negligence in inspecting it, in testing it, and in setting it up, but is a circumstance entering into the general ingredient of evidence, speaking on the question whether or not he has exercised reasonable care in the premises." 4 Thompson on Negligence, § 3990.

And we think this is the correct rule, and the fact that the master purchased the machinery from a reputable dealer is only an ingredient of evidence on the question of whether or not he has exercised reasonable care in the premises. And taking the instruction as a whole, the question of reasonable care was fairly submitted to the jury, and as favorable to the defendant as the law would warrant. *Halley-Ola Coal Co. v. Parker et al.*, 32 Okl. 642, 122 Pac. 632; 40 L. R. A. (N. S.) 1120; *C. R. I. & P. Ry. Co. v. Wright*, 39 Okl. 84, 134 Pac. 427; *Rock Island Coal Mining Co. v. Davis*, 144 Pac. 600, not yet officially reported.

The evidence is sufficient to sustain the judgment, and we cannot say the judgment is excessive. We, therefore, recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

On Rehearing.

BRETT, C. The plaintiff in error in its petition for rehearing insists that there was an utter lack of evidence to show negligence of any kind or character on the part of plaintiff in error to submit to the jury; that there was no evidence that it had knowledge of the defective condition of the U-bolt which broke, and that the U-bolt was so hidden and concealed that an inspection of it was impossible; and that the doctrine of *res ipsa loquitur* has no application between the master and servant.

This cause was not tried in the lower court, nor submitted to the jury in that court, upon the doctrine of *res ipsa loquitur*. Nor was that doctrine suggested or intimated in the original opinion. On the contrary, instruction No. 3, referred to, but not set out, in the original opinion, plainly tells the jury that negligence could not be presumed from the fact that the U-bolt broke, and that the defendant (plaintiff in error) cannot be held liable for latent or hidden defects in the U-bolt, which could not have been known to the defendant or its employes by the exercise of reasonable diligence. This instruction, quoted verbatim, is the following:

"You are further instructed that you cannot presume that the defendant was negligent from the mere fact that the U-bolt, supporting the

boom pole in question and described in the petition, broke, permitting the boom pole to fall upon the back of the plaintiff and injuring him, and if said bolt was defective by reason of some latent or hidden defect, which could not have been known to the defendant or its employes by the exercise of reasonable diligence in time to have avoided the injury, by proper inspection and examination of the machinery from time to time, taking into consideration the character of the work and the strain that was being required of it, and said accident was caused as the result of the breaking of the U-bolt, under such conditions, then the plaintiff cannot recover, for it would not be such negligence on the defendant's part as the law contemplates which would entitle the plaintiff to recover."

This instruction squarely presented the question to the jury, as to whether or not under the evidence adduced in their hearing, the defect in the U-bolt was, as contended by the defendant, of such a latent or hidden character that it could not be known to the defendant by the exercise of reasonable diligence, and told them plainly that negligence could not be presumed from the fact that the U-bolt broke, and under this instruction and the evidence the jury found against the contention of the defendant.

[4] In addition to the evidence set out in the original opinion, tending to show that knowledge of the defective condition of the U-bolt had been brought home to the defendant, the witness Barnes testified that immediately after this U-bolt had broken, the foreman said " * * * that he was expecting that to break, or looked for it, something like that." What would be the reasonable inference to be drawn from this language? That the foreman was referring to something that had not broken, or to the very thing that had broken? At that time it was manifest that it was the U-bolt that had broken, and that this was what had caused the accident; and to insist that this evidence does not tend to bring home to the defendant knowledge of the defective condition of the U-bolt, and should not have been submitted to the jury, seems to us absurd. That was the very gist of the controversy. If the defendant did not know, and could not by the exercise of reasonable diligence have known, that the U-bolt was defective, then the plaintiff could not recover, and the court so instructed the jury. But if, on the other hand, the defendant did know, or could, by the exercise of reasonable diligence, have known of the defective condition of the U-bolt, then it was liable. And this issue was squarely and fairly submitted to the jury.

This was purely an issue of fact, which had been raised by the pleadings and evidence, and to have refused to submit it to the jury would have been error.

We recommend that the petition for rehearing be denied.

PER CURIAM. Adopted in whole.

(54 Okl. 626)

**MIDLAND SAVINGS & LOAN CO. v.
NEIGHBOR et al. (No. 5636.)**

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

**MORTGAGES ⇨275—PURCHASER OF MORTGAGED
PROPERTY—RIGHT TO QUESTION VALID-
ITY.**

One who purchases real property expressly subject to a mortgage thereon is, in an action to foreclose the same, precluded from asserting the invalidity of such mortgage and defending against it on the ground that it is not fully enforceable against his grantor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 772-781, 1218; Dec. Dig. ⇨275.]

Commissioners' Opinion, Division No. 3. Error from District Court, Alfalfa County; James W. Steen, Judge.

Action by the Midland Savings & Loan Company, a corporation, against Oma J. Neighbor and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Geo. W. Partridge, of Cherokee, and A. J. Bryant, of Denver, Colo., for plaintiff in error. Titus & Talbot, of Cherokee, for defendants in error.

BLEAKMORE, C. This case presents error from the district court of Alfalfa county. On November 2, 1908, Lincoln H. Burr and wife executed and delivered their bond or note for the principal sum of \$1,000 and a mortgage on certain real estate situate in the town of Cherokee, Okl., securing the same, to the Midland Savings & Loan Company, a building and loan association incorporated and existing under the laws of the state of Colorado, and, by compliance with the law, authorized to do business in this state. By the terms of said bond the makers bound themselves to pay to the association, at its office in Denver, Colo., the sum of \$24 on or before the last day of each month, of which amount \$14 was a monthly installment, due upon 35 shares of the capital stock of the association, \$8.33 was monthly interest upon the principal sum, and \$1.67 a premium payable monthly upon said principal, and also such fines as should accrue upon delinquent payments for said stock, interest and premium, according to the by-laws of the company, until the principal sum should be paid in full as provided in the bond and, further, that in the event of default in the payment of any of said monthly payments, the association should have its option of declaring the principal sum due and payable at once, and in case of suit to pay an attorney's fee of \$100. On April 10, 1911, Burr and wife conveyed the mortgaged property to the defendant Oma J. Neighbor, who, as part of the purchase price thereof, expressly assumed the obligation of said bond, and agreed to pay the indebtedness evidenced thereby, said agreement being as follows:

"The Midland Savings & Loan Company, Denver, Colorado—Gentlemen: In accepting lot numbered 8 in block numbered 21 in the town of Cherokee, county of Alfalfa and state of Oklahoma, according to the recorded plat thereof, and the assignment of your certificate numbered 9346, representing thirty-five shares of stock, from Lincoln H. Burr, I accept the same subject to the mortgage held by your company on the said property, and assume and agree to pay said mortgage indebtedness, and to own and carry the said shares of stock, according to the contract of said Lincoln H. Burr, as a part payment of the purchase price of said property. Respectfully, Oma J. Neighbor and witness S. W. Hill."

Subsequently Oma J. Neighbor and J. W. Neighbor conveyed said property to the defendant F. R. Zacharias, subject to said mortgage. Numerous payments were made, apparently in compliance with the provisions of said obligation, by defendants and their predecessors in interest, the last being on August 11, 1911. Defendants having defaulted in the payment of certain installments, due according to the terms of the bond, the association exercised its option to declare the whole amount immediately payable, and, on July 1, 1912, brought this action, claiming the sum of \$776.08, including an attorney's fee of \$100.

Defendants contended that the bond and mortgage in suit constituted an Oklahoma contract, governed and to be construed by the law of this jurisdiction; that such contract did not comply with the law of this state relative to building and loan associations; that the premiums collected, and sought to be collected, were fixed and exacted by arbitrary rule of the association, and were not determined and accepted as the result of competitive bidding, as required by law; that the contract is usurious; that plaintiff is entitled to collect only the principal sum of \$1,000, with the minimum rate of interest thereon, etc. The court found and adjudged:

"That plaintiff had not required bids from its stockholders for preference of loan, and that the loan was made without any such bids as required by law, but by an arbitrary rule of the company, and that premium so paid by the defendant was paid on said arbitrary basis, and not as the result of any bidding for said loan, and the said contract is usurious; and that plaintiff is not entitled to the privileges granted to a building and loan association under the laws of this state; and that by reason thereof plaintiff is entitled to interest at 6 per cent. on the original bond from its date to this day, less the several sums of money paid thereon, as shown by plaintiff's petition herein; and the court further finds that plaintiff took possession of the property under foreclosure of this action prior to the 1st day of November, 1912, and has occupied the same since, and that the reasonable rental value thereof is the sum of \$20 per month for the past nine months, in the sum of \$180, and that the same should be credited on the amount found due the plaintiff herein; and the court finds the total amount due the plaintiff on said note and mortgage, after deducting all payments and rents as aforesaid, to be the sum of \$127.91, to bear interest at 6 per cent. per annum, and plaintiff is allowed \$100 attorney's fees, to be taxed as part of the costs of the ac-

tion, and judgment is entered for \$127.91 debt and \$100 attorney's fees."

In presenting its assignments of error plaintiff urges that the defenses sought to be interposed, were they otherwise good, cannot avail defendants in this case; and this is the only question we deem necessary to consider. The undisputed facts are that defendants purchased the mortgaged property expressly subject to the mortgage of plaintiff. Under such circumstances they are precluded from questioning the validity of such mortgage on any of the grounds asserted by them to defeat its enforcement. This doctrine is established in this jurisdiction by *Jones v. Perkins*, 43 Okl. 734, 144 Pac. 183, and *U. S. Bond & Mtg. Co. v. Keahey et al.*, No. 5945, 155 Pac. 557 (not yet officially reported). In the latter case, Mr. Justice Hardy, speaking for the court said:

"When one purchases land subject to a mortgage thereon, the land conveyed is effectually charged with the incumbrance to the same effect as if the purchaser had expressly assumed the payment of the debt or had himself made a mortgage on the land to secure it, and under such circumstances the purchaser is not allowed to defend against the mortgage he has assumed to pay on the ground that it is not valid against his grantor; for having purchased the premises subject to the mortgage, he is precluded from assailing its validity. *Jones et al. v. Perkins*, 144 Pac. 183; 1 *Jones on Mortgages*, §§ 336, 744. Having purchased the equity of redemption in the mortgaged premises and agreed to take the land subject to the mortgage, the amount of the mortgage indebtedness entered into the consideration therefor, and if he be permitted to defeat the mortgage on the ground of its invalidity, he would thus defraud his grantor and the mortgagee. This would be speculation upon the validity of a contract from which he had suffered no harm, and would permit him to withhold money to which he had no right, and without any consideration. In theory he has deducted the amount of the mortgage from the purchase price, and it would clearly be inequitable to allow him to urge the invalidity of the mortgage, and retain the amount thereof which was in effect furnished by his grantor, and not apply it to the discharge of mortgage. *Selby v. Sanford* [7 Kan. App. 781] 54 Pac. 17; *Green v. Houston*, 22 Kan. 38; *Johnson v. Thompson*, 129 Mass. 398; *Foy v. Armstrong* [113 Iowa, 629] 85 N. W. 753; *Trusdell v. Dowden*, 47 N. J. Eq. 396, 20 Atl. 972; *Fuller & Co. v. Hunt*, 48 Iowa, 163; *Brousseau v. Lowy* [209 Ill. 405] 70 N. E. 901; *Hiner v. Whitlow* [68 Ark. 121] 49 S. W. 353 [74 Am. St. Rep. 74]; *Gerdine v. Menage* [41 Minn. 417] 43 N. W. 91; *Gregory v. Arms* [48 Ind. App. 562] 96 N. E. 196; *Batts v. Middlesex Banking Co.* [26 Tex. Civ. App. 515] 63 S. W. 1046."

See, also, *Higbee v. Aetna Bldg. & Loan Ass'n*, 26 Okl. 327, 109 Pac. 236, Ann. Cas. 1912B, 223.

It appears from the evidence that the plaintiff in some manner had acquired possession of the mortgaged property nine months prior to the trial, the rental value of which is shown to be \$20 per month. There is also the statement of its agent that he collected \$140 rentals therefrom, which "went into the property." However, no showing is made as to how the same went into

the property, whether for necessary repairs or otherwise. The court allowed defendants credit for the full nine months, or \$180. It is impossible from the evidence to determine what amount, if any, should be credited upon the debt by reason of such rentals.

The judgment should be reversed and the cause remanded, with directions to the trial court to ascertain the exact amount due plaintiff under the terms of its contract, to require an accounting of the rental value of the property while in possession of plaintiff, allow defendants credit therefor, less any sums actually expended for necessary repairs, and render judgment accordingly.

PER CURIAM. Adopted in whole.

(54 Okl. 651)

CHENAULT v. MAUER MERCANTILE CO.
(No. 6006.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. SALES ⇐64—CONTRACT OF SALE—OPTION.

A contract worded as follows: "The seller agrees to sell and the buyer agrees to buy upon the terms as stated herein," is not an optional contract upon the part of the buyer, but is binding upon both parties.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 156; Dec. Dig. ⇐64.]

2. APPEAL AND ERROR ⇐173—CHANGE OF CONTENTION—DEFENSE—SALES.

A party entered into a contract to purchase a certain amount of goods by a certain date. Sixty days before the expiration of said time the seller shipped to the buyer the total amount of said goods. The buyer refused to accept the same and, after the expiration of said time mentioned in the contract, suit was instituted upon the account. The party set up as his defense that the contract gave him an option to purchase the goods by said date and was not binding upon him until he elected to exercise the same. *Held*, where the defense was based upon that ground alone in the trial court, he will not be heard for the first time to urge upon appeal that the goods were prematurely shipped.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1069, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. ⇐173.]

3. APPEAL AND ERROR ⇐1027—HARMLESS ERROR—INTERPRETATION OF CONTRACT.

Ordinarily it is the sole province of the court to interpret a contract introduced in evidence; but where the court erroneously leaves the interpretation to the jury, and the jury places the correct construction thereon, the error of the court does not prejudicially affect the rights of the complaining party.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4033; Dec. Dig. ⇐1027; Trial, Cent. Dig. § 124.]

4. APPEAL AND ERROR ⇐273—PRESENTATION BELOW—INSTRUCTIONS—GENERAL EXCEPTION.

A general exception to the entire instructions saves nothing for review here.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. ⇐273; Trial, Cent. Dig. §§ 690, 965.]

Commissioners' Opinion, Division No. 4. Error from County Court, McIntosh County; Ben D. Gross, Judge.

Action by the Mauer Mercantile Company, a corporation, against G. S. Chenault. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles R. Freeman, of Checotah, for plaintiff in error. McLaury & Hopps, of Oklahoma City, for defendant in error.

MATHEWS, C. The parties will be designated here as in the trial court. On the 14th day of May, 1910, plaintiff and defendant executed a contract wherein it was stipulated that the plaintiff agreed to sell, and the defendant agreed to buy, certain merchandise, and the contract contained a clause to the effect that the goods should be shipped "as ordered out by December 30, 1911." The defendant buyer having failed to "order out" the merchandise, on October 30, 1911, the plaintiff seller shipped the same to the defendant which the defendant refused to accept, whereupon in June, 1912, the plaintiff instituted suit upon the account. The case was tried to a jury, which found for plaintiff, and defendant prosecutes this appeal.

[2] The main question in this case is whether or not the written contract between the parties bound the defendant to purchase the merchandise mentioned in the contract by the said date of December 30, 1911, or merely gave him an option to purchase said merchandise by said date at the price stated in the contract. Other questions arise in the case, but a decision on this point practically decides the whole case; but we will discuss the assignments in the order in which defendant presents the same in his brief.

Defendant first complains that the plaintiff shipped the merchandise in controversy 60 days before the expiration of the contract and without any order from the defendant. If defendant had based his defense upon this point in the trial court, it is possible he might have been entitled to relief of some nature; but the evidence in the case shows that defendant informed plaintiff, prior to the shipment, that he would not comply with the contract or accept the merchandise. This being his state of mind we are unable to see how he could take advantage of the fact that the goods were prematurely shipped. Nowhere in the record is it shown that the defendant rejected the merchandise on that ground, but his only contention throughout the trial was that the contract was an optional one, and that he was not bound by the contract to take the merchandise, unless he elected to do so.

[3] The defendant next complains of the action of the court in leaving to the jury the duty of interpreting a certain clause in the contract in controversy. Ordinarily it is the

province of the court to construe and interpret written contracts when introduced as evidence in the case; but even if defendant be correct that the court should have construed the contract in the case at bar, yet, as we view it, the construction the jury placed on the contract was the proper one, and therefore the action of the court here complained of, if error, did not prejudicially affect the rights of the defendant.

[4] The defendant next urges that if the plaintiff was entitled to recover at all it could only recover the difference in the market value of the goods and the contract price for which they were sold to defendant, and complains of the court's instruction on this point to the effect that if the jury found for the plaintiff that the measure of its damages would be the contract price of the merchandise in controversy. An examination of the record reveals that the only exception to the court's instruction reserved by the defendant was a signed stipulation between the attorneys to the effect that a general exception may be reserved to all of the instructions given by the court. It has long since become the settled law of this jurisdiction that such an exception saves nothing for review here.

[1] This brings us to the controlling proposition in this case, and that is, Was the contract an optional one? In interpreting this contract we see no room for argument. The language used is clear and unequivocal, and to the effect that the parties thereto bind themselves in positive terms. The language used therein is as follows: "The seller agrees to sell, and the buyer agrees to buy, upon the terms as stated herein." If there had been an omission of the words, "the buyer agrees to buy," then appellant's contention that it was an optional contract upon the part of the buyer might be correct; but the buyer bound himself here in almost the same language that bound the seller. In all the cases cited by appellant we find the contracts to have been unilateral, and not bilateral, as is the contract under consideration. The only option the buyer was given here was the right to order out the merchandise at such time as he might elect up to December 30, 1911.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 647)

THOMPSON, County Judge, v. STATE ex rel. FICKLIN et al. (No. 5807.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS §20 — APPOINTMENT OF ADMINISTRATOR—RIGHT OF APPEAL—PARTIES.

Where an administrator is appointed by a county court, a party in interest who is not a

party to the proceeding, but who is entitled by law to be heard therein, by making affidavit, giving notice of appeal and tendering a solvent bond with sureties, the sufficiency of which said bond is unobjectionable, and thus duly complies with sections 6503 and 6506, Rev. Laws 1910, is entitled to an appeal to the district court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 83-105; Dec. Dig. ¶20.]

2. MANDAMUS ¶57—REMEDY AGAINST COUNTY JUDGE—APPEAL FROM APPOINTMENT OF ADMINISTRATOR.

Where a judge of a county court in the exercise of probate jurisdiction refuses to comply with section 6513, Rev. Laws 1910, a party interested in a matter adjudged by said court, where the party taking the appeal has fully complied with sections 6503 and 6506, Rev. Laws 1910, and tendered a bond, which is unobjectionable as to form, sufficiency, or solvency of sureties thereon, mandamus will lie to compel him to comply with said section.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 68, 114-120; Dec. Dig. ¶57.]

3. MANDAMUS ¶163—PETITION—DEMURRER—EFFECT AS ADMISSION.

The only defense that can be interposed to a petition for writ of mandamus is by answer. Where a demurrer is interposed to a petition for writ of mandamus, the same will be treated as an answer and the allegations of the petition thereby admitted to be true.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 841-843; Dec. Dig. ¶163.]

Commissioners' Opinion, Division No. 1. Error from District Court, Ottawa County; Preston S. Davis, Judge.

Mandamus by the State, on the relation of E. D. Ficklin, administrator of the estate of James Welch, deceased, and another, against Vern E. Thompson, Judge of the County Court of Ottawa County. From an order granting writ of mandamus, defendant brings error. Affirmed.

Vern E. Thompson and E. C. Fitzgerald, both of Miami, for plaintiff in error. James S. Davenport, of Vinita, for defendants in error.

COLLIER, C. This is an appeal from an order of the district court of Ottawa county, awarding a peremptory writ of mandamus, directed to and commanding Vern E. Thompson, as county judge of said county, "to certify to the district court all the papers and files which he has in his court relating to the appointment of administrator in probate No. 641 of said county court of Ottawa county, the same being the appointment of an administrator in the matter of the estate of James Welch, deceased, wherein the county court appointed J. S. Cheyne administrator, and that the said papers be certified and transmitted to the district court of Ottawa county as of the date the said petitioners filed their affidavit, notice, and bond, and that the bond of the said appellants be approved as of the date it was presented to the county court for approval." Said writ was granted upon the relation of E. D. Ficklin, who had been appointed administrator of the estate of

James Welch, deceased, and Helen Welch, who claimed to be the widow of said deceased, upon an appeal from an order of the county court of Ottawa county, appointing J. S. Cheyne as administrator of the estate of said deceased.

A careful examination of the notice of appeal, the affidavit made therefor and filed by said petitioners, shows that said notice of appeal and affidavit were in strict accord with the requirements of sections 6503 and 6506, Rev. Laws 1910, and that at the time of filing said notice of appeal petitioners tendered a bond in the amount fixed by the county judge of said county, which bond was in strict conformity with section 6506, Rev. Laws 1910, and was unobjectionable as to form and substance and solvency of the sureties thereon. Said county court refused to permit said appeal and to send to the clerk of the district court of Ottawa county a certified copy of the order sought to be appealed from, and of the matter, records, papers, and proceedings in the case, as he was required to do by section 6513, Rev. Laws 1910. From the order granting said writ of mandamus this appeal is prosecuted.

[1-3] Section 6503, Rev. Laws 1910, provides:

"A person interested in the estate or funds affected by the decree or order, who was not a party to the special proceeding in which it was made, but who was entitled by law to be heard therein, upon his application, or who has acquired, since the decree or order was made, a right or interest which would have entitled him to be heard, if it had been previously acquired, may also appeal as prescribed in this article. The facts which entitle such person to appeal, must be shown by an affidavit which must be filed with the notice of appeal."

Therefore it was the duty of said county judge to send to the district court of Ottawa county a certified copy of the order appealed from, and of the minutes, records, papers, and proceedings in the cause, regardless of whether or not there was any merit in the appeal, as to which he had no jurisdiction to determine.

Plaintiff in error demurred to the petition, which demurrer was overruled. Section 4915, Rev. Laws 1910, provides:

"No other pleading or written allegation is allowed than the writ and answer; these are the pleadings in the case, and have the same effect, and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had, in the same manner as in a civil action."

As will be seen, this statute does not provide for raising an issue by demurrer; but where one has been interposed, it will be treated as an answer, admitting all the facts stated in the petition, with a challenge of their sufficiency to authorize the writ. See the following cases: *Ellis et al. v. Armstrong*, 28 Okl. 311, 114 Pac. 327; *Kerr v. State ex rel.*, 33 Okl. 111, 124 Pac. 284; *Bd. Med. Examiners v. Gulley*, 41 Okl. 63, 136

Pac. 1083; *McLeod v. Graham*, 6 Okl. Cr. 197, 118 Pac. 160.

Section 6516, Rev. Laws 1910, provides:

"If the judge of the county court neglect or refuse to make or transmit such certified copies as are hereinbefore required to be transmitted to the clerk of the district court in cases of appeal, he may be compelled by the district court by an order entered, upon motion, to do so; and he may be fined, as for contempt, for any such neglect or refusal. A certified copy of such order may be served upon the county judge by the party or his attorney."

This statute (section 6516), while not denominating the order to be issued thereunder a mandamus, is a provision for an order in effect the same as mandamus, being an order requiring to be done some particular thing therein specified, and which appertains to the office or duty of an official. Opinion of Marshall, C. J., in *Marbury v. Madison*, 1 Cranch, 137, 168, 2 L. Ed. 60.

The court did not err in granting the peremptory writ.

Finding no error in the record, this cause should be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 594)

KING et al. v. FARRIS. (No. 5326.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR — 1012 — FINDINGS OF COURT—EVIDENCE.

Where an action at law is tried to the court without the intervention of a jury upon controverted questions of fact, and there is any substantial evidence reasonably tending to support the findings of the trial court, such findings will not be disturbed on the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. — 1012.]

Commissioners' Opinion, Division No. 3. Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by S. W. King, Jr., and others, a copartnership doing business as King, Collie & Co., against J. A. Farris. Judgment for defendant, and plaintiffs bring error. Affirmed.

Burwell, Crockett & Johnson, of Oklahoma City, for plaintiffs in error. L. G. Pitman, E. E. Hood, and J. D. Lydick, all of Shawnee, for defendant in error.

RITTENHOUSE, C. This suit was instituted upon 27 causes of action arising out of a contract between King, Collie & Co., of Dallas, Tex. and J. A. Farris, for the cotton season of 1908-09, wherein it is alleged that H. B. Sherman was the agent of the plaintiffs, and that all purchases from J. A. Farris should be made through such agent at Shawnee at prices to be designated by him, the cotton so purchased to be shipped to compresses designated by plaintiffs; that

the defendant was to guarantee the weights at compresses, and the grade of said cotton should be determined by the classifications given by the plaintiffs when the cotton reached Dallas, Tex.; that when the cotton purchased from J. A. Farris during said season had been classed by them that the amount that had been paid on drafts drawn by J. A. Farris was \$1,921.80 in excess of the value of said cotton as classed. To this petition an answer was filed, setting up a counterclaim on each cause of action. It was denied that under the terms of said contract the plaintiffs were to arbitrarily grade or classify said cotton or any part thereof; that said cotton was to be graded and classed at its full or actual grade or classification under the American standard of classification of cotton; that the defendant was to be allowed the same grade or classification on cotton sold to plaintiffs as plaintiffs put upon said cotton under the American standard of classification when they resold the same; that notwithstanding said verbal contract and agreement as aforesaid to grade and classify all cotton according to the American standard of classification, and give the defendant full, true, and correct grades and classifications upon said standard classification, and to pay said defendant for said cotton under said classification; that these plaintiffs did falsely, knowingly, and arbitrarily grade and classify said cotton much lower than its actual and real value, had it been graded according to the American standard of classification for grading cotton, and much lower than the grade or classification placed upon said cotton by these plaintiffs when they resold the same, and that the returns made by said plaintiffs to this defendant as to the grades of said cotton were false and untrue, and not according to said American standard of classification, and that said returns were known to be false, untrue, and incorrect at the time they were made by the plaintiffs to the defendant, and that said returns and classifications of said cotton made as aforesaid were for the purpose of cheating and defrauding the defendant out of his lawful and legitimate profits in said cotton; and praying in said cross-petition for a judgment against the plaintiffs in the sum of \$2,729.33. Upon a trial before a referee, a finding was made and judgment subsequently rendered in favor of defendant, J. A. Farris, for \$2,226.81. Motion for a new trial was overruled, and the cause brought here for review, wherein the plaintiffs rely upon but two questions: First, "What the contract was?" and, second, "What was the grade of the cotton?"

The trial court found that in the fall of 1908 the plaintiffs entered into an oral contract with J. A. Farris, whereby the defendant was to purchase cotton during the sea-

son of 1908 and 1909 at prices furnished by the plaintiffs, such cotton to be shipped to compresses to be designated by plaintiffs, samples to be drawn from each bale and sent to W. H. Sherman, at Shawnee, Okl., drafts with bills of lading attached showing number of bales and weight at compress to be made upon such agent; that the defendant was to guarantee weights; that in final settlement the weights at the compress should govern; that afterwards he was to furnish an additional sample to be sent from the compress from each bale, and said cotton to be classed according to the American standard of classification, and the defendant in settlement was to receive the benefit of such classification under which they resold or re-shipped the same; that in addition thereto plaintiffs were to pay the costs of exchange. It was further found by the court that during said cotton season Farris bought 2,278 bales of cotton, shipping the same in the name of the plaintiffs to different compresses; that he complied in all things with the terms of his contract; that all cotton purchased by Farris was received by the plaintiffs, and statements, called "out-turns," showing the number of bales, weight, class, and price, were given to the defendant, under which out-turns he was made to appear greatly in debt to plaintiffs, but that the said out-turns were false, and did not give the proper classification as agreed upon—that is, the American standard of classification, and that said out-turns did not grade as shown by the evidence; that, if the plaintiffs had classed the cotton in their out-turns to Farris according to the shipping class given it, they would have been largely indebted to the defendant; that the plaintiffs by letter informed the defendant that they had given him the benefit of their shipping class, but the court found that the statement was not true at the time when made, and the failure of the plaintiffs to produce the invoices or copies of invoices under which they shipped the said cotton, showing its class, and the total failure of the plaintiffs to make any explanation between their out-turns and shipping class, rendered the evidence of the plaintiffs in support of their petition almost worthless. The court also found that, under the contract as shown by the evidence, none of the plaintiffs' causes of action were sustained.

The plaintiffs contend that the evidence of J. A. Farris as to the grade given the cotton by himself and witness W. A. Thompson was incompetent, because the grade was not made under the American standard of classification, and therefore it is urged that there is a failure of sufficient evidence on this vital point to support the judgment of the trial court. This is not so. J. A. Farris testified that he had in mind the American standard of classification when he graded

the cotton, and that he reduced the grade under the American standard of classification. Objections were made to this evidence, because the cotton was classed under the classifications contemplated by the contract; but the plaintiffs could not be heard to complain, as the classifications were more favorable to them than to the defendant. Had the grading been above the American standard of classifications, then the plaintiffs would have a just complaint. W. A. Thompson, a witness for the defendant, also testified that the cotton was graded according to the American standard of classification, and N. B. Sherman testified that the cotton he examined met the required test, and the drafts were paid upon such grades. Several witnesses testified as to whether the cotton was spotted or not. There was evidence in support of each cause of action set forth in the counterclaim.

The contention which was urged before the trial court, and which is advanced here, is that the grading of the cotton by the plaintiffs at its office in Dallas is binding upon the defendant. The trial court had before it the testimony relative to the contract, it heard the evidence of the plaintiffs as to how the cotton was graded, and it also heard the evidence on behalf of the defendant as to how it was graded by him. There was a positive identification by the defendant and his witnesses of the grade and condition of each shipment of cotton. This was not true as to the witnesses for the plaintiffs, as it was admitted by each witness offered by the plaintiffs that they did not remember having graded the identical cotton in controversy, but merely testified to the general system of grading, explaining how they arrived at the classification, and procured the balance of their information to which they testified from the records in their office, not knowing whether they had personally graded the cotton or not. While the evidence is by no means conclusive, and in some respects very unsatisfactory as to fraud having been perpetrated, yet we feel that there was some competent evidence supporting the contention of the defendant that there was a mistake in the classification of this cotton, and the trial court was justified in finding for the defendant. This case was tried without the intervention of a jury upon the controverted questions of fact as to the proper classification of this cotton, and as there was evidence offered by the defendant showing a classification sufficient to support the findings of the trial court, such findings will not be disturbed by this court on the weight of the evidence.

We therefore conclude that there is evidence in this record reasonably tending to support the findings of the court, and the judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 686)

WALKER v. WALKER. (No. 6362.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

*(Syllabus by the Court.)***APPEAL AND ERROR** \S 614—**RECORD—CASE-MADE—CERTIFICATE—DISMISSAL.**

Where certificate of the trial judge to the case-made is not attested by the clerk, nor the seal of the court attached, the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2708-2713; Dec. Dig. \S 614.]

Commissioners' Opinion, Division No. 2. Error from District Court, Custer County; John R. Tolbert, Judge.

Action between Addison Walker, Executor of Wm. M. Walker, deceased, and Wesley S. Walker. From the judgment the executor brings error. Dismissed.

Phillips & Mills, of Clinton, for plaintiff in error. Darnell & Darnell, of Arapahoe, for defendant in error.

PER CURIAM. The case-made is signed by the district judge, but is not attested by the clerk, nor is the seal of the court attached thereto. Under the authority of Stallard v. Knapp, 9 Okl. 591, 60 Pac. 234; Ollgschlager v. Grall, 13 Okl. 632, 75 Pac. 1131; Oklahoma City v. McKean, 39 Okl. 300, 135 Pac. 19; Tarkenton v. Carpenter, 150 Pac. 482; Board of Com'rs of Creek County v. State ex rel. Jones, 150 Pac. 455; In re Garland, 153 Pac. 153, this appeal should be dismissed.

We, therefore, recommend that the appeal be dismissed.

PER CURIAM. Adopted in whole.

(49 Okl. 785)

In re BACON'S ESTATE.**WAKEMAN v. GREENAN et al.**

(No. 7411.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR** \S 568—**CASE-MADE—SETTLEMENT—NOTICE OF TIME AND PLACE—SHERIFF'S RETURN.**

Where a sheriff's return filed in this court and attached to the case-made which is attached to the petition in error shows due notice to defendant in error of a time and place when and where the case-made will be presented for settlement, but the certificate of the trial judge settling the same omits to show the particular place of settlement, and only shows it was done at a time corresponding with such notice and within the proper judicial district, it is held (1) that such return is prima facie evidence of such notice, and (2) that it will be presumed, in the absence of anything appearing to the contrary, that the same was settled at the place specified in the notice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. \S 568.]

2. APPEAL AND ERROR \S 565—**CASE-MADE—FILING—DISMISSAL.**

Where a petition in error, without case-made attached, is filed in this court, and afterwards, within the time allowed by law to commence proceedings in this court to review a judgment or order of a lower court, a case-made is also filed in this court, and then or later attached to the petition in error, there is at least substantial compliance with section 4442, Stat. 1893 (section 5240, Rev. L. 1910), and this court acquires jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2507-2510, 2554; Dec. Dig. \S 565.]

3. APPEAL AND ERROR \S 562—**CASE-MADE—MOTION TO WITHDRAW LETTER AND RESPONSE.**

Where a letter suggesting and the trial judge's response refusing amendments desired by defendant in error to a case-made are attached thereto, the bare statement that said letter and response are no part of the case-made, but were attached without authority of law or the knowledge or consent of the defendant in error, and is a private letter never filed in the trial court, is not sufficient to require this court, upon request of such defendant in error, to grant his request to withdraw the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2495-2499; Dec. Dig. \S 562.]

Error from District Court, Coal County; Chas. B. Wilson, Judge.

Action by E. I. Wakeman, formerly guardian of Ellen Bacon, a minor, against Patsy Greenan, as guardian of Ellen Bacon, and another. Judgment for defendants, and plaintiff brings error, and defendants file motion to dismiss and ancillary motions to strike sheriff's return and withdraw a letter from the case-made. Motions overruled.

Gordon Fryer, of Atoka, for plaintiff in error. G. T. Ralls, of Coalgate, for defendants in error.

THACKER, J. This decision is upon a motion by defendant in error to dismiss the petition in error herein, and also upon the former's accompanying motion to strike a sheriff's return attached to the case-made to show due notice of presentment of case-made to the trial judge for settlement, and also upon the first-mentioned party's request for leave to withdraw from attachment to said case-made a letter from his attorney to the trial judge suggesting amendments and a response thereon by the latter refusing to allow the same and stating his reasons therefor. The essential facts, when not expressly stated, will be understood from the points decided.

[1] The statutes (sections 4444, 4445, Stat. 1893, the same being sections 5242 and 5244, Rev. L. 1910) do not prescribe any mode of service of such notice of presentment of case-made for settlement, nor any mode of proof of such service; and, although the mode of proof adopted in the instant case is not to be commended, said sheriff's return, being sufficient in form, is prima facie proof of such service (Jones v. Balsley & Rogers et

al., 25 Okl. 344, 106 Pac. 880, 138 Am. St. Rep. 921, and R. L. McDonald & Co. v. Swisher, 57 Kan. 205, 45 Pac. 593), there being nothing in the case-made, nor in the certificate of settlement of the same, and no affidavit or other evidence offered by the movant that the recitals in said return are not true. The certificate of the judge settling the case recites that "on this, the 7th day of October, 1915, in the county of —, at —, Oklahoma, and within the Twenty-Sixth judicial district, the above and foregoing case-made was presented," etc., for settlement; but, notwithstanding the omission of the county and the place therein at which the case was settled, it will be presumed, in the absence of anything appearing to the contrary, that the same was done at the place stated in said notice.

[2] The mere fact that the petition in error was first filed herein without the case-made attached, the latter being filed later and now attached, both filings being within the six months period allowed for bringing cases to this court for review, does not defeat the jurisdiction of this court, and is not a ground for dismissal.

[3] The bare statement that said letter and response thereon in regard to amendments of the case-made is no part of the case-made, and was attached without authority of law or the knowledge or consent of defendant in error, and is a private letter never filed in the trial court, is not sufficient to require this court to permit the requested withdrawal by the defendant in error.

(49 Okl. 795)

**BOARD OF COM'RS OF CUSTER COUNTY
et al. v. CITY OF CLINTON.**

(No. 7422.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. TAXATION — §914 — DELINQUENT TAXES — INTEREST, PENALTIES AND FORFEITURES — DISPOSITION.

By section 2, art. 3, c. 43, Sess. Laws 1895, p. 220, amending section 1, art. 10, c. 70, St. 1893, and by section 3, art. 9, c. 32, Sess. Laws 1897, p. 257, it was provided that all interest, penalties, and forfeitures upon delinquent taxes should be paid into the county sinking fund.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1751; Dec. Dig. § 914.]

2. TAXATION — §908 — DELINQUENT TAXES — INTEREST, PENALTIES AND FORFEITURES — DISPOSITION — REPEAL OF STATUTE.

Said provisions were not repealed by the act of March 12, 1897, amending section 2, art. 3, c. 43, Sess. Laws 1895.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1740; Dec. Dig. § 908.]

3. TAXATION — §908 — DELINQUENT TAXES — PENALTIES — DISPOSITION — VALIDITY OF STATUTE.

Sections 6771 to 6775, both inclusive, imposing penalties upon delinquent taxes and making provision for the disposition thereof, are constitutional and valid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1740; Dec. Dig. § 908.]

4. CONSTITUTIONAL LAW — §229, 284 — EQUAL PROTECTION — DUE PROCESS — TAXATION.

Such statutes do not deny the taxpayer the equal protection of the laws, nor deprive him of his property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 685, 893-896; Dec. Dig. § 229, 284.]

Sharp, J., dissenting.

Error from District Court, Custer County; Thomas A. Edwards, Judge.

Action by the City of Clinton, a municipal corporation, against the Board of County Commissioners of Custer County and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

A. E. Darnell, of Arapaho, for plaintiffs in error. Geo. T. Webster, of Clinton, for defendant in error.

HARDY, J. The city of Clinton brought suit in the district court of Custer county against the board of county commissioners of Custer county and G. D. Witt, treasurer, and his successors in office, seeking to recover against said defendants certain sums alleged to be due plaintiff as penalties upon certain city taxes levied upon property within the corporate limits of said city of Clinton. Upon trial of the case judgment was rendered in favor of plaintiff in the sum of \$2,022.10, and defendants bring error.

[1-3] The questions of law involved in this case with reference to the right of the city or of the county to the penalties upon such taxes have been determined in No. 7214, Geo. K. Hunter, County Treas., v. State ex rel. City of Shawnee, 154 Pac. 545, in which it was held that, under the laws in force at the time the penalties involved accrued, it was the duty of the county treasurer to pay same into the county sinking fund, and to that extent the decision in that case is controlling here.

A number of counsel have been permitted to appear as amici curiæ, and different questions have been presented by them, one of which is that should the court be of opinion that the county was entitled to the penalties involved this holding would not be conclusive in an action brought by a city having a charter form of government. This question is not involved in this case, and was not presented or considered in case No. 7214.

It is further urged by counsel that, if the statute be construed so as to entitle the county to said penalties, it would render the statute void as being in violation of various constitutional provisions regulating the levy and collection of taxes.

In this connection it is well to observe that the penalty is not properly a part of the tax, and that neither the city nor the county levy a penalty, but, on the contrary, the Legislature has exercised its sovereign power and imposed these penalties as an ad-

ditional charge or punishment for delinquencies upon the part of the taxpayer in order to hasten the payment of the taxes due. The penalty is not created by the levy of the tax, nor has the Legislature authorized the city or the county to impose the same, and the fund being created by the Legislature, it follows that the Legislature has the right to dispose of said fund to the same extent as other fines and penalties arising from the violation of other laws of the state or the failure to perform other duties. *City of New Whatcom v. Roeder*, 22 Wash. 570, 61 Pac. 767; *Shultz v. Ritterbusch*, County Treas., et al., 38 Okl. 478, 134 Pac. 961.

[4] Neither can it be said that the statute imposing said penalties and regulating the disposition thereof violates any of the provisions of the federal Constitution. *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725.

The judgment of the court is therefore reversed, and the cause remanded to the trial court, with directions to enter a decree for defendants. All the Justices concur, except SHARP, J., who dissents.

(64 Okl. 640)

STITCH et al. v. DANSINGER BROS.
(No. 5779.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐773—FAILURE TO FILE BRIEF—REVERSAL.

The syllabus in *Messer v. White Sewing Machine Co.*, 149 Pac. 1097, is adopted as the syllabus in this case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108–3110; Dec. Dig. ⇐773.]

Commissioners' Opinion, Division No. 2. Error from County Court, Payne County; W. H. Wilcox, Judge.

Action between N. A. Stitch and another and Dansinger Bros. From the judgment, the parties first mentioned bring error. Reversed, and remanded for new trial.

J. M. Springer, of Stillwater, for plaintiffs in error. Freeman Miller, of Stillwater, for defendant in error.

PER CURIAM. This cause was docketed in this court on November 11, 1913, and was submitted on December 6, 1915. The plaintiff in error duly filed his brief, as required by the rules, on August 14, 1915, but the defendant in error has filed no brief, nor asked for an extension of time; or given any reason for not doing so. We have examined the record and brief of plaintiff in error, and the brief reasonably sustains the contentions therein.

We, therefore, recommend that the judgment be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(64 Okl. 671)

AUSTIN v. CAMPBELL. (No. 6489.)
(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐773—FAILURE TO FILE BRIEF—REVERSAL OF JUDGMENT.

The same as the second paragraph of the syllabus in *Taylor et al. v. J. H. Wade & Co.*, 44 Okl. 294, 144 Pac. 559.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3104, 3108–3110; Dec. Dig. ⇐773.]

Commissioners' Opinion, Division No. 2. Error from County Court, Bryan County; J. L. Rappolee, Judge.

Action by J. L. Austin against W. L. Campbell. Judgment for defendant, and plaintiff brings error. Reversed.

Porter Newman, of Durant, for plaintiff in error. W. H. Ritchey, of Durant, for defendant in error.

PER CURIAM. The plaintiff in error has served and filed brief in this cause, and the authorities cited therein seem to reasonably sustain the assignments of error. No brief has been filed by the defendant in error, or no reason given for such default.

Upon the authority of *Taylor et al. v. J. H. Wade & Co.*, 44 Okl. 294, 144 Pac. 559, and cases cited therein, the prayer of the petition in error is granted, and the judgment appealed from is reversed, and the cause remanded to the trial court, with directions to sustain the demurrer to the motion to modify the judgment, and to take such further proceedings therein as may be consistent with the law and procedure in such cases provided.

PER CURIAM. Adopted in whole.

(49 Okl. 649)

DRUMMOND v. DRUMMOND et al.
(No. 7822.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. ACTION ⇐64 — COMMENCEMENT — FILING OF PETITION—SUMMONS.

Under section 3931, Stat. 1893 (section 4703, Rev. Laws 1910), where the summons in an action for divorce is in due time served, the court acquires jurisdiction of the res or subject-matter of the action as of the date of the filing of the petition and issuance of summons thereon by virtue of the doctrine of relation.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 725–734; Dec. Dig. ⇐64.]

2. PROHIBITION ⇐5 — RIGHT TO REMEDY — MAINTENANCE OF DIVORCE SUITS—CONFLICTING JURISDICTION.

Where a husband commenced action for divorce against his wife in the district court of a county, and thereupon said wife commenced action for divorce and incidental relief against him in the district court of another county, and it does not appear that there is or will be any sharp and intolerable conflict of jurisdiction between said courts against which there is no adequate remedy at law, the writ of prohibition will

not issue to prevent the latter court from exercising jurisdiction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20-30; Dec. Dig. ¶5.]

Original application by Lee Drummond for writ of prohibition to prevent the district court of Oklahoma county from exercising jurisdiction in a divorce suit commenced by Bessie Drummond against applicant after divorce suit commenced by him against her in another county. Writ denied.

L. A. Williams, of Dewar, and Stuart, Cruce & Cruce, of Oklahoma City, for plaintiff. Harold Lee and G. A. Paul, both of Oklahoma City, for defendant.

THACKER, J. This is a case in which this court is petitioned by Lee Drummond for a writ of prohibition to prevent the district court of Oklahoma county from exercising jurisdiction in an action for divorce and incidental relief commenced by his wife, Bessie Drummond, therein on the third day after he had commenced an action for divorce against her in the district court of Okmulgee county.

It appears that on October 18, 1915, the plaintiff here duly filed his petition and thus commenced his action in Okmulgee county and caused summons to be duly issued to Oklahoma county, where his wife, Bessie Drummond, then resided. This summons was returned "not served," and no service was obtained upon her until an alias summons issued on October 28, 1915, was served upon her on November 3, 1915. In the meantime, to wit, on October 21, 1915, she commenced her said action against him in Oklahoma county, where she then resided, and caused summons then issued therein to be served on him on October 23, 1915.

The plaintiff here filed in the district court of Oklahoma county an application to dissolve an injunction that had been issued therefrom restraining him from disposing of any of his property pending her action in that court, and also filed a motion to set aside the order allowing her alimony pendente lite, both upon the ground that said court had no jurisdiction of her said action because of the pendency of the prior action commenced by him in the district court of Okmulgee county, which application and motion were overruled before plaintiff filed his petition in this court for a writ of prohibition.

[1, 2] There can be no question but that the action in the district court of Okmulgee county was the first commenced (section 3931, Stat. 1893; section 4703, Rev. Laws 1910), and, summons having been served in due time so as to perfect the jurisdiction of that court, the same must be by relation regarded as prior to that of the district court of Oklahoma county. Chicago, K. & W. Ry. Co. v. Board of Commissioners of Chase County, 42 Kan. 223, 21 Pac. 1071. Also see 1 Modern American Law, § 36, p. 231; 7 R.

C. L. § 106, pp. 1068, 1069; Farmers' L. & T. Co. v. Lake St. El. Ry. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Heldritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729; Wells v. Montcalm Circuit Judge, 141 Mich. 53, 104 N. W. 318, 113 Am. St. Rep. 520. This would be true even if section 3892, Stat. 1893 (section 4659, Rev. Laws 1910) was applicable, which does not appear. Kelly-Goodfellow Shoe Co. v. Todd, 5 Okl. 360, 49 Pac. 53; Raymond v. Nix, Halsell & Co., 5 Okl. 656, 49 Pac. 1110.

In 1 Modern American Law, 205, it is said: "Divorce is in rem because the status of one or both parties is thereby changed, and the judgment binds the world."

And if the res, though intangible, was first impounded, so far as susceptible of being impounded, by the district court of Okmulgee county, it would seem to follow that to the extent the same was so impounded the district court of Oklahoma county acquired no jurisdiction. M., K. & T. Ry. Co. v. Bradshaw, 37 Okl. 317, 132 Pac. 327; St. L. & S. F. Ry. Co. v. Crews, 151 Pac. 879.

In the case of State ex rel. Baumle v. District Court of Tenth Judicial Dist., 145 Pac. 563, however, the Northwestern Iron Co. v. Land, etc., Co., 92 Wis. 487, 66 N. W. 515, is approvingly quoted as follows:

"In connection with the application of this rule governing cases of conflicting jurisdiction, the term 'jurisdiction' is not used in its absolute sense. It is a rule of comity and discretion."

Indeed, it appears that if two courts of concurrent jurisdiction "do actually proceed to final judgment on the same cause of action, the judgment first in time, even in the later case, is a binding adjudication in the earlier." 1 Modern American Law, § 36, pp. 230, 231; 24 Am. & Eng. Enc. L. (2d Ed.) 833; Shepard v. Stockham, 45 Kan. 244, 25 Pac. 559; Chicago, etc., Ry. Co. v. Anderson County, 47 Kan. 766, 29 Pac. 96; Bolen Coal Co. v. Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810.

In 1 Modern American Law, 216, it is said:

"The same cause of action may be brought before two or more courts of the same state or government, or of different governments, and the same defendant be thus required to defend in each court. In such cases neither court will attempt directly to restrain the other; but the court which last assumed jurisdiction will generally, out of comity to the court whose power was first invoked, stay further proceedings in the case before itself. The defendant may also have an injunction issued against plaintiff restraining him from further proceedings in the second or later suit. This does not bind the court in which the latter suit is pending, but indirectly stops such further proceedings by acting on the party."

Also as to this see St. L. & S. F. Ry. Co. v. Crews, supra.

And, as said in 9 R. C. L. § 213, p. 413, citing the case of Cook v. Cook, 159 N. C. 46, 74 S. E. 639, 40 L. R. A. (N. S.) 83, and Ann. Cas. 1914A, 1137, with notes:

"One action, to be available as a plea in abatement to another, must involve the same cause of action. In actions for divorce, the one by the

husband, and the other by the wife, though the subject-matter, viz., the marriage status of the parties, is the same, the conduct of the parties which gives rise to the cause or ground for divorce is not the same, and therefore it would seem on principle that the pendency of an action by one spouse for a divorce on the ground of the misconduct of the other spouse cannot be pleaded in abatement of another action wherein the position of the parties as plaintiff and defendant is reversed. * * * But it has been also held that, where the husband and wife reside in different counties in the same state, and the wife commences an action for a divorce in the county in which she resides, and the husband thereafter begins a like action in the county in which he resides, and conflicting orders are made in the two actions as regards the temporary custody of the children, a writ of prohibition will lie to prevent the court in which the second action is commenced from assuming jurisdiction."

Also see 1 Corpus Juris, §§ 83, 107, pp. 66, 82.

It will be seen from the facts stated that no such sharp and intolerable conflict has arisen between the two district courts mentioned as to authorize this court to issue a writ of prohibition to either or to justify the exercise in any other manner of its constitutional power of supervisory control.

For the reasons stated, the petition should be denied. All the Justices concurring.

(54 Okl. 667)

A. L. JEPSON MFG. CO. v. SHANK et al.
(No. 6374.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. ESTOPPEL ⇐75 — CLOTHING ANOTHER WITH TITLE—INDICIA OF OWNERSHIP.

The old common-law maxim "that no one can transfer a better title to a chattel than he himself possesses" must, in the administration of justice, be properly qualified and restricted. If the owner has done nothing to clothe the seller with the indicia of title, the maxim is sound. But where the owner has given the seller express power to sell, and he does sell clothed with the indicia of ownership, the purchaser takes title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 192-195; Dec. Dig. ⇐75.]

2. PRINCIPAL AND AGENT ⇐103, 160½ — SALES—RESALE BY AGENT.

That an agent cannot sell the property of his principal in payment of his own debt is well settled. But when an alleged principal agrees that the agent may sell or trade the property for what he pleases, and pay him for it in cash, at an agreed price, the agent becomes a purchaser of the property from his alleged principal, and when he resells it, that sale is made on his own account; for it may be sold or exchanged for something that the alleged principal could not handle, and would not have, and he has agreed not to look to that trade, the thing traded, or the thing traded for for his pay, but to look to his alleged agent to pay him in cash. And if the alleged agent sells it to one he owes on a debt, the purchaser takes title; and the alleged principal must look to the alleged agent for the cash price he agreed to accept.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278-293, 353-359, 367, 588; Dec. Dig. ⇐103, 160½.]

Commissioners' Opinion, Division No. 2 Error from District Court, Kay County; W. M. Bowles, Judge.

Action by the A. L. Jepson Manufacturing Company, a corporation, against A. C. Shank and another. Judgment for defendants, and plaintiff brings error. Affirmed.

W. K. Moore, of Ponca City, for plaintiff in error. W. B. Clark and C. B. Harrold, both of Ponca City, for defendants in error.

BRETT, C. This is a suit in replevin, and was commenced by the plaintiff in error, which will be referred to as plaintiff, against the defendants in error, who will be referred to as defendants, to recover a player piano.

The material facts in the case are that the plaintiff is a manufacturer of pianos, and employed the Herrick Music Company at Ponca City to handle its instruments under an alleged consignment contract. But this contract, however, provided that:

"All pianos sold for cash or traded for anything other than negotiable notes, or lease contracts, shall be settled for by us [Herrick Music Company] in cash as soon as sold."

The defendants bought the player piano, in controversy, of the Herrick Music Company for \$650. The Herrick Music Company owed the defendants \$573 for automobile repairs, tires, gasoline, etc., and the defendants paid for the instrument by crediting the Herrick Music Company in full, and paying the balance of \$77 in cash. The plaintiff replevied the instrument, claiming the Herrick Music Company had not paid for it, and that it held title to the instrument, under the terms of its contract with the Herrick Music Company, until it was paid for. The case was tried to the court without a jury, and resulted in a judgment for the defendants, and the plaintiff appeals to this court from that judgment. We think the judgment is correct.

[1] 1. The old common-law maxim, upon which the plaintiff relies, "that no one can transfer a better title to a chattel than he himself possesses," never could, and never can, be the basis of justice, unless that maxim is properly qualified and restricted. If the owner has done nothing to clothe the seller with the indicia of title, the maxim is sound. But where, as in the case at bar, the owner gives the seller the express power to sell the property, and he does sell it, clothed with all the indicia of ownership, and the express right to sell it, to say that his vendee got no title, would be subversive of every principle of common sense, fair dealing, and justice.

[2] 2. But the plaintiff contends that the Herrick Music Company were only agents of the plaintiff, and had no right to sell the property of the plaintiff, in payment of their own debt. That statement, as an abstract proposition, is correct; but has no application to the facts of this case. For under

the terms of the contract between the plaintiff and the Herrick Music Company, the Herrick Music Company had the right to sell or trade these pianos to whoever they pleased, and for whatever they pleased, the only condition being that if they "sold for cash or traded for anything other than negotiable notes, or lease contracts," they should at once settle with the plaintiff in cash, at the wholesale price. That permitted them to sell the property for what they pleased and to make sale contracts, which were not on the account of plaintiff, their alleged principal. And where they made such sales, they became purchasers of the property from their alleged principal, and resold on their own account to the purchaser. For where the alleged principal agrees that the agent may sell or trade the property for what he pleases, and pay him for it in cash at an agreed price, the agent becomes a purchaser of the property from his alleged principal. And when he resells it, that sale is not made on the account of his principal, but is made on his own account. For it may be sold or exchanged for something that the alleged principal could not handle and would not have. And he has agreed not to look to that trade, the thing traded, or the thing traded for, for his pay, but to look to his alleged agent to pay him in cash. And if the alleged agent trades it to some one he owes, for the debt he owes, instead of trading it to some one else, and for something else, that purchaser will take title. And the alleged principal under his agreement must look to the agent for the cash price which he agreed to accept, since his agreement was made wholly independent of and without regard to the thing the agent might sell or trade the property for. In *Ex parte White*, in *re Nevill*, 6 L. R. Chan. App. Cases 397, the court says:

"* * * If the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different from those fixed by the contract. He is not guaranteeing the performance, by the persons to whom he sells, of their contract with him, which is the proper business of a *del credere* agent; but he is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in such a case is making, on his account, a contract of purchase with his alleged principal, and is again reselling."

This reasoning, we think, is sound, and is in harmony with the cases we have examined on this question. *Chickering et al. v. Bastress et al.*, 130 Ill. 206, 22 N. E. 542, 17 Am. St. Rep. 309; *Wilder & Co. v. Wilson*, 16

Lea (Tenn.) 548; *Bent v. Jenkins*, 112 Ala. 485, 20 South. 655.

And, since the Herrick Music Company under this contract became purchasers of the property, their vendee took title; and we think the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(49 Okl. 679)

MILES F. BIXLER CO. v. OLMSTEAD et al.
(No. 5877.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftarrow 773—FAILURE TO FILE BRIEF—REVERSAL—REVIEW.

Where plaintiff in error has prepared, served, and filed a brief, as required by the rules of this court, and there is no brief filed and no reasonable excuse given for its absence on the part of defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained; but where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. \Leftarrow 773.]

Error from County Court, Kay County; Claude Duvall, Judge.

Action by the Miles F. Bixler Company against Fred Olmstead and another, partners, as Olmstead Bros. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions to grant new trial.

J. E. Curran, of Blackwell, for plaintiff in error. John S. Burger, of Blackwell, for defendants in error.

HARDY, J. This case was commenced in the justice court by plaintiff in error against defendants in error, seeking to recover judgment for certain goods, wares, and merchandise sold to defendants in error. Judgment was for defendants in error, and on appeal to the county court judgment was again rendered for defendants in error, from which plaintiff in error prosecutes this appeal.

Counsel for plaintiff in error has filed a brief setting up a number of assignments of error for reversal of this case, one of them being that the verdict is not sustained by sufficient evidence. There is no brief on file on behalf of defendants in error, although brief of plaintiff in error has been on file since September 4, 1915. From an examination of the brief of counsel for plaintiff in error it appears that a number of the grounds for reversal are supported by good authorities, and would seem to be well taken.

It is a well-established rule in this jurisdiction that where counsel for plaintiff in error, in conformity with the rules of this court, has prepared, served, and filed brief,

in which, with other contentions, it is insisted that the judgment and verdict appealed from are not reasonably supported by the evidence, and there is no brief filed and no reason given for its absence on the part of defendant in error, the court is not required to search the record to find some theory upon which the judgment below may be sustained; but where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error. The authorities upon this point are collected in case No. 4363, *Messer & Westbrook v. White Sewing Machine Co.*, 149 Pac. 1097 (not yet officially reported).

On authority of such holding by this court, the judgment of the court below is reversed, and the cause is remanded, with directions to grant a new trial. All the Justices concur.

(49 Okl. 782)

BARKER v. NATIONAL OIL & DEVELOPMENT CO. (No. 4802.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(*Syllabus by the Court.*)

JUDGMENT \Leftrightarrow 381 — **POWER TO VACATE OR MODIFY.**

The judgments, decrees, or other orders of courts of general common-law jurisdiction, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 725; Dec. Dig. \Leftrightarrow 381.]

Error from District Court, Washington County; R. H. Hudson, Judge.

Action by Norman Barker against the National Oil & Development Company. From an order setting aside a default judgment for plaintiff, plaintiff brings error. Affirmed.

Norman Barker, of Bartlesville, pro se. James A. Veasey and J. P. O'Meara, both of Tulsa, for defendant in error.

SHARP, J. On September 10, 1912, Norman Barker commenced an action in the district court of Washington county, against the National Oil & Development Company, seeking the cancellation of a certain oil and gas mining lease, executed by the former owner of certain lands, the title to which was afterwards acquired by plaintiff. In the summons issued and served on defendant, October 10, 1912, was named as the answer day. On October 11th, the defendant being in default for want of an answer or other appearance, a decree was rendered in favor of plaintiff, and his title quieted in and to the demised premises. On October 15th following, being a day of the regular September term of court, on application of defendant's attorneys made in open court, the decree theretofore rendered in said cause was va-

cated and set aside, and leave given the defendant to file a demurrer to plaintiff's petition. To the action of the court in both respects, plaintiff excepted, and the case is brought to this court to reverse the action of the trial court in setting aside said default judgment.

The only authorities cited in the brief of counsel for plaintiff in error are *Long v. Board of County Commissioners*, 5 Okl. 128, 47 Pac. 1063, and *List v. Jockheck*, 45 Kan. 348, 748, 27 Pac. 184. The latter case is not in point, and the former was expressly overruled by this court in *Todd v. Orr et al.*, 44 Okl. 459, 145 Pac. 393, the opinion being written since the filing of the brief of plaintiff in error. The judgment rendered in favor of plaintiff was under the control of the trial court during the term at which it was rendered. As was said by this court in *Phillip Carey Co. v. Vickers*, 38 Okl. 643, 134 Pac. 851, quoting from *Bronson v. Schulten et al.*, 14 Otto, 410, 26 L. Ed. 797:

"It is a general rule of law that all the judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court."

The same general conclusion was reached in the subsequent case of *Todd et al. v. Orr*, supra, where it was held that courts of general common-law jurisdiction have the inherent power upon their own motion to set aside a verdict and grant a new trial on account of prejudicial error, when done at the same term of court at which the verdict was returned or judgment rendered, and that this power will not be deemed to have been taken away by statute unless the intention is clearly made to appear. The opinion reviews many authorities, including decisions both of this court and of the Criminal Court of Appeals, and from which it may fairly be said that the power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed, not alone by their solicitude for the rights of litigants, but also by the considerations of justice to themselves as instruments provided for the impartial administration of the law.

What caused the court to vacate and set aside the judgment we are not informed. It may have been that the court had become convinced of its own error in rendering the judgment, or it may have been on account of some excusable neglect on the part of the defendant in failing to enter its plea in said action. In either event the court had the authority to do what it did, and, having the authority and it not appearing that error was committed, or that there was an abuse of discretion in setting aside the judgment and permitting the defendant to file a demurrer, its action will not be reversed. A better practice, in such cases, would be for

the moving party to prepare and file a written motion, but as independent of such motion the court has the inherent power of its own volition to make the order, it cannot be said that a written motion was a necessary prerequisite.

The judgment of the court is affirmed. All the Justices concur.

(54 Okl. 566)

CHICAGO, R. I. & P. RY. CO. v. FOLTZ
(No. 4722.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT — INJURY TO SERVANT — NEGLIGENCE — PRESUMPTIONS FROM ACCIDENT.

An accident to an employé in the course of his employment carries with it no presumption of negligence on the part of the employer. The negligence of the employer is an affirmative fact to be established by the plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.]

2. NEGLIGENCE — "ACTIONABLE NEGLIGENCE"—ELEMENTS.

To constitute actionable negligence where the wrong is not willful and intentional, three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.]

For other definitions, see Words and Phrases, First and Second Series, Actionable Negligence.]

3. EVIDENCE — 123, 317 — HEARSAY — RES GESTÆ.

Evidence of a statement of an employé of the company examined, and held to be a narrative of a past act subsequent to the accident, and not a part of the res gestæ; the admission of such hearsay evidence being prejudicial error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368, 1174-1192; Dec. Dig. § 123, 317.]

Commissioners' Opinion, Division No. 3. Error from District Court, Major County; James W. Steen, Judge.

Action by Charles Foltz, administrator of the estate of Sidney Foltz, deceased, against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff and defendant brings error. Reversed in the name of Maggie Foltz, as administratrix of the estate of Sidney Foltz, deceased. Reversed and remanded.

C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, J. G. Gamble, of Des Moines, Iowa, K. W. Shartel, of Oklahoma City, and Brady & Willis, of Fairview, for plaintiff in error. A. Fairchild, of Enterprise, Or., Harry Randall, of Fairview, A. C. Beeman, of Cherokee, and E. C. Wilcox, of Anthony, Kan., for defendant in error.

RITTENHOUSE, C. This is an action by Maggie Foltz, as administratrix of the estate

of Sidney Foltz, deceased, to recover damages from the Chicago, Rock Island & Pacific Railway Company for the wrongful death of her son, Sidney Foltz, deceased, on or about November 19, 1909, while said deceased was an employé of the company as a section laborer, engaged on the day of his death in removing drift lodged against defendant's bridge over Eagle Chief creek, in Alfalfa county, Okl. It is alleged in the petition:

"That on and prior to the 14th day of November, 1908, the said defendant, as a part of its roadbed in the county of Major and state of Oklahoma aforesaid, had constructed a bridge over Eagle Chief creek, which bridge and portion of the roadbed of said defendant was necessary and used in the commerce aforesaid between the states; that said Sidney Foltz was an inexperienced section man; he did not know of the various dangers that he would encounter in the work herein mentioned; that on said 14th day of November, 1909, the said Eagle Chief creek was in a turbulent, swollen, and surging condition, and said stream bore in its current a great quantity and number of logs, drift, and trash, which was about to and did accumulate at said bridge, and was extremely apt to seriously damage said structure or demolish it and cause it to be swept away in the current, and said Amos Craig, foreman of said defendant, who had charge of the roadbed and repairing of said bridges and the general care and protection of the same from such drift, thereunto duly authorized, did on said 14th day of November, 1909, order the said Sidney Foltz to take a certain hook and pole and to assist other workmen in clearing said bridge of said drift and trash as might be lodged or about to be lodged against it, and to cause all of said drift and trash borne by said stream to pass under and beyond said bridge and to avert danger and damage thereby by reason of said swollen stream and the rapidity of the current as aforesaid; that, notwithstanding the fact that said Sidney Foltz was inexperienced and did not apprehend or appreciate the danger of said work, and that said defendant owed to said Sidney Foltz the duty to furnish him with reasonably safe tools and appliances with which to work, to not order him to work in a dangerous place, to furnish him with reasonably competent co-servants to work with, and the use of ordinary care in each of said particulars, the defendant wholly failed to recognize its duties as aforesaid, and furnished said Sidney Foltz with a pole that was fitted with a point or hook at the end thereof with which to loosen said drift, logs, and trash and to prod the same under said bridge, which pole was warped and crooked and insufficient in size, and had a dull point or hook on the end thereof, and was not a reasonably safe tool or appliance with which to work, and furnished said Sidney Foltz an unsafe place to work, to wit, said bridge, and furnished said Sidney Foltz grossly incompetent and inexperienced co-employees and servants who did not know the English language, and could not understand or speak the same, and could not hear and understand the command of the said Amos Craig as to what to do in assisting said Sidney Foltz, although given in plain English, all of which the said defendant well knew, or by the exercise of reasonable care could have ascertained and which was unknown to said Sidney Foltz; that by reason of the carelessness of said defendant as aforesaid, all of which was occasioned in and about the care, repair, and preservation of said bridge and roadbed of said defendant in the aid and furtherance of it performing its duty as a common carrier between the said states, the said Sidney Foltz, in the scope of his duty and at the command of said foreman, undertook to push and pull said drift,

logs, and trash, and prevent the same from accumulating and cause the same to float under said bridge and down said stream, and on account of the negligence aforesaid of the said defendant, its servants and employes, said point and said hook slipped and failed to stick into and hold said drift, logs, and trash, and said Sidney Foltz slipped off said dangerous place he was standing, to wit, said bridge, and fell into said stream and drowned."

In support of this petition the plaintiff proved that the deceased was 33 years of age; had had no sickness; had only worked 5 days on the section, and the foreman directed him, with two Mexicans, one named George, to go and remove the drift from the bridge, which was constructed of building timbers and crosspieces extending on either side of the track. He was dressed in heavy clothing, and wore new shoes and gloves. He was seen going in the direction of the bridge on a hand car about 10 o'clock with the two Mexicans. About 12 o'clock the two Mexicans were seen returning. At one o'clock the foreman bore the news of his death to his mother. His coat was found on the bridge. A prod pole that was slivered and liable to catch on the clothing and with a blunt point about one-fourth of an inch square was found across some logs beneath the bridge, one of which logs had a wire around it, running in the direction of some tracks on the bank north of it, at the end of the log, which tracks fit the shoes of the Mexican George. The tracks were deeper at the heel than at the toe, and the wire around the log extended in the direction of the tracks. Another employé had used this prod pole prior to the accident, and was cautioned by the foreman about using it. It was twelve or fifteen feet long and unwieldy to handle. The log around which the wire was found had a number of indentations in it corresponding with the point on the prod pole, and was chipped off and slivered on the side for a distance of about four feet; some of the marks being on the top, and some on the sides. The body of Sidney Foltz, on which there were no wounds or bruises, was found below the bridge. There were no rents in the clothing, except one of four or five inches on the inside of his overalls. The prod pole was sent to the company immediately after the accident.

[1] This is the only competent evidence admitted tending in any manner to substantiate the allegations of the petition. An examination of this evidence discloses that there was no evidence that the deceased was at the time of his death engaged in the removal of the drift as ordered by his employer, nor is there any evidence that he was on the bridge and met his death by falling therefrom, nor is there any evidence that he was using the defective prod pole at the time he met his death, and, while these facts are alleged in the petition, yet there is an absence of proof on the subject. The only eyewitnesses to this accident were two Mexicans, who

were not present at the trial, and whether the deceased met his death through the negligence of the railroad company is a mere matter of guess or conjecture. The only competent evidence tending in the least to throw any light upon the question of how the accident occurred was the evidence that the section foreman had sent the deceased, together with two Mexicans, to go to this particular bridge for the purpose of removing the drift; that they were seen going in the direction of the bridge, and had certain prod poles with them; afterwards the Mexican came back and informed the employer of the accident, and one witness testified that when they returned deceased's coat was lying on the bridge, the prod pole upon some logs, and there were marks on the logs corresponding with the end of the prod pole, and the deceased's body was found about 14 days thereafter below the bridge. These facts, construed together, show that an accident occurred which cost the deceased his life, but such facts do not carry with them the presumption that the railroad company was negligent in failing to furnish a safe place to work and safe tools with which to work, and that by reason of such failure the death occurred. Before plaintiff can recover, it is incumbent upon her to show that the company was guilty of negligence, not that the company may have been guilty of such negligence, but that it was in fact guilty of negligence, and such negligence was the cause of the death. Proof of the accident and death alone is not sufficient to authorize a recovery. In *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the court says:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employé to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. * * * If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony. * * *"

This case is approved and discussed in *St. Louis & S. F. R. Co. v. Rushing et al.*, 31 Okl. 231, 120 Pac. 973; *Solts v. Southwestern Cotton Oil Co.*, 28 Okl. 703, 115 Pac. 776; *Neeley v. Southwestern Cotton Seed Oil Co.*, 13 Okl. 356, 75 Pac. 537, 64 L. R. A. 145; *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191; *Chicago, R. I. & P. Ry. Co. v. Duran*, 38 Okl. 719, 134 Pac. 878.

[2] It is apparent from this record that the plaintiff has failed to show actionable negligence on the part of the company. To constitute such negligence, where the alleged wrong is not willful and intentional, this court has repeatedly held that three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) the

failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure. *Chicago, R. I. & P. Ry. Co. v. Duran*, supra, and cases there cited. In the instant case the negligence relied upon is the fact that the company furnished the deceased with a defective prod pole with which to remove the drift and an unsafe place to work. There is a want of any evidence upon this subject, and therefore the cause at bar does not come within the rule announced.

[3] It is contended by the defendant in error that the want of testimony showing the negligence of the company and the manner in which the deceased met his death was supplied by the testimony of one Elmer E. Law, who testified on behalf of the plaintiff that the Mexican by the name of George, who was present at the time of the accident, told the witness where the deceased was standing, that they had managed to get the wire around the log, that he was pulling on the wire, and the other two were working with their prod poles on the bridge, indicating the log they were working on when deceased fell off the bridge, indicating on what tie the deceased was standing, showed him the tracks in which he stood when the prod pole gave way, and which prod pole was used by the deceased. It is argued that this evidence was admissible as a part of the *res gestæ* and made by an agent of the company while in the discharge of his agency with such company; but an examination of the record shows that it was a narrative by the Mexican to the witness 4 or 5 hours after the accident occurred. It was said in *Gillespie et al. v. First Nat. Bank*, 20 Okl. 768, 95 Pac. 220:

"Declarations and admissions of the officers and agents of a corporation may be proved against the corporation as part of the *res gestæ* when the same are made during the agency of such officer or agent making such declarations or admissions, and when the same are in regard to a transaction depending at the very time, but they cannot be admitted if made as a narrative of a past act subsequent to the transaction. *Abbott's Trial Evidence*, 55; 1 *Greenleaf on Evidence*, 172; *Zane on Banks & Banking*, 169."

In the case of *City of Wynnewood v. Cox*, 31 Okl. 563, 122 Pac. 528, Ann. Cas. 1913E, 349, the court said:

"The objection was that the evidence was incompetent, being the declaration of an agent made subsequent to the accident and only conjecture, and could not bind the principal. In defense of this objection, counsel for plaintiff insist that, as corporations can act only through their agents, and as Whitaker was the general superintendent of this lighting system, he was therefore the agent of the city, and his acts and statements were the acts and statements of the corporation, and also that, if the statement was not received as an admission, it was admissible as a part of the *res gestæ*. In neither of these contentions are we able to concur. The general rule is laid down in the case of *Garske v. Town of Ridgeville*, 123 Wis. 503, 102 N. W. 22, 3 Ann. Cas. 747, to be, in substance, that declarations or admissions of a public officer cannot be given in evidence to bind a municipal cor-

poration of which he is the agent, unless they are a part of the *res gestæ*. This case is fully annotated in volume 3, *American & English Annotated Cases*, at pages 747, 749. And that the statement here sought to be introduced was not a part of the *res gestæ* we think is clear from the circumstances under which it was given.

"*Res gestæ*," as said by Mr. Wharton, in his work on *Criminal Evidence* (section 262), "are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that speaks. In such cases it is not necessary to examine as witnesses the persons who, as participants in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself."

It cannot be said that the statements of the Mexican George to witness Law was a part of the *res gestæ*. The statement formed no part of the circumstances of the accident itself; it was not made under the immediate spur of a transaction. In the case of *Coal-gate Co. v. Hurst*, 25 Okl. 588, 107 Pac. 657, Justice Williams, in writing the opinion, held that statements made by a fellow servant within 20 or 30 minutes after the accident were not a part of the *res gestæ*. See, also, *City of Wynnewood v. Cox*, supra; *Gowen v. Bush*, 76 Fed. 349, 22 C. C. A. 196; *Fredenthal v. Brown & McCabe*, 52 Or. 33, 95 Pac. 1114; *Louisville & N. R. Co. v. Pearson*, Admr., 97 Ala. 211, 12 South. 176; *Garske v. Town of Ridgeville*, 123 Wis. 503, 102 N. W. 22, 3 Ann. Cas. 747.

We therefore conclude that the evidence of Elmer E. Law as to the conversations held with the Mexican George was hearsay evidence and incompetent, and that the court erred in refusing to sustain the demurrer to the evidence or peremptorily instructing the jury.

The judgment should therefore be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(49 Okl. 716)

Ex parte SMITH. (No. 7645.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. STATUTES \S 35 $\frac{1}{2}$ — ENACTMENT — INITIATIVE AND REFERENDUM ELECTION — PROCLAMATION — PUBLICATION.

When the Governor duly issues a proclamation calling an election under the initiative and referendum upon a state question, and said proclamation is filed in the office of the secretary of state, where all persons may have access thereto and procure copies thereof, this will be sufficient publication of same.

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. \S 35 $\frac{1}{2}$.]

2. STATUTES \S 35 $\frac{1}{2}$ — ENACTMENT — INITIATIVE AND REFERENDUM ELECTION — STATUTORY PROVISIONS — PURPOSE.

Under sections 3384 and 3401, Rev. Laws 1910, it is the duty of the state election board, where an election is had upon a date other than

the general election in November, to forward to the county election board not later than 40 days before such election a sufficient number of copies of the text of the measure to be voted upon, together with a copy of the arguments for and against such measure and a copy of the official ballot, bound together in a single pamphlet, with a table of contents, to supply every voter therewith, and an additional number equal to 10 per cent. of the number of such voters, and it is the duty of the county election board to immediately distribute them to the precinct election inspectors, who should not later than five days prior to such election convoke, hold, or cause to be held public meetings of the electors of his district and distribute or cause to be distributed such pamphlets to the assembled voters, and to use all other diligent means of distributing them to all the voters of such election precinct.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35½.]

3. STATUTES \S 35½ — INITIATIVE AND REFERENDUM ELECTION—STATUTORY PROVISIONS—PURPOSE.

The purpose of this provision is to place in the hands of every voter in the state the text of the proposition to be voted upon, with copy of the official ballot and the arguments for and against such proposition, so that the voters may have an opportunity to acquaint themselves with the merits thereof and cast an intelligent ballot thereon.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35½.]

4. STATUTES \S 35½ — ENACTMENT—INITIATIVE AND REFERENDUM ELECTION — VALIDITY.

And while by section 3393 it is provided that the procedure regulating elections under the initiative and referendum is not mandatory, yet a substantial compliance therewith is required, and where it appears that by reason of the failure to substantially comply with the provisions of section 3384 a sufficient number of electors have been deprived of the opportunity to exercise their franchise as to change the result of the election had they participated therein, same will not be upheld.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35½.]

5. STATUTES \S 35½ — INITIATIVE AND REFERENDUM ELECTION—VALIDITY.

Held, under the facts disclosed in the opinion, there was not a substantial compliance with the law and the election held August 4, 1914, upon State Question No. 62, cannot be sustained.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35½.]

6. STATUTES \S 35½ — INITIATIVE AND REFERENDUM ELECTION — CANVASSING OF RETURNS.

Where the state election board met in regular session to canvass the returns of a primary election at which certain state questions were voted upon, and proceeded to canvass the returns upon such state question, but prior to the completion of such canvass one of the members absented himself from the sessions of said board on private business, and thereafter the remaining members complete the canvass and certify the result to the Governor, their action in so doing is valid, and will be upheld.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35½.]

7. STATUTES \S 35½ — SUSPENSION OF OPERATION — REFERENDUM PETITION — EFFECT OF FILING.

The filing of a petition referring to the people an act passed by the Legislature suspends the operation thereof until the same shall have

been approved by a majority of the votes cast at an election held thereon.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. \S 35½.]

Habeas Corpus by P. J. Smith. Writ granted.

McAdams & Haskell, of Oklahoma City, for petitioner. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for respondent.

HARDY, J. Petitioner applies for a writ of habeas corpus, and alleges that he is unlawfully restrained of his liberty by the sheriff of Oklahoma county under and by virtue of an information charging him and others with a violation of the provisions of section 1, c. 128, Session Laws 1913; that said section and said chapter were not in force as valid and subsisting laws at the time said information was filed or at any time since, for the reason that a petition in due form was filed within 90 days after the final adjournment of the Legislature, referring same to the people for approval or repeal, and that an election was had thereon on the 4th day of August, 1914, at which a majority of the voters voting upon said question voted against the repeal of said chapter. Petitioner alleges that said election is illegal because the law regulating same was not complied with in various material particulars, and that said act is still suspended by reason of the filing of said referendum petition.

[1] On June 20, 1914, the Governor issued a proclamation calling an election upon said referendum petition, being State Question No. 62, to be held on August 4, 1914, the day upon which the primary election was held. Petitioner insists that said proclamation should have been published in some way or manner. The law makes no such provision. The proclamation was duly issued and deposited in the office of the secretary of state, and was there among the archives of the state, and all persons desiring so to do could have access thereto and procure copies thereof. A similar question was determined by the Supreme Court of the United States in *Lapeyre v. United States*, 84 U. S. (17 Wall.) 191, 21 L. Ed. 606, where it was held that filing the proclamation of the President with the Secretary of State was a sufficient publication thereof. The witness Rainey, representing petitioners, claims he visited the office of the secretary of state seeking information in reference to the issuance of such proclamation, and was informed that no such proclamation had been filed. He does not state definitely what date he made this inquiry, but, conceding that he did, the proclamation was, in fact, issued and filed, and this was sufficient.

Section 3382, Rev. Laws 1910, requires that arguments for and against measures submitted shall be prepared by a joint committee of the House and Senate and a committee representing the petitioners. No arguments

were offered on behalf of the petitioners, and, the Legislature having adjourned prior to the calling of said election, there was no joint committee of the House and Senate by which arguments could be prepared. Arguments were prepared by Senator Campbell Russell, a member of the state senate, and by Fred S. Caldwell, purporting to be on behalf of the members of the Legislature and other citizens of the state. The state election board caused to be printed 150,000 pamphlets containing a text of the measure, ballot title, and arguments submitted, and of this number 4,000 were delivered to Senator Russell and by him distributed, and 146,000 were distributed by the state election board. These pamphlets were received by the state election board on the 24th day of July and thereafter immediately mailed out to the secretaries of the various county election boards.

[2] Sections 3384 and 3401, Rev. Laws 1910, requires the state election board, where the election on measures to be submitted to the people is held at a general election, to forward to the county election board of each county before the mandatory primary a sufficient number of such pamphlets to supply each voter of his county, and an additional number equal to 10 per cent. of such number of voters, and requires the county election board at the time of furnishing the primary election supplies to furnish each inspector for each precinct wherein a primary election is to be held a sufficient number of copies of the text of such measure to be submitted to popular vote, also a copy of the argument for and against such measure and a copy of the official ballot, bound together in a single pamphlet, with a table of contents, and further provides that, where the Legislature or the Governor shall order a special election for the purpose of referring such measure, the secretary of state election board shall not later than 40 days before any such special election forward such pamphlets to the county election board of each county, who shall in like manner immediately distribute them to the election inspectors for each election precinct, and makes it the duty of such inspectors not later than 5 days prior to the election to convoke, hold, or cause to be held a public meeting of the electors of his district, and distribute or cause to be distributed such pamphlets to the assembled voters, and use all other diligent means of distributing them to all the voters of such election precinct.

At the general election held in 1912, there were cast for United States Senator 250,707 votes. Taking this as a basis, the state election board should have distributed 276,000 such pamphlets, when, as a matter of fact, only 150,000 were distributed, being 126,000 less than the amount contemplated by law. At the primary election August 4, 1914, there were cast for the respective candidates for the different parties for Governor 181,939 votes. There were cast, upon State Question No. 62,

139,080 votes. Of the total number of electors participating in the primary on that day 42,859 did not vote upon said State Question No. 62. At the general election in November there were cast for Governor 253,687 votes. The only means adopted by the state election board to place the pamphlets required in the hands of the voters was to send them to the secretaries of the county election boards on various dates, commencing on the 24th day of July, and continuing thereafter until said pamphlets were distributed. In some of the counties, as shown by the evidence, and it is fair to presume the same condition existed throughout the state, the pamphlets were not distributed by the secretaries of the county election boards until the election supplies were furnished to the various precinct officials, and there was no general distribution of the pamphlets other than such as may have been made by the precinct officials on the day of the primary. If we take the figures of the general election in 1912 as a basis, there were 100,707 qualified electors in the state more than there were pamphlets printed, and, if the general election in 1914 be taken, there were 103,687 electors more than there were pamphlets printed and distributed. Petitioner urges that by reason of these facts the election was invalid. The Attorney General insists that the provisions of the initiative and referendum law are not mandatory, but directory, and that there was a substantial compliance with the terms of the law. By section 3393 it is provided that the provisions regulating the procedure in elections under the initiative and referendum are not mandatory, but, if substantially followed, will be sufficient, and, if the thing aimed at can be attained, and procedure sustained, clerical and mere technical errors shall be disregarded. *Norris et al. v. Cross*, 25 Okl. 287, 105 Pac. 1000.

[3] Petitioner insists that the election on August 4th was a special election, and that the provisions of section 3384 regulating special elections should have been complied with. The Attorney General says that this was a general election, and therefore such was not necessary. Section 3384 requires that, when a state question is voted upon at a general election, before the mandatory primary pamphlets shall be placed in the hands of the precinct inspectors, who shall furnish to each and every voter on said primary election day a copy of the same. This provision has reference to general elections held in November, and the remainder of the section provides that, when any special election is called, they shall be furnished not later than 40 days before the date of said special election, and public meetings shall be held by the precinct inspectors not later than 5 days before the date of such special election. The purpose of this provision is to place in the hands of the voters of the state the text of the propositions to be voted upon, together with a copy of the official ballot and the arguments for

and against such propositions, so that each and every voter of the state may have an opportunity to acquaint himself with the merits of the measure and the arguments for and against the same, and be prepared to cast an intelligent ballot upon said question. Amendments to the state Constitution may be adopted in the same manner, and, when measures of the highest public concern in which every citizen of the state has an interest are to be acted upon by the people at the polls, it is of the greatest importance that the electors be furnished with the information required by this section. If the provisions applying to a special election do not apply to an election on the date of the primary, there is no provision for furnishing the information required at such election. It would be more in harmony with the legislative intent to say that the statutes require in elections held upon dates other than the general election in November that the pamphlets shall be distributed in the manner required for special elections. It is doubtless the general rule as stated in *McCrary on Elections*, § 179:

"That, where the election has been held at the proper time and the proper place, and the voters have had notice and participated in it, the want of such notice as the law provides will not render it void; but, if it appears that due notice has not been given, and that a portion of the voters have thereby been deprived of their right to vote and participate, if it appear that this deprivation is sufficient to change the result if they had voted on the one side or the other, in such a case the election is clearly void."

Upon State Question No. 62 the number voting "Yes" were 86,135, and those voting "No" were 72,945, being a majority against the repeal of said law of 6,810 votes. There were 42,000 voters taking part in this primary who did not vote for or against this measure. There being 183,000 voters participating, there were 33,000 more electors than there were pamphlets printed. There were besides more than 70,000 electors entitled to participate in said election who did not attend the polls that day, and we are unable to say how they would have voted had they been in possession of the information concerning this question that was to be voted upon or whether they would have remained at home.

In *Town of Grove v. Haskell*, 24 Okl. 707, 104 Pac. 56, which involved a county seat election, it was held that, where the provisions with reference to notice were substantially complied with, and there was no averment or showing that the electors did not have actual notice or knowledge of the election, and failed to participate therein by reason thereof, the same would not be held void, and it was said in this connection:

"The vital and essential question in such cases is: Did the want of notice or knowledge result in depriving a sufficient number of the electors of the opportunity to exercise their franchise as to change the result of the election? If not,

then the will of the electors, as expressed, should be sustained."

This case reviews the authorities upon this proposition.

A similar question was decided by the Supreme Court of Nevada in *State v. Davis*, 20 Nev. 220, 19 Pac. 894, where an amendment to the Constitution was voted upon, and it was held that the statutes of 1887 (page 122), providing for the publication of proposed amendments in a daily newspaper of general circulation for 80 days next preceding the general election at which the amendment was to be voted upon, and requiring that as many copies of such paper should be sent without extra compensation to the clerk of each county as there were registered voters therein, and by the clerk mailed to the voters, was a reasonable requirement sanctioned by the Constitution, and that amendments voted on without compliance with such requirements were inoperative.

In *State v. Sengstacken et al.*, 61 Or. 455, 122 Pac. 292, Ann. Cas. 1914B, 230, it is held:

"Where from the number of votes cast at a special election it appears by a comparison of the number of registered voters in the district that no different result was possible had all the voters participated in the election, the failure to comply with the statutory requirements in respect to giving notice will not invalidate the election; but where the statutory notice was not given, and it appeared that from the number of voters registered at the last general election a different result was possible had all voted, the election was invalid."

In *Guernsey v. McHaley*, 52 Or. 555, 98 Pac. 158, the court said:

"The courts are practically unanimous that, where the object of an election and the time and place are provided by general law, the requirement as to notice is directory, and a failure of the officer charged with the duty of posting or publishing such notice to discharge his duty in that regard will not invalidate the election, and it seems equally as well settled that, if the time of the election is to be fixed by some public authority after the happening of some condition precedent, or if some * * * question in like manner is to be submitted to the voters at a regular election, the law authorizing such election, or the submission of such question, and providing for notice thereof, must be strictly followed. *Cooley on Constitutional Limitations*, § 603; *Marsden v. Harlocker*, 48 Or. 90, 85 Pac. 328 [120 Am. St. Rep. 786]; *George v. Oxford Tp.*, 16 Kan. 72; *Stephens v. People ex rel.* 89 Ill. 337."

"The reason for this distinction is that every voter is presumed to know the law and be thereby informed as to the time when, place where, and the officers to be elected, or matters to be determined at a general election held in pursuance to a public statute, and thus to be fully advised in the premises; but, where the election is not held in pursuance of such a general law, or some matter not provided in such law is to be determined thereat, this presumption does not arise, and the law authorizing such election or the submission of such question must be strictly pursued, and the required notice given."

Guernsey v. McHaley, supra; *Marsden v. Harlocker*, 48 Or. 90, 85 Pac. 328, 120 Am. St. Rep. 786; *State v. Staley*, 90 Kan. 624, 135 Pac. 602.

[4-8] The law fixes the date of the general

elections and determines the matters to be voted upon thereat, and each elector of the state is charged with notice of the provisions of said law, but in special questions to be submitted, while the time and place may be fixed by law, yet the questions to be voted upon in the very nature of things cannot be regulated by statute, and in order for the voters to be acquainted with the questions submitted and to inform themselves as to the merits thereof the statute requires these pamphlets to be distributed, and, while section 3393 provides that a substantial compliance is sufficient, yet we think that there must be, in truth and in fact, a substantial compliance. When, as in this case, barely more than half the required number of pamphlets are distributed, and it appears from the actual figures that more than 70,000 voters remained away from the polls, and 42,000 participating in the election failed to vote upon the question submitted, and that there were 33,000 less pamphlets distributed than there were voters participating in the election, this was not a substantial compliance with these provisions within the meaning and intent of the statute with reference to the number of pamphlets distributed, nor were the same placed in the hands of the individual voters of the state in substantial compliance with the law.

It is further objected that the returns upon said proposition were canvassed by two members of the board, the third member not being present, and therefore there was no legal canvass of the result. The board met as required by law to canvass the returns of the primary election, and all the members thereof were present upon different dates during the progress of such canvass, and while canvassing the returns of the primary the returns upon State Question No. 62 were also canvassed as they came in, but prior to the final result one member of the board absented himself on private business, and thereafter the two remaining members continued the canvass, and certified the result to the Governor. There was no irregularity in the canvass, nor is there any claim made that the result as canvassed was incorrect. This objection is without merit.

It is further claimed in the petition that the Governor failed to issue a proclamation declaring the result. We take judicial knowledge of the fact that on September 14, 1914, the Governor issued his proclamation declaring the result of the election held on said State Question No. 62. 16 Cyc. 904; 4 Wigmore on Ev. § 2577; 1 Chamberlayne, Mod. Law of Ev. § 646. The fact that this is a meritorious measure can have no controlling weight; for if, because the measure is meritorious, the requirements of the law may be disregarded, measures that are pernicious and obnoxious may be submitted under like circumstances and be adopted. The

question is of more importance than the merits of the measure under consideration. It involves the right of the electors of this state to be apprised of any proposed changes in the fundamental policies of the state as represented by proposed amendments to the Constitution or by changes in its general laws, and, these requirements being for the information and protection of the electors, substantial compliance therewith having been required, nothing less will suffice.

[7] By reason of the failure to substantially comply with the requirements of the law regulating the distribution of pamphlets containing the text of the measure to be voted upon, the sample ballots, and the arguments for and against said measure, we think the election was invalid. The petition, having been filed referring this act to the people for approval or rejection, suspended the operation thereof until an election is had thereon (Const. art. 5, § 3; William's Ann. Const. § 53); and therefore said law was not in force and operative at the time of the matters and things complained of.

The petitioner is therefore discharged from custody. All the Justices concur, except KANE, O. J., and TURNER, J., not participating.

(54 Okl. 632)

SCHOOL DIST. NO. 24 OF ROGERS COUNTY v. BROWN. (No. 5660.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 430, 565, 568, 614—
CASE-MADE — SUMMONS — DISMISSAL —
GROUNDS.

Where the defendant in error was not served with a notice of the signing and settlement of the case-made, nor was such notice waived, and, where the signature of the trial judge who signed the case-made is not attested by the clerk of the court and the seal thereof, and the case-made was not filed in the court below, and, where the defendant in error has not waived service of summons, nor where the summons has not been served, and the time has expired in which the appeal and record can be perfected, this court has no jurisdiction in the premises, and the attempted appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174, 2507-2510, 2523-2529, 2554, 2708-2713, 3126; Dec. Dig. \S 430, 565, 568, 614.]

Commissioners' Opinion, Division No. 4. Error from County Court, Rogers County; Walter W. Shaw, Judge.

Action by Estella Brown against School District No. 24 of Rogers County, Okl. Judgment for plaintiff, and defendant brings error. Dismissed.

C. S. Wortman, of Claremore, for plaintiff in error. H. Jennings, of Claremore, for defendant in error.

WATTS, C. Defendant in error sued the plaintiff in error in the county court of Rogers county, where judgment was rendered in

her favor, from which the plaintiff in error appeals. The motion for new trial was overruled on April 29, 1913, 60 days were given to make and serve a case-made, 10 days to suggest amendments, and 5 days to settle and sign. The case-made was served June 20, 1913, and settled and signed by the trial judge on July 9, 1913, and the appeal was lodged in this court on October 10, 1913.

The plaintiff in error relies on the following assignments for reversal:

"(1) Error in refusing and ruling out competent and legal evidence on the part of defendant. (2) Error in refusing requested instructions asked for by defendant."

The appeal is defective for a number of reasons. It nowhere appears that defendant in error was served with a notice of the signing and settling of the case-made nor does it appear that such notice was waived. Neither was the signature of the trial judge who settled and signed the case-made attested by the signature of the clerk of the court and the seal thereof, nor was the case-made filed in the court below. There is, however, a certificate of the clerk of the court, who certifies:

"That the above and foregoing is a true and complete copy of the case-made in case No. 415, Civil, Estella Brown v. School District No. 24, Rogers County, * * * as the same appears on file and of record in my office"

—but the seal of the court is not attached to the clerk's certificate, nor has defendant in error waived service of summons in error, nor has a summons in error been served. Most of the defects are jurisdictional, and as the time has long since expired in which the appeal and record could be perfected, this court has no jurisdiction in the premises.

Therefore, for the reasons mentioned, the appeal should be dismissed, and we so recommend.

PER CURIAM. Adopted in whole.

(54 Okl. 634)

PAGE v. TRYON. (No. 5674.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. INJUNCTION \S 186—DAMAGES—RIGHT TO RECOVER.

Ordinarily damages growing out of the issuing and enforcement of an injunction order cannot be recovered until the same has been dissolved by a final decree, but where the damages claimed did not accrue on account of the injunction the rule is different.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 397, 399-405; Dec. Dig. \S 186.]

2. APPEAL AND ERROR \S 882—INVITED ERROR—DAMAGES FROM INJUNCTION—COUNTERCLAIM.

A temporary injunction was made permanent. Afterwards the plaintiff filed a supplemental petition praying for damages on account of certain acts of defendant, out of which the injunction arose. Before the injunction was made permanent the defendant counterclaimed for damages and afterwards filed a supplemental answer praying for damages accruing after he

filed his original answer. The plaintiff moved to strike the original and supplemental answers so far as the same asked for affirmative relief upon the ground that the damages occurring after the commencement of the action cannot be recovered by a counterclaim filed in that action. Held, that the plaintiff, in filing his supplemental petition, invited the court to adjust the damages between the parties in that action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3591-3610; Dec. Dig. \S 882.]

Commissioners' Opinion, Division No. 4. Error from District Court, Creek County; Wade S. Stanfield, Judge.

Action by Charles Page against W. T. Tryon. Judgment for defendant, and plaintiff brings error. Affirmed.

Rice & Lyons, of Tulsa, for plaintiff in error. Smith & Walker, of Sapulpa, for defendant in error.

MATHEWS, C. The parties hereto will be designated as in the trial court. This controversy arose over the rights of two parties to a certain tract of land, one holding an oil lease upon said land, and the other an agricultural lease. The holder of the agricultural lease being in possession when the holder of the oil lease went upon the tract to bore for oil, he interfered with his operations, and on the 28th day of April, 1910, the plaintiff, the holder of the oil lease, obtained a temporary injunction against the defendant, the holder of the agricultural lease, restraining him from interfering with his operating on said land for oil.

On the 16th day of May, 1910, the defendant filed his answer, in effect a general denial, and further set out therein that he was in possession of said land in controversy under a recorded agricultural lease from the owner of the land, and was using the same for farming purposes; that when plaintiff's employes attempted to enter said premises he notified them not to come upon the land, and thereupon the plaintiff obtained a restraining order from the court, and thereafter the employes of plaintiff cut the fence of defendant, entered upon said land and began operating for oil; that they drove teams and wagons upon the land, and thereby injured the premises, and that they left the fence down so that defendant's cattle escaped from his inclosure, which occasioned much loss of time to him in hunting for same, for all of which alleged damage he prayed for judgment in the sum of \$500. The case was tried to a jury on the 24th day of May, 1913, which returned a verdict in favor of the defendant in the sum of \$500, and plaintiff prosecutes this appeal.

[1] The plaintiff has assigned numerous alleged errors, but has waived most of the same in failing to discuss the same in his brief. The first assignment discussed in his brief is his contention that defendant's counterclaim is for damages on account of the is-

suing and enforcement of the restraining order, which plaintiff urges is dependent upon the dissolution of the restraining order, and that no damages can be had for causing the same to be issued until it has been dissolved by a final decree. Ordinarily this is a correct statement of the law relative to damages arising by virtue of the procuring of an injunction, but it does not fit the facts in the case at bar.

While defendant, in his answer, prays for judgment against the plaintiff and his sureties on his injunction bond, it is plainly apparent that this was an inadvertence not intended. A permanent injunction was entered herein on the 19th day of May, 1910, but the evidence upon which the same was based does not appear in the record nor does it appear that the defendant contested the same. At the trial, the burden of proof was assumed by the defendant, and his entire evidence went to the amount of his damages, and no evidence was produced by either side relative to defendant's conduct in refusing to permit plaintiff's employes upon the premises to bore for oil. It is quite apparent that the injunction matter, by all sides, was considered settled and no longer in the case, but that there was then being tried out what damages, if any, defendant was entitled to on account of plaintiff's occupancy of the premises. The sureties on the injunction bond were not parties to the action, the bond itself was not declared upon, and not introduced in evidence, and was not referred to at the trial. Defendant had a right to damages, such as he prayed for in his answers and proved at the trial, even though he had been restrained from interfering with plaintiff's operations. The damages claimed by him and proven at the trial did not arise on account of the issuing of the injunction, because that was to the effect only that defendant should not interfere with plaintiff's oil operation, but the injunction did not give the plaintiff the right to tear down defendant's fences and so permit his stock to go at large or to do any other thing complained of by defendant in his answers.

Plaintiff next advances the proposition that the counterclaim set up in defendant's supplemental answer is for alleged damages for matters occurring after the granting of the injunction relief sought by plaintiff in his petition. To state plaintiff's contention more succinctly, it is that damages occurring after commencement of the action cannot be recovered by a counterclaim. The question here raised seems to be an original one as far as our own courts are concerned, and, without deciding the point, we will observe that the contention seems to be sustained by the authorities from other states. 34 Cyc. 670; *Kansas Loan & Inv. Co. v. Hutto et al.*, 48 Kan. 166, 29 Pac. 558; *Simpson et al. v. Jennings et al.*, 15 Neb. 671, 19 N. W. 473; *Jones et al. v. Swank*, 54 Minn. 259, 55 N. W. 1126. But see *Wynnewood Cotton Oil Co.*

v. W. R. Moore, 153 Pac. 633, No. 4973, not yet officially reported.

However, as we view the case at bar, it does not turn upon the foregoing proposition. On the 19th day of May, 1910, the court made the temporary injunction, granted on the 28th day of April, 1910, permanent. The record does not contain the evidence, if any, produced at this hearing. On the 5th day of September, 1910, the plaintiff filed a supplemental petition praying for damages against the defendant for destroying a well rig and for hindering plaintiff in his well drilling on the premises in controversy. On the 13th day of January, 1911, the defendant filed a supplemental answer, wherein he asked for further damages which he alleged he had sustained on account of plaintiff's occupancy of the land since the filing of his original answer. On the 15th of February, 1912, the plaintiff filed a motion to strike defendant's supplemental answer and the allegations in the original answer seeking affirmative relief for the reason that said allegations fall to state proper matter of counterclaim or set-off, which motion was by the court overruled.

On the 24th day of May, 1913, the case, as far as the same related to the damages sustained by defendant, went to trial before a jury. On the opening of the case the plaintiff made the following objection, which was overruled:

"At this time the plaintiff, Charles Page, objects to the introduction of any testimony on behalf of the defendant for the reason that the same is incompetent, irrelevant, and immaterial, and on matters alleged as a counterclaim are not proper matters of affirmative relief to the defendant in this cause."

Near the close of the trial, the defendant offered in evidence plaintiff's supplemental petition, whereupon the plaintiff dismissed said supplemental petition.

[2] From this history of the case, imperfect as the record gives it, we can arrive at no other conclusion except that the court treated the litigation between the parties as divided into two distinct actions. While all the pleadings were filed in the same cause, yet this could be easily done and we believe that was the intention of the court and the parties thereto. The injunction was made permanent on May 19, 1911, apparently by consent of all the parties, and that matter passed out of the case, for we do not find the same alluded to again in any way, but both sides thereafter filed pleadings looking to an adjustment of the damages between them, and even the plaintiff himself filed a pleading asking for damages against the defendant, and thereby invited the court to adjust the matter of damages between them. It is true he interposed timely objections against the defendant's testimony, but was at that time in the anomalous position of having on file a pleading asking for damages similar to the kind he objected to defendant offering proof on. Although he dis-

missed his petition asking for damages near the close of the case, yet it appears to us that it came too late because he had invited the trial upon the issues as framed and was then near its close. He pulled the string too late.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(49 Okl. 730)

CITY OF MANGUM et al. v. HEATLY et al.
(No. 7652.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 70—DECISIONS APPEALABLE — PLEADINGS — REFUSAL TO STRIKE.

An order overruling a motion to strike certain paragraphs of a petition is not an appealable order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 367-378, 386, 411; Dec. Dig. \S 70.]

2. APPEAL AND ERROR \S 286 — PRESENTATIONS BELOW—MOTION FOR NEW TRIAL.

Where a cause is tried upon its merits and final judgment rendered after full hearing, and no motion for a new trial is filed by the losing party, such judgment will not be disturbed on appeal for alleged errors of the trial court in ruling upon certain interlocutory motions not constituting a part of the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1680-1683, 1713-1717, 3024; Dec. Dig. \S 286.]

Error from District Court, Greer County; T. P. Clay, Judge.

Action by S. A. Heatly and another against the City of Mangum, a municipal corporation, and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

H. H. Edwards, of Mangum, for plaintiffs in error. B. L. Tisinger, of Mangum, and Burwell, Crockett & Johnson, of Oklahoma City, for defendants in error.

KANE, C. J. This was a suit in equity, wherein the defendants, plaintiffs below as taxpayers, prayed an injunction against the plaintiffs in error, defendants below, enjoining them from selling and delivering certain municipal bonds, with interest coupons attached, issued by the city of Mangum, for the purpose of building a municipal electric light plant. Hereafter the parties will be called "plaintiffs" and "defendants," respectively, as they appeared in the trial court.

Upon filing the petition the trial court issued a temporary injunction. Thereafter the defendants filed a motion to strike certain portions of the petition, which was sustained by the trial court as to paragraph 14, and overruled as to paragraphs 15, 16, 17, and 18. Thereupon the defendants filed a pleading entitled "Motion to Dissolve Temporary Injunction," which, omitting the formal parts, is in words and figures as follows:

"Come now the above-named defendants, by their attorney, and move the court the temporary injunction allowed herein be dissolved for the following reasons, to wit: (1) Defendants deny each and every material allegation set out in said petition and demand strict proof of said allegations. (2) That the relief prayed for in said petition would work a great injustice to the citizenship of the city of Mangum. Wherefore defendants pray that the temporary injunction allowed herein be dissolved, and that plaintiffs take nothing by way of the relief prayed for, and that plaintiffs be taxed with the costs of this action."

This latter pleading, while entitled "Motion to Dissolve Temporary Injunction," is in substance more in the nature of an answer to the petition, in effect, a general denial, and it was thus treated by the trial court and the parties, in the trial upon the merits, which subsequently followed. After the issues were joined as above, the respective parties proceeded to trial, introduced their evidence upon the merits of the case and rested, and thereupon the court rendered a final judgment overruling the motion to dissolve and making the temporary injunction formerly issued permanent. There was no motion for new trial filed by the losing party for the purpose of reviewing the action of the trial court in rendering judgment upon the merits, but a proceeding in error was prosecuted to this court, wherein the only errors assigned are the following:

"(1) The court erred in overruling defendants' motion to strike certain paragraphs from plaintiffs' petition. (2) The court erred in overruling defendants' motion to dissolve the temporary injunction."

On behalf of the defendants the cause is elaborately briefed upon its merits, while counsel for the plaintiffs confine their brief solely to the contention that the proceeding in error ought to be dismissed, for the reasons: (1) The motion to strike does not constitute a part of the judgment roll, and therefore the only method by which this court can review the action of the trial court in overruling it is by preserving the question by filing a motion for new trial; or (2) it could not be of any avail to any party to this litigation for this court to review the action of the trial court in denying the motion to strike and the motion to dissolve the temporary injunction, because after both of these orders were entered, the court considered the evidence, and rendered a final judgment; and so long as this final judgment remains in force and not attacked, it is immaterial whether or not the trial court erred in making some interlocutory order.

[1] There is no attempt on the part of counsel for plaintiff in error to answer either of these grounds for dismissal, and to us they seem to be well taken. The action of the trial court upon the motion to strike, being but an interlocutory order, was not appealable, and therefore not now subject, except as an incident, to a review of the case upon its merits, and, of course, as no review of the

case upon its merits was asked or could be had without a motion for new trial, it would be unjust to set aside the final judgment rendered by the court after full hearing for an error predicated upon such ruling.

That the motion to strike does not constitute a part of the judgment roll is settled by *McMechan v. Christy*, 3 Okl. 303, 41 Pac. 382; *Devault v. Merchants' Exchange Co.*, 22 Okl. 624, 98 Pac. 342; *Summer et al. v. Sherwood*, 25 Okl. 70, 105 Pac. 642.

[2] If we treat the pleading entitled "Motion to Dissolve Temporary Injunction" as a motion, what we have said above also applies to it; and if we treat it as an answer to the petition, as the parties and the court below seem to have done, the defendants are in no better situation. The cause was tried and judgment rendered after full hearing upon its merits. The defendants did not file a motion for a new trial, nor do they in this court ask to have the final judgment in the case vacated or set aside. It is well settled that the defendants having failed to file a motion for new trial and to have the same passed upon by the trial court, the judgment rendered became final, and this court has no authority to review the same. *Bd. Com'rs v. Grace*, 23 Okl. 35, 99 Pac. 653; *Ahren-Ott Mfg. Co. v. Condon*, 23 Okl. 365, 100 Pac. 556; *Divine v. Harmon*, 23 Okl. 901, 101 Pac. 1125; *Grunawalt v. Grunawalt*, 24 Okl. 758, 104 Pac. 905; *Kansas Rolling Mill v. Bovard*, 34 Kan. 21, 7 Pac. 622.

For the reason stated the motion to dismiss must be sustained.

(54 Okl. 545)

HARPER v. BOARD OF COM'RS OF OKLAHOMA COUNTY et al. (No. 4285.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

On rehearing.

Former opinion, 149 Pac. 1102, modified.

BREWER, C. Plaintiff in error was permitted to file petition for rehearing out of time, and, same being filed, complains of the decision, wherein the county was allowed to recover back the item of \$408.15, same being expenses incurred for supplies for the office of district clerk. This item, being of minor importance, because of the small amount involved, as compared with the other sums in controversy, received in the trial of the case, in the briefs and in the former opinion, but slight consideration; and we are now convinced that we were in error in allowing it to enter into the recovery allowed the county.

Section 1600, Rev. Laws 1910, subd. 4, which was in force at the time, requires the county, through its board of commissioners, to furnish to the district clerks "necessary blank books, plats, blanks and stationery," and this item confessedly contains some sup-

plies for which the commissioners had authority to expend the county funds. The item of supplies entering into this sum was not brought into the case-made; but, as we know from the briefs that a part of said supplies was proper to be furnished by the county, if other parts were not, it was incumbent upon the county to show the fact, thus showing a want of jurisdiction in the board to allow them, which opened the way for a recovery back, after time for an appeal from the action of the board in paying them had expired. Therefore this item of \$408.15 should be deducted from the amount of the total recovery allowed in this case; and the former opinion filed herein is modified to the extent of such reduction.

PER CURIAM. Adopted in whole.

(54 Okl. 573)

DEPENBRINK et al. v. MURPHY et al. (No. 4924.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐773—FAILURE TO FILE BRIEF—DISPOSITION OF CAUSE.

By rule 7 (137 Pac. ix) this court, where the defendant in error in a civil cause fails to file a brief in support of the judgment attacked by the appeal, the court is given the discretion to either affirm or reverse the cause, and may reverse the judgment without examining the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. ⇐773.]

2. APPEAL AND ERROR ⇐773—FAILURE TO FILE BRIEF—REVERSAL.

Where plaintiff in error has prepared, served, and filed a brief as required by the rules of this court, and there is no brief filed and no reasonable excuse given for its absence on the part of defendant in error, this court is not required to search the record to find some theory upon which the judgment below may be sustained, but, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the petition of plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. ⇐773.]

Commissioners' Opinion, Division No. 4. Error from District Court, Caddo County; J. T. Johnson, Judge.

Action by William J. Murphy and another against James G. Depenbrink and another. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Parmenter & Lenertz, of Lawton, for plaintiffs in error. H. W. Morgan, of Anadarko, and Simpson & Holding, of Chickasha, for defendants in error.

ROBERTS, C. [1] This case comes from the district court of Caddo county, and is an action to cancel a deed to certain real estate in Anadarko, held in the name of defendant James G. Depenbrink, and to quiet

title in the plaintiff William J. Murphy. The case was tried on the 27th day of September, 1912, and after motion for new trial was overruled, decree was entered for the plaintiff Murphy, canceling the deed, and quieting title in him, as prayed. Defendants Depenbrink bring error, and make Alvina Bitsche a party defendant. H. W. Morgan, attorney of record for Mrs. Bitsche, accepted service of case-made on the 21st day of December, 1912; and Simpson & Holding, attorneys of record for Murphy, accepted service of case-made on the 3d day of January, 1913. All parties defendant in error waived service of summons in error, and entered voluntary appearance in this court in due time. The plaintiffs in error served their printed briefs on defendants in error, on the 24th day of June, 1913, which were filed in this court, on the same day. The case was set for July 8, 1915, and submitted on the same day. The defendants were notified to file briefs prior to the 12th day of June, 1915. On the 14th day of June, 1915, the defendant in error Murphy filed the following motion, supported by affidavit attached:

"Comes now the above-named defendant in error William J. Murphy, and prays the court to be permitted to submit this cause, without brief, and prays the court to examine the record without the filing of a brief on behalf of the defendant in error, for the reasons set forth in the affidavit of defendant in error, said affidavit being herein referred to and made a part of this motion, and attached hereto.

"As defendant in error in duty bound will ever pray."

"William J. Murphy, Defendant in Error."

"Comes now William J. Murphy, and, having first been duly sworn, upon his oath states that he is the above-named defendant in error; that he has received from the clerk of the above-entitled court notice, as per order of the court, to file brief on behalf of defendant in error. The affiant herein, William J. Murphy, and defendant in error in the above-entitled cause, further swears that by reason of his poverty he is unable to have a brief prepared in said cause, and is unable to have a brief printed, and is unable to have a brief typewritten, should he be allowed to do so by the court.

"William J. Murphy.

"Subscribed and sworn to before me this 12th day of June, 1915.

"[Seal.] Lester L. Price, Notary Public.

"My commission expires on the 8th day of Nov, 1917."

The record and case-made contains 440 pages, and the petition in error sets out 43 assignments of error, 34 of which are argued in the briefs by counsel, and some of them in several subdivisions. The defendant in error claims that he was not able to file briefs, either printed or typewritten, because of his poverty. He does not claim sickness or any other disability except poverty. We call especial attention to the fact that the briefs of plaintiff in error have been on file in this court for more than 2½ years. The attorneys for defendants in error are lawyers of well-known standing and ability in this state, and no doubt would have filed, at least typewritten briefs, if they had been requested. As above stated, defendant

in error had more than 2½ years to raise a few dollars to pay for typewritten briefs, and no doubt this court would willingly have permitted such briefs on a proper showing. It is plain to be seen that the excuse offered is not sufficient. Defendant, in his motion, requests this court to go through this record of 440 pages, and examine and answer the 75 pages of argument of counsel for plaintiff, contained in their briefs, without even the assistance of typewritten suggestions. Rule 25 of this court (137 Pac. xi) is as follows:

"The brief of the plaintiff in error in all cases shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court. If the defendant in error or appellee shall claim that such abstract is incomplete for the purpose stated, his brief shall contain a counter abstract correcting any such omissions or inaccuracies. Where a party complains on account of the admission or rejection of testimony, he shall set out in his brief the full substance of the testimony to the admission or rejection of which he objects, stating specifically his objection thereto. Also, where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portion to which he objects or may save exceptions. A party need not include in his abstract all the evidence in support of a claim on his part that it does not show or tend to show a certain fact; but when such a question is presented, the adverse party shall print so much of the evidence as he claims to have that effect. The abstract shall state only the substance of those parts of the record the bearing of which upon the case can be clearly shown in this manner; such as are purely formal or otherwise immaterial shall be omitted altogether, but quotations must be made with verbal accuracy whenever the decision of any question in controversy may be affected thereby. The abstract shall refer to the pages of the record.

"The brief shall contain the specifications of errors complained of, separately set forth and numbered; the argument and authorities in support of each point relied on, in the same order, with strict observance of rule vii. The brief of the appellee or defendant in error shall also be printed when so required of the plaintiff in error, and contain, with pertinent reference to the pages of the abstract, any points challenging the right of plaintiff in error to be heard; a full statement of any additional facts shown by the abstract and deemed essential; citations of authorities and discussion of alleged errors, in the same order as in the brief of the plaintiff in error."

And rule 7 (137 Pac. ix) provides:

"In each civil cause filed in this court, counsel for plaintiff in error shall, unless otherwise ordered by the court, serve his brief on counsel for defendant in error at least forty (40) days before the case is set for submission. Counsel for plaintiff in error shall file with the clerk of this court fifteen (15) copies of such brief within the time above designated, and defendant in error shall, within thirty (30) days after the service of the brief of plaintiff in error upon him, file with the clerk of this court fifteen (15) copies of his answer brief and serve same upon plaintiff in error; and all reply briefs, except as otherwise ordered by the court, must be filed by the date the case is submitted or called for argument. Proof of service must be filed with the clerk within ten (10) days after service.

"In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment, in its discretion."

[2] In the case of *Taby v. McMurray*, 30 Okl. 602, 120 Pac. 664, this court, by Judge Ames, lays down the following rule:

"When the defendant in error chooses not to aid this court with a brief, and the brief of the plaintiff in error appears reasonably to support the assignments of error, it is not the duty of this court to search the record with a view of ascertaining some possible theory on which the judgment may be affirmed."

And in *Beaver v. Oklahoma State Loan Co.*, 30 Okl. 585, 120 Pac. 943, the court, speaking through Justice Sharp, says:

"The petition in error in this case was filed December 18, 1909, and counsel for plaintiffs in error, on March 22, 1910, filed their brief. Defendants in error have filed no brief, and have given no reason for their failure to do so. Under these circumstances, this court is not required to look to the record to ascertain upon what possible theory the judgment of the trial court might be sustained, but will exercise the option given it, under rule 8 (20 Okl. viii, 95 Pac. vi). *Flanagan et al. v. Davis*, 27 Okl. 422, 112 Pac. 990, and Oklahoma cases cited; *Butler v. Stinson*, 26 Okl. 216, 108 Pac. 1103; *Ellis v. Outler*, 25 Okl. 469, 106 Pac. 957; *Buckner v. Oklahoma National Bank*, 25 Okl. 472, 106 Pac. 959; *Reeves v. Brennan*, 25 Okl. 544, 106 Pac. 959; *Butler v. McSpadden*, 25 Okl. 465, 107 Pac. 170."

The excuse given by defendant in error without any showing of effort, or any other explanation, is not sufficient to require this court to perform the duties of counsel, and spend the time of the court in making diligent search of the record to ascertain upon what possible theory the judgment of the trial court might be sustained. We have read the brief of plaintiff in error in connection with the record, and the argument of counsel appears to reasonably sustain sufficient of the assignments of error to require a reversal of the case. We, therefore, recommend that the judgment of the lower court be reversed, and the case remanded for new trial.

PER CURIAM. Adopted in whole.

(54 Okl. 566)

ROSE v. WOLDERT GROCERY CO.

(No. 4904.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(*Syllabus by the Court.*)

1. TRIAL — 156 — DEMURRER TO EVIDENCE — EFFECT AS ADMISSION.

The test applied to a demurrer to the evidence is that all the facts which the evidence in the slightest degree tends to prove, and all inferences or conclusions which may be reasonably and logically drawn from the evidence, are admitted. The court cannot weigh conflicting evidence, but must treat the evidence as withdrawn which is most favorable to the demurrant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. — 156.]

2. SALES — 161 — DELIVERY — WHAT CONSTITUTES — CARRIERS.

Where goods are sold, and in pursuance of such sale are delivered to the carrier to be de-

livered to the buyer, the carrier is presumed to act as agent of the buyer, and delivery to the carrier is delivery to the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380; Dec. Dig. — 161.]

3. SALES — 339 — ACTION AGAINST BUYER — SUBMISSION OF ISSUES — EVIDENCE — MEASURE OF DAMAGES.

There was evidence that the contract price of the car of melons was \$120, and that, owing to the refusal of the commission company to accept the same, they were sold for \$55. This is sufficient evidence of the measure of damage to authorize the submission of such question to the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 924, 926; Dec. Dig. — 339.]

Commissioners' Opinion, Division No. 3. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by the Woldert Grocery Company against J. E. Rose, doing business as the Rose Commission Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tom F. McMechan, of Oklahoma City, for plaintiff in error. G. A. Gessner, of Oklahoma City, for defendant in error.

RITTENHOUSE, C. It is alleged in the petition that on July 14, 1911, the Rose Commission Company contracted for and ordered from the Woldert Grocery Company, of Tyler, Tex., one car of fresh melons, the average weight to be 28 pounds, the same to be at the time en route to Oklahoma, for an agreed price of \$120 f. o. b. Athens, Tex., and that said car, O. S. L. 13491, was shipped via the Frisco, consigned to the Rose Commission Company, Oklahoma City, Okl. In support of these allegations evidence was introduced showing that on July 14, 1911, the Rose Commission Company received quotations to the effect that the Woldert Grocery Company had watermelons for sale and quoting prices. On the same day the Rose Commission Company wired the Woldert Grocery Company:

"Can use car thirty average rolling hundred twenty answer quick."

In reply to that message the grocery company wired:

"Thirty average sold make twenty-eight average hundred twenty if unsold."

The commission company answered:

"Take car twenty-eight average must be fresh stock rolling."

This was confirmed on the same day with message as follows:

"Confirm melons O. S. L. thirteen four nine one from Athens to-day."

The testimony of Rose was to the effect that these communications were had by wire, and that the meanings of the messages were:

"Q. I would like for you to explain to the court and jury. We don't understand it. A. 'Can use car thirty average.' That means the melons must average 30 pounds each. That don't mean that every melon has to weigh 30 pounds, but means that the whole car all the

way through must average 30. There may be some melons weigh 25 pounds, and some 40, but the average weight of the whole 24,000 pounds of melons, divided by the number of melons, must average 30 pounds. Whenever the number of melons divided into the total number of pounds don't show the average weight you call for, it is not a trade at all for they have sent you something you did not buy. Q. That word 'rolling,' what does that mean? A. Already loaded and en route. 'Rolling' means the car is coming. You see these cars are all billed to themselves, and they wire out, and whenever they can sell a car, the man that gets a telegram to them first is the one that gets the car, and they divert the car to him, and they wire the railroad company to notify the one they sold it to. * * * Q. I hand you Exhibit C, and ask if you received that? A. 'Thirty average sold. Make twenty-eight average hundred twenty if unsold.' Yes, sir. Q. Ask you to explain what that means to the jury. A. 'Thirty average sold.' That means to say he did not have any cars rolling weighing 30 pounds average. 'Make twenty-eight average' means he had those. He did not have a car averaging 30 pounds, but did have a car averaging 28. That means averaging 28 pounds. The carload of melons means 24,000 pounds, and the number of melons in there should average 28 pounds average. Q. I hand you Exhibit D and ask you if that is the telegram you sent in reply to the last telegram you just read? A. 'Take car twenty-eight average must be fresh stock rolling.' Yes, sir; I did. Q. I hand you telegram marked Exhibit E and ask you if you received that from the Woldert Grocery Company? A. 'Confirm melons car O. S. L. thirteen four nine one from Athens to-day.' I would not be sure about that. Q. That would mean to you it was en route? A. That means that car left there that day. Q. Car No. 13491 O. S. L. is the name on the car, whatever road it applies to? A. Yes."

The witness H. D. Pickens testified that he loaded car O. S. L. 13491 with Alabama sweet watermelons on July 13, 1911, and sold the same to Woldert Grocery Company of Tyler, Tex.; that he kept a record of the melons, which was introduced in evidence; that there were 842 melons, of a total weight of 24,360 pounds; that they were taken direct from the vine to the car, were fresh, and the coloring excellent. H. A. Bump testified that he was adjuster for the Produce Referring Company, and had been for nine years; that the company has for its purpose the issuing of a book to subscribers giving names and ratings of shippers and commission men throughout the United States, having adjusters who adjust between the different shippers and commission men who are subscribers to such book, and, when differences arise between shippers and commission men which they are unable to settle themselves, it is referred to the adjuster; that on about the 18th day of July, 1911, he made an inspection of this car and sold the same to A. Morrison & Co. for the sum of \$55 net for the car f. o. b. Oklahoma City, Mr. Morrison paying the freight. The evidence of the witness Rose further shows that he refused to accept the car of melons because there were 25 melons which had been cut open and ruined, and that either the car had been robbed or a large part of the melons were never put in it. A demurrer was interposed to the evidence, for the reason the same failed to establish facts

sufficient to constitute a cause of action against the defendant or to sustain the allegations of the petition, and for the further reason that said evidence failed to show any cause of action upon which judgment could be rendered in favor of plaintiff and against defendant. This demurrer was overruled.

It is insisted here that the evidence fails to establish a cause of action, in this, that the uncontradicted evidence shows that the Rose Commission Company was acting within its rights in refusing to accept the melons, because the car contracted for was a full car of 24,000 pounds, and, while the evidence shows a shipment of a full car, the uncontradicted evidence shows that, when the car was presented to the Commission Company at Oklahoma City, it did not conform to the contract by reason of the shortage; and it is insisted that, where one contracts for a certain amount of goods of a certain character, he is entitled to the exact amount and character of goods purchased. We have no fault to find with the proposition of law advanced, but we do not think that the question is properly raised by a demurrer to the evidence. In the instant case there was evidence that the car was loaded in conformity with the contract, and other evidence was introduced attempting to show that there was a shortage in weight, either by a failure to fill the car or by theft. In this respect there is a conflict as to whether the shipment complied with the contract. This question is a proper one for the jury.

[1] The test applied to a demurrer to the evidence is that all the facts which the evidence in the slightest degree tends to prove, and all inferences or conclusions which may be reasonably and logically drawn from the evidence, are admitted. The court cannot weigh conflicting evidence, but it must treat the evidence as withdrawn which is most favorable to the demurrant. *Edmisson v. Drumm-Flato Commission Co.*, 13 Okl. 440, 73 Pac. 958; *Ziska v. Ziska et al.*, 20 Okl. 634, 95 Pac. 254, 23 L. R. A. (N. S.) 1; *Shawnee Light & Power Co. v. Sears*, 21 Okl. 13, 95 Pac. 449. Applying the test to the question under discussion, by the withdrawal of all the evidence most favorable to the demurrant, which is the evidence of Mr. Rose as to shortage, we are convinced that the evidence supports the allegations of the petition and is sufficient as against a demurrer thereto.

The same question is raised under the last assignment of error, wherein it is urged that the court erred in refusing to grant a new trial on the ground that the judgment was contrary to the evidence. The vital question which underlies all the argument advanced is that the goods were shipped by the consignor to itself at Oklahoma City; but this condition is not shown by the plaintiff's evidence.

[2] Under the first assignment it is argued that the contract involved the right of inspec-

tion and refusal if the melons were not according to the contract, citing the case of *St. Louis & S. F. R. Co. v. Allen*, 31 Okl. 248, 120 Pac. 1090, 39 L. R. A. (N. S.) 809. This case is not decisive of any point raised in the instant case. There was no evidence offered by the plaintiff that the car was consigned by the plaintiff to itself at Oklahoma City; and, in the absence of such a showing, the rule is that, where the goods, in pursuance of an order, were delivered to a carrier to be delivered to the buyer, the carrier is presumed to act as agent of the buyer, and delivery to the carrier is delivery to the buyer.

[3] It is next urged that the demurrer to the evidence should have been sustained because there was no competent evidence as to damages. There was evidence that the contract price of this car of melons was \$120, and that on account of the refusal of the defendant to accept the melons they were sold for \$55. This was some evidence of the damages sustained sufficient to carry the question to the jury.

The judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(30 Or. 506)

HUDSON v. BROWN LUMBER CO.

(Supreme Court of Oregon. March 7, 1916.)

1. TRIAL \S 295—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In a personal injury action by a servant hurt by the live rollers carrying timbers to a saw, the court charged that plaintiff alleged he was injured through the negligence of defendant, but it was for plaintiff to so prove by a preponderance of the evidence, and that negligence was the doing of something which a man of ordinary prudence would not do under all the existing circumstances; ordinary prudence being the criterion. The court also charged that, if defendant owned and had charge of the machinery, and the work involved a risk to employes, particularly to plaintiff, and defendant did not use every care and precaution which was practicable, limited only by the necessity of preserving the efficiency of the machine, and that defendant was negligent as alleged in plaintiff's complaint, and that, if the negligence of plaintiff himself contributed to the injury, such contributing negligence was not a defense, but might be taken into account in fixing the amount of damages to be recovered by plaintiff. *Held*, that, though plaintiff's cause of action was based on the Employers' Liability Act (Laws 1911, p. 16), the instructions, taken as a whole, were not erroneous, notwithstanding ordinary prudence is not the criterion of liability under the act.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 703-717; Dec. Dig. \S 295.]

2. DAMAGES \S 210—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a personal injury action, where there was medical testimony that the injuries complained of could not have produced the condition

which plaintiff disclosed at trial, and that such condition was probably the result of some severe illness, contracted or hereditary, an instruction that, if plaintiff's condition was the result of disease, there could be no recovery, was warranted.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 537, 538; Dec. Dig. \S 210.]

Department 2. Appeal from Circuit Court, Lane County; J. W. Hamilton, Judge.

Action by Luther B. Hudson against the Brown Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action for damages for personal injuries. The complaint alleges, in substance, that on May 16, 1912, plaintiff was employed by defendant in its sawmill as off-bearer of slabs and timber from a cut-off saw, and that his duties involved the necessity of passing back and forth through a narrow opening in the system of rollers which served as a conveyor of such slabs and timbers; that one Stone, as the agent and employé of defendant, had charge of the cut-off saw and controlled the direction of the lumber upon the live rollers by means of a lever; that the system of rollers was propelled by steam power transmitted from the engine which supplied power for the operation of the mill; that the work in which plaintiff was engaged involved risk and danger, and it was necessary for the safety of plaintiff that the machinery should be provided with a system of signals, so that the person in control of the rollers might promptly communicate with plaintiff and warn him of the operation thereof, so as to enable him to avoid injury, and that such a system was practicable; that, disregarding its duty, defendant neglected to provide such system of signals, and carelessly and negligently, without warning, by its agent and employé Stone, caused a large timber to be propelled against plaintiff at the instant when in the performance of his duties he was passing through the opening between the rollers, so as to jam him against one of the rollers, causing the injury of which complaint is made. Then follow allegations of the character of the injuries received and the special and general damages suffered. To this complaint an answer was filed, which, after some admissions and denials, pleads affirmatively assumption of risk, contributory negligence, and unavoidable accident. A trial was had, and from a verdict and judgment in favor of defendant, plaintiff appeals.

Albert Abraham, of Roseburg, for appellant. F. S. Senn, of Portland (Senn, Ekwall & Recken, of Portland, Thompson & Hardy, of Eugene, and J. S. Medley, of Cottage Grove, on the brief), for respondent.

BENSON, J. (after stating the facts as above). [1] The first assignment of error

challenges the correctness of instructions numbered 24 and 25 as given by the trial court to the jury. These were as follows:

"Upon this question of negligence I will call your attention to what is meant when we use that term or word 'negligence.' The plaintiff alleges that he was injured through the negligence of the defendant, by and through its agent Stone, at that time, in the manner of handling the machinery. But it is for the plaintiff to prove that by a preponderance of the evidence, as I have instructed you, before he can recover any damages in the case.

"Negligence is defined as follows: The word 'negligence' in the law has been defined to be the doing of something which a man of ordinary prudence would not do under all the existing circumstances of the case. You will see that the phrase 'ordinary prudence' is made the criterion. The doing of something which a man of ordinary prudence would not do under all the existing circumstances of the case, or the failure to do something which a man of ordinary prudence would do under all the existing circumstances of the case."

Plaintiff contends that, since the alleged cause of action falls within the influence of the Employers' Liability Act, "ordinary prudence" is not the limit of the employer's duty. If the court's instructions had stopped with these, there might be some merit in the contention; but it is to be remembered that the question of contributory negligence was involved, and the foregoing instruction is proper in determining the possible negligence of the plaintiff, and the court also gave the following:

"If you find that the defendant owned and had charge of the machinery referred to in the pleadings, that is, the live rolls, cut-off saw, slab conveyor, and dead rolls, and the operation thereof, and that the work and operation thereof involved a risk or danger to the employés, and particularly to the plaintiff herein, and that the defendant did not use every care and precaution in the operation thereof which was practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the machine or apparatus or the operation thereof, and that defendant was negligent as alleged in plaintiff's complaint, and that the negligence of the plaintiff himself contributed to the injury, I instruct you that such contributing negligence is not a defense, but may be taken into account by you in fixing the amount of damages to be recovered by plaintiff, and only for such purpose."

Considering these instructions together, we conclude that they fairly state the law applicable to the case.

[2] The next assignment is to the effect that the court erred in giving the following instruction:

"I also instruct you in this case, if you find that this plaintiff's (Mr. Hudson's) present condition is due to some disease or organic trouble, whether it be hereditary, or whether he became afflicted during his lifetime, then he could not recover in this case. If you find that at the time of the accident he was suffering from some disorder or disease or illness, and that the injury which he claims occurred on May 16, 1912, merely aggravated his condition, that is, made the condition worse, in such event he could not recover in this case. He alleges in his complaint

that this injury is the only cause of his present condition, and he would be required to prove that by a preponderance of the evidence."

Plaintiff insists that there is no evidence in the record to which such a statement of the law is pertinent. The injury which forms the basis of the action is disclosed to be neurasthenia, or nerve exhaustion, which prevents the patient from performing any labor, and also involves considerable pain and suffering. Two of the physicians who testified upon the trial asserted that the injuries to the plaintiff could not have produced the condition in which the plaintiff was at the time of the trial, and asserted that the other possible cause of the symptoms would be a defective nervous organization, or the sequelæ of some severe disease either acquired or inherited. In addition to this, Dr. F. H. Vincil, one of plaintiff's witnesses, testified that he examined Hudson three days after the accident, and, among other symptoms, noted that there was albumen in his urine, which he says is a symptom of Bright's disease. He also expresses the opinion that the plaintiff's liver is organically wrong. The credibility of these witnesses was a matter for the consideration of the jury only, but their statements certainly constituted evidence which justified the instruction as given.

Finding no error in the record, the judgment of the lower court is affirmed.

MOORE, C. J., and BEAN and McBRIDE, JJ., concur.

(79 Or. 473)

WETTERSTEN et al. v. FISHER et al.

(Supreme Court of Oregon. March 7, 1916.)

1. EJECTMENT §64 — PLEADING — DESCRIPTION OF PROPERTY — SUFFICIENCY.

A description of realty in the petition in an ejectment suit as "real property situate in the county of M., state of O., to wit, lot eight (8), block seven (7), in Central Albina, an addition to the city of P., M. county, O.," when accompanied by the statement that the premises were familiarly known as a certain number and street, which was the only property owned by the plaintiff and occupied by her, is sufficient to confer jurisdiction on the county court of that county.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 158-164; Dec. Dig. §64; Pleading, Cent. Dig. § 64.]

2. DEEDS §114 — PROPERTY CONVEYED — DESCRIPTION — SUFFICIENCY.

A description in a deed of realty as "lot eight (8), block seven (7), in Central Albina addition to the city of P., M. county, O.," is sufficient to convey the interest in the lot, although the article "an" was omitted between the words "Albina" and "addition," since that error did not necessarily render the description uncertain, where the deed also recited that the property described was the only property owned by the grantor, and referred to papers on file in connec-

tion with the sale under court order, as property of a minor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 320, 321; Dec. Dig. § 114.]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by Esther P. Wettersten, minor, and Charles A. Johns, her guardian, against Susie Fisher and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

This was an action in ejectment to recover an undivided one-third interest in lot 8, block 7, Central Albina, an addition to the city of Portland, Multnomah county, Or. The cause was tried before the court without a jury. The court made findings, which are conceded by the plaintiffs to correctly state all the necessary facts in the case, as follows:

"(1) Prior to January 14, 1910, Walter B. Wettersten, Alma H. Wettersten, and Esther P. Wettersten were the owners in fee simple, as tenants in common and as legatees of their mother, of the following described real property situate in the county of Multnomah, state of Oregon, to wit: Lot 8, block 7, Central Albina, an addition to the city of Portland, Multnomah county, Or.

"(2) Since that time the defendants have become and now are the owners of the undivided two-thirds at that time belonging to Walter B. Wettersten and Alma Wettersten; the only dispute in this suit being as to the one-third at that time owned by Esther P. Wettersten.

"(3) On or about October 1, 1909, Walter B. Wettersten was duly appointed guardian of the person and estate of Esther P. Wettersten, a minor, and duly qualified as such and entered upon the discharge of his duties. The estate belonging to the said Esther P. Wettersten consisted of the one-third interest in the above-described real property, which was the only real property owned by her. On this lot was situated a small house which was known as No. 889 Borthwick street. This property was inventoried in said estate as being worth approximately \$666.65, and that amount represented the reasonable value of the property at that time, and said property at least during the month of January, 1910, was occupied by the said minor and her guardian, Walter B. Wettersten, his wife and child.

"(4) On January 14, 1910, Walter B. Wettersten filed in the county court of the state of Oregon, for Multnomah county, a petition as guardian of the person and estate of Esther P. Wettersten, a minor, for license and authority to the said guardian to sell real property belonging to the estate and described in the petition as follows: 'Lot eight (8), block seven (7), in Central Albina addition to the city of Portland, Multnomah county, Oregon, which property is familiarly known and described as 889 Borthwick street in said city.' This petition also recited that the property described was the only real property belonging to the estate of the said Esther P. Wettersten, a minor, and that it was occupied by her and her guardian and his wife and child.

"(5) Thereafter, on January 14, 1910, an order of the county court of the county of Multnomah was made to show cause why such sale should not be authorized and licensed, and such further proceedings were had that on April 16, 1910, the property described in said petition was sold to Susie Fisher, one of the defendants herein, for the sum of \$1,000, and return of sale was duly made, and on April 16, 1910, an order of confirmation of the sale was duly made and entered. This sale and the proceedings for such sale were proper and correct in all details, and

all proceedings required by law in the sale of real property belonging to a minor were had; the property being described as above set out in said petition. In this sale it was the intention of all parties to sell the real property belonging to the said minor's estate. And thereafter, pursuant to said sale and order of confirmation, the return of sale and report of guardian shows that said defendant Susie Fisher paid to the said Walter B. Wettersten, guardian, the sum of \$1,000, which was accepted by him, and a deed was thereupon made by him as guardian to the said defendant Susie Fisher, which deed was recorded on the 19th day of April, 1910, in Book 495, at page 143, and on January 12, 1911, in Book 524, page 127, of the Records of Deeds of Multnomah county, which deed described said property as being lot eight (8), block 7 (7), in Central Albina addition to the city of Portland, Multnomah county, Oregon, and further recited that the property conveyed was the only property owned by the said Esther P. Wettersten, a minor, in addition to referring to the several papers herein referred to, filed in said county court in connection with the sale of said premises.

"(6) Defendants herein are husband and wife, and that immediately on the execution of said guardian's deed from Walter B. Wettersten to the defendant Susie Fisher the said Esther P. Wettersten, minor, and Walter B. Wettersten, her guardian, delivered possession of said premises to the defendants, and ever since said date said defendants have been in continuous, open, and notorious possession of the same, exclusive of the plaintiff Esther P. Wettersten and the plaintiff Charles A. Johns, her present guardian."

Upon these findings the court entered a judgment for defendants, and plaintiffs appeal.

John K. Kollock, of Portland (Kollock, Zolinger & McDowall, of Portland, on the brief), for appellants. V. A. Crum, of Portland (Miller Murdoch, of Portland, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1, 2] The description in the petition was sufficient to give the county court jurisdiction, and the description in the deed was adequate to convey all of Esther P. Wettersten's interest in the property described in the complaint. 13 Cyc. 630, 632, 637; 8 R. C. L. 1037; Raymond v. Coffey, 5 Or. 132, 134; Pursley v. Hayes, 22 Iowa, 11, 39, 92 Am. Dec. 350. It is conceded and found that the property described in the complaint was the only real property owned by the minor, and that there was a house on the property known as 889 Borthwick street; that the intent of all parties was to sell the property that is described in the complaint, and but for the omission of the article "an" between the word "Albina" and the word "addition" everything connected with the sale is regular. The accidental omission of the article "an" in the petition and deed could not have misled any one. If it, standing alone, might have rendered the description uncertain, which under the findings we very much doubt, that uncertainty was cleared up and cured by the allegation in the petition that the premises were familiarly known as No. 889 Borthwick street, that it was the only real property own-

ed by the minor, and that it was occupied by her and her guardian and his wife and child. The deed also recited that it was the only property owned by the minor and referred to the papers on file in connection with the sale. We are of the opinion that the guardian's deed passed the title to the purchaser.

The judgment is affirmed.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

(54 Okl. 600)

NATIONAL LIFE INS. CO. v. HALE.
(No. 5485.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. INTEREST \S 37—"PENALTY"—BILLS AND NOTES.

Where a promissory note, drawing 5½ per cent. interest, payable semiannually, contains a clause which provides that the rate shall be increased to the maximum legal rate of interest in the event of default in payment of either principal or interest at maturity, such increased rate of interest is not a penalty, but a valid contract for the payment of interest (overruling the first syllabus in *National Life Ins. Co. v. Hall et al.*, 34 Okl. 395, 125 Pac. 1108).

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. \S 37.]

For other definitions, see Words and Phrases, First and Second Series, Penalty.]

2. PLEADING \S 354—ANSWER—MOTION TO STRIKE.

Where the answer fails to state a defense to the action, or to any part thereof, a motion to strike said answer from the files should prevail.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095; Dec. Dig. \S 354.]

Commissioners' Opinion, Division No. 1. Error from District Court, Canadian County; John J. Carney, Judge.

Action by the National Life Insurance Company against M. F. Hale. Judgment for defendant, and plaintiff brings error. Modified and affirmed.

Curtis M. Oakes, of Ottawa, Kan., and Wm. H. McNeal, of Chickasha, for plaintiff in error.

COLLIER, C. This action was brought August 16, 1912, upon a promissory note, made to the Deming Investment Company in the sum of \$1,600, and by said company, for value and before maturity, assigned to plaintiff in error, and to foreclose a mortgage given to secure payment of said note. Said note is as follows:

"No. 12185. \$1,600.00.

"On the 1st day of December, 1906, I promise to pay to the order of the Deming Investment Company (a corporation), the principal sum of sixteen hundred dollars, with interest thereon at the rate of 5½ per cent. per annum from Nov. 21, 1901, until maturity, payable annually, according to the tenor of five interest notes, one being for ninety and 25/100 dollars, and four others for eighty-eight and 20/100 dollars each,

all of even date herewith, both principal and interest notes payable at the National Park Bank, New York City, N. Y. If default be made for ten days in the payment of any sum, either principal or interest, after the same becomes due and payable according to the terms hereof, then the whole amount herein promised to be paid shall at the option of the holder hereof at once become due and payable.

"All sums herein promised to be paid shall bear 12 per cent. per annum interest after maturity, payable annually, whether the same become due according to the terms hereof, or by reason of default of any payment of principal or interest.

"Privilege is reserved to pay \$100 or any multiple thereof or the whole amount at the maturity of any coupon on and after Dec. 1, 1902, by giving 60 days' notice.

"Dated this 21st day of November, 1901.

"[Signed] Lida A. Miller.

"Attest:

"L. J. Hoover.

"Bert E. Bickford."

The only defense interposed was by defendant in error, who was permitted to intervene in the case, upon the ground that he had purchased the land described in said mortgage and execution sale, which sale was confirmed by the district court of Canadian county, and that he was the owner of said land. He further averred in his answer that:

"Defendant denies that the plaintiff is entitled to recover \$160 as attorney's fees for the foreclosure of said mortgage, for the reason that this defendant offered to pay the said plaintiff the amount of said indebtedness, with interest at 5½ per cent. per annum, and \$75, which was reasonable attorney's fees for the amount of services rendered by plaintiff's attorney in said action, * * * but that the plaintiff refused to accept same, and insisted on having this defendant pay interest on said indebtedness at the rate of 12 per cent. per annum from December 1, 1911."

Defendant prayed that plaintiff be awarded judgment in the sum of \$1,600, with interest thereon at 5½ per cent. per annum from December 1, 1911, together with \$75 as attorney's fees and costs of suit.

Plaintiff moved to strike from the files said answer and plea of intervention of defendant in error, upon the ground that the averments of the plea did not state a defense to the action, nor did they show such equities in him to entitle him to intervene in this action. The court overruled said motion to strike, to which plaintiff excepted. The case was tried to the court. Plaintiff offered in evidence the note and mortgage described in the petition, and the written assignment of said note and mortgage by the Deming Investment Company to plaintiff in error, and the written application for an extension of time of payment of said note made by the makers thereof, which was the only evidence offered or introduced in the case. The court rendered judgment for plaintiff for \$1,600, together with interest thereon at the rate of 5½ per cent. per annum from December 1, 1911, and for the further amount of \$160 attorney's fees, with interest thereon at 6 per cent. per annum from the filing of this ac-

tion, and for cost and disbursements of said action. That portion of the decree, limiting the recovery of plaintiff to 5½ per cent. interest per annum from December 1, 1911, to date thereof, was objected to by plaintiff, which objection was overruled, and exceptions saved. Thereupon plaintiff filed a motion for new trial, which was overruled and excepted to. To reverse said judgment this appeal is prosecuted.

[1] There is but one question involved in this controversy, viz., whether the increased rate of interest provided for in the note and mortgage in case of default of payment at maturity shall be construed as interest proper, or a penalty for failure to pay when due. If the increased rate can be properly held to be "interest," the provision as to the increased interest is valid. If said increased rate of interest can be properly held to be purely a "penalty," it is in contravention of the laws of this state and void.

While the adjudicated cases are not in entire harmony as to whether or not said advanced rate of interest should be held to be a penalty, we are of the opinion that the great weight of authority and the better considered cases force the conclusion that the advanced rate of interest provided to be paid after maturity of said note—12 per cent. being a legal rate of interest in Oklahoma Territory at the time said note and mortgage were executed—was not a penalty, but a legal and binding obligation to pay interest.

In *Miller v. Kempner*, 32 Ark. 573, it is held:

"Where a note contains a stipulation for interest, at the rate of 10 per cent. per annum until maturity, and 2 per cent. per month after maturity, the increased interest after maturity cannot be treated as a penalty."

In the case of *Portis v. Merrill*, 33 Ark. 416, it is said:

"The note on its face is plainly a contract for interest at 5 per cent. per month from its maturity, and the appellant could not set up a contemporaneous verbal agreement that it was to be a penalty, and thereby vary the plain terms of the written contract. * * * We cannot make new contracts for parties, or alter their plain meaning by construction. * * * A sane man has no claim upon a court of law or equity to relieve him from a hard bargain, when it is voluntarily entered into, and no fraud is practiced upon him."

In *Thompson v. Gerner*, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81, it is held:

"A provision in a promissory note, after providing for the payment of monthly interest at the rate of 8 per cent. per annum, that, 'if said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent. per month,' is not to be treated as a penalty, but as a contract to pay 1 per cent. per month interest upon a contingency."

In *Finger v. McCaughey*, 114 Cal. 64, 45 Pac. 1004, it is held:

"An agreement in a note secured by mortgage for interest from date at the rate of 10 per cent. per annum, provided that, if the note is not paid at maturity, it shall bear interest at the rate of 12 per cent. per annum from its date until paid,

is valid and binding as to the increase of rate contingent upon nonpayment. * * *"

Said cases of *Thompson v. Gerner* and *Finger v. McCaughey*, supra, are decided under statutes of California (Civ. Code), which contain a provision practically the same as section 1125, Comp. Laws 1909, which reads:

"Sec. 1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in next section. Section 1671. The parties to a contract may agree therein upon an amount * * * of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

In *Eccles v. Herrick et al.*, 15 Colo. App. 350, 62 Pac. 1040, it is held:

"An agreement in a promissory note to pay an additional interest on the principal of the note from its date, in case of default in the payment of the principal or any interest coupon when due, is not a penalty, but is an agreement into which the parties have a right to enter and is binding."

In *McKay, Adm'x, v. Belknap Sav. Bank*, 27 Colo. 50, 59 Pac. 745, it is held:

"A contract in a promissory note to pay a certain interest if paid at maturity, but, if not paid at maturity, to pay a higher rate of interest from date of note, is not a penalty imposed for the purpose of enforcing prompt payment, but is an agreement to pay a higher interest on a contingency, and is enforceable."

See, also, *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564.

In *Wilkerson v. Daniels*, 1 G. Greene (Iowa) 180, it is said in the syllabus:

"Under the statute authorizing parties to contract for interest not exceeding 20 per cent. per annum, it was legal to make a note drawing 12 per cent., and, if not paid when due, 15 per cent., per annum. It will not be considered by a court of equity as a contract for a penalty, but for interest after a given day."

And in the opinion the court says:

"The statute in force at the date of the execution of the note regulating interest permitted parties to contract for the payment of interest at the rate of 20 per cent. per annum. The makers of this note agreed to pay 12 per cent. per annum from date, and, if not paid to the day, 15 per cent. This cannot be construed as a penalty against which a court of equity will afford relief. It is a contract to pay 15 per cent. interest per annum on a contingency, which we think the law then permitted."

In *Holmes v. Dewey*, 66 Kan. 441, 71 Pac. 836, the syllabus reads:

"An agreement by the makers of a promissory note to pay interest at 6 per cent. per annum from its date until maturity, and 10 per cent. after that time, is not unlawful as to the excess over 6 per cent. agreed to be paid after the note should become due."

See, also, *Young v. Thompson*, 2 Kan. 83; *Parker v. Plymell et al.*, 23 Kan. 402; *Hutchinson v. Benedict*, 49 Kan. 545, 31 Pac. 147; *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709; *Insurance Co. v. Landers*, 5 Kan. App. 623, 47 Pac. 621; *Brown v. Cory*, 9 Kan. App. 702, 59 Pac. 1097.

In *Capen v. Crowell*, 66 Me. 282, the syllabus reads:

"On a promissory note payable on time, stipulating for a higher rate of interest than 6 per cent. after due until paid, interest is recoverable according to its terms."

And in the body of the opinion the court says:

"Interest is as justly due for the use of money after the maturity of a loan as during its continuance and before the contract for its repayment has been broken. * * * It is none the less so though the rate of interest should be increased by the agreement of parties in case of nonpayment. * * * But the rate of interest according to the agreement of the parties must control, whether it be a rate specified to be paid from the giving of the note or from its maturity. * * *"

In *Davis v. Hendrie*, 1 Mont. 499, the syllabus reads:

"A promissory note in which the maker agrees to pay 'interest after maturity at the rate of 4 per cent. per month until paid' is an agreement between the parties to liquidate the damages for a breach of the contract. This interest is not fixed as a penalty for the breach of the contract, and the agreement will be enforced by the courts."

And in the body of the opinion the court says:

"The contract for interest in this case cannot be treated as a penalty. The parties did not so understand it themselves. No fair interpretation of the contract can discover any such understanding. If the interest agreed upon is to be regarded as a penalty, then the court below erred in fixing the damages for the breach at the legal rate of interest, because the statute fixes the interest only in the absence of agreement; and in this case there was an agreement, and the question should have been determined on the testimony as to what were the actual damages, and the plaintiff might have recovered any amount he could have proved, not exceeding the 4 per cent. * * * stipulated for. This, however, I hold, was not fixed as a penalty."

In *Omaha L. & T. Co. v. Hanson*, 46 Neb. 870, 65 N. W. 1058, the syllabus is as follows:

"Where by the terms of a promissory note it is provided that it shall bear interest until maturity at a given rate, and thereafter at a higher lawful rate, such contract is not usurious, nor is the agreement for the higher rate of interest after maturity a mere penalty."

In *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. 560, the syllabus contains the following language:

"A note providing for a legal rate of interest until maturity, and for a higher, but still legal, rate after maturity, is valid, and will be enforced according to its terms."

In *Pass v. Shine*, 113 N. C. 284, 18 S. E. 251, it is said:

"We can conceive of no reason why the defendant could not lawfully contract in the deed itself, as he could have agreed in the note, that the rate of interest should be 8 per cent. after maturity. It has generally been conceded by the courts of this country that interest is allowable as damages for default in the performance of a contract to pay money." 11 Amer. & Eng. Enc. Law, 383. By special agreement a lawful rate may be paid from the date of contracting a debt till it becomes due. The fact that the creditor is content with a lower rate before maturity does not affect his right to demand under a special agreement a higher rate, not exceeding the limit fixed by law, after maturity."

In *Close v. Riddle*, 40 Or. 592, 67 Pac. 932, 91 Am. St. Rep. 580, it is held:

"A provision in a promissory note that, if the note shall not be paid at maturity, it shall thereafter bear a specified higher rate of interest than before maturity (such higher agreed rate being less than the highest legal rate), is not an agreement for a penalty, and not properly enforceable in equity, but it is rather an agreement for liquidated damages, which the parties are at liberty to make if they choose."

In *Wortman v. Vorhies*, 14 Wash. 152, 44 Pac. 129, it is held:

"An agreement to pay interest upon a promissory note at the rate of 9 per cent. per annum until maturity, and 1 per cent. per month thereafter, and also to pay interest upon coupon interest notes attached to the principal note, at the rate of 2 per cent. per month after maturity of such interest notes, is enforceable. * * *"

In *Loan & Trust Co. v. Dygart* (C. C.) 89 Fed. 123, the third syllabus is as follows:

"There is no ground on which a court can refuse to enforce the payment of interest on the debt secured at the rate of 12 per cent. after maturity, where such is the contract of the parties, and the note is not usurious."

This was (the above case) an action on a note providing for the payment of 10 per cent. interest until maturity, and 12 per cent. thereafter, and the court upheld the contract as a legitimate contract for the payment of interest according to its terms. See, also, *Mortgage Co. v. Wilson* (C. C.) 24 Fed. 310; *De Hass v. Dilbert*, 70 Fed. 227, 17 C. C. A. 79, 30 L. R. A. 189; *Linton v. Vt. National Life Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54.

In *National Life Ins. Co. v. Hall et al.*, 34 Okl. 395, 125 Pac. 1108, which was a case involving the identical question involved in this case, the learned judge sums up as follows:

"If it appears from the language of the note that the parties had in contemplation or under consideration the earning power this money might have after maturity, or what its use might be worth because of some contemplated investment, or what its retention might be worth to the makers, and the minds of the parties met in contract and agreed as to what the use of such money would be worth in either case, and their subsequent acts show this to be the meaning intended, then we think the increased rate should be treated as interest on money, as distinguished from penalty for nonpayment. But, on the other hand, if it appears from the face of the note that such provision for an increased rate after maturity, or, in case of default, is intended merely as an incentive to prompt payment, or as a punishment for nonpayment, and that after default payment will be enforced anyway, and the acts of the parties show this to be the meaning intended, then it should be treated as a penalty, and as void under the statute."

We think this summing up of the case of *Nat. Life Ins. Co. v. Hall*, supra, is sound; but we are unable to agree that under said summing up it appears from the note in question that the increased rate of interest contracted by said note to be paid after maturity should be treated as a penalty, and to so hold would be to write into the note a construction not warranted. We think that the provision in the note to pay an additional rate of interest after maturity, said condi-

tional rate of interest not being usurious, is a legal and binding obligation, and can be enforced. We therefore must decline to follow the rule declared in said case of *Nat. Life Ins. Co. v. Hall*, supra, that an advanced rate of interest, contracted to be paid after maturity, is a penalty and void. In short, we are convinced that parties may legally contract for the payment of interest at different rates in the same note, at different times, so long as the contract is not tainted with usury. It follows that the first syllabus in *Nat. Life Ins. Co. v. Hall*, supra, is hereby overruled.

[2] Under our view of this case, the answer of intervenor failed to set up any defense to the action, and the court erred in overruling the motion to strike said answer from the files, and also erred in refusing to grant a new trial.

This case should be reversed and remanded as to that provision in the judgment which fixes interest after maturity at 5½ per cent. per annum, with instructions to modify said judgment so as to fix the rate of interest upon the judgment rendered from the 1st day of December, 1911, at the rate of 12 per cent. per annum, and said judgment, except as herein modified, should be affirmed.

PER CURIAM. Adopted in whole.

(49 Okl. 681)

MISSOURI, K. & T. RY. CO. v. GILBREATH.
(No. 6841.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

MASTER AND SERVANT §137 — DEATH OF RAILROAD EMPLOYEE—NEGLIGENCE.

G., an acting section boss in the employ of a railway company, in due time got off the track upon which a passenger train was approaching to let the train go by, and thereafter, when the train was almost upon him, returned to the track from a place of safety and was hit by the train and killed. Held, that there was no duty upon the part of the engineer of the passenger train, who observed the action of the deceased, to ring the bell or sound the whistle to attract his attention to the approaching train, there being nothing to indicate that he intended to step on the track in front of the engine or thereafter the engine could have been stopped, or the injury avoided.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. §137.]

Error from District Court, Bryan County; Summers Hardy, Special Judge.

Action by Emma Gilbreath, administratrix of the estate of B. F. Gilbreath, deceased, against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to grant new trial.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. W. F. Semple and Hatchett & Ferguson, all of Durant, for defendant in error.

KANE, C. J. This was an action for personal injuries resulting in death, commenced by the defendant in error, plaintiff below, against plaintiff in error, defendant below, pursuant to the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]). Hereafter the parties will be called "plaintiff" and "defendant," respectively, as they were designated in the court below. Upon trial to a jury there was verdict for the plaintiff in the sum of \$4,000, to reverse which this proceeding in error was commenced.

The first assignment of error—and, in view of the conclusion we have reached, the only one necessary to be noticed—is:

"The trial court erred in overruling the demurrer to the evidence which was interposed by the plaintiff in error at the close of all the evidence on the part of the defendant."

The decedent was a section hand employed by the defendant company, who, at the time of the injury, was acting as boss of the gang in place of the regular section boss who was temporarily absent. The specific acts of negligence relied upon by counsel for plaintiff was the failure of the engineer of the "Flyer" to sound the whistle or ring the bell to warn the section men of the approach of his train.

The facts and circumstances surrounding the injury may be fairly summarized from the testimony of B. M. Flannery, a witness on behalf of the plaintiff, substantially as follows:

I am now and was during the month of August, 1912, a fireman on a freight train for the Missouri, Kansas & Texas Railway Company and recall the death of B. F. Gilbreath. I was at the time sitting on the seat box of the engine No. 684 of the north-bound freight train. There were double tracks at the point of the accident. When I first saw Mr. Gilbreath so I could distinguish him from the others he started towards the track from the west side like he was starting to cross the track. I had seen him and the other section hands before that time. When I first saw them they were working on the south-bound track, and they all got off of the track and went on the west side, part of them stood on the top of the bank and a part along down off of the bank. The "Katy Flyer" train No. 5 was coming south on this south-bound track and passed this point somewhere about 4 o'clock. When the men got off of the track the Flyer was a good ways off. We were going north and I just happened to look and saw the men get off to let the Flyer by. When the Flyer was about 200 feet from the section men I saw one, who was Mr. Gilbreath, start across the track in front of it. He got to the middle of the track or a little to the east side between the rails and stooped over like he was going to pick up something with his back to the Flyer, and by that time our engine got right even with him and the Flyer's engine hit him. He had just gotten there when he was struck. I did not see anything that he was attempting to pick up. I don't remember of hearing the Flyer whistle or ring the bell. At the time Mr. Gilbreath started on the track I hallooed at him as loud as I could, but I do not suppose he could have heard me. He was hit before I was through hallooing.

The testimony of Mr. Honnell, the engineer upon the "Katy Flyer," who testified for the

defendant, was not substantially different from the foregoing, except that he testified positively that the ordinary signals were given. It may be summarized as follows:

I have been a licensed locomotive engineer for 18 years and have been working for the Missouri, Kansas & Texas since 1892, and have been 4 years in the passenger service. I was in charge of the engine that struck Mr. Gilbreath. When approaching Calera I sounded the station whistle and started the bell ringer, and at the required distance before coming to the crossing in front of the depot I sounded the crossing whistle. About the time I was passing the depot I saw section men working down south of the station. I also saw the freight train approaching from the south quite a distance from the station on the north-bound track, and I sounded the crossing signal just after passing the depot for the crossing at the south end of Calera and also to warn the section men. The section men did not get off of the track until I whistled the crossing whistle. They then left the track and started over to the west side. All of them cleared the track and got into a place of safety. The bell rings automatically. In order to start it you turn a little valve and it rings until you shut it off. All at once I saw a man run up onto the track, and, being so close to him, I was worried and expected to strike him, and at once sounded several short blasts of the whistle. The engine was about 90 feet from him when he ran onto the track. The running board partly obstructed my view of him by him being so close to the engine. At first I could see him about to his knees, and finally he got so I could not see him at all. If he had been 20 or 30 feet further away I could have seen him. The running board is the board running from the cab window at the side of the boiler to enable the engineer to step out of his cab window to walk around the boiler in the event that anything goes wrong. I could not see Mr. Gilbreath when he was struck. My train was running from 45 to 50 miles an hour. It is a fast train and maintains about the same schedule as the trains known as the Limited and Kansas City Special. The Flyer and these other trains are the fastest trains on this system. Calera is not a stop for the Flyer, and I was running about the usual rate of speed. After Mr. Gilbreath stepped upon the track there was nothing that I could have done to avoid the accident. It was impossible to have stopped the train in that short distance. I applied the brakes, but I knew that I could not stop and avoid striking him. The train ran I should judge 900 or 1,000 feet before stopping. This was a fairly good stop for a train of this kind. The track was downgrade.

There were other witnesses who testified for the respective parties, but there was practically no conflict in the evidence as summarized above, unless it was upon the question whether the engineer of the "Flyer" rang the bell and sounded the whistle to attract the attention of the deceased to the approaching train.

No matter how deeply we may sympathize with the plaintiff, there can be no escape from the conclusion that the testimony of her own witnesses conclusively shows that the injury which caused the death of her husband was the result of an unavoidable accident in so far as the railway company is concerned, for which no recovery can be had under the law as it existed at the time the injury occurred. It may be conceded, generally, that it would be the duty of the engineer to warn the deceased of the approach of

the "Flyer" by ringing the bell and blowing the whistle, and that he did not do so, and still, owing to the special circumstances of this case the plaintiff would be in no better situation. The engineers on the south-bound "Flyer" and the north-bound freight train both testified that they saw the decedent get off the track "to let the Flyer by" whilst yet it was "a good ways off," and the testimony of the former, to the effect that after the deceased returned to the track there was nothing that could have been done which would avert the accident, is uncontroverted. There is some contention on the part of counsel to the effect that there was no evidence that the deceased knew the Flyer was approaching upon the track upon which he was working, or that he got off the track to let it go by. In this we think counsel is in error. The engineer on the freight train testified on that question as follows:

"Well, the Flyer was a good ways off when I first seen them and they got off the track. We was coming north and I just happened to look and saw the section men there, and as I seen them they all got off to let the Flyer by. I just thought in my mind that they got off to let the Flyer by and there wasn't anybody in the way."

It may be urged that the statement that the deceased got off the track "to let the Flyer by" was a mere conclusion of the witness, but even so, it was the only conclusion which reasonably could be reached from the facts and circumstances of the case, and if the jury found differently on that point—and there is nothing in the record to indicate that they did—such a finding clearly would not be supported by the evidence. It seems to us in such circumstances that negligence cannot be based upon the failure of the engineer to ring the bell or sound the whistle to warn the trackmen of the approach of his train when it was obvious to him that they had knowledge of this fact. The contingency that the deceased would leave a place of safety and return to the track immediately in front of the rapidly approaching passenger train, after having gone to such place of safety "to let the Flyer by," is too remote to be seriously considered.

However, there is nothing in the record to indicate that the jury so found, except the return of a verdict in favor of the plaintiff; and from an examination of the authorities cited by counsel and the instructions given by the court, we think it quite likely that the verdict is more the result of the action of the trial court in applying to the facts non-applicable principles of law than of error in the findings of fact themselves by the jury. Counsel insist, and the trial court seems to have taken the view, that the law applicable to this case is stated in 2 Thompson on Negligence, par. 1758, as follows:

"The position of track walkers, track repairers, and especially that of car repairers, is materially different, in respect of the question of their contributory negligence, from that of ordinary travelers at highway crossings, and still more

so from that of trespassers. They are not only lawfully upon the railway track and hence in a position of danger, but they are there under contract with the railway company for the performance of certain duties which require, to a greater or less extent, the exercise of their faculties, in the performance of which their faculties may become so absorbed as not to enable them to take the same care for their safety which might reasonably be expected from travelers at crossings and from intruders upon railway tracks or in railway yards. These considerations impose upon the railway company, with peculiar force, the duty of giving them warning upon the approach of a train or engine, by the use of audible signals, and by checking or stopping the train or engine in time to avoid injuring them, if the engineer perceives that, for any reason, they are not paying attention to those signals. As a general rule, it is not contributory negligence, as matter of law, for a person so employed not to be on a constant lookout for approaching trains. This must be so if we are paying the slightest attention to the position of a man who is fastening a fishplate, or who is oiling or repairing the wheel of a car on a passenger train which has stopped temporarily at a station for that purpose. Such a person cannot keep his eyes on his work, and at the same time keep them strained in both directions for approaching trains, or for ocular signals. Such persons are therefore not blameworthy, as matter of law, merely because they become so engrossed in their work as not to heed the approach of a train, or because they rely upon the reasonable expectation that the railway company will, through its trainmen, perform the duty of giving them the necessary and proper signals. But it does not follow from these considerations that contributory negligence will be wholly excused, even in persons thus engaged. For example, the duties of a track walker are manifestly not so absorbing as to relieve him from the obligation of exercising reasonable care for his own safety, by looking and listening for approaching trains. On the other hand, if he is seen by those in charge of the train to be absorbed upon some object so that he does not heed the approaching train, and they run him down, the company will be liable."

We find no fault with the law as above laid down by Judge Thompson in his admirable text-book, but do not believe it has any application to the facts in the case before us. He was discussing the law from the standpoint of the contributory negligence of the plaintiff; whilst in the case at bar, the question under discussion is the primary negligence of the defendant. In this jurisdiction, by constitutional provision, if there is evidence tending to show primary negligence on the part of a railway company, the question of contributory negligence is always a question of fact which must be submitted to the jury. Section 6, art. 23, Williams' Constitution.

The law as stated in the text is applicable to the cases where the person injured was, or appeared to be, so absorbed in his occupation that he remained at his post of duty unmindful of the approaching train until he was run down and injured. As we have already shown, that is not the class of cases to which the case at bar belongs; nor does it belong to the class of cases which counsel cite in support of their position. From one of them, *Sullivan v. Mo. Pac. Ry. Co.*, 97 Mo. 113, 10 S. W. 852, we quote the following:

"* * * Indeed, although the fireman and engineer saw Sullivan on the track, and saw that his attention was attracted to the steam shovel, still there is evidence that no signal was given until the instant the engine struck him."

From another, *St. Louis, I. M. & So. Ry. Co. v. Jackson*, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646, 8 Ann. Cas. 328, we quote the following:

"Now, in the case at bar, there was affirmative evidence to the effect that the work of tamping gravel under the ties required some care and attention, and the plaintiff's intestate was stooping over, engaged in this work with his back to the approaching train."

In another, *Schulz v. Chicago, M. & St. P. Ry. Co.*, 57 Minn. 271, 59 N. W. 192, we find the following:

"The track on which this train was approaching was straight for about 1,800 feet, and the deceased could be seen for that distance before the train reached him. It was a question for the jury whether the persons managing the train, if they had been exercising proper care, would not have discovered that deceased was unaware of its approach."

The distinction between the case at bar and the foregoing and the other cases of the same class cited by counsel for plaintiff, while quite obvious, may be further emphasized by comparing them with a few cases to which it is more nearly analogous. In *N. Y., N. H. & Hudson Ry. Co. v. Pontillo*, 211 Fed. 331, 128 C. C. A. 573, the deceased, a track walker, was walking beside the track in a place of safety. He was not in view of the engineer, but was of the fireman. The train was moving about 15 miles an hour. The bell was ringing. The deceased stepped upon the track when the train was about 10 feet from him. It was contended that the fireman should have given notice to the engineer of the presence of the deceased, and that the whistle should have been sounded to warn him of the approaching train. The court held that:

"The contingency that he would step out on the main track directly in front of a passenger train at the precise moment that it was due at that point without turning his head, seems too remote to be seriously considered."

In *Land v. St. L. & S. F. R. Co.*, 95 Kan. 441, 148 Pac. 612, the deceased was a section foreman. The accident occurred at a place where there were double tracks. The south-bound train passed on the west track, emitting a large amount of steam and smoke, which settled down over the tracks, obscuring the view. After the train passed the deceased walked over the west track and walked a short distance south between the parallel tracks and then attempted to cross the east track and was struck. The train was going at about 45 miles an hour. It was claimed that crossing signals were not given, and that the train was moving at a high rate of speed. The jury found that no signals were given until the deceased was discovered on the track, at which time it was too late to avoid the accident. The court said:

"Railroads must operate their passenger trains and transport their passengers without impeding their progress or imperiling their safety by the necessity of making it a condition precedent to see if its section men, employed for the purpose of keeping the track safe while trains are running over it, are themselves looking out for their approach. Of course, when those in charge of the engine discover a section hand in a place of danger from which it becomes apparent that he will not or cannot protect himself, they must use due care to avoid injuring him, but ordinarily a greater burden than this they are not called upon to exercise."

In *Helm v. Mo. Pac. Ry. Co.*, 185 Mo. 212, 84 S. W. 5, the injured person, a section laborer, was standing near the track in a place of safety drinking water from a keg. Upon the approach of the train which hit him he in some way got his feet tangled with some shovels or tools and fell upon the track, where he was hit by the train. The court said:

"The necessary, underlying postulate as to this charge is that the deceased was in a place of peril, and the next ingredient necessary to a recovery is that the defendant knew, or by the exercise of ordinary care could have known, that he was in peril, in time to have stopped the train and avoid the injury. There is no controversy in the case that the deceased was a section hand in the employ of the defendant, nor that, when the train was from 200 to 600 feet from him, he was standing at the water keg, at a distance of at least 6 feet south of the track. There can be no doubt in the mind of any one that while in that position he was not in a place of peril. The trainmen, therefore, had a right to assume that he would remain in that safe position, and would not do anything towards thereafter placing himself in a position of danger, and hence were not required to stop the train or check the speed."

In another case, which is probably more nearly analogous to the case at bar than any other called to our attention, *St. L. & I. M. Ry. Co. v. Lawrence*, 106 Ark. 32, 152 S. W. 1002, the deceased was a section foreman. He knew of the approach of the train, and had removed a speeder from the track, and thereafter started back onto the track when the train was from three to five telegraph poles distant, and stooped over to pick up something from the track. It was contended on the part of the plaintiff that the deceased went upon the track to pick up a jack, which might have endangered the safety of the train. The court, however, deemed these different circumstances as to the purpose for which he went upon the track as immaterial. Answering the contention of counsel that the engineer should have put the engine under control, that its speed should have been so reduced that by application of the air the train could have been stopped, or its speed reduced, when it seemed that the injured person was stooping over the track as if to remove something from it, the court say:

"This would be the law if it appeared that there was anything in the situation of the persons upon the track which made it appear that they were unaware of the danger of their situation. But there was no such duty here. All the persons on the track were section men,

whose business it was to make the track safe for the passage of trains, and who were charged with notice that trains might run at any time; and it not only appeared to the engineer that they were all aware of the approaching engine, but such was actually the fact, and both cars were removed to a place of safety."

We think the foregoing authorities are sufficient to make clear the precise point upon which the case before us turns, and that it belongs to the latter class of cases, and not the former. When the case is properly classified, the conclusion reached here is supported by an unbroken line of authorities.

For the reason stated, the judgment of the court below is reversed and the cause remanded, with directions to grant a new trial.

All the Justices concur, except HARDY, J., who was disqualified and not sitting.

(54 Okl. 578)

ROLLOW v. FROST & SADDLER et al.

(No. 4974.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT \S 43 — VOLUNTARY—SETTING ASIDE AND REINSTATEMENT—JURISDICTION—COMPLIANCE WITH STATUTE—"JUDGMENT OR ORDER."

Where one brings an action in the district court to quiet title to certain real estate, seeking the cancellation of his conveyance of the same, and while a demurrer is pending to his petition, said action is dismissed by the court on his application at his cost, such dismissal is a judgment or order within the purview of section 5267, Rev. L. 1910 (section 6094, Comp. L. 1909); such court is without jurisdiction at a subsequent term to vacate such a judgment or order and reinstate said cause, under subdivision 3 of said section, without a substantial compliance with section 5268, Rev. L. 1910 (section 6095, Comp. L. 1909).

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 84-91; Dec. Dig. \S 43.]

For other definitions, see Words and Phrases, First and Second Series, Judgment; Order.]

2. DISMISSAL AND NONSUIT \S 43 — VOLUNTARY—SETTING ASIDE AND REINSTATEMENT—VALIDITY OF PROCEEDINGS—COMPLIANCE WITH STATUTE.

Where such court, at a subsequent term, makes an attempted order vacating such judgment or order and reinstates said cause, over the objection of the adverse party, and without a written motion or application and reasonable notice to the adverse party, *held*, not a substantial compliance with section 5268, Rev. L. 1910, and the order is therefore a nullity.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 84-91; Dec. Dig. \S 43.]

3. VENDOR AND PURCHASER \S 231, 245 — RECORD OF MORTGAGE—ACTUAL KNOWLEDGE—QUESTIONS FOR JURY.

Evidence, as between the mortgagees and a subsequent purchaser, examined, and *held*, to fully sustain the judgment of the trial court.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513-539, 612; Dec. Dig. \S 231, 245.]

Commissioners' Opinion, Division No. 3. Error from District Court, Garvin County; R. C. Allen, Judge.

Action by Frost & Saddler, a copartnership composed of N. B. Frost and another, against Robert Dyer and others. Judgment for plaintiffs, and defendant J. A. Rollow brings error. Affirmed in part, and reversed and remanded in part.

J. B. Thompson, of Pauls Valley, for plaintiff in error. Blanton & Andrews, of Pauls Valley, for defendant in error Frost & Saddler. Carr & Field, of Pauls Valley, for defendants in error Dyer.

DUDLEY, C. This is an appeal from the district court of Garvin county. On April 28, 1909, the defendant in error Robert Dyer commenced an action in said court against the plaintiff in error, Rollow, being case No. 331, to quiet title to 40 acres of land situated in said county, constituting his allotment, by the cancellation of a deed executed by him and his wife to Rollow on January 29, 1909. In May following Rollow filed a general demurrer to Dyer's petition. Following this, and on April 28, 1911, at a special term of said court, said cause was dismissed, at the cost of Dyer, the plaintiff therein. The dismissal, omitting the caption, is as follows:

"Comes now R. T. Jones, attorney for plaintiff in this cause, and asks the court to have an order of dismissal entered in the above-styled cause, dismissing the same at plaintiff's costs. And, the court being fully advised, it is ordered that said cause be and the same hereby is dismissed, at cost of plaintiff."

Prior to the making of this order, and on April 4, 1911, the defendants in error Frost & Saddler, a copartnership, commenced an action in said court against Dyer and wife, the plaintiff in error, Rollow, and others, being case No. 873, to recover the amount claimed to be due upon a promissory note of \$219.98, and to foreclose a mortgage securing the same, covering said real estate, executed by Dyer and wife to them on December 5, 1908, due February 1, 1909. Personal service of summons was had upon Dyer and wife, and they made default. Rollow filed an answer and cross-petition in said case, claiming to be the owner of the mortgaged premises, and seeking to have said mortgage canceled and removed, as a cloud upon his title. To this answer and cross-petition the plaintiffs, Frost & Saddler, replied. On January 30, 1912, and at a subsequent term of said court, an order was made, over the objection of Rollow, reinstating case No. 331 and consolidating the same with case No. 873. The portion of said order reinstating said case and consolidating the same with case No. 873, necessary to be considered, is as follows:

"On the 30th day of January, 1912, came on to be heard the above cause, and all parties agreeing that said cause should be continued for the term, and it further being the agreement of the plaintiffs and the several defendants, except John Rollow, that the case of Robert Dyer et al. v. J. A. Rollow, No. 331, should be consolidated with this case, and that all the matters in controversy in both suits should be litigated in

this suit; and it further appearing that said suit No. 331 had been erroneously dismissed at a former term of this court, the same is upon the motion of the plaintiffs in said suit hereby reinstated, and as above stated consolidated with this cause. It is therefore ordered that both of said cases be consolidated and continued until the next term of this court."

Rollow saved timely exceptions to the action of the trial court in reinstating said cause and consolidating the same with case No. 873. Dyer filed no written motion or application to have said case reinstated, but the same was reinstated upon his oral application, without notice to Rollow or his attorney of record. His attorney, however, was present in court when the order was made, and objected to the making thereof. In October, 1912, said consolidated cases were tried, resulting in a judgment: (1) In favor of Frost & Saddler for the amount due upon said note and the foreclosure of said mortgage upon said real estate; and (2) in favor of Dyer canceling the deed made by him and his wife to Rollow. From this judgment, Rollow has appealed.

[1, 2] It is first contended that the trial court committed prejudicial error in making the order of January 30, 1912, in effect vacating the order of dismissal of April 28, 1911, in case No. 331, and reinstating the same, for the reason that the statute (sections 5267, 5268, Revised Laws 1910; sections 6094, 6095, Snyder's Comp. L. 1909), prescribing the grounds for and the manner in which district courts may vacate or modify their own judgments and orders, at a subsequent term, was not substantially complied with, and therefore the pretended order reinstating said case was a nullity. In determining this question two propositions present themselves: (1) Is the entry of April 28, 1911, a judgment or order within the purview of section 5267, supra? and (2) if so, was there a substantial compliance with section 5268, supra, in making the order of January 30, 1912, vacating the judgment or order of April 28, 1911, and reinstating said cause?

Section 5267, supra, in part provides:

"The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made:

"First. By granting a new trial for the cause, within the time and in the manner prescribed in section 5035.

"Second. By a new trial granted in proceedings against defendants constructively summoned, as provided in section 4728.

"Third. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order. * * *

It is claimed that the entry of April 28, 1911, was made by the clerk through mistake, and, if it is a judgment or order, the district court had the power to vacate the same, under subdivision 3 of the above section. Said entry is in effect a dismissal of said action by the court, upon the application of the plaintiff therein, at his cost. This order effectually dismisses and disposes of

that case, and is a judgment or order, within the purview of said section. 1 Black on Judgments (2d Ed.) § 21; *Houston v. Clark*, 36 Kan. 412, 13 Pac. 739; *Brown et al. v. Kirkbride*, 19 Kan. 588; *Dahler v. Steele*, 1 Mont. 206; *Harjo v. Black et al.*, 153 Pac. 1187 (No. 7569). Mr. Justice Sharp, speaking for the court in the case last cited, discussing the question of the power of the court to set aside orders of dismissal, said:

"The authority of the court, generally speaking, to set aside orders of dismissal, does not differ from that of other orders or judgments."

In this case the plaintiffs dismissed the action, without an order of the court. There can be no doubt but that the entry of April 28, 1911, was a judgment or order, within the purview of section 5267, *supra*.

The rule is well settled in this state that a trial court has a wide and extended discretion in modifying, vacating, or setting aside orders or judgments made, rendered, and entered in its own court, when it does so at the same term at which such order or judgment was made and entered; but after the term expires there must be a substantial compliance with the terms of the statute, in order to give the court further jurisdiction. *McAdams v. Latham*, 21 Okl. 511, 96 Pac. 584; *McKee v. Howard et al.*, 38 Okl. 422, 134 Pac. 44; *Crowley-Southerland Commission Co. et al. v. Husband*, 42 Okl. 77, 140 Pac. 1144; *Jenkins v. Brown et al.*, 148 Pac. 697; *Hawkins v. Hawkins*, 153 Pac. 844. See, also, *Alliance Trust Co. v. Barrett et al.*, 6 Kan. App. 689, 50 Pac. 465; *Fisher v. Montgomery et al.*, 87 Kan. 687, 125 Pac. 61. Measured by this rule, was there a substantial compliance with section 5268, *supra*, in making the order of January 30, 1912? We think not. This section provides:

"The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment, because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term."

There was no motion filed by the plaintiff, neither was there any notice given to the adverse party, or his attorney of record. In the absence of these two prerequisites, neither of which were waived, it certainly cannot be said that there was a substantial compliance with the foregoing statute. *McKee v. Howard*, *supra*; *Jenkins v. Brown*, *et al.*, *supra*; *Hawkins v. Hawkins*, *supra*; *Alliance Trust Co. v. Barrett*, *supra*; *Harding v. Gillett*, 25 Okl. 199, 107 Pac. 665; 23 Cyc. 952; *Jenkins v. Corwin*, 55 Ind. 21; 1 Black on Judgments (2d Ed.) § 346. We therefore conclude that the pretended order of January 30, 1912, was a nullity.

Having reached this conclusion, it is not necessary to determine the question as to whether or not the two actions could properly be consolidated.

[3] The remaining question to be determin-

ed is the correctness of the judgment of the trial court in favor of defendants in error *Frost & Saddler*, foreclosing their mortgage upon said real estate as against the plaintiff in error. Said mortgage was executed on December 5, 1908, and recorded on December 14, 1908. The deed under which Rollow claims was executed on July 29, 1909, and recorded on the following day. Rollow seeks to have said mortgage canceled and removed as a cloud upon his title, claiming that he did not know nor have any knowledge of its existence at the time he procured his deed, and that the original mortgage did not bear the notary's seal and was not entitled to record, and was therefore not constructive notice to him. The original mortgage as introduced in evidence bears the notary's seal, but the mortgage as recorded does not show the seal. There is a conflict in the evidence as to whether or not the original mortgage bore the notary's seal. This controverted question of fact was determined adversely to the plaintiff in error. Aside from this fact, there is evidence reasonably tending to show that plaintiff in error had actual knowledge of the existence of the mortgage at the time he procured his deed; and, if this is true, the question of the notary's seal becomes immaterial. Section 1195, *Snyder's Comp. Laws 1909*. This question of fact was likewise determined adversely to the plaintiff.

There was no controversy as between the mortgagors and mortgagees as to the execution of the note and mortgage or the amount due thereon, but the sole controversy was as to whether or not the mortgage was a valid lien as against the plaintiff in error. By his answer and cross-petition he invoked the equitable jurisdiction of the court to cancel the mortgage and remove the same as a cloud upon his title. The action, therefore, is in the nature of an equitable one, and this court has the right to review and weigh the evidence. *Maas et al. v. Dunmyer*, 21 Okl. 434, 96 Pac. 591; *Schock v. Fish*, 144 Pac. 534; *Wimberly v. Winstock et al.*, 149 Pac. 238; *Tucker v. Thraves*, 151 Pac. 598. With this rule in view, we have carefully examined the entire record, and on consideration of the same we are of the opinion that the judgment of the trial court is correct, and should not be disturbed.

Plaintiff in error also complains of the introduction of certain testimony over his objection, but an examination of the record in this respect leads us to the conclusion that the court did not commit prejudicial error in permitting the evidence complained of to be introduced.

From an examination of the entire record we are of the opinion that the judgment of the trial court in favor of the defendants in error *Frost & Saddler*, foreclosing their mortgage, should be affirmed, but that that portion of the judgment in favor of defend-

ant in error Dyer, canceling the deed made by him and his wife to the plaintiff in error, Rollow, should be reversed and remanded.

PER CURIAM. Adopted in whole.

(49 Okl. 673)

HUNTER, County Treasurer, v. STATE ex rel.
CITY OF SHAWNEE. (No. 7214.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. TAXATION — §914 — DELINQUENT TAXES — INTEREST, PENALTIES, AND FORFEITURES — DISPOSITION.

By section 2, art. 3, c. 43, Sess. Laws 1895, p. 220, amending section 1, art. 10, c. 70, Stat. 1893, and by section 3, art. 9, c. 32, Sess. Laws 1897, p. 257, it was provided that all interest, penalties, and forfeitures upon delinquent taxes should be paid into the county sinking fund.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1751; Dec. Dig. § 914.]

2. TAXATION — §908 — DELINQUENT TAXES — INTEREST, PENALTIES AND FORFEITURES — DISPOSITION — REPEAL OF STATUTE.

Said provisions were not repealed by Act March 12, 1897 (Laws 1897, c. 32, art. 4) § 1, amending section 2, art. 3, c. 43, Sess. Laws 1895.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1740; Dec. Dig. § 908.]

3. STATUTES — §161 — CONSTRUCTION — LAWS ENACTED AT SAME SESSION.

Where statutes relating to the same subject-matter have been enacted at the same legislative session, they should be construed together as in pari materia, so that effect may be given to each, rather than to infer that one of such statutes was meant to destroy the other.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.]

4. STATUTES — §219 — CONSTRUCTION — USAGE.

The construction placed on the statutes by officers charged with the enforcement thereof in the discharge of their duties at or near the time of their enactment, which has long been acquiesced in, is a just medium for their judicial interpretation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.]

Sharp, J., dissenting.

Error from Supreme Court, Pottawatomie County; Leander G. Pitman, Judge.

Action by the State, on the relation of City of Shawnee, a municipal corporation, against Geo. K. Hunter, Treasurer of Pottawatomie County. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Chas. W. Friend, of Shawnee, and Clarence Robison, of Tecumseh, for plaintiff in error. W. T. Williams, of Shawnee, for defendant in error.

HARDY, J. The state, upon the relation of the city of Shawnee, commenced this action in the superior court of Pottawatomie county, against Geo. K. Hunter, as treasurer of said county, seeking a writ of mandamus to compel the defendant, as such treasurer, to pay over to the city of Shawnee

certain penalties by way of interest that had accrued on taxes levied on property within the city of Shawnee by said city, and collected by the county treasurer. The city of Shawnee contends that under the law it is entitled to said penalties, and that same are wrongfully retained by the defendant, while said defendant, as county treasurer, contends that said penalties properly belong to the county sinking fund, and should be by him credited to said fund.

It is a general rule, in the absence of statutory provisions to the contrary, that interest and penalties accruing upon taxes follow the tax and go to the state, county, or city, according as the one or the other is entitled to the tax itself, and in cases where two or more of these are interested in the tax such interest and penalties should be apportioned among them in the ratio of their respective share in the tax. 37 Cyc. 1594. The natural inquiry therefore would be whether any disposition of the interest and penalties upon delinquent taxes has been made by legislative provision.

[1, 2] By section 1, art. 10, c. 70, Stat. 1893, it was provided that to all taxes after delinquent there should be added certain penalties; but no provision was contained in the Statutes of 1893 making disposition of these penalties. This section had reference to the revenue of the territory and to counties, while the provisions regulating revenue of cities was contained in sections 9 to 16, both inclusive, art. 3, c. 14; and by section 15 of said last-named article it was provided that all taxes and assessments levied by cities should be certified to the county clerk to be placed on the tax rolls for collection, subject to the same penalties and should be collected in like manner as other taxes. By section 2, art. 3, c. 43, Sess. Laws 1895, p. 220, section 1, art. 10, c. 70, Stat. 1893, being section 5643, was amended in reference to the time at which taxes should become delinquent, and adding thereto certain penalties, and further providing:

"Provided, all penalties shall be credited to the county fund, and all rebates charged to the same fund."

Prior to this time the law provided that county taxes should constitute three funds, to wit, the general fund, the road and bridge fund, and the sinking fund. Sections 5625-5627, Stat. 1893. On the 8th day of March, 1895, the Legislature enacted article 2, c. 43, Sess. Laws 1895, pp. 216, 219, by which was created the salary fund, court fund, poor fund, road and bridge fund, supply fund, contingent fund, and sinking fund. This act was passed on the same day as the provision requiring penalties to go into the county fund, and this remained the condition of the law until 1897, when the Legislature enacted article 9, c. 32, Sess. Laws 1897, p. 257, creating sinking funds for all municipal cor-

porations authorized by law to levy taxes; and by section 3 of said article it was provided:

"Sec. 3. All penalties, interest and forfeitures now accruing, or which hereafter may accrue to the counties on delinquent taxes, shall be turned into the sinking fund, and all rebates upon taxes allowed by the county commissioners shall be paid out of the sinking fund. * * *

At this time, by virtue of section 2, art. 3, c. 43, Sess. Laws 1895, penalties upon all taxes, territorial, county, and city, were credited to the county fund, and all rebates charged to the same fund; but, as has been seen, there was in reality at that time no county fund, as such, but the county taxes were divided up into various funds, one of which was denominated sinking fund. And by section 3, art. 9, c. 32, Sess. Laws 1897, the Legislature directed that all penalties, interest, and forfeitures and delinquent taxes should be turned into the sinking fund. Plaintiff contends that this section intended to direct that only penalties accruing on territorial and county taxes should be paid into the county sinking fund, and did not include city taxes. We do not think this contention is well taken. By section 2, art. 3, c. 43, Sess. Laws 1895, all penalties were required to be paid into the county fund, and, there being no county fund, as such, it was the intention and purpose of the Legislature in enacting the provision in question to designate the particular fund into which such penalties should be paid, and, if it had been the intention of the Legislature to except from this provision penalties upon city taxes, it would have been an easy matter to say so, and, not having said so, it is apparent that no change in the law was meant, except to designate the particular fund into which the penalties should go. This act was approved March 3, 1897. On March 12, 1897 (Laws 1897, c. 32, art. 4), the Legislature amended section 2, art. 3, c. 43, Sess. Laws 1895, with reference to delinquent taxes, making provision for the time when taxes should become delinquent, and fixing the rate of interest that should accrue as penalties thereon, and prescribing the manner of their collection. This section, as amended, omitted the proviso which directed that all penalties, interest, and forfeitures should be credited to the county fund, and all rebates charged to the same fund; and plaintiff contends that by reason of such omission the Legislature intended a repeal thereof. It will be seen that on March 3, 1897, the Legislature in the article above referred to relating to sinking funds had directed that all penalties, interest, and forfeitures should be turned into the county sinking fund; and the act of March 12, 1897, which omitted the proviso in the act of 1895, was passed at the same session of the Legislature.

[3] The question then is whether by the act of March 12 it was intended to repeal

the act of March 3, 1897. We do not think so. The rule of statutory construction is that, where statutes relating to the same subject-matter have been enacted at the same legislative session, they should be construed together as in *pari materia*, so that effect may be given to each, rather than to infer that one of the statutes was meant to destroy the other. *Hess v. Trigg et al.*, 8 Okl. 286, 57 Pac. 159; *Garton et ux. v. Hudson Kimberley Pub. Co.*, 8 Okl. 631, 58 Pac. 946; *Ratliff v. Fleener*, 43 Okl. 652, 143 Pac. 1051; *Sutherland, Stat. Const.* (2d Ed.) § 443; *Endlich, Int. Stat.* § 43; *Black, Int. of Law*, § 86. The two statutes are not repugnant to each other, but, on the contrary, may be construed together and each given effect. That this was the legislative intent is evidenced by the fact that article 9, c. 43, Sess. Laws 1897, is found in *Wilson's Rev. & Ann. Stat.* 1903 as article 2, c. 73, being sections 5892 to 5895, both inclusive, and was carried into *Snyder's Comp. Laws* 1909 as sections 7402 to 7405, and with certain modifications is found in *Rev. Laws* 1910 as sections 6771, 6775.

[4] Thus it is seen that this provision has been in the statutes of the territory and of the state from its first enactment in 1895 up to the present time. It therefore appears that it was the legislative intent that all penalties accruing on delinquent taxes, whether of the territory, county, or city, should be paid into the county sinking fund; and, this being the statutory disposition of such penalties and interest, the authorities relied upon by plaintiff can have no controlling force. If there were any doubt of this being the correct construction of these statutes, unless the legislative intent to the contrary were clearly apparent, the fact that in the various counties officials charged with the enforcement thereof from the date of the statute until the present, in the discharge of their duties under the revenue laws of the territory and state, have given such statute the same construction as we give, would be of great weight, and we would not disregard such construction without the most cogent and persuasive reasons.

In *League v. Town of Taloga*, 35 Okl. 277, 129 Pac. 702, it was said:

"The construction placed on statutes * * * by officers in the discharge of their duties, either at or near the time of the enactment, which has been long acquiesced in, is a just medium for its judicial interpretation."

And in *State ex rel. Reardon v. Hooker*, 26 Okl. 460, 109 Pac. 527, it was said:

"Where the meaning of a statute is doubtful, long usage is a just medium by which to expound it."

For the reasons given, the judgment of the superior court of Pottawatomie county is reversed, and the cause is remanded, with directions to enter a decree denying the writ and dismissing the case. All the Justices concur, except SHARP, J., who dissents.

(49 Okl. 788)

BOLEN et al. v. LIGETT. (No. 4781.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

*(Syllabus by the Court.)***1. PARTNERSHIP — "FICTITIOUS NAME" — WHAT CONSTITUTES.**

The adoption by a firm composed of two brothers of their surname, followed by the word "Bros.," as the name of the firm, is not the adoption of a "fictitious name, or a designation not showing the names of the persons interested as partners in such business," within the meaning of section 4469, Rev. Laws 1910 (section 5023, Comp. Laws 1909).

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. ¶ 64.]

For other definitions, see Words and Phrases, First and Second Series, Fictitious Name.]

2. PARTNERSHIP — "FICTITIOUS NAME" — ACTION ON CONTRACTS.

Section 4471, Rev. Laws 1910 (section 5025, Comp. Laws 1909), does not forbid a firm composed of two brothers, who have adopted as the partnership name their surname, followed by "Bros.," from maintaining an action on or on account of any contracts made in their partnership name in any court of this state.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. ¶ 64.]

Error from County Court, Washita County; L. R. Shean, Judge.

Action by W. C. Bolen and Park Bolen a copartnership doing business as Bolen Bros., against C. L. Ligett. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Massingale & Duff, of Cordell, for plaintiffs in error. Rutherford Brett, of Oklahoma City, and Richard A. Billups, of Cordell, for defendant in error.

SHARP, J. This action was commenced December 28, 1911, to foreclose a chattel mortgage given as security for the payment of a promissory note executed by defendant to plaintiffs. The petition, among other things, alleged that plaintiffs were a copartnership doing business in Sentinel, Okl., under the firm name and style of Bolen Bros. Defendant answered, setting up as a defense that plaintiffs were transacting business in the state of Oklahoma under a fictitious name and designation not showing the names of the persons interested in said partnership, and had not filed with the clerk of the district court of Washita county, Okl., a certificate stating the names in full of the members of said copartnership and their place of residence, and caused the same to be published in some newspaper for four weeks in said county as required by law, and prior to the bringing of said action, and that there were newspapers published in said county of Washita at and prior to the filing of said action. At the trial, December 12, 1912, the parties entered into a stipulation that the members of the firm were W. C. Bolen and Park Bolen, and that they had never published any statement or filed any certificate in the office of the clerk of the district court as

provided in sections 5023, 5025, Comp. Laws 1909 (sections 4469, 4471, Rev. Laws 1910). Defendant then moved to dismiss plaintiffs' action because of such failure to comply with the statute, which motion was by the court sustained, and from the judgment rendered in favor of defendant, plaintiffs bring error.

[1, 2] The sole question to be determined is whether it was incumbent upon W. C. Bolen and Park Bolen, doing business under the firm name of "Bolen Bros.," to comply with the statute above referred to before they could prosecute this cause of action against defendant; in other words, is "Bolen Bros." a fictitious name or designation within the meaning of section 5023, supra? The question has heretofore been before this court, with such conclusions reached that both parties to the present case are asserting their respective contentions under different decisions.

In Patterson et al. v. Byers, 17 Okl. 633, 89 Pac. 1114, 10 Ann. Cas. 810, W. K. Patterson and N. H. Patterson were partners doing business as the Patterson Furniture Company, and, not having complied with the provisions of the statute, it was objected that they were doing business in violation of the statute, and could not prosecute the action. But the court said:

"Now, we think the name 'Patterson,' being the true surname of every member of the partnership known as the Patterson Furniture Company, can in no sense be said to be a fictitious name. And, under the ruling of the California Supreme Court in construing this statute, the word 'Patterson,' being the true surname of the members composing the Patterson Furniture Company, is a name that discloses the names of the members of the partnership, and that such a designation and doing business under such a title is not doing business under a fictitious name, or under a name which does not disclose the true names of the partners, and that partners doing business under such an appellation are not within the provisions of the sections referred to, and are not required to file and publish the certificate therein required."

Our statute was taken from California, and the decision in the above case was rested upon the cases of Pendleton et al. v. Cline et al., 85 Cal. 142, 24 Pac. 659; McLean v. Crow, 88 Cal. 644, 26 Pac. 596; and Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566, construing a statute the same as that of California. The question in both of the California cases was somewhat different from the one here, in that the partnership name was made up of the names of the two members thereof. However, the principle announced was that a partnership name showing the surname only of the partners was not a fictitious name or designation within the meaning of the statute, and it was not necessary that the partners file a certificate as provided in the statute. The facts in the Guiterman Case are very like those here presented. It was there held that Guiterman Bros., a copartnership composed of A. Guiterman, S. A. Guiterman, and L. A. Guiter-

man, was not a fictitious name, nor a designation not showing the names of the persons interested as partners in such business, within any reasonable meaning of the statute.

The doctrine announced in the Patterson Case has never been overruled by this court, notwithstanding the decision in *Baker v. Van Ness*, 25 Okl. 34, 105 Pac. 660 (in which no reference was made to the Patterson Case), as appears from the opinion in *Bleecker v. Miller*, 40 Okl. 374, 138 Pac. 809, where, after citing the Patterson Case and the cases upon which it was predicated, it is said of the decision in the Baker Case that, the plaintiff having failed and neglected to file a reply to the special defense of failure to comply with sections 5023, 5025, Comp. Laws 1909, the allegation of new matter in the answer being uncontroverted, and the same constituting a complete defense to the action, the court's action in rendering judgment in favor of plaintiff was contrary to law. It thus appears, in the view of the court in the latter case, the question in the Baker Case was one of pleading, and that there was no intention to depart from the earlier opinion of the court in the Patterson Case.

In *Carlock et al. v. Cagnacci*, 88 Cal. 600, 26 Pac. 597, where the firm name of the plaintiff partnership was Carlock & Robb, it being composed of F. M. Carlock and H. D. Robb, the court held that such partnership name was not a fictitious name nor a designation not showing the names of the partners, within the provisions of the statute, and followed the decision in *Pendleton v. Cline*, supra. In *Vaughan v. Kujath*, 44 Mont. 484, 120 Pac. 1121, the action was brought to recover on a promissory note signed by defendants and others in favor of "McLaughlin Bros."; the note having been transferred by the latter to the plaintiff. The only defense interposed by defendants was that "McLaughlin Bros.," the payee in the note, was a designation not showing the names of the persons interested as partners in the business conducted by it, and that such partnership had not complied with the provisions of the statute as to filing and publishing certificate showing the names of the members in full. It was held that the name "McLaughlin Bros." did not come within the statute. In *Walker et al. v. Stimmel*, 15 N. D. 484, 107 N. W. 1081, the partnership name of the plaintiffs was Walker & Korthof, which the court held not to be a fictitious name, nor a designation failing to show the names of the two persons interested as partners. In *Bovee et al. v. De Jong*, 22 S. D. 163, 116 N. W. 83, the partnership name considered was Bovee & Norfitt, and it was held that such name, being the surnames of the two men constituting the firm, was sufficient notice to enable all interested persons to easily ascertain the initials or Christian names of the respective partners with whom they may deal, and that such name was not fictitious. In *Czatt v.*

Case et al., 61 Ohio St. 392, 55 N. E. 1004, the firm name, Case & Taylor, was composed of the surnames of the two members of the firm, and it was held that such name was not a fictitious name or designation not showing the names of the persons who constituted the firm, within the meaning of the statute of that state. In *Axe et al. v. Tolbert et al.*, 179 Mich. 556, 146 N. W. 418, the firm name of the plaintiffs was William Axe & Son, and it was held that there was nothing fictitious or misleading or uncertain in the name, but, on the other hand, it gave the full name of the head of the firm, and plainly disclosed the identity of the other member. In *Cross et al. v. Leonard*, 181 Mich. 24, 147 N. W. 540, it was held that the adoption as a firm name by a partnership composed of two brothers of their surname, followed by the words "Bros.," was not an "assumed name" within the provisions of the Michigan statute prohibiting the carrying on of any business under an assumed name, unless a certificate showing the real names of the parties was filed. In *Castle Bros. v. Graham*, 87 App. Div. 97, 84 N. Y. Supp. 120, affirmed in 180 N. Y. 553, 73 N. E. 1120, the action was brought to recover the balance of the price of work done for defendant by the firm of Castle Bros., which assigned its claim to the plaintiff, a corporation. The firm was composed of two brothers named Castle, and it was held that the name "Castle Bros." was not within the section of the Code providing that no person or persons should carry on business under an assumed name, or under any designation other than the real names of the individuals, unless they filed a certificate setting forth the name under which the business was to be conducted and the true names of the persons conducting it. In *Hale et al. v. City Cab, Carriage & Transfer Co.*, 66 Wash. 459, 119 Pac. 837, the name "Hale-Tindall Company," which name contained the names of all the partners, was held not to be an assumed name, within the statute requiring that a certificate be filed of the names of all the members of a partnership doing business under an assumed name.

From the above cases it must be concluded that a partnership doing business under the firm name and style of Bolen Bros. was not transacting business under a fictitious name or designation, when composed of persons whose names were Bolen, and who were brothers, as would make the doing of business by it without compliance with the statute, in violation of law, or preclude them as partners from recovering in the present action should they establish their claim. An excellent case supporting this conclusion is *In re Richards Bros.* (D. C.) 206 Fed. 932. There, after making special mention of the *Pendleton v. Cline* Case, it was said:

"The courts of Oklahoma, South Dakota, and North Dakota followed the reasoning of the California court in *Pendleton v. Cline*, supra. *Patterson v. Eyers*, 17 Okl. 633, 89 Pac. 1114, 10

Ann. Cas. 810; Bovee v. De Jong, 22 S. D. 163, 116 N. W. 83; Walker v. Stimmel, 15 N. D. 484, 107 N. W. 1081. The Ohio court, after certain conflicting decisions between the inferior courts, finally decided this matter in *Cochran v. Hirsch*, 6 Ohio Dec. 41, holding that the style 'Hirsch Bros.' was not a fictitious name. In this case the Ohio court again cites with approval the California case of *Pendleton v. Cline*, supra. After the courts of all these other states, with statutes similar to California, had followed the case of *Pendleton v. Cline*, and had assumed that, if a man by the name of *Pendleton* and a man by the name of *Williams* could do business under the name of '*Pendleton & Williams*' without violating the statute, two brothers could do business in their surname with the word '*Bros.*' added, then in 1902 came the decision in the California Supreme Court in *North v. Moore*, 135 Cal. 621, 87 Pac. 1037, holding that the name '*Abrams Bros.*' was a violation of the California statute, and that it did not show the names of the persons interested as partners. It is a very brief opinion. No argument nor reasons are given for the results reached. Absolutely no reference is made to their own opinion in *Pendleton v. Cline* and the other decisions of their own court, and in numerous other states which had followed *Pendleton v. Cline*. A careful reading of the case of *North v. Moore*, supra, indicates that no one appeared before the court to represent the appellant, and that the decision of the lower court was affirmed on the supposition that the appeal from the order of the lower court had been abandoned. There is nothing in this case to indicate that there was any intention on the part of the California court to change the rule laid down in *Pendleton v. Cline*, and there is nothing in this decision which should change the uniform holding of the courts that names like '*Richards Bros.*' are not assumed or fictitious."

It follows that the trial court erred in sustaining defendant's motion to dismiss plaintiff's petition, for which the cause is reversed and remanded. All the Justices concur.

BOARD OF COM'RS OF GARVIN COUNTY v. PYEATT. (No. 5775.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 773—FAILURE TO FILE BRIEFS—DISMISSAL.

Where no briefs have been filed by the plaintiff in error, the cause should be dismissed. [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. \Leftrightarrow 773.]

Commissioners' Opinion, Division No. 2. Error from District Court, Garvin County; R. McMillan, Judge.

Action between the Board of County Commissioners of Garvin County and Alvin F. Pyeatt, assignee, etc. From the judgment, the Board brings error. Dismissed.

John M. Stanley, of Pauls Valley, for plaintiff in error. A. F. Pyeatt, of Pauls Valley, pro se.

PER CURIAM. This case was docketed in this court on November 11, 1913, and on September 28, 1915, was dismissed because the plaintiff in error had failed to file briefs. On October 19, 1915, the dismissal was set

aside on the application of the plaintiff in error, and 20 days allowed to file briefs. No briefs have as yet been filed.

We therefore recommend that the appeal be dismissed.

PER CURIAM. Adopted in whole.

(54 Okl. 639)

BOARD OF COM'RS OF GARVIN COUNTY v. PYEATT. (No. 5776.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 773—FAILURE TO FILE BRIEF—DISMISSAL.

Where no briefs have been filed by the plaintiff in error, the cause should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. \Leftrightarrow 773.]

Commissioners' Opinion, Division No. 2. Error from District Court, Garvin County; R. McMillan, Judge.

Action between the Board of County Commissioners of Garvin County and Alvin F. Pyeatt. From the judgment, the Board brings error. Dismissed.

John M. Stanley, of Pauls Valley, for plaintiff in error. A. F. Pyeatt, of Pauls Valley, pro se.

PER CURIAM. This case was docketed in this court on November 11, 1913, and on September 28, 1915, was dismissed because the plaintiff in error had filed no briefs. On October 19, 1915, the dismissal was set aside on the application of the plaintiff in error, and 20 days allowed to file briefs. No briefs have as yet been filed.

We therefore recommend that the appeal be dismissed.

PER CURIAM. Adopted in whole.

BOARD OF COM'RS OF GARVIN COUNTY v. PYEATT. (No. 5777.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 773—FAILURE TO FILE BRIEF—DISMISSAL.

Where no briefs have been filed by the plaintiff in error, the cause should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. \Leftrightarrow 773.]

Commissioners' Opinion, Division No. 2. Error from District Court, Garvin County; R. McMillan, Judge.

Action between the Board of County Commissioners of Garvin County and Alvin F. Pyeatt, assignee, etc. From the judgment, the Board brings error. Dismissed.

John M. Stanley, of Pauls Valley, for plaintiff in error. A. F. Pyeatt, of Pauls Valley, pro se.

PER CURIAM. This cause was docketed in this court on November 11, 1915, and on September 28, 1915, was dismissed because the plaintiff in error had filed no briefs. On October 19, 1915, the dismissal was set aside on the application of the plaintiff in error, and 20 days allowed to file briefs. No briefs have as yet been filed.

We therefore recommend that the appeal be dismissed.

PER CURIAM. Adopted in whole.

(54 Okl. 596)

CHICAGO, R. I. & P. RY. CO. v. SHEETS.
(No. 5288.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. CARRIERS §271 — RAILROADS §218 — POWER TO MAKE REGULATIONS—PASSENGERS.

The general rule, in the absence of statutory provision to the contrary, is that a railway company may adopt reasonable regulations prescribing that certain of its passenger trains running regularly upon its road shall stop only at designated stations; and it is the duty of an intending passenger to inform himself whether the train upon which he means to take passage will, under the regulations of the company, stop at his destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1067-1071; Dec. Dig. §271; Railroads, Cent. Dig. § 715; Dec. Dig. §218.]

2. CARRIERS §383—PASSENGERS—QUESTIONS FOR JURY.

Whether one was misinformed or misled, through the fault of the carrier's servants, as to a regular stopping place of a particular train which he purposed to board, or whether he was, by the acts and declarations of such servants, induced to believe when he entered such train that the same would, according to the regulations of the company, stop at his destination, are questions of fact to be submitted to a jury under proper instructions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1492-1496; Dec. Dig. §383.]

Commissioners' Opinion, Division No. 3. Error from District Court, Canadian County; John J. Carney, Judge.

Action by W. F. Sheets against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, J. G. Gamble, of Des Moines, Iowa, and K. W. Shartel, of Oklahoma City, for plaintiff in error. John W. Clark, of El Reno, for defendant in error.

BLEAKMORE, C. On November 9, 1912, W. F. Sheets commenced this action against the Chicago, Rock Island & Pacific Railway Company, by his petition alleging in substance that about 4 o'clock in the morning of January 2, 1912, the defendant received him as a passenger on one of its trains, and for a valuable consideration undertook to safely transport him from the town of Minco

to the town of Union in the state of Oklahoma; that after he had boarded said train, "it being one of defendant's scheduled passenger trains," and when said train was about 2 miles out of the town of Minco and about 4 miles from the town of Union, the conductor of said train called for his ticket, and, when he received it, informed the plaintiff that said train did not stop at Union and that plaintiff would have to pay his fare to El Reno and back to Union, a distance of some 18 miles, which he declined to do; whereupon the conductor stopped the train at a place distant from any railway station or from any farmhouse and unlawfully and forcibly ejected the plaintiff from said train; that it was cold and dark, and the ground and roadbed covered with ice; that there was no highway close, and that plaintiff was compelled to walk on defendant's roadbed to the town of Union, about 4 or 5 miles distant, and in doing so to cross the South Canadian river bridge, which, owing to the time of night, was dangerous.

"That defendant's actions toward plaintiff were loud and boisterous and tended to and did humiliate him before the other passengers, and did wound and injure his feelings, and did greatly inconvenience him by making him walk to his destination; that by reason of the said wrongful acts of the defendant as aforesaid, this plaintiff was damaged in the sum of \$500."

From the testimony it appears that on the morning in question the plaintiff and two others, Messrs. Thompson and Studebaker, reached the town of Minco, a flag station on defendant's railroad, a short time before the arrival of the north-bound train, purposing to take passage thereon, Studebaker to El Reno, and plaintiff and Thompson to Union. Studebaker purchased three tickets, two of them being to Union and return for the plaintiff and Thompson, and one for himself to El Reno. The ticket agent, evidently misunderstanding the intended destination, issued two tickets to Enid and return, but upon his attention being called thereto corrected his mistake and delivered the two tickets for Union, but made no statement as to whether the train then about to arrive would stop at that station, nor did the plaintiff inquire in regard thereto. There was no other train to Union until about 12 o'clock of that day.

There was an employé of defendant stationed at the opening of the train for the purpose of inquiring the destination of each passenger attempting to go aboard. The evidence is conflicting as to whether plaintiff informed the person at the entrance of the train where he purposed stopping. He was, however, permitted to enter, and after the train had proceeded some distance was informed by the conductor, who examined the tickets, that such train did not stop at Union, and that he and Thompson must either pay their fare to El Reno or get off the train. Plaintiff and Thompson refused to pay the

fare, and the train was stopped, and they were told to get off, and did so. There was no physical force or violence used to accomplish their ejection. Plaintiff testified, however, that the tone of voice and manner of the conductor was harsh, short, and insulting, and he appeared angry. The testimony is also conflicting as to the distance the place where plaintiff was ejected was from Minco, his starting point; the trainmen testifying that the switch lights of that station were in sight, and the plaintiff and Thompson stating that such lights could not be seen or that they did not see them. There was no evidence as to whether the place where they were expelled was near some dwelling house. It was dark, the weather was very cold, and the ground was covered with ice and snow. Plaintiff and Thompson after some discussion, decided to go on to Union, although Minco was nearer. This they did, arriving there at daybreak. Union was not a stop for the train in question. There was judgment for plaintiff.

In his brief plaintiff states:

"The gist of this action is the wrongful ejection of plaintiff from the defendant's train, and is therefore an action in tort. There has been no claim on the part of plaintiff for damages for the loss of time or other special damages."

There are numerous assignments of error relative to the giving and refusal of instructions. The court gave the following instructions, of which complaint is made:

"No. 8. You are further instructed that if you believe the defendant railway company sold the plaintiff in this case a ticket which read that the passenger was entitled to transportation from Minco to Union City, and on the face of said ticket the passenger was authorized to ride from Minco to Union City, and if you further believe that the plaintiff in this case boarded the train of the said defendant company without objection on the part of the agents of the said defendant and rode part of the distance without objection, that under those circumstances and conditions it was the duty of the defendant company to carry said passenger from Minco to Union City and there stop long enough to give him reasonable opportunity to alight from said train, even although said Union City was not a regular stopping place for said passenger train."

"No. 10. You are further instructed that a person who seeks passage on a railroad train for the purpose of going from one place or point of said road to another, has a right to expect that the ticket seller on the company's road will sell tickets in compliance with the rules and regulations of the company. Therefore, if you believe from the evidence in this case that the ticket seller at Minco, Okl., sold and delivered to the plaintiff a ticket to Union City, Okl., the plaintiff in this case had a right to rely upon the provisions of the ticket which it is alleged provided that he should be carried from Minco and back on the company's train, and you are further instructed that if said ticket was sold immediately before the coming of a train into the said station at Minco, that the plaintiff had a right to expect under these circumstances that he could enter the said train and receive transportation on said train to the point designated in the ticket, to wit, Union City; and under such conditions he was authorized to enter said train for the purpose of receiving passage and transportation to Union City, Okl."

It is also urged that there was error in refusing to give the following instruction requested by defendant:

"3. The court instructs you, gentlemen of the jury, that unless the train upon which plaintiff attempted to ride, and from which he was ejected, was scheduled to stop at Union City, plaintiff had no right to ride thereon, under the ticket sold him, unless he elected to pay his fare to a scheduled stop, and that defendant's employes were legally justified in ejecting him therefrom, unless he had gotten upon the train through the negligence of the defendant's servants, or on account of misinformation given him by such servant."

[1, 2] The general rule, in the absence of statutory provision to the contrary, is that a railway company may adopt reasonable regulations prescribing that certain of its passenger trains running regularly upon its road shall stop only at designated stations; and it is the duty of an intending passenger to inform himself whether the train upon which he is about to take passage will, under the regulations of the company, stop at his destination, and without agreement or special contract providing therefor he has no right to insist upon the company changing the course of its business for his accommodation or to serve his convenience; but the circumstances may be such as to mislead the passenger in this regard, and if he is misinformed or misled through the fault or negligence of the company's servants as to the regular stopping place of a particular train and thereby induced to board such train believing it will stop at his destination, and is ejected for refusal to pay his fare to a regular stopping place, he may recover. *Mitchie on Carriers*, § 2443; *Fetter on Carriers of Passengers*, § 302 et seq.

In *Noble v. A., T. & S. F. Ry. Co.*, 4 Okl. 534, 46 Pac. 483, it is held:

"In the absence of statutory provisions to the contrary, a railroad company has a right to adopt a regulation providing that one of its regular trains of passenger cars, or a part of them, running regularly upon its road, shall not stop at certain designated stations. And the duty is imposed upon one proposing to travel as a passenger on such road to inform himself whether the train upon which he takes passage stops at the station or place to which he is going, according to the regulations of the company. This is well settled in numerous cases."

In our opinion the giving of instructions, Nos. 8 and 10, above quoted, constituted prejudicial error. Whether under the facts and circumstances of this case the plaintiff was misinformed or misled, through the fault of defendant's servants, as to the regular stopping places of the particular train he purposed boarding, or was by the acts and declarations of such servants induced to believe when he entered said train that the same would stop at his destination, were questions of fact which should have been submitted to the jury under a proper charge; and it was error to refuse to charge the jury as requested by defendant in this regard, or to give other instructions of similar import.

Plaintiff insists that although he may have refused to pay his fare to a station at which the train he boarded was scheduled to stop, yet he is entitled to recover on account of the breach of defendant's statutory duty in causing his expulsion at a point other than any usual stopping place, or near some dwelling house. The statute relied on, which was in force at the time of the occurrence in question (section 1394, Comp. Laws 1909), provides:

"If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars in the following manner: A passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping place, or near some dwelling house."

This contention cannot avail plaintiff here, for the reason that no evidence was offered tending to show whether the place at which he was ejected was near to, or far from, a dwelling house.

It is not deemed necessary to advert to other assignments of error, as the questions presented may not arise again.

The judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(54 Okl. 593)

CHICAGO, R. I. & P. RY. CO. v. THOMPSON. (No. 5287.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

EJECTION OF PASSENGER.

Syllabus the same as in 154 Pac. 550 (No. 5288).

Commissioners' Opinion, Division No. 3. Error from District Court, Canadian County; John J. Carney, Judge.

Action by C. L. Thompson against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. O. Blake, H. B. Low, R. J. Roberts, and W. H. Moore, all of El Reno, for plaintiff in error. John W. Clark, of El Reno, for defendant in error.

BLEAKMORE, C. This case is based upon the same facts involved and considered in cause No. 5288, Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error, v. W. F. Sheets, Defendant in Error, 154 Pac. 550, and the law of that case controls this.

The judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(54 Okl. 611)

JONES v. GALLAGHER. (No. 5600.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. LOGS AND LOGGING — SALE OF TIMBER — CONSTRUCTION OF CONTRACT — COVENANT — "GRANT, BARGAIN, AND SELL."

Section 639 of Mansfield's Digest of the laws of Arkansas, which was put in force in the Indian Territory by the Act of Congress of February 19, 1903, c. 707, 32 Stat. 841, 10 Fed. Stat. Ann. 130, and which was in force at the time the contract involved herein was entered into, provides: "All lands, tenements and hereditaments may be aliened and possession thereof transferred by deed without livery of seisin, and the words 'grant, bargain, and sell' shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed." Held, that this section being in force at the time the conveyance involved herein was made, entered into and became a part of the agreement as fully, and to the same extent as though the language had been written in the body of the contract. And held, further, that there being no express words of limitation embodied in the contract involved, the words "grant, bargain, and sell," as used herein, import an express covenant by the grantor to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple in said premises, and that he conveyed the same with full covenant of seisin.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. —3.]

For other definitions, see Words and Phrases, First and Second Series, Grant, Bargain and Sell.]

2. COVENANTS — COVENANT OF WARRANTY — SATISFACTION BY AFTER-ACQUIRED TITLE — MITIGATION OF DAMAGES.

While it is true that if prior to eviction a grantor of land, with covenant of warranty, purchases an outstanding title, it inures to the benefit of the grantee, and operates as a discharge of the warranty; but where the purchase of a paramount title is made by the grantor after eviction of the grantee, the grantor cannot compel the grantee to accept such after-acquired title in satisfaction of the covenant of warranty, nor in mitigation of damages for the breach thereof.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 139-155; Dec. Dig. —100.]

3. COVENANTS — COVENANTS OF WARRANTY — CONSTRUCTIVE EVICTION — WHAT CONSTITUTES.

If a grantor assumes to convey with full covenants of warranty unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee which entitles him to the same remedies that he would be entitled to had he been turned out of the actual possession of the land by legal process, and if in such case the grantor subsequently obtains a good title, while he will be estopped to deny the title of his grantee, yet he cannot compel the latter, after his eviction by title paramount, to accept such after-acquired title in satisfaction of the covenants in his deed, nor in mitigation of damages for the breach thereof.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 157-163; Dec. Dig. —102.]

Commissioners' Opinion, Division No. 4. Error from Superior Court, Pittsburg County; W. C. Leidtke, Judge.

Action by J. H. Gallagher against James E. Jones. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

Arnote & Rogers, of McAlester, for plaintiff in error. Robert N. McMullen, of McAlester, for defendant in error.

ROBERTS, C. This case comes from the superior court of Pittsburg county. The parties herein will be designated plaintiff and defendant, the same as below.

The action was commenced on the 10th day of June, 1910, by J. H. Gallagher, against J. E. Jones, to recover an alleged balance of \$500 on a note of \$1,500, with interest at 8 per cent. per annum from the 23d day of April, 1907; and an open account for \$13.06, with interest at 6 per cent. per annum from the 5th day of January, 1908. The defendant filed answer and cross-petition, in substance: (a) Admitting the execution of the note, and also the account of plaintiff; (b) alleging that the note involved, with two others, one for \$1,500, and one for \$701.83, similar to the one sued on, except as to time of payment, were given by defendant to plaintiff, as part consideration for 4,170 acres of timber, which plaintiff sold to defendant for the consideration of \$15,000, being located in sections 15 to 35, inclusive, in township 7 N., range 22 E., in Latimer and Haskell counties, Okl. The answer further charged, in substance: (c) That plaintiff did not have title to about 1,500 acres of the timber included in sale contract; (d) that on about 60 acres of said timber, plaintiff did not have length of time to remove it, as provided in contract; (e) that plaintiff sold and removed a portion of the timber included in the contract of sale to defendant. It then alleged the plaintiff did not have title to said 1,500 acres of said land, and that certain Indian minors, naming them, and the Choctaw and Chickasaw Nations owned the land, and evicted defendant, to his damage in the sum of \$6,064.10; (f) that plaintiff did not have muniments of title to another portion of the timber on land described in contract of sale, and agreed if he did not secure good title to said last-mentioned timber, that he would give defendant credit of \$1,500 on notes, and thereafter, in the spring of 1909, an agreement was made in writing in which plaintiff furnished to defendant spurious title to certain timber on land included in said contract, allotted to Mollie Williams, an Indian minor, as being a good title, but that plaintiff did not have any title to said land; that said land was a part of the consideration of said agreement between plaintiff and defendant, and that plaintiff, not having title to the Mollie Williams land and having represented to defendant that he had good title

to said land, defendant was damaged in the sum of \$398.20.

The second paragraph of this answer was a claim for damages by reason of false and fraudulent representations made by plaintiff to defendant as to the quality of timber, and that said representations were known to be false by plaintiff, and were made for the purpose of inducing defendant to enter into the contract, and to defraud the defendant, for which defendant claimed damages in the sum of about \$8,000.

The contract of sale of timber contained the following conditions:

"Know all men by these presents: That I, J. H. Gallagher, of Lodi, Choctaw Nation, Indian Territory, in the Central District of the United States Court of the Indian Territory, party of the first part, being owner of the land and timber hereinafter described, under due and proper allotments of the parties hereinafter described, and James E. Jones, party of the second part. Witnesseth: That the party of the first part, for and in consideration of the sum of \$15,000, receipt whereof is hereby acknowledged, first parties have granted, bargained, sold, conveyed, and by these presents do hereby grant, bargain, sell, and convey and confirm unto the said party of the second part, his heirs and assigns, all of the following timber hereinafter described."

This contract is dated April 23, 1907. Then follows the description of the land upon which the timber is located; after the description is the usual tenure and warranty clause of a deed, the warranting clause being:

"Will warrant and defend the title to said timber and all rights herein mentioned against all lawful claims and demands whatsoever."

It is then provided that the defendant shall remove the timber within ten years, but upon payment of an additional sum equal to 10 per cent. of the gross amount paid, he shall have such additional time as shall be necessary to remove the timber, and that he shall have the right of ingress and egress upon the lands for the purpose of removing the timber, and that plaintiff bound himself, that the timber conveyed should not be damaged, touched, or interfered with, and that he would protect the same against any and all trespassers and other persons, including persons to whom the land might be conveyed, and then follows a description of other personal property included in the contract.

The contract then stated that Gallagher had not furnished Jones allotments and filings on certain parcels of land, and that Gallagher agreed to furnish him such filings and timber contracts properly recorded, and that if he failed to do so he should credit Jones with \$1,500 on the amount due on the contract; then followed a description of the land, which description included the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 28, township 7 N., range 22 E. This land was the allotment of Mollie Williams. The contract was signed by J. H. Gallagher and wife, Della Gallagher, and duly acknowledged before a notary public.

The contract of settlement as to the Mollie Williams land was not dated, but evidence shows it was made in the spring of 1909. This contract recited provisions of the original contract of sale in regard to which plaintiff had failed to furnish evidences of title to certain timber, and that if he failed to furnish evidences of title, credit was to be given of \$1,500 to defendant on his notes, and then provided that plaintiff, having failed to deliver certain filings and timber contracts for a portion of the land, that the defendant should have credit for \$1,000 on his notes given as part payment for the timber, and the note sued on in this action was credited with \$1,000, as of the date of the note. The contract was signed by J. H. Gallagher and James E. Jones.

November 23, 1912, plaintiff filed his reply, in which he denied all allegations of the answer, except those expressly admitted, admitting the execution of the two other notes, one for \$1,500, and the other for \$701.83, and that they were given as part of the purchase price of the timber mentioned in the answer, and admitted the contract of sale of timber and contract of settlement.

The sixth paragraph of the answer set forth that plaintiff had perfected his title to the timber by purchasing the superior outstanding title to 1,160 acres of land, on which he had no title to the timber. This included the allotments of John Jackson, Winnie Jackson, and Douglas Jefferson, Indian minors, and the Cyrus Lewis 60 acres, to which plaintiff had only two years within which to remove timber, and the land of Joshua Johnson, an Indian freedman. These titles were secured during September, October, and November, 1912.

On November 26, 1912, defendant filed demurrer to the sixth paragraph of plaintiff's reply, on the ground that the same did not state facts sufficient to constitute a defense to the answer and cross-petition. On the same date demurrer was overruled, to which ruling defendant excepted. The evidence shows that plaintiff had no title to the timber on 1,510 acres of the land included in the contract, being land allotted to John Jackson, Winnie Jackson, Douglas Jefferson, minors, and Joshua Johnson and Cyrus Lewis. The court instructed the jury that plaintiff did not have title to said 1,510 acres of timber. The court also instructed the jury that the plaintiff had perfected title in himself to 1,160 acres of the said 1,510 acres of the land, and that the perfected title inured to the benefit of defendant.

Plaintiff offered in evidence orders confirming the sale of this land from John Jackson, Winnie Jackson, and Douglas Jefferson, together with the deeds of their guardians; also deeds of Joshua Johnson and Cyrus Lewis, all of which deeds and orders for the 1,160 acres of timber land above mentioned were admitted over the objection and exception of defendant. These deeds are dated

November 11, 1912. None of these deeds allowed to exceed five years within which to remove the timber, and one of them was limited to two years within which to remove the timber. The evidence shows that the defendant was evicted from 1,120 acres of the 1,160 acres of land as soon as he commenced to remove the timber, which was in 1907 and 1908, some four or five years before plaintiff secured title to it, being all the land to which plaintiff acquired title in 1912, except the 40 acres of Joshua Johnson, freedman.

The jury was instructed to find for the plaintiff the amount of the note and the account sued on, including the interest, and then strike a balance between the amount of this note and account and the damages found for defendant, if any, and return a verdict for such balance, and the jury returned a verdict in favor of defendant in the sum of \$1,210.19. This indicates that the jury found damages for the defendant in the sum of about \$2,000. There were no special findings of these questions of damages, and it is impossible to determine upon what feature of the case damages were assessed by the jury. There were some special findings by the jury as to correction of errors in the description of the land in the contract of sale, which, however, have no bearing upon the questions raised by the assignments of error. Judgment was then rendered by the court upon the verdict of the jury in favor of the defendant in the sum of \$1,210.19, and for correction of the contract of sale in accordance with the special findings of the jury. Motion for new trial was overruled, exceptions saved, and defendant evidently being of the opinion that the judgment was too small, brings error.

The plaintiff contends that there was no covenant of seisin in the contract of sale, and that because thereof he did not become liable for failure of title. We cannot give our approval to that contention. The contract provides that:

"J. H. Gallagher [plaintiff], being the owner of said land and timber, * * * in consideration of the sum of \$15,000, the receipt whereof is acknowledged, has granted, bargained, sold, conveyed, and by these presents does hereby grant, bargain, sell, convey, and confirm unto J. E. Jones [defendant], his heirs and assigns, all the following described lands."

[1] Section 639 of Mansfield's Digest of the Laws of Arkansas, which was put in force in the Indian Territory by the Act of Congress of February 19, 1903, c. 707, 32 Stat. 841, 10 Fed. Stat. Ann. 130, and which was in force at the time this contract was entered into is as follows:

639. "All lands, tenements and hereditaments may be aliened and possession thereof transferred by deed without livery of seisin, and the words 'grant, bargain and sell' shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, free from incumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by such

deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed."

This section being in force at the time, entered into and became a part of the agreement as fully, and to the same extent as though the language had been written in the body of the contract. It provides that the words "grant, bargain, and sell" shall be an express covenant of seisin, "unless limited by express words in the contract." There are no words of limitation in the contract. The statute had been construed by the Supreme Court of Arkansas long before it was put in force in the Indian Territory. As early as 8 Ark. in *Bird v. Smith*, at page 368, that court said:

"The words, 'grant, bargain, and sell,' which are used in the deed declared upon, are, by the statute made an express covenant to the grantee, his heirs and assigns, that the grantor is seized of an indefeasible estate in fee simple, * * * unless limited by express words in such deed."

As stated before, the contract of sale contained no express words of limitation, and therefore must be held to contain full covenant of seisin.

The defendant further contends that the plaintiff could not, after the defendant was evicted from the land, secure title thereto and require him to accept it either in satisfaction of plaintiff's contract of warranty with said defendant, or in mitigation of damages, by reason of breach of said contract.

[2] This brings us squarely to the question whether a grantor, conveying with covenant of warranty, and title fails, can, after eviction of the grantee, purchase the outstanding paramount title, and thereby defeat the grantee's right to recover damages for failure of title, or avail himself of such after-acquired title in mitigation of damages. Upon this proposition the court instructed the jury as follows:

"2. You are instructed as a matter of law: That the plaintiff herein at the time of the conveyance or attempted conveyance of the lands mentioned in the contract and deed introduced in evidence herein did not have the title to 1,510 acres of said land, and that there was outstanding against said land better and paramount title in different individuals. That of said 1,510 acres the title to 1,160 acres thereof has been perfected in the plaintiff herein, which said perfecting of the title in the plaintiff herein would inure to the benefit of this defendant, and this leaves a balance of 350 acres of said land to which the title has not been perfected. It is necessary that you keep in mind these two amounts of land in order that you may understand thoroughly the instructions of the court herein given.

"3. You are instructed that a failure of title alone is not sufficient in law to enable the defendant herein to recover on the breach of warranty, alleged by him in his petition, but in order to recover damages on account of breach of warranty of title it is necessary that the defendant go further and show that he has been evicted; that is, that he has been deprived of possession of enjoyment of said premises by the party holding the paramount title thereto. To constitute an eviction it is not necessary that the de-

fendant herein should have been compelled by lawful process or by force to quit said premises or refrain from cutting timber thereon, but it is only necessary that he was notified by the person holding the paramount title of such person's claims to said land and that thereupon he, recognizing said claim, the defendant, voluntarily or otherwise, surrendered the possession of said timber to the parties so claiming said title thereto, or refrained from going upon said land and removing the timber therefrom."

"5. You are instructed that if you should find from a preponderance of the evidence in this case that the defendant has been evicted from the 1,160 acres of timber land, or any part thereof, then it will become necessary for you to consider the question of the subsequent perfecting of the title to said 1,160 acres of timber land in the plaintiff. However, should you find from a preponderance of the evidence that there was an eviction of the defendant from all of said 1,160 acres of timber land, or any part thereof, then as to that part of said 1,160 acres of timber land from which there was an eviction, it will be necessary for you to consider the fact of the perfecting of the title to said lands in the plaintiff, in mitigation of the defendant's damages, if any, by reason of the failure of title to said timber lands, and defendant's subsequent eviction therefrom, and you are instructed that in the event you should find from a preponderance of the evidence that the defendant was evicted from said 1,160 acres of land, or any part thereof, then the defendant would be entitled to recover against the plaintiff such damages as you may find him entitled to receive under the instructions of the court herein given you relating to damages in this action."

"11. If you should find the defendant entitled to recover damages on account of the 1,160 acres of land heretofore mentioned in these instructions, in determining his said damages, you should take into consideration all of the facts and circumstances relating thereto as disclosed by the evidence in this case, taking into consideration the length of time defendant was given by the contract between plaintiff and defendant to remove said timber, and the length of time given by the instruments since acquired by the plaintiff to remove said timber, and award the defendant such damages, if any, as he may have suffered by reason of his being delayed in removing said timber or of his inability to remove the same within the time provided in said new instruments of conveyance."

It is plain to be seen from these instructions that the trial court took the position that a grantor, conveying with covenant of warranty, where title fails, can, after eviction of the grantee, purchase the outstanding title, and, at least, avail himself of such after-acquired title in mitigation of damages. That is evidently the theory upon which the case was tried in the lower court.

We cannot give our assent to this doctrine. The evidence is conclusive that defendant was evicted from about 1,500 acres of the timber involved long before this suit was commenced. He filed his answer and cross-petition claiming damages for failure of title, or breach of contract, on the 21st day of January, 1911, and the plaintiff procured the outstanding title to 1,160 acres of the timber, in September, 1912. Upon this proposition, in 11 Cyc. 1137, the law is laid down as follows:

"If, prior to the eviction of the grantee, a grantor of land with covenant of warranty purchases an outstanding title, it inures to his own benefit in discharge of his covenant; but where

a grantor purchases a paramount title after the eviction of his grantee, such title does not inure to his grantee by way of estoppel without his consent so as to defeat his right to sue for breach of covenant to recover damages, nor can the grantor avail himself of it in mitigation of damages."

In *Blanchard v. Ellis*, 1 Gray (67 Mass.) 195, 61 Am. Dec. 417, the court says:

"Supposing it to be well settled that if a new title comes to the grantor before the eviction of his grantee it would inure to the grantee, and not deciding, because the case does not require it, whether the grantee, even after eviction, might elect to take such new title, and the grantor be estopped to deny it, we place the decision of this case on this precise ground, that where a deed of land has been made with covenants of warranty, and the grantee has been wholly evicted from the premises by the title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount and compel the grantee to take the same against his will, either in satisfaction of covenant against incumbrances, or in mitigation of damages for the breach of it."

The Supreme Court of Mississippi, in *Southern Plantation Co. v. Kennedy* Heading Co., 104 Miss. 131, 61 South. 166, states the rule as follows:

"It is true that if, prior to eviction, a grantor of land with a covenant of warranty purchases an outstanding title, it inures to the benefit of the grantee and operates as a discharge of the warranty; but where the purchase of a paramount title is made by the grantor after the eviction of the grantee, or after suit begun, when the grantee has the right of instituting a suit without actual eviction, he cannot compel the grantee to accept such after-acquired title in satisfaction of the covenant of warranty, or in mitigation of damages for the breach thereof."

[3] In *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405, it is said:

"If a grantor assumes to convey with full covenants of warranty unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee which entitles him to the same remedies that he would be entitled to had he been turned out of the actual possession of the land by legal process. If, in such a case, the grantor subsequently obtains a good title, while he will be estopped to deny the title of his grantee, yet he cannot compel the latter, after his eviction by title paramount, to accept such after-acquired title in satisfaction of the covenants in his deed or in mitigation of damages for the breach thereof."

The Supreme Court of Minnesota, in *Resser v. Carney*, 52 Minn. 397, 54 N. W. 89, uses the following language:

"A purchaser of vacant real estate, receiving a deed thereof, with a covenant of seisin, from one who has no title, the covenant being wholly broken, is not compelled, at least after he has commenced an action for the breach of the covenant, for the recovery of the purchase money paid, to accept a title which his grantor may then acquire."

In 3 *Washburn on Real Estate* (6th Ed.) § 1929, we find this rule:

"The cases are numerous where courts have held that if one without any title makes a deed of land with covenants of warranty, and afterwards acquires a title to the same, it will inure to the grantee and covenantee by way of estoppel. And in several states the rule is recognized by statute. The effect is that the title ac-

quired by the grantor who has conveyed with warranty inures, so instant that he gains the title, to his grantee, and vests in him, or to the grantee of such grantee if with like covenants. But if, before the covenantor acquires a title, the covenantee sue for a breach of the covenant of seisin, it seems that he could not defeat that action by purchasing in the title and tendering it to his covenantee, if the latter refuse to accept it."

The foregoing authorities fully support the contention of defendant that where a grantee under a warranty deed has been evicted by title paramount, the grantor cannot, by purchasing such outstanding title, compel the grantee to accept the same, either in satisfaction of the covenant, or in mitigation of damages for a breach of it. The instructions of the trial court upon this proposition were erroneous, and clearly prejudicial to the defendant. Counsel for plaintiff cite several authorities to support their contention upon that question, but they are not in point. The text cited by counsel, 11 Cyc. 1159, does not include the question of eviction before purchase of paramount title. The same may be said of the two Kansas cases, *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. 606, and *Kimball v. Bell*, 49 Kan. 173, 30 Pac. 240.

Another controlling question involved herein is the fact that the subsequently acquired title tendered by plaintiff does not comply with the original agreement. It will be remembered that this was a sale of the timber, and in the first contract the defendant was granted ten years in which to remove it from the land, while in the after-acquired title the defendant was allowed only five years, and as to part of the land only two years. The court would not, and could not, undertake to make a new contract, nor change the old one for the parties, nor would it attempt to compel the defendant to accept a contract which he had never made. As this case is likely to be tried again, we suggest that instruction No. 7 is not a correct statement of the law, under section 27, *Mansfield's Digest*, supra; it is as follows:

"You are instructed that the words of covenant used in the deed or instrument in question are what are known as a covenant of general warranty, the legal effect of which is that the plaintiff did not covenant that he was the true owner of the property conveyed, or that he was the owner in fee simple with a right to convey it, but only that he would protect and defend the defendant against the rightful claims of all persons thereafter asserted."

We have hereinbefore fully gone into the question of covenant of seisin as contained in the deed contract, and under the law as laid down herein, that instruction is erroneous and prejudicial to the rights of the defendant.

For the several reasons herein expressed, this case should be reversed, and remanded for new trial in accordance herewith.

PER CURIAM. Adopted in whole.

(53 Okl. 1)

BILLINGS HOTEL CO. et al. v. CITY OF ENID et al. (No. 7816.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS §623 — NUISANCE §83 — CHARTER POWERS — ABATEMENT OF NUISANCE—INJUNCTION.**

A municipal corporation, in the exercise of a power granted in the charter " * * * to define what shall be a nuisance in the city, * * * and to abate such nuisances by summary proceedings and to punish the authors by penalties, fines and imprisonment," may not invoke the aid of a court of equity to abate a nuisance consisting of a rooming house where intoxicating liquors are sold contrary to section 13, c. 70, Session Laws 1911, and the city charter, and defined by both to be a nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1371-1374, 1383, 1384; Dec. Dig. §623; *Nuisance*, Cent. Dig. § 194; Dec. Dig. §83.]

*(Additional Syllabus by Editorial Staff.)***2. WORDS AND PHRASES—"SUMMARY PROCEEDING."**

A "summary proceeding" is a form of trial in which the ancient established course of legal proceedings is disregarded. In no case can a party be tried summarily unless when such proceedings are authorized by legislative authority, except, perhaps, in cases of contempts; for the common law is a stranger to such a mode of trial. A common use of summary proceedings is in the enforcement of city ordinances.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Summary Proceeding*.]

Original proceedings for writ of prohibition by the Billings Hotel Company and others against the City of Enid and others. Writ issued.

John F. Curran and Hills & Manatt, all of Enid, for plaintiffs. Harry O. Glasser, of Enid, for defendants.

TURNER, J. This is an original proceeding for a writ of prohibition. The record discloses that on October 22, 1915, the city of Enid, a municipal corporation, as plaintiff, and on the relation of its city attorney, filed in the district court of Garfield county a petition alleging that the Billings Hotel Company, Walter Billings, manager, and seven others, petitioners here, were maintaining a place within the corporate limits of the city, and were there selling intoxicating liquors contrary to law, that the place was known as the Billings Hotel, but, in fact, was a mere rooming house, that the same was a nuisance as defined by an ordinance of the city, and prayed for a temporary injunction restraining petitioners from operating the same, and that the sheriff of Garfield county take possession and lock it up. All of which the court did, without notice or bond to petitioners, on October 10, 1915, and in said order set November 10, 1915, at Cherokee, as the time and place when and where said temporary injunction would come on for final hearing.

On November 4, 1915, came petitioners and moved the court to dissolve the temporary injunction, for certain reasons stated in the motion, and when the court in chambers heard the same and refused so to do, and overruled the motion, this proceeding was commenced.

[1] Assuming the things were done as charged in the city's petition, and that the place where done was a public nuisance within the contemplation of section 13, c. 70, Sess. Laws 1911, yet, as the act further provides:

"The Attorney General, county attorney, or any officer charged with the enforcement of any of the provisions of this act, of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same"

—it is contended that the court was without jurisdiction to entertain the city's suit, for the reason that the same was not brought in the name of the state on relation of the Attorney General, as required by the act, but was brought by the city on relation of its city attorney. On the other hand, the city attorney disclaims any intention of proceeding under said act. Instead he says the city relies on its right to maintain the action, "as a body politic, under the authority conferred by law upon the municipal corporation through the charter granted to the city of Enid by the state of Oklahoma." Quoting his entire contention, it is:

"That the city of Enid has the power under the authority delegated to the city by the state to proceed in equity, by way of injunction, to abate a public nuisance. It will be contended that this authority is to be found in the city charter, wherein authority is delegated to the city, by section 28, of article 3 of the Enid city charter, 'to define what shall be nuisances in the city, and within three thousand feet of the corporation lines, outside of the city limits, and to abate such nuisances by summary proceedings and to punish the authors thereof by penalties, fines and imprisonment,' together with the further grant of power in section 3 of article 3 of said charter 'to prohibit dramshops, drinking saloons, and other places where intoxicating liquors are sold.'

"That, pursuant to this authority, the city of Enid has, by section 4 of Ordinance 677, art. 84, re-enacted a transcript of the state law relative to nuisances resulting from the wrongful acts of any person who may engage in the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicating liquors contrary to law in a given place. There is no method provided in the city ordinance for the summary abatement of any such nuisances existing within the city of Enid, and neither is there any state law authorizing the summary abatement of this class of nuisances by any state officer. By the laws of Oklahoma (section 4257, Harris-Day Code) the remedies against a public nuisance are: (1) Indictment or information; (2) a civil action; (3) abatement. And by section 4260, Harris-Day Code, a public nuisance may be abated by any public body or officer authorized thereto by law. Therefore it must appear that the city of Enid, being a body politic, and having the authority conferred upon it by the state of Oklahoma, through its charter, to abate, by summary proceedings, any nuisance within the city of Enid, would have the right to appeal to the courts of

equity in its corporate name to abate, by injunction, a summary proceeding, any nuisance wholly within the city and particularly offensive to the citizens thereof, and this authority seems clear without any discussion of any state laws relative to the liquor question."

In other words, if we catch the point, it is the contention of the city attorney that the city, pursuant to section 28, art. 3, of its charter, by section 4 of Ordinance 677, reenacted the state law defining a nuisance as contained in section 13, supra, that the place in question falls within its terms, and that, having so declared it to be, the city has the right to abate it by injunction pursuant to its grant of power contained in said section 28, authorizing the city, " * * * to define what shall be nuisances in the city, * * * and to abate such nuisances by summary proceedings, and to punish the authors thereof by penalties, fines and imprisonment." Not so. A grant of power to abate a nuisance by summary proceedings confers no power on the city to proceed to abate it by injunction in a court of equity. This for the reason that a suit in equity is not a summary proceeding.

[2] A summary proceeding is defined by Bouvier to be:

"A form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury. In no case can a party be tried summarily, unless when such proceedings are authorized by legislative authority, except perhaps in cases of contempt; for the common law is a stranger to such a mode of trial."

27 Am. & Eng. Enc. of Law (2d Ed.), at page 375, says:

"A common use of summary proceedings is in the enforcement of city ordinances. Both in England and the United States statutes have been enacted conferring the power upon municipal tribunals sitting within the bounds of the municipal corporation of enforcing the ordinances or by-laws of the corporation in summary proceedings. These proceedings for the punishment of offenders against the ordinances, which are made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority, for the preservation of peace, good order, safety, and health, and which relate to minor acts and matters, are not usually or properly regarded as criminal, and hence are not in contravention of the constitutional guaranty of trial by jury in criminal cases."

From all of which we learn that the city, under its charter, can abate the alleged nuisance within its borders by proceeding against its authors in its municipal courts in a summary way, and, when convicted for a violation of its ordinance defining a nuisance, may impose on them the penalty prescribed thereby. By authorizing the city thus to proceed such grant of power excludes the idea that the city is empowered to proceed in any other manner, to wit, by a suit in equity, to restrain a nuisance as is here attempted. Besides, the grant of power contained in section 3, art. 3, of the charter "to prohibit ramshops, drinking saloons, and other places

wherein other intoxicating liquors are sold, and to close variety theaters when necessary, expedient or advisable," containing, as it does, a grant of power to close variety theaters, would seem to exclude the idea of a grant of power to the city to close a nuisance such as this is alleged to be or to deal with it at all except in the manner stated. And, when we note that Rev. Laws 1910, § 4260, declares that "a public nuisance may be abated by any public body or officer authorized thereto by law," and Rev. Laws 1910, § 4881, says, "An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the Attorney General, upon information and belief, and no bond shall be required, but the county shall, in all other respects, be liable as other plaintiffs," we are more than ever satisfied that the idea that the city may maintain this suit is excluded. In *State ex rel. Haskell v. Huston*, 21 Okl. 782, 97 Pac. 982, we said:

"When one person or class of persons is named in a power of attorney, or in act of the lawmaking power, as being authorized to do a certain thing therein named, all other persons are thereby excluded from doing the same thing as effectually as if they were positively forbidden."

City of Ottumwa v. Chinn et al., 75 Iowa, 405, 39 N. W. 670, was a suit in equity by the city to enjoin a public nuisance. The suit was based upon Code Iowa, § 456, which authorized cities and towns "to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated," and section 482, which authorized them to pass ordinances for carrying into effect the powers conferred by section 456 and other sections, and in which it was held that a civil action in equity could not be maintained under the powers granted in those sections in the name of the city for the abatement of a nuisance; "the method contemplated by the statute being by ordinance and criminal prosecution." In the opinion it is said:

"It is insisted by appellant that section 456 of the Code confers the right to maintain this action. That section gives to cities and towns organized under the general laws of the state 'power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated.' It is claimed by appellant that this power may be exercised in any manner which the corporation may think best, and that, since it may sue and be sued, it can accomplish the purpose of the statute by means of an action in court. * * * It is a general proposition of law that municipal corporations have and can exercise only those powers granted in express words; those necessarily implied or incident to the powers expressly granted; and those essential to the purposes of the corporation. *Clark v. City of Davenport*, 14 Iowa, 500; 1 Dill. Mun. Corp. § 55; *Hangar v. City of Des Moines*, 52 Iowa, 194, 2 N. W. 1105 [35 Am. St. Rep. 266]. Section 482 of the Code authorizes cities and towns to make and publish ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the

powers conferred by section 456 and other sections of the same chapter. The ordinary method of abating a public nuisance and punishing its author is by criminal proceedings. *Mayor v. Canal Co.* [12 Pet. 99, 9 L. Ed. 1012], supra. "Though the jurisdiction of equity in restraint of public nuisances is well established, it will not be exercised where the object sought can be as well attained in ordinary tribunals, unless upon the application of one who suffers a personal injury aside from the injury to the public." 1 High, Inj. § 761. The petition in this case charges a nuisance within the meaning of section 4089 of the Code. The remainder of the chapter in which that section appears provides for the abatement of the nuisance and the punishment of the one who caused it. So far as the petition shows, the rights of the general public may be fully protected by ordinary criminal proceedings. The plaintiff does not appear to be especially affected by the nuisance, but bases its demand for relief upon the alleged fact that it is injurious to its citizens. These, however, constitute a part of the general public. Plaintiff is not authorized to bring an action for the benefit of the public, and has failed to bring itself within the provision of section 3331 of the Code. In view of the general provisions of the statute, relating to public nuisances, we conclude that the abatement contemplated by section 456 of the Code was to be effected by the direct action of the corporation itself, as through the medium of an ordinance, rather than by equitable proceedings in court."

None of the cases cited by the city are in conflict with the Iowa case and what we have said. *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763, cited by the city in support of its contention, was a suit in equity brought by the village to restrain defendants from draining off a pond within the village limits in the hot months of summer, thereby converting the overflowed land into a marshy swamp, and causing the decayed vegetable matter on the bottom of the pond to create sickness. The village secured the relief, and the case was affirmed by the Supreme Court of Minnesota, for the reason that the charter of the village expressly conferred the power to bring the suit. Stating the general rule, the court said:

"It is undoubted law that, except in the case of a private person sustaining an injury special in kind, a bill to restrain an existing or threatening public nuisance by injunction will only lie at the suit of the state, or of some proper officer or body, as the authorized representative of the state. It must also be conceded that a municipal corporation has no control over nuisances within its corporate limits, except such as is conferred upon it by its charter or general laws."

After which the court proceeded to draw from the charter a grant of power sufficient to maintain the suit, thus:

"But these propositions are not, in our judgment, decisive of this case. The plaintiff is a village incorporated under Special Laws 1881, c. 38. Chapter 4 of this act, which defines the general powers of the common council of the village, provides that they shall have authority, by ordinances, resolutions, or by-laws: '(25) To remove and abate any nuisance injurious to

the public health'; '(27) To do all acts and make all regulations which may be necessary and expedient for the preservation of health or the suppression of disease.' And section 5 of chapter 4 of the act provides that 'the powers conferred upon the council to provide for the abatement of any nuisance shall not bar or hinder prosecutions or proceedings in court according to law.' Under these grants of power undoubtedly the common council could pass an ordinance prohibiting or abating the nuisance complained of, and provide for its enforcement by appropriate penalties. In fact, they did pass an ordinance prohibiting drawing off the water in the pond below a certain depth, which, however, the defendants have disobeyed. Is the plaintiff, in the matter of remedies for the abatement of a nuisance in such cases, limited to the enforcement of the penalties prescribed by ordinance, or may it resort to a court of equity to restrain or abate it?"

Whereupon the court held that a resort to a court of equity was granted to the city in the charter, and affirmed the case. It is clear that, had the charter in that case failed to contain a sufficient grant of power to enable the village to bring the suit, such relief would have been denied.

Neither is *City of Huron v. Bank of Volga*, 8 S. D. 449, 66 N. W. 815, cited by the city, in conflict with what we have said, but rather in line. That was a suit by the city in a court of equity, against a private corporation, to abate a public nuisance within the confines of the city. It consisted of a large wooden structure owned by the defendant, situated conspicuously upon a public business street, and which had been partially destroyed by fire. The city prevailed, but did so in virtue of a grant of power contained in its charter. After stating the general rule to be:

"While a private person is not authorized to maintain an action unless specifically injured, a city council, being the governmental agency to whom the inhabitants of a municipality have a right to look in a proper case for protection from the evil effects of a public nuisance, may, when authorized so to do, resort to indictment, a civil action, or abatement, according to the exigencies of the particular case"

—the court went on to say:

"But, in our opinion, section 4688 of the Compiled Laws, when considered with respondent's city charter, reasonably construed, authorizes the proper authorities to apply in a case like the present to a court of equity for aid in the enforcement of its general power 'to restrain, prohibit, and suppress nuisances at common law.'"

For how could the court hold otherwise when the grant of power to restrain implied the power to invoke the power of a court of equity so to do.

We are therefore of the opinion that, as the city's charter contains no grant of power authorizing the city to restrain a nuisance within its borders, the city may not invoke the powers of a court of equity so to do, and that the writ should run.

It is so ordered. All the Justices concur.

(49 Okl. 794)

BRADER v. JAMES. (No. 4721.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

*(Syllabus by the Court.)***1. INDIANS — 15 — ALLOTMENT — DEED CONVEYING INHERITED LANDS — VALIDITY.**

Section 22 of the act of Congress of April 26, 1906 (34 Stat. at L. 137, c. 1876), giving to the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, authority to sell and convey the lands inherited from such decedent, but which further provides, "All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe," renders void a deed to inherited lands, whether surplus or homestead, allotted during the lifetime of a deceased full-blood Choctaw, who died prior to the date of the passage of the act, where the heir, an adult full-blood Choctaw, attempted to convey by deed, on August 17, 1907, without obtaining the approval of the Secretary of the Interior to such conveyance.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. ¶ 15.]

2. INDIANS — 15 — INDIAN LANDS — CONVEYANCE BY FULL-BLOOD INDIAN HEIR — APPROVAL.

The title to the lands in controversy being, at the date of the passage of the act of April 26, 1906, in the defendant in error, any conveyance thereafter made by her was controlled by the law then in force; and as such law provided that a conveyance by a full-blood Indian heir was subject to the approval of the Secretary of the Interior, and such approval not having been secured, the deed was void.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. ¶ 15.]

3. INDIANS — 2 — GUARDIANSHIP — TERMINATION — POWER OF CONGRESS.

Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 2, 3; Dec. Dig. ¶ 2.]

4. INDIANS — 15 — ALIENATION OF INHERITED ALLOTTED LANDS — APPROVAL — POWER OF CONGRESS.

Congress, in the exercise of its constitutional authority, and while the guardianship relation over full-blood Indians continues, may impose restrictions on full-blood Indian heirs, requiring that conveyances by them of inherited allotted lands be approved by the Secretary of the Interior; and this, notwithstanding the restrictions imposed by prior legislation have expired by limitation, or by the death of the allottee.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. ¶ 15.]

5. INDIANS — 15 — ALIENATION OF INHERITED ALLOTTED LANDS — GUARDIANSHIP.

The Acts of Congress of July 1, 1902 (32 Stat. at L. 641, c. 1362), April 26, 1906 (34 Stat. at L. 137, c. 1876), June 16, 1906 (34 Stat. at L. 267, c. 3335), and May 27, 1908 (35 Stat. at L. 312, c. 199), pertaining to the affairs of the Chickasaw and Choctaw Indians, and the Enabling Act, evince no intention on the part of the United States to discontinue or surrender, but on the contrary, to continue its relation of guardianship over full-blood Choctaw

and Chickasaw Indians, in respect to the alienation by them of inherited allotted lands.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. ¶ 15.]

6. INDIANS — 15 — ALIENATION OF INHERITED ALLOTTED LANDS — RESTRICTIONS — VALIDITY OF STATUTE — IMPAIRMENT OF RIGHTS.

The rights of full-blood Choctaws, who were made citizens of the United States by the act of March 3, 1901 (31 Stat. at L. 1447, c. 868), with all the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by Act April 26, 1906, par. 22, imposing restrictions upon the alienation by them of inherited allotted lands, notwithstanding that prior to the passage of the act the lands so inherited, or a part thereof, may have been free of all restrictions.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. ¶ 15.]

Hardy, J., dissenting.

Error from District Court, Choctaw County; A. H. Ferguson, Judge.

Action by Rachel James, née Reeves, against J. H. Brader. Judgment for plaintiff, and defendant brings error. Affirmed.

Downs & Ellis and E. A. Blythe, all of Hugo, for plaintiff in error. Works & Copping, of Hugo, for defendant in error. C. C. Herndon, of Tulsa, Tibbetts & Green, of Guthrie, H. A. Ledbetter, of Ardmore, Joseph P. Rossiter and J. C. Wright, both of Okemah, and E. E. Hood, of Shawnee, amici curiæ.

SHARP, J. On October 27, 1905, Cerena Wallace, a full-blood Choctaw Indian, died, leaving as her sole surviving heir at law her daughter, Rachel James, née Reeves, the defendant in error. Thereafter, and on the 17th day of August, 1907, said defendant in error, a full-blood Choctaw, joined by her husband, Davis James, attempted to convey by warranty deed a part of the lands inherited by her from her deceased mother, the lands sold constituting the homestead allotment of 160 acres and 40 acres of the surplus allotment. On the 13th day of September, 1909, the purchaser, Tillie Brader, for the consideration of \$1, executed to the plaintiff in error, J. H. Brader, a quitclaim deed to said land. The deed executed by Rachel James and her husband to Tillie Brader, was never approved by the Secretary of the Interior, neither does it appear that it was ever presented for approval. On August 28, 1912, Rachel James instituted in the district court of Choctaw county an action at law to recover the possession of said land, and for the use and occupation thereof during the time the same was occupied by defendant, Brader. Trial being had, judgment was awarded plaintiff for the possession of the land and for \$250, which sum the court found to be the reasonable rental value of the property, after crediting the defendant with the value of all improvements which he had erected thereon.

The record before us fairly presents these

questions: (1) Could Rachel James, a full-blood Choctaw Indian, on and after the 26th day of April 1906, and before May 27, 1908, convey the lands inherited by her from her mother, who was a full-blood Choctaw Indian, and which lands had been allotted to her during her lifetime, so as to give a good title to the purchaser, without the conveyance being approved by the Secretary of the Interior; (2) If the legislation of Congress undertook to make such conveyances valid only when approved by the Secretary of the Interior, is it constitutional?

[1, 2] The allotment made to Cerena Wallace was under authority of, and, originally in the matter of alienation, controlled by, sections 12, 15, and 16 of the Supplemental Agreement with the Choctaws and Chickasaws of July 1, 1902 (32 Stat. at L. 641, c. 1362). According to section 12 of said agreement, it was provided that each member of said tribes should, at the time of the selection of his allotment, designate as a homestead out of said allotment lands equal in value to 160 acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as might be, which should be inalienable during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment, and that separate certificate and patent should issue for said homestead. As to the surplus allotment, it was provided by section 16 that all the lands allotted to the members of said tribes, except such land as was set aside to each for a homestead, as therein provided, should be alienable after the issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in 5 years; in each case from date of patent; provided, that such land should not be alienable by the allottee or his heirs, at any time before the expiration of the Choctaw and Chickasaw tribal governments, for less than its appraised value. In section 15 it was provided that lands allotted to members should not be affected or incumbered by any deed, debt or obligation of any character, contracted prior to the time at which said land might be alienated under said act, nor should said land be sold except as therein provided. It will be observed that the homestead lands were inalienable—

"during the lifetime of the allottee, not exceeding 21 years from the date of certificate of allotment."

The period of restriction was thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of 21 years. Thus, with respect to homestead lands, the Supplemental Agreement imposed no restriction upon alienation by the heirs of a deceased allottee. This was the view taken in *Mullen et al. v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, where it was

said that, where lands were allotted to a living member of the tribe, upon his death the homestead portion thereof descended free of restrictions. When the 40 acres of surplus allotment became alienable it is impossible to determine from the record; neither, as we shall presently see, is it important to a determination of the case. Some 16 months prior to the conveyance by Rachel James, Congress passed the act of April 26, 1906 (34 Stat. at L. p. 137, c. 1876). From this act it appears that Congress had undertaken to make new provisions for the protection of full-blood Indians of the Five Civilized Tribes, and to place them, as to the alienation, disposition, and incumbrance of their lands, under restrictions such as to operate to protect them, and to require the Secretary of the Interior to approve conveyances of certain classes of Indians, in order that they might part with lands of the character named therein only upon fair remuneration, and when their interests had been sufficiently safeguarded by competent authority. This intention is clearly expressed in various sections of the act, particularly in sections 19, 21, 22, and 23. While all are important, and bear upon the question of the policy of Congress with regard to full-blood Indians, section 22 is the only one with which we are directly concerned. This section provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in the case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The leading authority, apparently relied upon by both sides, construing this act, is that of *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. There, however, the act was passed prior to the expiration of the 5-year period of restrictions contained in section 16 of the Creek Supplemental Agreement of June 30, 1902 (32 Stat. at L. 500, c. 1323). In all other, if indeed not in all, respects, the case furnishes a controlling authority. The same construction of section 22 of the act of 1906 was urged by the defendants in that case as is insisted upon by the plaintiff in error here. Construing the act in connection with the subsequent act of May 27, 1908 (35 Stat. at L. 312, c. 199), it was held to have been the purpose of Congress to require conveyances provided by section 22 to be approved by the Secretary of the Interior. It was said that

the sections of the act of April 26, 1906, under consideration showed a comprehensive system of protection as to full-blood Indians. Various sections of the act concerning different classes of transactions were pointed out, and it was stated that under section 19, full-blood Indians were not permitted to alienate, sell, dispose of, or incumber allotted lands within 25 years, unless Congress otherwise provided; that the leasing of their lands, other than homesteads, for more than 1 year, could be made under rules and regulations prescribed by the Secretary of the Interior; that in case of the inability of a full-blood Indian, already owning a homestead, to work or farm the same, the Secretary might authorize the leasing of such homestead; that under section 20 leases and rental contracts of full-blood Indians, with certain exceptions, were required to be in writing, subject to the approval of the Secretary of the Interior; that under section 23 authority was given to all persons of lawful age and sound mind to devise and bequeath all their estates, real and personal, and all interests therein, but that no will of a full-blood Indian, devising real estate, and disinheriting his parent, wife, spouse, or children, should be valid until acknowledged before and approved by a judge of the United States Court for the Indian Territory, or by a United States commissioner. Particular consideration was then given to section 22, which it was said would enable full-blood Indians, as well as others, to convey inherited allotted lands, but that conveyances made under said section by heirs who were full-blood Indians should be subject to the approval of the Secretary of the Interior. This, it was admitted, would have the effect of extending the requirements of the approval of the Secretary of the Interior as to full-blood Indians beyond the term prescribed in section 16 of the act of 1902, and it was said such was the purpose of Congress, which, it was stated, was emphasized in paragraph 29 of the act, wherein all previous inconsistent acts and parts of acts were repealed. Answering the contention that it was not intended Congress should interfere with Indian full-blood heirs in their right to make conveyances after the expiration of the 5 years named in paragraph 16 of the act of 1902, it was said that, had Congress intended not to interfere with full-blood Indians in their right to make conveyances after said time, it would have been easy to have said so, and some reference would probably have been made to the prior legislation. It was further observed that no reference was made to the prior legislation, but that it was broadly enacted that all conveyances of the character named in paragraph 22, made by heirs of full-blood Indians, should be subject to the approval of the Secretary of the Interior. To use the language of the court:

"The construction contended for by the defendant in error places Congress in the attitude

of requiring such conveyances to be made with the approval of the Secretary of the Interior for the time between the passage of the act of 1906 and the expiration of the period named in the act of 1902, with unrestricted power thereafter to make such conveyances without such approval. Such construction is inconsistent with subsequent legislation of Congress upon the same subject, and which proceeds upon the theory that, in the understanding of Congress at least, restrictions still existed so far as the inherited lands of full-blood Indians were concerned."

After reviewing various provisions of the act of May 27, 1908, it was said that the obvious purpose of those provisions was to continue supervision over the right of full-blood Indians to dispose of land by will, and to require conveyances of interests of full-blood Indians in inherited lands to be approved by a competent court, as, provided in said latter act, after which conclusion the court further observed:

"We cannot believe that it was the intention of Congress, in view of the legislation which we have quoted, to leave untouched the 5-year restriction of the act of 1902, so far as the inherited lands of full-blood Indians are concerned, or to permit the same to be conveyed without restriction from the expiration of that 5-year period until the enactment of the legislation of May, 1908."

Attention was then called to the terms of the Enabling Act for the admission of the state of Oklahoma (34 Stat. at L. 267, c. 3335), after which, upon the question then under consideration, the court concluded:

"We agree with the construction, contended for by the plaintiff in error, and insisted upon by the government, which has been allowed to be heard in this case, that the act of April, 1906, while it permitted inherited lands to be conveyed by full-blood Indians, nevertheless intended to prevent improvident sales by this class of Indians, and made such conveyance valid only when approved by the Secretary of the Interior."

The proviso to section 22, if taken literally, can lead to but one conclusion, and that is: All deeds to inherited allotted lands, made by full-blood Indian heirs, after the passage of the act, are subject to the approval of the Secretary of the Interior. Said section conferred upon heirs the right to sell and convey inherited lands, but of full-blood Indian heirs it was required that all conveyances made by them should be subject to the approval of the Secretary of the Interior, under such rules and regulations as that officer might prescribe. In other words, the right of alienation was given upon the condition, in the case of full-blood Indian heirs, that the Secretary of the Interior should be satisfied with and approve the conveyance made; the obvious object of the provision being one of protection to the Indian.

Nor is there anything in the language used, or in the history of the times, to indicate a purpose to confine the operation of the statute to sales and conveyances made by full-blood heirs to lands thereafter inherited, and to exclude lands inherited, but not conveyed, prior to its adoption. The one class needed protection as much as the other, and each

are equally within the statute, fairly construed.

In *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, the lands conveyed to the appellants were described as those which had been allotted to Choctaws of the full blood, deceased; and the conveyances were made by the full-blood heirs prior to April 26, 1906, and prior to which time there was, as we have seen, no restrictions upon the right of alienation of such heirs. In other words, the heirs in that case had authority of law to make the deeds attacked, notwithstanding the fact that they were full bloods; this, under section 22 of the Supplemental Agreement. That attention is called to the fact that the conveyances were made prior to April 26, 1906, is, to our minds, significant, for if the act of that date is without force as to unrestricted inherited lands of full bloods, it would not matter when the conveyance was made, if the contention of the plaintiff in error be correct. Our conclusion, then, is that the proviso or latter clause of section 22 of the act of April 26, 1906, means just what it says, and requires that all deeds made by full-blood Indian heirs of inherited allotted lands, since the passage of the act, in order to be valid, must be approved by the Secretary of the Interior. This, too, regardless of the fact that Cerena Wallace, the full-blood allottee, died before the passage of the act of April 26, 1906, for it is the law in force at the date of conveyance, and not that of the time of the death of the ancestor, that controls. *McHarry v. Eatman*, 29 Okl. 46, 116 Pac. 935; *Harris v. Gale* (C. C.) 188 Fed. 712; *United States v. Knight et al.*, 206 Fed. 145, 124 C. C. A. 211; *Stephens v. Smith*, 10 Wall. 321, 19 L. Ed. 933.

Passing to the question of the constitutionality of the act, we refer again to the opinion in *Tiger v. Western Investment Company*. There *Marchie Tiger*, the full-blood Creek heir, had sold and conveyed the allotted lands inherited by him, after the expiration of the 5-year restriction period. It was held by the court that the rights of the Creek Indians, who were made citizens of the United States by the act of March 3, 1901 (31 Stat. at L. 1447, c. 868), with all the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by the Act of April 26, 1906, paragraph 22, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the Creek Supplemental Agreement of June 30, 1902, beyond the 5-year limitation therein named. In considering this subject we must remember that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as a dependent people, and to legislate concerning their property with a view to their protection as such dependents. *Chero-*

kee Nation v. Georgia, 5 Pet. 1, 17, 8 L. Ed. 25, 31; *Stephens v. Cherokee Nation*, 174 U. S. 445, 484, 19 Sup. Ct. 722, 43 L. Ed. 1041, 1055; *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; *Lone Wolf v. Hitchcock*, 187 U. S. 565, 23 Sup. Ct. 216, 47 L. Ed. 306. And we may say, further, that the power of the general government to deal with, control, and protect the property of Indians, where not expressly abandoned, may not fairly be open to controversy. Arising originally out of the necessities of the situation, it now has the support of immemorial legislative and executive usage, and likewise that of judicial sanction, as evidenced in a long line of decisions of the Supreme Court. This power remains in full force and vigor until its further exercise is deemed unnecessary by those in whom it rests. *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *United States v. Rickert*, 188 U. S. 439, 23 Sup. Ct. 478, 47 L. Ed. 536; *Wallace v. Adams*, 204 U. S. 420, 27 Sup. Ct. 363, 51 L. Ed. 550, and cases last cited.

On March 2, 1906, by joint resolution, Congress extended the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory; and in section 28 of the very act under which it is provided that the deed of a full-blood Indian heir to inherited lands shall be approved by the Secretary of the Interior, and in less than 2 months after the passage of the joint resolution, Congress enacted that the tribal existence and the then present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations were continued in full force and effect for all purposes authorized by law, until otherwise provided by law, with certain enumerated limitations upon the tribal authority. Neither this act or the act of May 27, 1908, evinced an intention on the part of Congress to abandon or terminate the relation of guardianship over those whom it regarded as a dependent people, but on the other hand, manifested a purpose to continue that relation. Also, in passing the Enabling Act for the admission of the state of Oklahoma, Congress was careful to preserve the authority of the government of the United States over the Indians, their lands, property or other rights, which it had prior to the passage of the act. 34 Stat. at L. 267, c. 3335. *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 842, 56 L. Ed. 1248. As to both tribal unallotted lands and annuities, and otherwise, the government retained, and yet retains, the former control. This is also true in the matter of protecting the Indian in the lands from which restrictions have not been removed. Such was the conclusion of the Supreme Court in *Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, 829, where it is said by Mr. Justice Hughes:

"The placing of restrictions upon the right of alienation was an essential part of the plan of individual allotment; and limitations were im-

posed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning. That the conferring of citizenship was in no wise inconsistent with the retention of control over the disposition of the allotted lands was expressly decided in the case of *Tiger v. Western Inv. Co.*, etc.

See, also, *Wiggan v. Connolly*, 168 U. S. 56, 16 Sup. Ct. 914, 41 L. Ed. 69; *Perrin v. United States*, 232 U. S. 478, 34 Sup. Ct. 387, 58 L. Ed. 691; *Bowling v. United States*, 233 U. S. 528, 34 Sup. Ct. 659, 58 L. Ed. 1080; *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755; *Texas Co. v. Henry*, 34 Okl. 342, 126 Pac. 224.

Powers, rights, and interests of sovereignty are never relinquished by mere lapse of time or by implication. Once rightfully established and asserted, they are presumed to exist, and to continue to exist until abandoned by express terms. This principle applies alike to prerogatives of the executive, powers of the legislative, and the jurisdiction of the courts. *United States v. Knight*, 14 Pet. 301, 10 L. Ed. 465; *United States v. Herron*, 20 Wall. 251, 22 L. Ed. 275. As expressed in *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967:

"An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions."

Construing section 7 of the act of Congress of May 27, 1902 (32 Stat. at L. 275), authorizing the adult heirs of any deceased Indian, to whom allotted lands had been patented, to sell inherited lands subject to the approval of the Secretary of the Interior, and providing that when so approved full title should pass to the purchaser, the same as if a final patent without restrictions on alienation had been issued to the allottee, the Circuit Court of Appeals, in *National Bank of Commerce v. Anderson*, 77 C. O. A. 259, 147 Fed. 90, in holding that the trust attached to the proceeds of the sale, said:

"We construe the act as expressing the intention of Congress, not to end the trust, but to permit a change of the form of the trust property. The property being held in trust by the United States for a period which had not yet expired, and which period was subject to * * * extension by the President, the intention to terminate the trust must be found to be clearly expressed in order to warrant us in holding that the trust does not follow the property in its changed form."

There Henry Taylor, the heir, though a citizen of the United States, was an Indian of the Puyallup Tribe. He lived his own independent life, had severed his tribal relation, and was neither dependent on the government or under official control.

A very able opinion is that of Judge Sanborn in *United States v. Thurston County*,

143 Fed. 287, 74 C. O. A. 425, where, after referring to the fact that the Indian was also a citizen of the United States and of the state of Nebraska, it is said:

"Their civil and political status, however does not condition the power, authority, or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. *Matter of Heff*, 192 U. S. 488, 509 [25 Sup. Ct. 506], 49 L. Ed. 848; *Buster v. Wright*, 68 C. O. A. 505, 135 Fed. 947; *Wallace v. Adams*, 74 C. O. A. 540, 143 Fed. 716. * * * They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that 'from their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen.' *United States v. Kagama*, 118 U. S. 375, 384 [6 Sup. Ct. 1109], 30 L. Ed. 228."

We cite these two latter cases as authority upon the question that Congress has not terminated the relation of trust, but has, on the other hand, zealously continued its exercise.

[3-6] It is for Congress, and not the courts, to determine when and how the relation of guardianship shall be abandoned. As was said in *Tiger v. Western Investment Co.*, after reviewing many former opinions of that court upon the subject:

"Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

Also, as said in *United States v. Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195, speaking to the question under consideration:

"It is not within the power of the courts to overrule the judgment of Congress."

Whether the restrictions on alienation as provided in the Supplemental Agreement, under which the lands were allotted, had or had not expired does not of itself, and while the title remains in the Indian, determine that Congress has renounced its power to legislate in the latter's behalf as a dependent. Upon this question we again quote from the *Tiger Case*:

"Upon the matters involved our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees, as shown in this case; that in the present case, when the act of 1906 was passed, Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such

as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."

The relation of guardianship between Rachel James and the general government did not depend upon whether the lands inherited by her were alienable at the time descent was cast. Neither was the power of Congress to impose restrictions made to rest upon there being restrictions in force at the time of the passage of the act. It is because of the relation of guardianship that at the time existed between the general government and Rachel James that Congress had the power to impose restrictions on her right to convey lands inherited by her. As was said in *Heckman v. United States*, supra:

"During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribes permits no other conclusion. Out of its peculiar relation to these dependent people sprang obligations to the fulfillment of which the national honor has been committed."

Until this guardianship had been unequivocally renounced, Congress could, in its wisdom, continue the exercise of its judgment in respect to the rights and privileges that should be accorded those of her class. The relationship being the source from which the power is derived, the imposition during its continuance of a new restriction stands upon the same ground as the extension of one yet in force. In other words, the existence of the right of guardianship cannot be made to depend upon the existence of a restriction on a particular piece of land. If the relations of the Indian to the government were, in every respect, save for the bare existence of a restriction upon his title, the same as those of a noncitizen white man, the restriction could not be constitutionally enlarged without the Indian's consent, because, being *sui juris* himself, his power to dispose of his allotment would be absolutely measured by the terms of his deed, and any attempt to vary those terms would be a clear invasion of his property rights. But it would be absurd to say that the authority to vary a restriction is conferred by a restriction. If, therefore, the power is not to be derived from the restriction itself, but must come from the relation of guardianship, of which the restriction is merely one evidence, it must follow that the existence of the restriction is wholly immaterial to the exercise of the power. The power that is correlative to the duty of protection must be such as is adequate to the occasion. If, while an Indian remains a ward of the nation, Congress should make a gross mistake in giving him full control over property essential to his

welfare, but which he is not fitted to protect, Congress, acting for him, and with a view to his protection, may correct the mistake, for, as already seen, the power of Congress is not alone dependent upon legislation being had while a limitation remains in effect. The guardianship is of the person as well as of the property. Hence the right to deal with the Indian liquor problem; the right to educate the Indians; to sell their unallotted lands, and keep and pay out per capita the moneys derived therefrom, at will; to appoint probate attorneys; and generally to superintend, counsel, and guide them in their personal affairs. It is the government's peculiar function and duty to afford him protection. This he needs in respect of all his property. Congress, whenever it chooses, may renounce its control and its protective care over the individual. Until that is done, it is safe to assume that there is a reason for continuing the relation; that the Indian is not ready for complete liberation from restraint, and that whatever liberties or disposition over his property are allowed him from time to time are in the way of experiments, subject to recall if found hasty and ill-advised. The restriction upon alienation is but one mode of exercising the general protective power over those Indians whom Congress may regard as dependent. The power to impose a restriction is entirely consistent with the possession by the individual Indian of rights which are constitutionally protected from interference by Congress. He may not be arbitrarily deprived of property, but the protection of his property is a legitimate and necessary exercise of the power of guardianship, subject to which his property is held; and the imposition of restraint upon his liberty of disposition is a necessary and legitimate means of protecting his property.

Not only is this view borne out by the decision in the *Tiger Case*, but in the early case of *Stephens v. Smith*, 10 Wall. 321, 19 L. Ed. 933. In *Choate et al. v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, the distinction between the right to exemption from taxation based on a sufficient consideration and the power of Congress to impose a limitation on alienation was expressly recognized. Meeting the contention of the state that the act of May 27, 1908 (35 Stat. at L. 312, c. 199), was not in fact a tax exemption, but was intended only to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private contract, or, differently expressed, that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were removed by the act, the provision as to nontaxability went as a necessary part thereof, it was said:

"But the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the

ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant."

It will be seen that the statute involved undertook to destroy this right by making lands from which restrictions had been removed, subject to taxation by the local taxing authorities. Section 22 contains no such provision, but, instead, requires that conveyances by full-blood Indian heirs shall be subject to approval by the Secretary of the Interior, under such rules and regulations as he may prescribe.

We are not unmindful that the Circuit Court of Appeals, in *Bartlett et al. v. United States*, 203 Fed. 410, 121 C. C. A. 520, held that it was not within the power of Congress to reimpose a restriction upon the alienation of land, against which none at the time existed. The *Bartlett* Case did not involve the alienation of inherited lands, neither did it involve the relationship between the general government and full-blood Indians. Besides, the act under consideration was that of May 27, 1908, which expressly excluded from its operation the imposition of restrictions removed from land by or under any law enacted prior to its passage. It was upon this ground that the decision was affirmed on appeal to the Supreme Court of the United States. *United States v. Bartlett et al.*, 235 U. S. 72, 35 Sup. Ct. 14, 59 L. Ed. 137. Section 9 of the latter act provided:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir to such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

The court, however, had before it for construction, section 1 of the act continuing restrictions upon the living allottees, to which was attached the proviso already referred to. While it was said by the court, referring to the former section:

"If taken literally, the language which we have quoted from the act of 1908 is doubtless broad enough to impress all allotments of the class described, whether then subject to the original restriction or theretofore freed from it,"

—and it was held that, on account of the proviso, the language was not to be taken literally. Whether this proviso includes inherited lands named in section 9 of the act it is unnecessary to consider, for we are not construing the latter act, but instead, in the respect mentioned, distinguishing it from the former. Whether in principle the *Bartlett* Case may be distinguished from the one under consideration need not be considered or determined, for in the recent case of *United States v. Western Investment Company* (C. C. A.) 226 Fed. 726, it was held that, though the period for which the Creek allotment made a prior allotment to an Indian, confirmed thereby, alienable by the allottee or his heirs without approval of the Secretary

of the Interior expired before enactment of the act of April 26, 1906, c. 1876, § 22 (34 Stat. at L. 145), prohibiting full-blood heirs of a deceased Indian conveying his land without approval of such officer, a conveyance by such heir of such land after such enactment was subject thereto. In that case, according to the opinion, the lands inherited by the grantor, Mary Bird, a full-blood Creek Indian, were free of restrictions from the 1st day of March, 1906, until April 26th following. The opinion is rested upon section 22 of the act of April 26, 1906, requiring that conveyances by heirs who are full-blood Indians shall be subject to the approval of the Secretary of the Interior, and the decision of the Supreme Court in the *Tiger Case* that Congress had not, by the Supplemental Creek Agreement, or by any other act, released its control over the alienation of full-blood Creek Indians, and that it was within its power to continue to restrict such alienation by requiring the approval of the Secretary of the Interior of conveyances made by them.

In *United States v. Shock* (C. C.) 187 Fed. 870, it was said that it was within the power of Congress to impose restrictions upon the alienation of lands of Indian allottees, although restrictions imposed by prior legislation have expired by limitation. In *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, it was held that it was within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment is made, so long as the land is held by the allottee, although in the meanwhile he may have been made a citizen of the United States.

Nor does the opinion, in *re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, announce a different rule. In that case, section 6 of the General Allotment Act of February 8, 1887 (24 Stat. at L. 388, c. 119), provided:

"That upon the completion of said allotments and the patenting of the land to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

Heff was convicted in the United States Court in 1904, with having violated the act of Congress of January 30, 1897 (29 Stat. at L. 506, c. 109), by selling intoxicating liquors to one John Butler, a Kickapoo Indian, to whom certain lands had been allotted under the act of February 8, 1887. It was contended by the petitioner, in his application for a writ of habeas corpus, that the act of January 30, 1897, was unconstitutional as applied to the sales of liquor to an Indian who had received an allotment and patent of lands under the provisions of the act of February 8, 1887, because it was provided in

said act that each and every Indian to whom allotments had been made should be subject to the laws, both civil and criminal, in the state in which said allottee might reside, and, further, that said Butler, having received an allotment of land in severalty and his patent therefor under the provisions of the allotment act, was no longer a ward of the government, but a citizen of the United States and of the state of Kansas, and subject to the laws, both civil and criminal, of said state. After reviewing a number of the decisions of that court, pertaining to the relationship between the government and the Indians, and the rights and obligations consequent thereon, it was said that a new policy had found expression in the legislation of Congress, the purpose of which was the breaking up of tribal relations, the establishment of separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States. The court said:

"Of the power of the government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may, at any time, abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one sui juris. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress may be made clear by its legislation, but when that purpose is made clear, the question is at an end."

In a former treaty between the Kickapoos, concluded June 28, 1862 (Revision of Indian Treaties, art. 3, p. 449), it was provided:

"At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the requests of such persons, cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be * * * [set apart and placed to their credit severally] their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

In construing the two treaties the court said:

"Now the act of 1887 was passed 25 years after the treaty of 1862 with the Kickapoos, and must be construed in the light of that treaty. By the treaty it was declared that at the instance of the President, and upon compliance with specified provisions, certain of the

Indians should be considered as competent persons, should cease to be members of the tribe, and become citizens of the United States."

It was said that, the act of 1897 being a police regulation, it could not be doubted that an act of Congress, attempting as a police regulation to punish the sale of liquor by one citizen of the state to another, within the territorial limits of that state, would be an invasion of the state's jurisdiction, and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. The point decided by the court was that when the United States granted the privilege, or privileges, of citizenship to an Indian, gave to him the benefit of, and required him to be subject to, the laws, both civil and criminal of the state, it placed him outside the reach of police regulations on the part of Congress; that the emancipation from federal control, thus created, could not be set aside at the instance of the government, without the consent of the individual and the state; and that this emancipation from the federal control was not affected by the fact that the lands it had granted to the Indian were granted subject to a condition against alienation or incumbrance, or the further fact that it guaranteed him an interest in tribal or other property. The difference in the facts before the court in the *Heff* Case, and those before us, in no way makes the decision in that case an authority. Without enumerating these distinctions, several of which stand out conspicuously, it is sufficient to say that in that case, involving as it did a police regulation, there had been, by express congressional enactment, an emancipation of the Indian from federal control, and by the express terms of which he became subject to both the civil and criminal laws of the state in which he resided. Here no such abdication of power or surrender of control appears, but instead, as already seen, the various acts of Congress, touching the question of both the form of removal and imposition of restrictions, gave evidence conclusive of an intention on the part of the general government to continue, for the time being, its relation of guardianship over full-blood Indians.

At the date of the passage of the act of April 26, 1906, the Choctaw and Chickasaw Indians were residents of, and their lands were situated in, an unorganized territory. Their tribal governments were shorn of all power, and existed in name only. There was none other to control and manage their affairs than the general government. The legislation of Congress in behalf of the full-blood Indians is a matter of current history. No less so, however, is the vigilance and activity displayed in the other branches of government, brought about by congressional enactment. Many suits were brought by the United States in carrying out its policy of protection to those whom Congress regarded

as dependents and in need of protection. Indeed, at all times, on and since the passage of the act, has the government shown a most determined and persistent purpose to continue the exercise of the authority derived from its guardianship relation, and in the Enabling Act to see that the power was reserved to it.

A case sometimes cited as authority for a conclusion different from that which we have reached is *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, where, however, a quite different question was before the court. In that case, Moose Dung, the younger, the heir at law of the senior Moose Dung, in 1891, executed to the Meehans a lease to certain lands which had been set apart to his father during the latter's lifetime, and of which estate the younger Moose Dung was the sole heir at law. Afterwards, in 1894, said younger Moose Dung executed a second lease to said lands to Jones. Subsequent thereto, and during the same year, Congress passed a joint resolution, authorizing the Secretary of the Interior, in his discretion, to approve the latter lease. This was afterwards done, and the contest over the possession arose between the two lessees, a portion of the terms of the leases running concurrently. It was held that the elder Moose Dung, having acquired a complete title in fee simple, his heir, upon whom the estate devolved at his death, had the right to make the original lease, and that the interests of the lessees acquired thereby could not be divested by any subsequent action of the lessor, or by Congress, or of the executive department of the government. The court said:

"The congressional resolution of 1894, and the subsequent proceedings in the Department of the Interior, must therefore be held to be of no effect upon the rights previously acquired by the plaintiffs by the lease to them from the younger chief."

The decision, therefore, is not an authority for the contention that Congress is without power to impose restrictions on alienable allotted lands of full-blood Indians.

It may be well to note that the act enjoined upon the Secretary of the Interior is in no sense judicial, but, on the other hand, is purely ministerial. *Jennings v. Wood*, 192 Fed. 507, 112 C. C. A. 657. It follows the making of a bargain between the heir or heirs and the intending purchaser. The Secretary's jurisdiction is invoked only when the conveyance is presented to him for his approval. As was said in the above case:

"His connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto."

The rule that the act is ministerial is the same under the act of May 27, 1908, requiring the approval by the county courts of the deed of full-blood heirs. *Tiger v. Creek*

County Court, 146 Pac. 912; *Bartlett v. Okla. Oil Co. et al.* (D. C.) 218 Fed. 330.

It should be remembered that the lands, the title to which is in controversy, were allotted to Cerenia Wallace during her lifetime. What effect, if any, the act of 1908 would have on conveyances made by the full-blood Indian heirs of enrolled tribal members who died subsequent to enrollment, but before selecting their allotments, and where allotments were thereafter duly made in their name or on behalf of their heirs, not being directly involved, is not determined, and anything herein is not intended to affect the rights of such heirs or those holding under or through them. From what has been said, we are of the opinion that Congress, in the passage of the act of April 28, 1906, acted within the scope of its lawful authority, and that the deed from Rachel James to the plaintiff in error, not having been approved as required by law, was void.

It follows that the judgment of the lower court should be and is affirmed. All the Justices concur, except HARDY, J., dissenting.

HARDY, J. I dissent from that portion of the opinion holding that the conveyance of the homestead lands was void. It was necessary that the conveyance of the surplus lands be approved. *Gannon v. Johnson*, 40 Okl. 695, 140 Pac. 430, Ann. Cas. 1915D, 522. Cerenia Wallace, the allottee, died October 27, 1905, after having selected the lands in controversy, as her allotment. This was prior to the passage of the act of Congress approved April 28, 1906 (34 Stat. L. 137); therefore the homestead descended free from restrictions upon the alienation thereof. *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834.

Upon reviewing the authorities cited by the court, it is seen that the holding of the court in *United States v. Allen*, 179 Fed. 13, 103 C. C. A. 1, is stated in the ninth paragraph of the syllabus as follows:

"It is within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, although in the meantime he may have been made a citizen."

This case was reversed by the Supreme Court in so far as it held that the United States could maintain a suit to set aside conveyances to lands after restrictions thereon had expired. *Mullen et al. v. United States*, supra; *Goat v. United States*, 224 U. S. 458, 32 Sup. Ct. 544, 56 L. Ed. 841; *Deming Inv. Co. v. United States*, 224 U. S. 471, 32 Sup. Ct. 549, 56 L. Ed. 847. In *United States v. Shrock* (C. C.) 187 Fed. 870, decided by the Circuit Court for the Eastern District of Oklahoma, the opinion was expressly placed upon the ground that the question of the authority of Congress to reimpose restrictions upon the alienation of

lands of Indian allottees was settled in the affirmative so far as this jurisdiction was concerned by the doctrine announced in *United States v. Allen*, supra.

In *United States v. Western Inv. Co. (C. O. A.)* 226 Fed. 726, it was held that according to the provisions of the act of April 26, 1906, restrictions had been reimposed upon the conveyance of inherited lands by the heirs of a deceased Indian to whom an allotment had been made in his lifetime. It will be noted that in this case the District Court for the Eastern District of Oklahoma, from which court the appeal was taken, had departed from its holding in the case of *United States v. Shrock*, and reached the conclusion that restrictions could not be reimposed, and the Circuit Court of Appeals, in reversing the case, reached the opposite result. The opinion cites no authorities in support of its conclusion other than the case of *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. I think I will be able to demonstrate that the case of *Tiger v. Western Inv. Co.* is not authority for such conclusion.

In *Stevens v. Smith*, 10 Wall. 321, 19 L. Ed. 933, the lands involved were reserved for the use of Victoria Smith, a half-breed Indian, by the United States under the provisions of the treaty of June 3, 1825 (7 Stat. 244). By the eleventh article of that treaty it was stipulated that the Nation should not sell the lands without permission of the government, and the court observed that it would assume the contracting parties intended this prohibition to apply to the individual members of the tribe. By act of May 26, 1860 (12 Stat. 21) the title of the United States to those lands, the use of which had been allotted to Victoria Smith, was conveyed to her, and this act declared void all prior contracts for the sale thereof and forbade any future disposition except by the Secretary of the Interior, on the request of the party interested. Only the use of the lands was allotted to Victoria Smith prior to the act of May 26, 1860, and by the very act of conveyance, and as one of the conditions thereof, the restrictions upon the alienation of said lands were imposed.

The case of *Tiger v. Western Inv. Co.*, supra, involved the construction of the act of April 26, 1906, in so far as it affected the prohibition against alienation of allotted lands by the allottee or his heirs, created by the Supplemental Creek Agreement of June 30, 1902, which at the date of the act had not expired; and it was held that under these circumstances Congress had the power to extend the restrictions. In the opinion it is stated that the legislation proceeded "upon the theory that in the understanding of Congress at least restrictions still existed so far as inherited lands of full-blood Indians are concerned"; and, after a review of the policy of Congress in reference to legislation of this character, and referring to the fact that

citizenship had been conferred upon Marchie Tiger, and that citizenship was not incompatible with restriction upon the alienation of said lands, it was said:

"In this state of affairs Congress, with plenary power over the subject, by a new act permitted alienation of such lands at any time subject only to the condition that the Secretary of the Interior should approve the conveyance."

And, after declaring the conclusion of the court to be that Congress had at all times the right to pass legislation in the interest of the Indians, it was further said:

"That in the present case, when the act of 1906 was passed, Congress had not released its control over the alienation of lands of full-blood Indians of the Creek Nation; that it was within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease, and, while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indians."

It is significant that throughout the entire discussion by the court the distinction is made clear that at the time the act was passed *the restriction upon the lands involved had not expired*, and that the right of Congress to pass the act is placed upon the conditions existing, and this authority is stated to be that Congress may extend or vary existing restrictions, and nowhere in the opinion is it said that Congress may reimpose restrictions after they have once expired.

The italics throughout this opinion are mine.

Of the authorities cited by the court we find that the *Allen Case* was criticized by the same court that decided it. The opinion in the *Shrock Case* was expressly based upon the holding in the *Allen Case*, and was afterwards departed from by the court rendering the opinion therein. In *United States v. Western Inv. Co.*, the conclusion reached was expressly based upon the holding in *Tiger v. Western Inv. Co.*, and in *Tiger v. Western Inv. Co.*, is found no expression by the Supreme Court to the effect that a right exists upon the part of Congress to reimpose restrictions when they have once expired, and in *Stevens v. Smith* the restriction was a condition of the grant.

There is, and can be, no question at this time that when a restriction has expired by lapse of time, it has been removed the same as if done by an express act of Congress or by the Secretary of the Interior. *United States v. Bartlett*, 235 U. S. 72, 35 Sup. Ct. 14, 59 L. Ed. 137; *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941.

In *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, an Indian chief owned in fee land which fronted on a stream. The chief died, and in 1891 his son and heir, during the continuance of the tribal organization, let the land to Meehan for 10 years. In 1894 he again let the same land to Jones

for 20 years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the consent of the Indian and the Secretary of the Interior, the lease was made to Jones. Litigation followed, in which Meehan relied upon the first contract and Jones relied upon that made under Congressional authority. Judgment was for Meehan; and, in reviewing the opinion in that case the Supreme Court, in *Choate v. Trapp*, supra, said:

"The court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee; and, while Congress had power to make treaties, it could not affect titles already granted by the treaty itself."

In *Re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, the court had under consideration the authority of the United States to punish under its police power the sale of liquor within a state by a citizen thereof to an Indian who had selected an allotment under the act of February 8, 1887 (24 Stat. L. 388), by which it was provided that each allottee thereunder should have the benefits of and be subjected to the laws of the state where he resides, and by the terms of which citizenship was conferred upon each such allottee. The contention was made that because the purchaser was an Indian, notwithstanding he had taken his allotment under the terms of the act and as a citizen of the United States and of the state of Kansas, the United States might punish the sale of liquor to such Indian. In denying this contention, the court, speaking through Mr. Justice Brewer, said:

"But the logic of this argument implies that the United States can never release itself from the obligation of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore state, citizenship, the benefits and burdens of the laws of the state may, at any time, repudiate this action, and reassume its guardianship and prevent the Indian from enjoying the benefits of the laws of the state, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood in his veins, he is to be forever one of a special class over whom the general government may, in its discretion, assume the rights of guardianship which it has once abandoned and this, whether the state or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound."

And, after noticing the fact that the lands of the Indians were restricted from alienation, and declaring the rule that an allottee may enforce his right to any interest in the tribal or other property, and that Congress may enforce and protect any condition which it attaches to any of its grants, further said that the fact that the property was subject to a condition against alienation did not affect the civil or political status of the holder of the title. The extent of the power of Congress to legislate respecting the personal

and political status of such Indians was expressed as follows:

"But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state; and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

The effect of the holding in the *Heff* Case is that, when Congress has released its guardianship over the personal and political status of the individual Indian to the extent of conferring citizenship on him so that he becomes a citizen of the United States and of the state in which he resides, this grant cannot be retracted without the consent of the state of which he is a resident and the individual himself. This is true because he owes certain duties and is under certain obligations to the state of his residence, and has the rights therein of other citizens. If the theory of the court be true that, because Congress has made an improvident grant to the Indian of property rights, those rights may be taken away because he is still a citizen of the tribe, then by parity of reason a grant of citizenship may also be retracted because guardianship has not been fully and completely surrendered.

In *Bartlett v. United States*, 203 Fed. 410, 121 C. C. A. 520, the Circuit Court of Appeals for the Eighth Circuit, being the same court which rendered the opinion in the *Allen* Case and in the case of *United States v. Western Inv. Co.*, in the course of its opinion said that Congress could not, by virtue of the guardianship of the United States, deprive an individual Indian of his full property rights in and to his lands and reimpose restrictions upon the alienation thereof, and the expression in the *Allen* Case to the contrary was referred to as "mere obiter."

In *Hemmer v. United States*, 204 Fed. 898, 123 C. C. A. 194, a Sioux Indian by the name of Taylor, under the act of March 3, 1875 (18 Stat. 420, c. 131) which gave the benefit of the Homestead Laws to Indians that might abandon their tribal relations and avail themselves of the homestead laws, but placing a restriction of 5 years upon the alienation of the lands so homesteaded, entered 160 acres of land in reliance upon said act, and on June 10, 1884, had resided thereon the required length of time to entitle him to make final proof and receive his patent. On July 4, 1884, less than a month thereafter, Congress passed an act enlarging the class of Indians who might avail themselves of the homestead act, and providing a 25-

year restriction instead of 5 years. The court held that the act of 1884 did not apply to Taylor's homestead, he having entered his land under the act of 1875, and resided thereon the full time required before the passage of the act of 1884, and that the latter act did not have the effect of reimposing a restriction for 25 years upon the alienation thereof, although his conveyance was not executed until August 8, 1908.

The question here is whether the right to alienate his allotted or inherited lands is a property right which vests in the individual Indian upon the removal of restrictions. If it be such, it is protected from legislative impairment by the fifth amendment to the federal Constitution. I maintain that it is such a right, and therefore the right to reimpose restrictions thereon does not exist.

In Choate v. Trapp, supra, the court held the exemption from taxation to be a vested property right, which could not be impaired. In Mullen v. United States, supra, speaking of the interests of the heirs of an Indian who died before receiving his allotment, which was afterwards selected in his name, it was said:

"These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was the subject of sale. The fact that they were 'full-blood' Indians makes no difference, for, at the time of the conveyances in question, heirs of the full blood, taking under the provisions of paragraph 22 of the Supplemental agreement, had the same right of alienation as other heirs."

The right to inherit, purchase, lease, sell, hold, and convey real and personal property is guaranteed to every citizen of the United States, by section 1978, Rev. Stat. (U. S. Comp. St. 1913, § 3931), being the Civil Rights Act. In the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835, it was said that Congress by passing the act under consideration had undertaken—

"to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens."

See, also, Allgeyer v. State of Louisiana, 165 U. S. 580, 17 Sup. Ct. 427, 41 L. Ed. 832; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; Powell v. Penn., 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253.

The term "property" has a most extensive signification, and, according to its legal definition, consists in the free use, possession, enjoyment, and disposition by a person of all his acquisitions, without any control or diminution save only by the laws of the land. The term not only includes the thing over which dominion may be exercised, but in its broader sense is that dominion or right of use and disposition which one may exercise over subjects or things, to the exclusion of others, and includes the right to possess, use,

enjoy, and dispose of a thing; and it is hard to conceive of property without these rights and attributes therein. 1 Blackstone, Comm. 138; Black's Law Dictionary, title, Property; Anderson's Law Dictionary, title, Property. The authorities defining property are collected in Words and Phrases, title, Property (First and Second Series).

It is true that the right to use and dispose of such property may be regulated by the laws of the land, but this means "regulation" and does not include the right to take or destroy the same without due process of law, and without just compensation. The state may require that a deed of conveyance shall be in writing, and shall be acknowledged and recorded and may specify the manner of acknowledgment and the officer before whom it shall be executed. But when the right to convey, after it has once vested, and where the grantor is possessed of the full legal and equitable title in the thing conveyed, without condition or restriction, is made to depend upon the will of some third person with the power of veto, the right has been seriously impaired and in effect destroyed. As to a citizen of the United States not of Indian blood, it is conceded this could not be done. No distinction exists in this respect between a white person and an Indian. In Choate v. Trapp, it was said:

"There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *Re Heff*, 197 U. S. 504, 25 Sup. Ct. 506, 49 L. Ed. 855; *Cherokee Nation v. Hitchcock*, 187 U. S. 307, 23 Sup. Ct. 115, 47 L. Ed. 190; *Jackson ex dem. Smith v. Goodell*, 20 Johns. (N. Y.) 188; *Lowry v. Weaver*, 4 McLean, 82. Fed. Cas. No. 8584; *Whirlwind v. Von der Ahe*, 87 Mo. App. 628; *Taylor v. Drew*, 21 Ark. 487. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe subject to the guardianship of the United States as to his political and personal status."

Referring to the right of Congress to remove restrictions upon the alienation of Indian lands, it was said the right was in pursuance of the power of Congress to lengthen or shorten the period of the Indian's disability, but it was further said that:

"No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres or 50 acres, or the timber growing on the land."

It was conceded by eminent counsel therein that no right which was actually conferred could be arbitrarily abrogated by statute, and the court in the discussion of the case said:

"If there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentee."

Determining the effect to be given to the decision in *Tiger v. Western Inv. Co.*, which

the court thinks justified its conclusion that restrictions may be reimposed on these homestead lands after the original restriction had been removed, the Supreme Court said:

"Nothing that was said in *Tiger v. Western Inv. Co.* (citing it) is opposed to the same conclusion here, for that case did not involve property rights, but related solely to the power of Congress, to extend the period of the Indian's disability. *The statute did not attempt to take his land or any right, member, or appurtenances thereunto belonging.* It left that as it was."

The court then gave the reason underlying the legislation by Congress which extended the time during which the allottee could not sell, and called attention to the fact that:

"Tiger was still a ward of the Nation so far as the alienation of his lands was concerned, and a member of the existing Creek Nation"—and after stating the rule that citizenship was not incompatible with guardianship, the court continued:

"But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the fifth amendment. * * * We have seen that it was a vested property right which could not be abrogated by statute."

And again in the opinion it was said, with reference to the power of Congress to legislate with respect to tribal property, that:

"There is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. *Reichert v. Felps*, 6 Wall. 160, 18 L. Ed. 849."

Thus it is shown that the right to alienate property is property itself, and it is conceded that if such right has vested in a white person, that right could not be impaired even by Congress. So it is also seen that with reference to vested private rights there is no distinction between an Indian and any other citizen of the United States. This being true, any legislation which would impair or lessen such right would be invalid. There is no question about the right of Congress to impose as a condition of its grant restrictions upon the alienation thereof, because the title vests subject thereto, and same operates as a condition annexed to the title; but, when full and complete title in fee simple without condition or restriction has vested, the right of disposition is a property right, and is protected by the fifth amendment.

In *Chase v. United States*, 222 Fed. 593, 138 C. C. A. 117, the United States as trustee and guardian of the Omaha Tribe of Indians and of Rose Wolf Setter, a member of said tribe, brought suit against Hiram Chase, the sole heir of the grantee of a tract of 40 acres of land under section 4 of the treaty of March 6, 1865, with the Omaha Tribe of Indians (14 Stat. 667, 668). The question there was whether Hiram Chase, the sole heir of the grantee of said tract or Rose Wolf Setter, the sole heir of the grantee of the same land under section 5 of the act for the sale of a part of the reservation of that

tribe, of August 7, 1882 (22 Stat. c. 434, pp. 341, 342), had the title and the right of possession of the tract; in other words, whether the treaty of 1865 granted to Clarissa Chase, the mother of defendant, a substantial title to or right in the land in question or a mere revocable license to the possession and use thereof. In reversing the case with instructions to render judgment on the merits in favor of Hiram Chase, the court said:

"If by the treaty of 1865 a substantial right in or title to the land in question was granted to or vested in Clarissa Chase and her heirs, the subsequent act of Congress of 1882 was ineffective to impair or destroy that right or title because:

"First, Indians as well as other residents and citizens of the United States, are protected by the fifth amendment to the Constitution against deprivation of property, life, or liberty without due process of law. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. *Choate v. Trapp*, 224 U. S. 565, 670, 671, 32 Sup. Ct. 565, 58 L. Ed. 941; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; *In re Heff*, 197 U. S. 488, 504, 25 Sup. Ct. 506, 49 L. Ed. 848; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; *Jackson v. Goodell*, 20 Johns. (N. Y.) 188; *Lowry v. Weaver*, 4 McLean, 32 Fed. Cas. No. 8584; *Whirlwind v. Von der Ahe*, 67 Mo. App. 628; *Taylor v. Drew*, 21 Ark. 485.

"Second. Except in political cases—and this case is not a political case—Congress has no power, under the Constitution of the United States, to affect rights or titles granted by a treaty, or to determine what rights were granted thereby. Nor may the character of the right or interest granted to Clarissa Chase by the treaty of 1865 be determined by the opinion of Congress that that right or interest was revocable and negligible, though it be evidenced by its declaration in the act of 1882 that after the new allotments were made under that act the certificates of right and title issued by the Commissioner of Indian Affairs under the treaty of 1865 should be null and void. The construction of treaties and the determination of the character and extent of the rights and titles granted under them is a judicial, and not a legislative, function, and by the Constitution the power is granted, and the duty, which may not be renounced, is imposed upon, the courts to form and enforce their independent judgments upon these questions, although these judgments may differ from the opinions of the Congress or its members. *Jones v. Meehan*, 175 U. S. 1-32, 20 Sup. Ct. 1, 44 L. Ed. 49; *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. Ed. 727; *Reichert v. Felps*, 6 Wall. 160, 162, 18 L. Ed. 849; *Smith v. Stephens*, 10 Wall. 321, 327, 19 L. Ed. 933; *Holden v. Joy*, 17 Wall. 211, 247, 21 L. Ed. 523."

If it be once established that Congress may reimpose restrictions upon lands from which same have been removed, it may impose restrictions where none existed. Then if such Indian received title to other lands by inheritance from a white ancestor, or purchased same from funds accumulated by his own toil and industry, the fact of guardianship by the United States over him would authorize Congress to impose restrictions upon the use, enjoyment, and disposition of such property, and also to withdraw the same from state or municipal taxation. It seems clear that such

cannot be done, and if it cannot be done, upon what principle can it be said that Congress may draw to itself control over the alienation of other lands, the title of which, both legal and equitable, has been conveyed to the Indian, simply because such lands at one time comprised a part of the Indian domain. If this power may be exercised with reference to the lands, why may it not be exercised with reference to all kinds of property, even to the extent that if an Indian has a sum of money in the bank, legislation might be enacted placing restrictions upon the disposition and use of such property or money. This is not an illogical deduction from the opinion of the court, and demonstrates the consequences that might possibly follow if guardianship over the Indian be the sole test of the right of Congress to legislate in the respects mentioned. Mixed bloods of whatever degree of blood, together with intermarried citizens, are still wards of the nation in the sense that they are members of existing tribes, and that their tribal affairs have not been completely wound up and their tribal existence dissolved. In this sense they are as much wards of the government as the full-blood heirs of a deceased allottee, and if Congress possesses the power to reimpose a restriction upon the alienation of the lands of a deceased allottee by the heirs thereof in the case of full bloods, as in the case at bar, should Congress determine that previous legislation was unwise, it might reimpose restrictions upon the alienation of the lands of all allottees without regard to the quantum of blood, including intermarried citizens, and might re-enact any legislation regulating the property and affairs of the tribes. Some of the representatives of the state in the halls of the National Congress are members of the Indian tribes, and would be brought within the terms of such restrictive legislation. In short, the Congress could withdraw from the jurisdiction of the state and from the operation of its laws all of the lands in at least one-half of the state the title to which is still in the hands of the members of Indian tribes. It seems to me clear that this cannot be done.

If Congress may reimpose restrictions upon lands which were selected in the lifetime of the allottee and afterwards descended to his heirs, it may also impose restrictions upon lands which were allotted in the name of Indians who died prior to selecting their allotment. In *Skelton v. Dill*, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198, and in *Adkins v. Arnold*, 235 U. S. 417, 35 Sup. Ct. 118, 59 L. Ed. 294, it was held that the restrictions imposed by section 16 of the Supplemental Creek Agreement of June 30, 1902, applied only to allotments made to living citizens in their own right, and not to allotments made on behalf of deceased persons under the authority of section 28 of the original agreement of March 1, 1901.

The fact that the legislation may not have

been for the best interests of the Indian is not a sufficient reason for the court to depart from the terms of the act as written. As was said by the Supreme Court in *United States v. First National Bank of Detroit*, 234 U. S. 245, 34 Sup. Ct. 846, 58 L. Ed. 1298:

"If the true construction has been followed with harsh consequences, it cannot influence the courts in administering the law. The responsibility for the justice or wisdom of legislation rests with Congress, and it is the province of the courts to enforce, not to make, the laws."

The policy of Congress with reference to the Indians is stated in *Re Heff*, supra, where, after reviewing legislation upon similar questions it was said:

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States."

This being the policy of Congress, the statute should be so construed as to be in harmony therewith, and so as not to interfere with existing rights which have been vested under prior laws. The rule as stated in 2 Sutherland Stat. Const. § 488, is as follows:

"In the construction of the provisions of any statute they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public or of individuals be not infringed."

In order to ascertain the legislative intent, it is a familiar rule of construction that subsequent legislation upon the same subject may be referred to. *Tiger v. Western Inv. Co.*, supra. The act of May 27, 1908 (35 Stat. L. 312), was an act which extended or enlarged restrictions upon the alienation of all allotted lands of mixed bloods of three-fourths or more Indian blood. In that act it was provided:

"Nothing herein shall be construed to impose restrictions removed from lands by or under any law prior to the passage of this act."

Here was a declaration by Congress that legislation of the character involved was not intended to reimpose restrictions which had been removed. Taken in connection with the act of 1906, the conclusion seems to follow that no such effect was intended by that act. On February 27, 1907, Hon. Frank M. Campbell, Assistant Attorney General, in an opinion to the Secretary of the Interior, considering section 22, said:

"This section provides the manner in which sales may be made notwithstanding any restrictions upon alienation, and seems to apply to the heirs of all deceased allottees, without regard to quantum of Indian blood. It cannot, however, be held to apply to heirs who received their inheritance free from all restrictions. There would have been no occasion for this provision, or field for its operation, if the same provision which relates to homesteads had extended to the other or surplus allotted lands. The provision in the act of July 1, 1902, supra, is that they may be alienated, one-fourth in acreage in one year, one-fourth in two years and the balance in five years from the date of the patent. There is no permissible construction of said section 22 except that it applies, so far as Choctaws and Chickasaws are con-

cerned, to these surplus lands, which descend to the heirs burdened with restrictions upon the alienation, and not upon the homestead, which descends free of all restrictions." *Bledsoe on Indian Land Law* (1st Ed.) p. 303.

On August 17, 1909, the Attorney General construed the act of May 27, 1908, and held that conveyances made by full-blood heirs of lands inherited by them prior to the act of May 27, 1908, were not valid unless approved by the Secretary of the Interior, and held, further, that the provisions of section 9 of said act should not be held to operate retroactively and to remove absolutely all restrictions upon the alienation of lands of all allottees who died prior to the passage of that act. 27 Opinions Attorney General, p. 530. On June 7, 1911, that official rendered an opinion holding that lands allotted to the Choctaws and Chickasaws under the supplemental treaty (Act of July 1, 1902), could not be conveyed prior to act of April 26, 1906, by the full-blood heirs of such allottees within the period of inhibition named by the former act, as that section was not retroactive. 29 Opinions Attorney General, p. 131.

For the foregoing reasons, I think the deed to the homestead was valid without approval.

(57 Okl. 231)

CAMPBELL et al. v. THORNBURGH et al.
(No. 6622.)

(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 1, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 418—RULING ON DEMURRER—OBJECTION—WAIVER.

Where a demurrer to a pleading is sustained, and the party whose pleading is attacked elects to amend, the error, if any, in the ruling on the demurrer, is waived and cannot be assigned as error.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1399, 1403-1406; Dec. Dig. \S 418.]

2. APPEAL AND ERROR \S 1106—MOTION TO DISMISS—ISSUE OF FACT—DISPOSITION OF CAUSE.

Where, in such case, a direct issue of fact is raised on a motion to dismiss, the plaintiff in error alleging that he never intended to take time to plead and that the journal entry giving such time was entered in his absence and without his consent, and the defendant in error denying these statements, the case will be remanded to the trial judge to find the fact, where the record gives no solution of the true conditions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4386-4398, 4586; Dec. Dig. \S 1106.]

Commissioners' Opinion, Division No. 2. Error from County Court, Okmulgee County; Mark L. Bozart, Judge.

Action by W. M. Campbell and others against Wright Thornburgh and others. Judgment for defendants, and plaintiffs bring error. Remanded, with directions.

A motion to dismiss this appeal on the ground that after a demurrer to the petition

was sustained the defendant took time to plead over. The record shows two orders. The first made on the 14th day of May, 1914, recites:

"This cause coming on to be heard on this 14th day of May, 1914, on a demurrer of the defendants to the petition of the plaintiff heretofore filed, and after hearing argument of counsel, both for and against said demurrer, and being fully advised in the premises, the court finds that the first, second, fifth, sixth, and seventh grounds of the demurrer should be sustained, and that the third and fourth grounds of the demurrer should be overruled. It is therefore ordered, adjudged, and decreed that the first, second, fifth, sixth, and seventh ground of the demurrer are hereby sustained, and the third and fourth grounds of the demurrer be and the same are hereby overruled, to which action of the court the plaintiff excepts. It is further ordered, adjudged, and decreed that the plaintiffs be and they are hereby given 20 days in which to file an amended petition. Exceptions allowed."

On the 28th day of May, 1914, another order was entered as follows:

"This cause coming on for hearing on this 28th day of May, 1914, being a regular term day of the April, 1904, term of this court, and plaintiff appearing and refusing to plead further, and electing to stand on their petition heretofore filed, to which the demurrer was heretofore sustained on the 14th day of May, 1914, it is ordered, considered, and adjudged that the petition be dismissed at plaintiff's costs, to which action of the court the plaintiff excepts, etc."

In the reply to the motion to dismiss it is stated that counsel for the plaintiff had no notice of the filing of the first order and asked no further time to plead, but this statement is denied by the defendants in error. There is nothing in the record to show that the plaintiffs were not present. In fact, the first journal entry recites that the demurrer was argued on that date, and that exceptions were saved to the ruling of the court on that date, and then follows the order allowing the plaintiffs time to file an amended petition. The question now presented is on the motion to dismiss.

Wm. M. Matthews, of Okmulgee, for plaintiffs in error. Harlan Read and L. L. Cowley, both of Okmulgee, for defendants in error.

DEVEREUX, C. (after stating the facts as above). [1] In *Berry v. Barton*, 12 Okl. 221, 71 Pac. 1074, 66 L. R. A. 513, it is specially held that, where a demurrer is sustained and time is given to amend the petition, that error in sustaining the demurrer is waived. In the opinion it is said:

"In order to take advantage of the ruling on a demurrer when it is sustained, the party must stand upon his pleading held to be defective, and not amend. * * * But it is argued that in this case the defendants did not plead over, and therefore they are in a position to urge as error the sustaining of the demurrer. This position cannot be sustained. It is true that nearly all of the cases state that, by pleading over after a demurrer has been sustained, a party waives the error, if any has been committed by the court in such ruling. The rule not

only applies where the party actually pleads over, but also where he takes leave to plead over after a demurrer has been sustained to his pleading. It is the intention of the party as indicated by his acts, at the time, which fixes his standing in court. By taking leave to amend he thereby indicates his intention to abandon his former position and to draft his pleading upon a different theory, or to state his cause of action in different language. By taking leave to amend, he admits the insufficiency of the pleading, and he is bound by his own conduct, and cannot afterwards take advantage of it. Any other rule would permit delays under the guise of a desire to submit to the ruling of the court and amend, when in fact the party had no intention of amending. Courts everywhere insist upon such rules of practice and conduct of parties litigant as will promote justice and such as will not encourage or countenance deception. The attorney is supposed to know the law of his case equally as well as the court, and inasmuch as the statute, with the permission of the court, allows a party at his own exception to amend or stand on his pleading, it is only fair that he should make his election and then be bound by it; and, if he elect to amend, he cannot afterward, simply because his own views of the law may have changed, or further investigation convinced him that his former position was correct, urge error in a ruling which he had accepted as the law. When he elects to amend, he abandons, not necessarily his view of the law as urged against the demurrer, but that particular pleading, and it is just the same as though it had never been filed, and a party who expressly abandons a pleading cannot at his own election, without permission of the court, urge it as an existing pleading in the case."

This case has been cited with approval in *Jenkins v. Oklahoma City*, 27 Okl. 230, 111 Pac. 941; *Childsey v. Ellis*, 31 Okl. 107, 125 Pac. 464; *Pacific Mutual Ins. Co. v. O'Neal*, 36 Okl. 792, 130 Pac. 270.

[2] But it is urged by the plaintiff in error that they were not present and knew nothing of the signing of the first order. There is nothing, however, in the record to support this contention. It appears from the first order that the cause was argued on that date, that exceptions were saved to the ruling of the court, and the order then contained a provision giving the plaintiffs time to amend their petition. The second order does not recite that there was any mistake in making the first order, but seems to fall directly within the decision of *Berry v. Barton*, supra, that in the interim before the entering of the second order counsel had changed their minds and concluded to stand on the petition. We cannot, on this motion, look at anything but the record, and it is stated positively by counsel in reply to the motion to dismiss that they had no notice of this order and never intended to plead further, and that the second order was intended to supersede the first. This is specifically denied by the defendants in error. We cannot pass upon this question of fact; but, if the contentions of the plaintiff are correct, it would be a miscarriage of justice to dismiss the appeal on this ground.

By section 5243, Rev. L. 1910, it is provided that if, after a record or case-made has

been filed in this court, it shall appear that any statement, or certificate, or motion or other matter is omitted from such record, or insufficiently stated therein, the appellate court, may, of its own motion, cause such correction to be made, and that no appeal shall be dismissed by reason of such errors or omissions, until an opportunity be given to supply the correction.

We therefore recommend that this case be remanded to the county court of Okmulgee county, with instructions to find, first, whether the plaintiffs in error were present when the first journal entry was entered; second, whether the plaintiffs in error knew at the time this journal entry was entered that it contained a provision giving them time to file an amended petition; and, third, whether it was intended by the court in the second journal entry to expunge the first. That such corrections be made within 30 days from this date, and that 5 days' notice of the hearing be given to the defendants in error.

PER CURIAM. Adopted in whole.

(54 Okl. 741)

McCLURE v. INGRAM. (No. 6367.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773—FAILURE TO FILE BRIEF—REVERSAL.

Where defendant in error files no brief, and the brief of plaintiff in error reasonably sustains his contention, the court will not examine the record to find some theory upon which to affirm the judgment, but same may be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3104, 3108-3110; Dec. Dig. \S 773.]

Commissioners' Opinion, Division No. 2. Error from County Court, Muskogee County; Thomas W. Leahy, Judge.

Action by A. T. Ingram against Sarah McClure. Judgment for plaintiff, and defendant brings error. Reversed.

D. E. Herschelman, of Porum, for plaintiff in error.

BRETT, C. This cause was duly submitted in this court December 6, 1915. On November 9, 1915, the plaintiff in error filed her brief. The defendant in error has filed no brief, and assigns no reason for his failure to do so. The contention of plaintiff in error seems to be reasonably supported by the authorities cited in her brief. And under the authority of *Midland Elevator Co. v. Harrah*, 44 Okl. 154, 143 Pac. 1168, and the authorities therein cited, we recommend that the judgment be reversed and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(54 Okl. 736).

HAMBERGER et al. v. WHITE. (No. 6360.)
(Supreme Court of Oklahoma. Jan. 18, 1916.)*(Syllabus by the Court.)***1. ATTORNEY AND CLIENT ⇨101—COMPROMISE OF ACTION—AUTHORITY OF ATTORNEY—BURDEN OF PROOF.**

The same as the first paragraph of syllabus in *John A. Scott v. Mrs. J. M. Moore*, Administratrix of the Estate of J. M. Moore, Deceased, 152 Pac. 823.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 200-216; Dec. Dig. ⇨101.]

2. ATTORNEY AND CLIENT ⇨101 — UNAUTHORIZED COMPROMISE—RIGHTS OF CLIENT.

Where an attorney at law does compromise and settle his client's claim, without any authority from his client, and in such settlement the attorney receives from the adverse party a consideration which is much less than the client's demand, the client may ignore such compromise and settlement, and treat the same as a nullity, and recover the full amount of his demand from the adverse party.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 20-216; Dec. Dig. ⇨101.]

Commissioners' Opinion, Division No. 2. Error from County Court, Oklahoma County; John W. Hayson, Judge.

Action by Solomon Hamberger and Israel Hamberger, partners doing business as Hamberger Bros. Shoe Company, against Fannie White. Judgment for defendant, and plaintiffs bring error. Reversed.

Nicholas & Lyle and R. H. Towne, all of Oklahoma City, for plaintiffs in error. G. A. Paul, of Oklahoma City, for defendant in error.

GALBRAITH, C. This action was commenced by the plaintiffs in error in the justice court to recover the amount of an account for goods, wares, and merchandise sold and delivered. There was judgment for the plaintiff, and defendant appealed to the county court, where, upon a trial to the court and a jury, there was an instructed verdict for the defendant, and judgment rendered against the plaintiffs in error for costs. From that judgment an appeal has been perfected to this court by petition in error and case-made.

The facts in brief, as shown by the record, are that the defendant in error was engaged in the mercantile business at Oklahoma City in February, 1912, and became financially embarrassed and sought to make a settlement with her creditors. Through her attorney she prepared a circular letter setting out her financial condition, the amount of her stock, and inability to pay, and the amount of her debts, and making a proposition to pay in full settlement and compromise 20 per cent. on the dollar in cash. This circular was accompanied by a receipt for the creditor to sign, acknowledging full settlement of claim for and in consideration of 20 per cent.

of the amount thereof. One of these circulars was received by the plaintiff in error. Without replying, the plaintiff in error forwarded the same, together with their account against the defendant in error, to Nicholas & Lyle, at Oklahoma City, with positive directions not to accept the proposition of compromise, but to insist upon the payment of 100 per cent. on the dollar of their claim; otherwise, place the debtor in bankruptcy. This letter bore date of February 22, 1912. On March 20, 1912, at a meeting of the creditors held at the office of the attorney for the defendant in error, in Oklahoma City, Mr. Lyle, of the firm of Nicholas & Lyle, agreed with other creditors to accept, in full settlement of Hamberger Bros. Shoe Company's claim against Mrs. White, the offer of 20 per cent. A few days thereafter a check for 20 per cent. of the amount of the claim was delivered to Nicholas & Lyle, and later on this check was cashed. Mr. Lyle testified that at the time he agreed to the settlement he had no knowledge of the instructions of clients to insist upon the payment of 100 per cent. on the dollar, and agreed to the settlement in the belief that it was to the best interest of clients, and that after settlement had been made he discovered that clients had instructed against the compromise, and had only authorized settlement of the claim on the payment of 100 per cent. on the dollar; that he then attempted to revoke the settlement made with the attorney for the defendant in error, but was unable to come to any agreement with him; that this 20 per cent. was retained and credited on the claim of clients by the attorneys, and this action was for the balance due upon the account. It nowhere appears that the Hamberger Bros. Shoe Company authorized the attorney to make the compromise settlement, or approved or ratified the settlement made.

[1] While there are a number of assignments of error set out in the petition in error, there is but one controlling question presented by this appeal; that is, whether or not the compromise of the plaintiff in error's claim made by the attorney was binding upon the clients. The rule announced by *Weeks on Attorneys at Law* (2d Ed.) 471, is as follows:

"It is laid down in American cases that an attorney has no authority, arising from his employment in that capacity, no implied power, to compromise his client's claim, or to settle a suit and conclude the client, without the latter's consent."

Thornton on Attorneys at Law, vol. 1, par. 220, announces the rule as follows:

"The general rule also prohibits the attorney from receiving, in the absence of authority from his client, a sum less than that actually due in consideration of his client's claim, especially where it has been previously reduced to the form of judgment or decree. The debtor is not injured by being compelled to pay the whole debt, and it has been held that one who undertakes to set-

tie with an attorney for less than the actual debt must, at his peril, ascertain whether the attorney has authority to make such compromise, the burden being upon him to establish that fact."

Mr. Thornton, after stating that the act of the attorney in compromising a claim for less than the amount due may be ratified by the client, proceeds:

"In the absence of authority or ratification, however, the client may recover the full amount of the debt less the sum paid to his attorneys."

The rule announced by these authorities was recognized and applied by this court in the case of *Turner v. Fleming et al.*, 37 Okl. 75, 130 Pac. 551, 45 L. R. A. (N. S.) 285, Ann. Cas. 1915B, 831, wherein Mr. Commissioner Brewer, in the third paragraph of the syllabus, announces the rule as follows:

"An attorney, by virtue of his retainer, can do anything fairly pertaining to the prosecution of his client's cause and the protection of his client's interests involved in the suit; but he cannot, under such general authority, surrender or compromise away his client's substantial rights."

The rule was also announced by Mr. Commissioner Collier in a later case, that of *Scott v. Moore*, 152 Pac. 823, in the first paragraph of the syllabus, as follows:

"An attorney at law is without authority to compromise an action pending, without being specifically authorized by his client so to do; and when such attorney makes such compromise, and his authority to do so is put in issue, the burden is on the party asserting the compromise to show authority, * * * or ratification."

[2] The Supreme Court of Kansas, in *Jones v. Inness*, 32 Kan. 177, 4 Pac. 95, announced the rule as follows:

"Where an attorney at law does compromise and settle his client's claim without any authority from his client, and in such settlement the attorney receives from the adverse party a consideration which is much less than the client's demand, the client may ignore such compromise and settlement, and treat the same as a nullity, and recover the full amount of his demand from the adverse party."

The rule as announced by the above authorities finds abundant support in the authorities cited in the notes in the above textbooks and cases. Applying this rule to the case at bar, we are constrained to hold that the act of the attorneys in accepting 20 per cent. of the plaintiff in error's claim in settlement and compromise thereof was not binding upon the client, and inasmuch as the client did not authorize such settlement, and did not approve or ratify it, the same is void, and could be ignored by the client, and the balance of the claim collected, as was attempted to be done by this suit.

It was error in the trial court to instruct a verdict for the defendant. It would have been entirely proper for him to have instructed a verdict for the plaintiffs. However, we recommend that the judgment appealed from be reversed, and the cause remanded, with directions to the trial court to vacate the judgment and verdict of the

jury in favor of the defendant in error, and to grant a new trial in said cause.

PER CURIAM. Adopted in whole.

(79 Or. 618)

STEPHENS v. OREGON NUT & FRUIT CO.
et al.

(Supreme Court of Oregon. Jan. 18, 1918.
On Petition for Rehearing, March 28, 1918.)

1. MORTGAGES \Leftrightarrow 581 — ATTORNEY'S FEE — AMOUNT.

Under a provision in a mortgage for \$10,019, which, together with the note, provided for the payment of a reasonable attorney's fee in case of action to collect the note or suit to foreclose, where the main litigation resulting in foreclosure was pending but a short time, \$500 was a reasonable amount to be allowed as an attorney's fee, but amount fixed at \$200, where plaintiff in his brief states that that amount would be satisfactory.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. \Leftrightarrow 581.]

2. MORTGAGES \Leftrightarrow 401—FORECLOSURE—TIME.

Where a mortgage payable five years after its date provided that on default in the payment of interest or in any of its terms the whole amount should become due and collectable, a suit to foreclose for arrears of interest for two years, besides taxes, in view of the mortgagor's letter indicating that its ability to pay depended on its success in obtaining the money with which to liquidate, was not prematurely commenced.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1160-1165, 1208, 1209; Dec. Dig. \Leftrightarrow 401.]

Department No. 2. Appeal from Circuit Court, Yamhill County; Webster Holmes, Judge.

Suit by Smith Stephens against the Oregon Nut & Fruit Company and others to foreclose a mortgage and for an attorney's fee. Decree for plaintiff, and from the part thereof disallowing an attorney's fee, he appeals. Modified.

This is a suit brought by the plaintiff, Smith Stephens, against the Oregon Nut & Fruit Company, a corporation, and a number of subsequent claimants to foreclose a purchase-money mortgage executed by the corporation to the plaintiff to secure the payment of a note dated September 1, 1910, for the sum of \$10,019.60 due on or before five years after date, with interest at 7 per cent. per annum, payable annually. Both the note and mortgage provided that if default was made in the payment of the annual interest, or any part thereof, the whole sum of both principal and interest should become due and collectable at the option of the holder thereof. The mortgage also stipulated that in case default was made in any of its other terms or conditions, the whole sum should become due and collectable. Both instruments made provision for the payment of a reasonable attorney's fee in case suit or action were instituted to collect the note, or any part thereof, or upon the breach of any term of the mortgage and in case of the foreclosure thereof. On October 10, 1914, the defendant was in arrears for the interest for the years ending September 1, 1913, and September 1, 1914, besides some taxes which plaintiff had paid; and this suit was instituted. The defendant corporation denied only one paragraph of the complaint, No. 16, alleging \$1,100 to be a reasonable attorney's fee to be allowed the plaintiff in this suit. It was not denied that the note was due, or that the condition of the mortgage had been broken.

The trial court rendered a judgment for the principal and interest due on the note and mortgage, together with the amount of taxes paid by the plaintiff, but disallowed any attorney's fee for the reason, as stated in the findings, that it was not necessary for the plaintiff to file this suit to foreclose the mortgage, as the Oregon Nut & Fruit Company was ready, willing, and able to pay it. The court rendered the usual decree of foreclosure. Plaintiff appeals from that part of the decree disallowing attorney's fees.

Frank S. Grant, of Portland, and B. A. Kilks, of McMinnville (W. T. Vinton, of McMinnville, on the brief), for appellant. L. C. Mackay, of Portland, for respondents.

BEAN, J. (after stating the facts as above).

[1] It will be noticed that none of the facts upon which the right to recover attorney's fees is based are put in issue by the answer, only the reasonable amount being disputed. Considerable evidence was taken by the parties, much of which does not seem to relate to the issue. It appears from the record that a stipulation was signed by the attorneys for the respective parties, but at the request of defendant's counsel was not filed in the case. It was, however, introduced in evidence without any objection on the part of the defendant, and is the only direct evidence we find as to the amount of reasonable attorney's fees in the suit, and is all the proof except what is disclosed by the pleadings and other records. Other testimony upon this point was held unnecessary by the trial court. This stipulation suggests \$500 as attorney's fees in the suit in case of the payment of the principal and interest at an early date, and \$800 if payment should not be so made. Under all the circumstances of the case, as the main litigation was pending but a short time, we find that \$500 is a reasonable amount to be allowed plaintiff as attorney's fees in this suit. *Lockhart v. Ferrey*, 59 Or. 179, 115 Pac. 431.

The stipulation on the part of the defendant contained in the note and mortgage is to the effect that the annual 7 per cent. interest to be paid should not be diminished on account of any expenses of foreclosure that might be incurred. The right to recover attorney's fees is based upon the contract then made by the parties. This right is not challenged by the pleadings.

[2] Some suggestion is made by the defendant corporation that the suit was prematurely commenced. The record discloses, however, that it was in arrears for interest for over two years, and also in default in the payment of taxes. The letter in behalf of the corporation upon which it relies indicates that its ability to pay was dependent upon its success in obtaining the money with which to liquidate, and might have been taken as a time server. There are no inequitable features suggested by the pleadings or the record to defeat the right of the plaintiff to recover the full amount due upon the note and mortgage, together with reasonable attorney's fees. Any other ruling would be

arbitrary and in violation of the contract embodied in the instruments.

The decree of the lower court will therefore be modified so as to allow the plaintiff \$500 attorney's fees, together with costs and disbursements in the lower court, and upon this appeal.

MOORE, C. J., and McBRIDE and HARRIS, JJ., concur. EAKIN, J., did not sit.

On Petition for Rehearing.

BEAN, J. But one question was involved in this case, namely, the amount of attorney's fees to be allowed for instituting the suit to foreclose a mortgage for about \$12,000. Upon a petition for rehearing defendant's counsel calls attention to a statement in the plaintiff's brief to the effect that if the trial court had allowed the sum of \$200 it would have been satisfactory. This matter was obscured, as the brief covered considerable ground which was not deemed necessary to examine, and was therefore overlooked. It shows that the plaintiff would be satisfied with this small fee, therefore the prior opinion will be so modified as to allow plaintiff an attorney's fee in the suit of \$200. With this change the rehearing is denied.

MOORE, C. J., and McBRIDE and HARRIS, JJ., concur.

(79 Or. 133)

KIMBALL v. HORTICULTURAL FIRE RELIEF OF OREGON et al.

(Supreme Court of Oregon. Jan. 25, 1916.)

1. APPEAL AND ERROR \S 237—SCOPE OF REVIEW—PRESERVATION OF EXCEPTIONS.

Where certain statements were admitted subject to objection of plaintiff on condition that their materiality would thereafter be shown, and it was not shown, and plaintiff failed to move to strike them, he could not, on appeal, predicate error on their admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1302½; Dec. Dig. \S 237.]

2. APPEAL AND ERROR \S 959—PLEADING \S 236—AMENDMENT—DISCRETION OF COURT.

The allowance of an amendment to the petition is within the discretion of the trial court, and will not be disturbed, in the absence of a manifest abuse of sound judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 3825–3831; Dec. Dig. \S 959; Pleading, Cent. Dig. $\S\S$ 601, 605; Dec. Dig. \S 236.]

3. INSURANCE \S 643—ACTIONS—PLEADING—AMENDMENT.

In an action on an insurance policy, where the petition failed to allege waiver of its conditions, it was not error to allow an amendment to include the allegation of waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. $\S\S$ 1587, 1613; Dec. Dig. \S 643.]

4. INSURANCE \S 664—ACTIONS—ESTOPPEL—EVIDENCE.

A policy of insurance contained the condition that no officer of the company could waive its provisions, except on certain conditions, the waiver to be attached to the policy. When plaintiff made claim for loss thereunder, the company's secretary replied in writing that plaintiff would hear from them about the time he settled with another company. He had already brought suit against that company. Held, that the letter, though it was incompetent to show waiver, was admissible to show a waiver by estoppel to allege laches of plaintiff in failing to make claim and sue as required by the policy, since plaintiff might have construed it to

mean that the company would abide by the judgment in the suit already brought.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699; Dec. Dig. Ⓒ664.]

5. INSURANCE Ⓒ645—ACTIONS—ESTOPPEL—PLEADING.

In such case, where the complaint alleged only waiver of the conditions of the policy, the trial court was warranted in holding, as a matter of law, from a mere inspection of the language of the letter, that the averment of the complaint was adequate, from which an inference of estoppel necessarily arose, so that it was not error to submit the question of estoppel to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. Ⓒ645.]

6. INSURANCE Ⓒ664—EVIDENCE—ADMISSIBILITY.

Since an estoppel implies that a party was misled to his prejudice and may arise without intent to mislead, testimony tending to prove any deception is admissible, so that it is not error to admit in evidence letters of defendant company's secretary upon which plaintiff relied in failing to sue within the time required by his insurance policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1687, 1688, 1699; Dec. Dig. Ⓒ664.]

Department 2. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by E. M. Kimball against the Horticultural Fire Relief of Oregon, a corporation, and the Pacific Home Mutual Fire Insurance Company, a corporation. After dismissal as to the first-named defendant, judgment was rendered for plaintiff, and the Pacific Home Mutual Fire Insurance Company appeals. Affirmed.

This action was commenced December 27, 1913, to recover the amount of an insurance policy by reason of the loss of quantities of grain, flour, bran, shorts, and sacks by fire, which occurred April 21, 1911, and while the property was contained in the plaintiff's mill at Jordan, Or. A copy of the policy having printed thereon the provisions of section 4666, L. O. L., and also a copy of a letter written by an agent of the insurer to the insured were made parts of the complaint, in which it was alleged that by such letter the insurer waived a clause of the policy, providing that no action thereon should be sustainable unless it was commenced within 12 months next after the fire. A paragraph of the policy reads:

"No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as, by the terms of this policy, may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent or representative, shall be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The complaint was demurred to on the ground that the action had not been com-

menced within the time limited, and that the initiatory pleading did not state facts sufficient to constitute a cause of action. The demurrer having been overruled, an answer was filed denying the material averments of the complaint. For a further defense it was alleged that the action had not been commenced within the time limited, and that no officer, agent, or other representative of the defendants, or either of them, had waived any of the conditions of the policy. For a second defense it was averred that the policy was rendered void by reason of the false sworn statement of the insured in respect to the quantity and value of the personal property which he asserted was destroyed, setting forth the particulars of the declared deception. The allegations of new matter in the answer were controverted by the reply, and the cause, having been tried, resulted in a judgment for the sum demanded against the defendant, the Pacific Home Mutual Fire Insurance Company, and it appeals.

John Bayne, of Salem, for appellant. Wm. H. Trindle, of Salem, for respondent.

MOORE, C. J. (after stating the facts as above). [1] The court, over objection and exception, but with the promise that the testimony would subsequently be connected, permitted the plaintiff, as a witness in his own behalf, to state that after the fire he left with an attorney at Albany, Or., a package of papers pertaining to the loss; that some time thereafter these papers were taken to Salem in this state and left with another attorney, where they remained several months, and then were delivered to the attorney who instituted this action. No testimony was offered tending to render such sworn statements material. The court and counsel evidently forgot the matter until after the cause was submitted. The defendant's counsel should have interposed a motion to strike out the testimony so objected to, but, not having done so, no error, under the circumstances, can be imputed to the court.

[2, 3] It is maintained that an error was committed in allowing the plaintiff's counsel to amend the complaint so as to allege a waiver by the defendant of the clause of the policy hereinbefore quoted. The granting or denial of a motion for leave to amend a pleading is a matter within the trial court's discretion which will not be disturbed, except in case of manifest abuse of sound judgment, which is not apparent in this instance.

[4] The plaintiff having introduced his evidence in chief and rested, the action was dismissed as to the defendant the Horticultural Fire Relief of Oregon, which corporation it was alleged in the complaint had succeeded to all the interests and assumed all the liabilities of the defendant the Pacific Home Mutual Fire Insurance Company, but the court refused to grant a judgment of

non suit as to it. When all the testimony had been received and the cause submitted, the court denied a motion to direct a verdict in favor of the Pacific Home Mutual Fire Insurance Company, and it is contended that errors were thereby committed. The latter application will alone be considered, since it necessarily includes the former motion.

Testimony was received at the trial tending to show that the Pacific Home Mutual Fire Insurance Company, which, for brevity, will be called the defendant, is a corporation engaged in insuring property against loss or damage by fire, and on October 4, 1910, in consideration of the payment of the required premium, issued to the plaintiff, E. M. Kimball, a policy of insurance, whereby it undertook for the term of one year to indemnify him, in the sum of \$500, against such loss of or damage to his personal property, hereinbefore described, while contained within the place specified; that on April 21, 1911, and while the plaintiff remained the owner of such property, which was then contained in his mill, that building and all its contents were destroyed by fire, and the loss so sustained did not result from any of the causes excepted in the policy; that the value of the grain, etc., was \$747, which was the extent of the plaintiff's damages by reason of the total destruction of such property; that he immediately notified the defendant of such injury, and seven days after the fire he made and submitted to the insurer due proof of his loss as requested; that upon the receipt thereof the defendant, by its proper agents, made a full and complete investigation of the fire and ascertained and estimated the loss, occasioned by the destruction of such grain, etc., to have been the sum so stated. It further appears from the testimony that at the time of the fire the plaintiff, in addition to the indemnity herein referred to, also had valid insurance policies on his mill, that had been issued, one by the Horticultural Fire Relief of Oregon in the sum of \$1,000, and another by the Lower Columbia Fire Relief Association for \$2,000. A letter, written by an agent of the latter insurance company to a representative of the former, was received in evidence, over objection and exception, and is as follows:

"Woodburn, Oregon, May 15, 1911. M. R. Markam, Forest Grove, Ore.—Dear Sir: Yours in regard to burning of Kimball mill at Jordan, rec'd. I did not adjust the loss there. S. A. Dawson did that and made such a report that our president is looking further into it. If there was much stock on hand when the fire occurred of what flouring mills are supposed to keep it would surely have showed afterward. Dawson was not apprised of any insurance on stock until after he had been there. Sincerely yours, J. Voorhees, Secy."

Another letter, written by the president of the Lower Columbia Fire Relief Association to an agent of the Horticultural Fire Relief was also received in evidence, over objection and exception, and reads:

"Portland, Oregon, May 26, 1911. Mr. M. R. Markam—Dear Sir: At a full meeting of our board of directors we all concurred in not paying E. M. Kimball for his loss. Yours respectfully, A. F. Miller."

Immediately thereafter the plaintiff received notice from the agents of the Lower Columbia Fire Relief Association, denying any liability on its policy by reason of the destruction of the mill. Upon the receipt of such information the plaintiff wrote a letter, of which the following is a copy:

"Jordan Flouring Mills, E. M. Kimball, Prop. Scio, Ore. May 27/11. Pacific Home Fire Ins. Co., Forest Grove, Ore.—Gentlemen: Will you please inform me why you have not settled my claim for Ins. and what you intend to do about it. Hoping to hear from you soon, I remain, Yours respy, E. M. Kimball."

In response to such inquiry he received a letter which reads:

"Pacific Home Mutual Fire Insurance Company, Forest Grove, Oregon. June 5th, 1911. Mr. E. M. Kimball, Scio, Ore.—Dear Sir: We have your letter of May 27th, asking why we have not settled your claim for loss and what we intend to do about it. We wish to say in reply that we got a proof as to loss through the Horticultural Company of Salem, and it was received by this office in an unfinished condition, and as we were not able at that time to get the desired information through this source, we took the matter up with the Lower Columbia Fire Relief Association, who were also interested at this place, and since receiving the report from this association, we have not had a directors' meeting to take any action in the matter. Would say, therefore, that we will take the matter up for settlement at our next meeting and you will probably hear from us about the time you have settlement with the Grange Association. Yours respectfully, F. A. Watrous, Sec'y."

The "Grange Association" thus mentioned was intended to mean the defendant next hereinafter named, against which a suit was instituted on its policy, resulting in a final decree in plaintiff's favor October 21, 1913. *Kimball v. Lower Columbia Fire Relief Ass'n of Oregon*, 67 Or. 249, 135 Pac. 877. The testimony further tends to show that a notice of the decree so obtained was given to the defendant and a demand made upon it to pay the plaintiff the sum of \$500 and interest, but upon a refusal to comply with such request this action was instituted. The plaintiff, referring to the letter which he received June 5, 1911, from F. A. Watrous, testified, as to the alleged waiver set forth as an amendment to the complaint, to the effect that by such communication he was induced and persuaded to believe the defendant would wait the result of the suit which he intended to bring against the Lower Columbia Fire Relief Association of Oregon—would abide the decree in the event of a recovery therein, and pay him the amount of its policy—and that, believing such representations and relying thereon, he allowed a period of more than 12 months to elapse from the time of the fire before bringing this action, which he would not have done except for such letter.

Based upon the evidence and testimony thus detailed, the motion for a directed verdict presents the question as to whether or

not the letter of F. A. Watrous is sufficient to constitute an estoppel against the defendant. As to the conduct of its secretary to raise a bar or impediment by his letter against his principal, in discussing a similar subject, Mr. Justice Boggs, in *Dwelling House Ins. Co. v. Dowdall*, 55 Ill. App. 622, 627, observes:

"The stipulation in the policy that no agent or other representative of the company shall have power to waive any provisions or condition of the policy may be effective as against an alleged waiver by agreement or contract with an agent or representative, but has no application when the law declares a waiver by estoppel, because of the acts of the company through its agent or representative. Such estoppels do not rest upon the power, or lack of power, of the agent to change the provisions of the policy or waive any of its agreements, but arise in law, because of the acts of the company through its agent, acting in the scope of his apparent power as its representative."

In *Webster v. State Mutual Fire Ins. Co.*, 81 Vt. 75, 80, 69 Atl. 319, 320, Mr. Justice Powers, in distinguishing between a relinquishment of a known right and a preclusion which in law prevents a party from alleging or denying a fact in consequence of his own previous act, averment, or denial to the contrary, says:

"The terms 'waiver' and 'estoppel,' as applied to the law of insurance contracts, are usually used as meaning the same thing, and they are so used in many of our own cases. Courts have frequently asserted that they are convertible terms. * * * A closer inspection of the matter, however, convinces us that they are essentially different. A waiver involves the act or conduct of one of the parties to the contract only. An estoppel involves the act or conduct of both parties to the contract. * * * A waiver is the intentional relinquishment of a known right. * * * It involves both knowledge and intent. An estoppel may arise where there is no intent to mislead. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position. * * * An estoppel always involves this element. A waiver may amount to an estoppel, but not necessarily so. Though the conduct of the insurer may not have misled the insured to his prejudice, yet if with full knowledge, he intentionally elects not to take advantage of the forfeiture, the law, in its zeal to avert the forfeiture, will hold the insurer irrevocably bound as by an election to treat the contract as if no cause of forfeiture had occurred. And this election may be either express or implied."

In *Insurance Co. v. Eggleston*, 96 U. S. 572, 577, 24 L. Ed. 841, in discussing this subject, Mr. Justice Bradley asserts:

"Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

Mr. Watrous, as secretary, was unquestionably a general agent of the defendant, and clothed with sufficient power to bind it by the

statements contained in his letter, and, assuming, without deciding, the latter was not competent to prove a technical waiver by agreement, because not indorsed on nor attached to the policy, the writing was nevertheless properly received in evidence for the purpose of showing a situation where the law will declare a waiver by estoppel.

[5] It will be remembered that in response to the plaintiff's letter of inquiry of May 27, 1911, as to why the defendant had not settled his claim for insurance and what the company intended to do about it, Mr. Watrous, nine days thereafter, wrote him in part as follows:

"Would say, therefore, that we will take the matter up for settlement at our next meeting and you will probably hear from us about the time you have settlement with the Grange Association."

This letter was written at a time when the defendant knew the insurance company last mentioned did not intend to pay the plaintiff for his loss under its policy, as is evidenced by the letter of May 26, 1911, written by A. F. Miller to M. R. Markam. From a mere inspection of the language employed by F. A. Watrous in his letter to the plaintiff, the trial court was warranted in holding, as a matter of law, that the averment of the complaint as amended in respect to the waiver was adequate from which an inference of an estoppel necessarily arose, and as the evidence and testimony received tended to establish such allegation, the question under proper instructions was properly submitted to the jury to find as to whether or not the facts so set forth were substantiated.

[6] An estoppel always implies a party has been misled to his prejudice, or into an altered position which he would not have taken except for representations relied upon; and, as the estoppel may arise without an intent to guide astray, upon principle, testimony tending to prove such a deception must be admissible, and, this being so, no error was committed in receiving in evidence the letters to the introduction of which exceptions were taken.

No error was committed in refusing to direct the jury to find a verdict for the defendant.

The question of the plaintiff's alleged false swearing with respect to his proof of loss was submitted, under proper instructions, to the jury, which found in his favor, from which verdict it must be concluded such averment was disproved.

Other alleged errors are assigned. They are not deemed important, and will not be considered. The judgment should be affirmed; and it is so ordered.

BEAN, HARRIS, and McBRIDE, JJ., concur.

(51 Mont. 544)

FIRST NAT. BANK OF MISSOULA v. COTTONWOOD LAND CO. et al. (No. 3581.)

(Supreme Court of Montana. Jan. 14, 1916.)

1. ABATEMENT AND REVIVAL —57—ACTIONS—SURVIVAL.

Under Rev. Codes, § 6494, declaring that an action shall not abate by death or other disability of a party, the right of action against a director of a corporation given by section 3850, as amended by Laws 1909, p. 217, § 1, requiring corporations to file a financial report and declaring that on failure the directors shall be jointly and severally liable, survives.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 286-293; Dec. Dig. —57.]

2. CORPORATIONS —351—DIRECTORS—ACTIONS—RIGHT OF ACTION.

Where a corporation which failed to file a financial statement executed a note, the action against the directors given by Rev. Codes, § 3850, as amended by Laws 1909, p. 217, § 1, must be on the debt, and cannot, under section 5866, declaring that no person is liable on an instrument whose signature does not appear thereon, be maintained against the directors on the note.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1492, 1493; Dec. Dig. —351.]

3. CORPORATIONS —338—DIRECTORS—ACTIONS AGAINST.

Where a corporation failed to file the required financial statement and then gave notes, directors liable for the debts of the corporation under the direct provisions of Rev. Codes, § 3850, as amended by Laws 1909, p. 217, § 1, are not discharged because of renewal of the instruments; their liability not being that of sureties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1460-1466; Dec. Dig. —338.]

4. NOVATION —4—WHAT CONSTITUTES.

In such case, where it was not agreed that the renewals should constitute a payment, they do not work a novation within Rev. Codes, §§ 4958, 4959, declaring that a novation is made by the substitution of a new obligation with intent to extinguish the old, for it will be presumed in the absence of such showing that the renewal notes were not given in discharge of the original obligation.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. —4.]

For other definitions, see Words and Phrases, First and Second Series, Novation.]

Appeal from District Court, Powell County; G. B. Winston, Judge.

Action by the First National Bank of Missoula against the Cottonwood Land Company, W. R. Glasscock, and the Union Bank & Trust Company, as executor of the estate of James T. Manning, deceased. From a judgment sustaining the demurrer of the executor, plaintiff appeals. Reversed and remanded.

Harry Parsons, of Missoula, for appellant. Scharnikom & Jordan, of Deer Lodge, for respondents.

HOLLOWAY, J. During all of 1911, and 1912 until December 20th, James T. Manning was a director of the Cottonwood Land Company, a domestic trading corporation. The directors, including Manning, failed and

neglected to make any report of the financial affairs of the company for either 1911 or 1912. On November 22, 1912, the company became indebted to the First National Bank of Missoula in the sum of \$7,050, evidenced by a promissory note due in four months with interest at 8 per cent. per annum, and signed "Cottonwood Land Company, by W. R. Glasscock, Pres., W. R. Glasscock." On December 20, 1912, Manning died, and the Union Bank & Trust Company was appointed executor of his last will. In July, 1913, a renewal note for \$7,000 due in 30 days, with interest at 10 per cent. per annum, executed in the manner and form as the original note was delivered to the bank and with it 490 shares of the capital stock of the company as collateral security for the payment of the debt. A claim against Manning's estate was duly presented, but payment was refused, and this action was instituted. The complaint recites the history of the transactions in great detail. It is alleged that the stock pledged as security is worthless, that the corporation is insolvent, and that demand for payment, made upon the other directors, has met with refusal. To the complaint the Union Bank & Trust Company, as executor, interposed a demurrer upon the following grounds: (1) That the executor is improperly made a party, for the reason that the complaint fails to disclose any liability on the part of Manning during his lifetime; (2) that the complaint fails to state facts sufficient to constitute a cause of action; (3) that the complaint is uncertain, in that it cannot be determined whether relief is sought upon the express contract or upon a liability created by statute. This demurrer was sustained, and the plaintiff, electing to stand upon its complaint, suffered judgment of dismissal to be entered and appealed.

[1] 1. Section 3850, Revised Codes, as amended by an act approved March 11, 1909 (Laws 1909, p. 217, § 1), requires the directors of a domestic trading corporation, within 20 days after December 31st of every year, to prepare and file a report which shall exhibit the financial affairs of the corporation. The statute provides further:

"If any such corporation shall fail to file such report, directors of the corporation shall be, jointly and severally, liable for all debts or judgments of the corporation then existing, or which may thereafter be in anywise incurred until such report shall be made and filed."

Counsel for the respective parties indulge in much discussion as to the character of this statute—whether penal or remedial in its nature. If the survival of plaintiff's cause of action was made to depend upon the application of principles of the common law, the discussion would be pertinent as well as interesting; but, since the matter is determined by statute, the labors of counsel are largely in vain. That the statute creates a right of action in favor of the creditor and

against the delinquent director must be conceded by every one. Such an action was unknown to the common law. That the right of action thus created survives the death of the delinquent director and may be prosecuted against his estate is not an open question in this jurisdiction. In *Melzner, Adm'r, v. Northern Pac. Ry. Co.*, 46 Mont. 162, 127 Pac. 146, we had under consideration the following from section 6494, Revised Codes:

"An action, or cause of action, or defense, shall not abate by death, or other disability of a party, or by the transfer of any interest therein."

The history of our legislation upon the subject of abatement and revival was reviewed, and the conclusion was reached that in adopting the section in the language quoted above it was the intention to establish in this state a general survival statute. The remaining portion of section 6494 is adjective law. We are satisfied with that conclusion and that the cause of action survives the death of the party in the wrong as well as the death of the one whose rights are infringed.

[2] The complaint contains all the allegations necessary to state a cause of action in favor of the bank and against Manning's estate; and that the cause of action relied upon is one created by statute, and not for the breach of an express contract, is too obvious to admit of discussion. Indeed, since Manning did not sign the note, it would be impossible to state a cause of action against him or his estate for a failure to pay the note. Rev. Codes, § 5866; *Kohrs v. Smith*, 45 Mont. 467, 124 Pac. 275.

[3] 2. Neither do we think that plaintiff pleaded itself out of court by the addition to the complaint of the unnecessary allegations respecting the execution and delivery of the original note or the substitution therefor of the renewal note and the acceptance of collateral security after Manning's death. As already observed, the action is not founded upon the note, and neither the original note nor the note given in renewal had anything whatever to do with Manning's liability. Assuming for the purposes of this appeal that the changes wrought in the relationship of the parties by the substitution of the new note and the acceptance of security were such as to exonerate a guarantor or surety, the executor cannot profit thereby, for Manning was not a surety nor a guarantor for the corporation. In *Dally v. Marshall*, 47 Mont. 377, 133 Pac. 681, in discussing the general immunity from liability for the corporation's debts which may be enjoyed by the directors or waived by their failure to file the required annual report, this court said:

"They may render their immunity effective by doing this [filing the report]; otherwise they are conclusively presumed to have assented to stand good as sureties for all the liabilities

which they have permitted the corporation to assume."

The question under consideration was the constitutionality of section 3850 above, and the language quoted is found in argument advanced to demonstrate that the statute does not impose a fine or penalty upon delinquent directors. After language might have been employed. The words "as sureties" might have been omitted, as they add nothing to the argument. The expression as it appears is an unfortunate one, and all the more unfortunate if the trial court in this instance was misled into the belief that this court was on record in support of the proposition that the relationship of a delinquent director to his company is that of surety or guarantor. That it could not have been the intention to declare such a rule, however, is manifest from the opinion as a whole. In the same paragraph from which the language above is taken, the court quotes with approval from *Fitzgerald v. Weidenbeck* (C. C.) 76 Fed. 695, to the effect that the liability of delinquent directors to the corporation's creditors is a direct liability. The purpose of requiring such a report is to furnish information to those who conduct business with the corporation. If the report is filed and thereby made a public record, information concerning the corporation's financial condition and responsibility is available to every one. If for any reason the directors fail or refuse to furnish such information in the manner required by law, any one becoming a creditor of the concern may rightly do so upon the faith of the individual responsibility of the directors. The liability thus imposed is joint and several, direct and primary. The creditor's right of action is not dependent upon the insolvency of the corporation (7 R. C. L. 521), and neither the corporation nor other directors need be joined in the action. *Fitzgerald v. Weidenbeck*, above; *Patterson v. Stewart*, 41 Minn. 84, 42 N. W. 928, 4 L. R. A. 745, 16 Am. St. Rep. 671; 10 Cyc. 856.

[4] 3. The allegations of the complaint do not disclose payment of the original debt or a novation as defined in sections 4958 and 4959, Revised Codes. It is the general rule that the renewal of a note without change in the parties operates only to extend the time of payment (*Bank v. Weston*, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547), and is not in any sense payment of the debt or discharge of the original obligation unless made such by special agreement (*Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Griffith v. Grogan*, 12 Cal. 317; *Savings Bank v. Central Market Co.*, 122 Cal. 28, 54 Pac. 273). In the absence of an affirmative showing that the renewal note was given and accepted as a discharge and payment of the original debt, the presumption of payment will not be indulged. *Boston Nat. Bank of Seattle v. Jose*, 10 Wash. 185, 38 Pac. 1028. While plaintiff might

have omitted the historical recitals from its complaint with profit and without loss, their presence in the pleading does not render it subject to demurrer.

The judgment is reversed, and the cause remanded, with directions to the lower court to overrule the demurrer of the defendant Union Bank & Trust Company as executor of the estate of James T. Manning, deceased.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(47 Utah, 371)

MOUNTAIN LAKE MINING CO. v. MIDWAY IRR. CO. et al. (No. 2583.)

(Supreme Court of Utah. Jan. 7, 1916.)

1. APPEAL AND ERROR ⇨1221—JUDGMENT—JURISDICTION TO AMEND.

After reversal on defendants' appeal and remand to the trial court with directions to enter judgment for defendants, the Supreme Court had jurisdiction to amend its judgment to make it conform to the opinion of the majority of the court where there was a difference between the opinion and the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4722; Dec. Dig. ⇨1221.]

2. COURTS ⇨107 — CONSTRUCTION OF OPINION.

In suit to quiet title to the use of water, where both parties claimed the water, plaintiff claiming that he had developed it, while defendants claimed that it was part of a natural stream, the opinion of a justice of the Supreme Court concurring in the reversal of judgment for plaintiff held to have necessarily concurred also, in the affirmative judgment for defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 360; Dec. Dig. ⇨107.]

3. WATERS AND WATER COURSES ⇨152 — SUIT TO QUIET TITLE TO USE OF WATER—JUDGMENT.

In a suit to quiet title to the use of water which plaintiff claimed as having developed it and which defendants claimed as part of a natural stream, general affirmative judgment for defendants was not too sweeping in that it denied plaintiff the right to use any water at any time, even for culinary or other domestic purposes, though all the water was not used by defendants, since in every judgment granting the right to the use of water it inheres that any one may use some of it for culinary or domestic purposes at any time when the claimant of the water does not use or require all of it for useful purposes.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. ⇨152.]

4. APPEAL AND ERROR ⇨719 — QUESTIONS REVIEWABLE—FINDING UNASSIGNED AS ERROR.

A finding not assigned as error is not presented for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. ⇨719.]

5. JUDGMENT ⇨251, 256—ON TRIAL OF ISSUES—CONFORMITY TO PLEADINGS AND FINDINGS.

In an action to quiet title to the use of water, where defendants pleaded that for more than 25 years they and their successors had used for irrigation the water of the natural stream in question derived from the mountains through natural channels and fissures, and needed it all,

and prayed judgment quieting their title to the waters of the stream issuing from plaintiff's tunnel, and for a perpetual injunction restraining plaintiff from asserting any claim of ownership in the water issuing from the tunnel, and the court found that defendants and their predecessors had used all of the water of the stream for more than 25 years for irrigation, judgment quieting title in defendants to the use of the water, awarding them all of the water of the stream during both the irrigation and nonirrigation seasons of each year, was responsive to the findings and within the issues presented by the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 437, 446-454; Dec. Dig. ⇨251, 256.]

Action by the Mountain Lake Mining Company against the Midway Irrigation Company, William Bonner, and others. From a judgment for plaintiff, defendants appealed. Judgment was reversed, with directions to enter judgment for defendants. On plaintiff's motion to amend the judgment entered in favor of defendants.

Thurman, Wedgwood & Irvine, of Salt Lake City, for appellants. A. C. Hatch, of Heber, and E. E. Corfman, of Provo (E. A. Walton, of Salt Lake City, of counsel), for respondent.

FRICK, J. On October 23, 1915, and after the petition for a rehearing had been overruled and the case had been published (Mountain Lake Min. Co. v. Irr. Co., 149 Pac. 929), but before the remittitur had gone down, the plaintiff filed a motion to amend in certain particulars the judgment entered in favor of appellants by this court. The motion was based upon the theory that the writer in his concurring opinion had only concurred with Mr. Justice McCARTY to the extent of reversing the judgment of the court below and had not concurred in the affirmative judgment entered by this court in favor of the appellants by which the title to the waters in question was quieted in appellants. In view therefore that Mr. Chief Justice STRAUP had dissented, it is contended that the affirmative judgment is not the judgment of the majority of this court. The writer desires to confess that his concurring opinion is not as clear as it might be and that, prima facie at least, counsel had some ground upon which to base the motion.

[1] Before passing upon the merits of that motion, however, it becomes necessary to pass upon appellants' motion to strike plaintiff's motion upon the ground that this court has no jurisdiction to entertain said motion because the case has passed beyond our jurisdiction. We are of the opinion that appellant's motion cannot prevail, and that we have ample power or jurisdiction to amend the judgment so as to make it conform to the opinion of the majority of the court if, in fact, there is a difference between the opinion and the judgment. Nothing is asked for in the motion except to make the judgment conform to the actual decision,

and to do that we have ample power. 23 Cyc. 866. Appellants' motion must therefore be overruled.

[2] Should plaintiff's motion to amend the judgment prevail? Is it true that the concurring opinion merely concurs in the reversal of the judgment and does not concur in the affirmative relief or judgment in favor of the appellants? I shall not devote much time nor space to a discussion of the proposition. It seems to me that any disinterested person who will read the concurring opinion with care must arrive at the conclusion that, while the writer concurred in the reversal of the judgment with some hesitation or reluctance, yet he fully concurred with his Associate, Mr. Justice McCARTY, in the affirmative judgment in favor of the appellants. In view of the circumstances of this case, after having concurred in the reversal of the judgment there was in fact no logical way out except also to concur in the affirmative judgment in favor of appellants. That is so for the simple reason that both parties claimed the water in dispute. The plaintiff claimed it as having developed it, while the appellants claimed it as part of the natural stream. If the water in dispute was not developed water, then it was part of the natural stream. If it was part of the stream, it belonged to appellants by reason of prior appropriation. If it belonged to the appellants, the judgment in their favor followed as a logical and necessary conclusion. It is not a case where title to the thing in dispute may belong to neither party. Here it necessarily belonged to one or the other of the litigants. A finding therefore that the water did not belong to the plaintiff was tantamount to a finding that it belonged to the appellants. I entertained that view when I wrote the concurring opinion and have discovered nothing in either the briefs or oral arguments of counsel for plaintiff that has caused me to change or modify that view. I assumed therefore that a mere concurrence with my Associate was sufficient, and that the mere fact that I stated my reasons for concurring in the reversal of the judgment was not, as counsel contend, tantamount to a refusal to concur in the affirmative judgment in favor of the appellants. The judgment in their favor is therefore the conclusion of the majority of the court and must prevail.

[3] It is, however, also insisted that the judgment is too sweeping, in that it denies the plaintiff the right to use any of the water flowing out of the tunnel at any time, not even for culinary or other domestic purposes, even though all the water is not used by the appellants. Such is not the purpose, nor is it the legal effect, of the judgment. It is a matter which inheres in every judgment granting the right to the use of water that any one may use some of it for drinking or culinary or domestic purposes at any time when the claimant of the water

does not use or require all of it for a like or some other useful purpose. Nothing was intended by the judgment except the ordinary and usual results flowing from judgments quieting title to the use of water in this arid region, and the judgment in that regard must be given the ordinary and usual effect.

Since writing the foregoing, Mr. Justice McCARTY has handed me his concurring opinion, and I desire to add that I fully concur with him in both his statements and conclusions.

McCARTY, J. (concurring). [4, 5] The contention made by counsel for respondent that a majority of this court did not concur in "directing a judgment or decree absolute for appellants" is so clearly and fully answered by Mr. Justice FRICK in the foregoing supplemental opinion that nothing more need be said on that question.

It is alleged in the motion "to amend and correct" the opinion heretofore filed in the cause that an "affirmative judgment" for defendants (appellants) upon their counterclaim would deprive respondent of its property without "due process of law." Counsel have not pointed out in their printed brief filed in the case in support of the motion wherein and in what respect an affirmative judgment in favor of appellants would deprive respondent of its property without due process of law. Counsel, however, in their oral discussion of the motion to this court, clearly expressed their views and made plain their position regarding the foregoing propositions. They contended that the judgment directed to be entered by the court is, in some respects, not responsive to the findings and wholly outside of the issues presented by the pleadings, in that it decrees and awards to appellants all the water of Snake creek during both the irrigation and nonirrigation seasons of each and every year. Appellants in their counterclaim alleged, among other things:

(1) "That for more than twenty-five years next preceding the commencement of this action these defendants (appellants) and their grantors and predecessors in interest have been, and that these defendants are now the owners of, all the water and water rights for irrigation, domestic, and other beneficial purposes of the waters of what is known as Snake creek," etc.

(3) "That the sources of said creek consist of rains, melting snows, springs, and seepages, and during the spring, fall, and summer months of each and every year ordinarily said springs and seepages constitute by far the greater portion of the waters of said creek and are the main reliance of the defendants for the irrigation of their lands and for domestic and other beneficial purposes."

(4) "That said springs and seepages have their sources in the bosom of the mountains upon which are situated the mines and mining claims of plaintiff described in its complaint and, when not interfered with, find their way to the surface of said mountain on the eastern slope thereof through natural channels and fissures in the rock imbedded in said mountains, and the same reaches the surface thereof, and the said waters find their way into said creek and are natural tributaries and feeders thereof."

(5) "That all of the waters of said creek as above described and the water rights pertaining thereto are, as above stated, owned by these defendants, and the same are necessary and not more than sufficient, when economically used, for the purposes hereinbefore stated."

(6) "That the tunnel constructed and excavated by plaintiff (respondent here) * * * undermined, intercepted, cut off, and diverted the underground streams, springs, and seepages constituting the permanent sources of the waters of said creek; * * * that by said undermining, intercepting, cutting off, and diverting the waters aforesaid as above described, the said springs and seepages and streams were prevented from reaching the surface of the ground through the natural channels heretofore described, whereby and by means whereof said springs and streams ceased to flow to the natural outlets thereof and thence into said creek as they had done theretofore, but, on the contrary, were by the means aforesaid diverted away and caused to flow into and through said tunnel and out of the mouth thereof as hereinbefore stated."

(7) "That said plaintiff, in violation of the rights of these defendants in and to the use of said water, now unlawfully claims a portion thereof, but said claim is adverse to the rights of these defendants as above set forth and is unconscionable, inequitable, and without foundation of right."

Their prayer was:

"Wherefore defendants pray judgment by decree quieting their title to the waters issuing from plaintiff's tunnel and for a perpetual injunction enjoining and restraining plaintiff, its servants, agents, employees, and successors in interest, from asserting any claim of ownership whatever in or to the water issuing from said tunnel. Defendants pray for general relief and for costs hereon."

The trial court found:

"That the stockholders of the defendant corporation, Midway Irrigation Company, and the other defendants, are the owners of land in severalty, situated in and near Midway, Wasatch county, Utah, amounting to approximately 4,000 acres; that the said lands are unproductive without irrigation, but, with irrigation, are highly productive and valuable; that more than 25 years prior to the commencement of this action, and many years prior to the commencement of the said Mountain Lake Tunnel, various people settled upon said lands, and appropriated for beneficial uses in irrigating their said land, and for domestic and culinary purposes, all of the water flowing in Snake creek, and their successors have ever since used said water for the irrigation of said land and other beneficial purposes."

This finding was presumably drafted and presented to the trial court by counsel for defendants. Let that be as it may, the finding is not assigned as error, and hence is not before this court for review. It will thus be observed that the judgment directed to be entered by this court is responsive to, and clearly within, the issues. Moreover, respondent, neither in its complaint nor at the trial, claimed any interest in or to any of the waters of Snake creek or its tributaries, except a portion of the water issuing from the tunnel which it claimed to have developed by excavating and draining of its tunnel. The question of what use appellants make of the water during the winter and nonirrigation seasons of the year was not an issue and was not before the trial court for adju-

dication. I therefore join with Mr. Justice FRICK in denying the motion.

STRAUP, C. J. (concurring). For the reasons stated in my dissenting opinion (149 Pac. 929), I still think the judgment of the court below ought to have been affirmed. Whether aptly expressed or not, I think it was the intention by the concurring opinion to concur, not only in the reversal of the judgment, but also in the direction of a judgment for the appellants. I so regarded it when I wrote the dissenting opinion. At any rate, that intention now is clearly indicated, and thus the prevailing opinion as to both propositions ought to be regarded, as I do regard it, the judgment of the court.

(47 Utah, 315)

OCKEY v. BINGHAM-NEW HAVEN COPPER & GOLD MINING CO.
(No. 2561.)

(Supreme Court of Utah. Jan. 3, 1916.)

1. MASTER AND SERVANT ⇨239—PROTRUDING SET SCREW—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

Plaintiff, as shift boss in defendant's mill, directed the work during the shifts in which he was on duty. The motor operating the line shaft having stopped, plaintiff, after starting the machinery, attempted to replace a belt on a line shaft pulley, and while so engaged was caught by a projecting set screw. All the other set screws were countersunk, and plaintiff did not know that the screw in question protruded, nor could he see it while the machinery was in motion. Held, that plaintiff was not guilty of contributory negligence in law in attempting to replace the belt.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 749, 750; Dec. Dig. ⇨239.]

2. MASTER AND SERVANT ⇨270—UNGUARDED SET SCREWS—NEGLIGENCE—QUESTION FOR JURY.

The question whether or not an employer is negligent in operating machinery with unguarded or projecting set screws is ordinarily for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. ⇨270.]

3. MASTER AND SERVANT ⇨219—INJURY TO EMPLOYÉ—PROTRUDING SET SCREW—ASSUMED RISK.

Plaintiff, who was a shift boss in control of defendant company's mill, working in every part of it, and who had helped remodel the mill, when he had adjusted many set screws in the machinery, was injured while attempting to replace a belt on a line shaft pulley by being caught by a projecting set screw on a bearing collar. He did not know that such screw projected, and all the other screws of the shaft were countersunk, which he knew. While the shaft was in motion, it was impossible to see the set screw in question, and it did not appear that plaintiff's duties included inspection of the machinery. Held, that plaintiff did not assume risk of injury from such set screw as an ordinary risk of employment or one readily discernible by the exercise of ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. ⇨219.]

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Action by Ross Ockey against the Bingham-New Haven Copper & Gold Mining Company, a corporation. From a judgment entered for defendant on a nonsuit, plaintiff appeals. Reversed.

This is an action for personal injuries. It is alleged in the complaint that plaintiff was, on the 2d day of November, 1911, at work for the defendant, a corporation, in its concentrating mill at Bingham Canyon, Utah; that it was a part of his employment to adjust belts on certain pulleys and to replace the belts thereon when they, by reason of the movements of the pulleys, or other causes, slipped or came off; that the pulleys were secured and adjusted on a certain line shaft in the mill, at the end of which were two collars, one on each side of the end bearing; that the collars were fastened to the shaft by means of set screws; and that these set screws, when properly made, would fit into the collar, and the heads thereof would not project beyond the collar. It is further alleged that it was the duty of defendant to use set screws that would properly fit into the collars and that would not project beyond the surface thereof; that defendant carelessly and negligently used a set screw in one of the pulleys the head of which projected above and beyond the collar a distance of about one inch, and that it was unknown to plaintiff, who believed that the set screw was properly made and that it properly fitted into the collar on the line shaft; that plaintiff, while in the exercise of due care and in the performance of his duties adjusting the belt on a pulley, had the leg of his trousers caught by the set screw by reason of its projecting above and beyond the collar of the shaft, and he was thrown against the timbers of the mill and violently against the pulley and shaft; that he received certain injuries (describing them); that plaintiff prior to and at the time he was injured was strong and able-bodied, and was capable of earning, and did earn, \$3.50 per day.

Defendant answered, admitting that plaintiff was on November 2, 1911, employed by defendant, that plaintiff received "slight injuries" while at work for defendant in its mill, and that he was earning \$3.50 per day, but denied each and every allegation alleging negligence on the part of defendant. Defendant also pleaded the defense of contributory negligence and that of assumed risk. Defendant, at the conclusion of plaintiff's evidence, moved the court for nonsuit on the following grounds: (1) That the evidence failed to show negligence on the part of defendant; (2) that the evidence showed that plaintiff was guilty of contributory negligence; and (3) that he assumed the risks of the hazards as dangers under which he was injured.

The motion for nonsuit was granted, and

judgment entered in favor of the defendant. Plaintiff appeals.

Willard Hanson and Marioneaux, McKinney & Powers, all of Salt Lake City, for appellant. King & Nibley, of Salt Lake City, for respondent.

McCARTY, J. (after stating the facts as above). [1] The mill in which appellant received the injuries complained of was several stories in height. The concentrating tables were on the main floor, and the jigs were located on the floor above. Between the main floor and the jig floor was a platform or subfloor upon which were a pump and an electric motor. A line shaft extended along the subfloor practically the entire length of the building. This line shaft was fastened by bearings to the pillars or upright timbers that supported the sub or jig floor. The concentrating tables were operated by power transmitted from the motor on the subfloor to the tables by means of belts connected with and extending from the pulleys on the tables to the pulleys on the line shaft. On each side of the bearings and on each side of the pulleys on the line shaft were collars called safety collars. These collars were to prevent the line shaft from moving out of the bearings and the pulleys from slipping laterally along the shaft, and were held in place by means of set screws which were countersunk in the collars. The evidence shows that all set screws in the mill except the one mentioned in the complaint were set in safety collars; that is, collars in which the head of the set screw can be countersunk so as not to project beyond the collar. The line shaft was connected to the electric motor referred to herein, which motor could be stopped, and started by means of a switch, and also a clutch on the shaft. The usual manner of starting the shaft in motion was to turn the current through the motor and then throw the clutch, which permitted the power to be applied on the shaft. The shaft could be stopped either by throwing the clutch or stopping the motor.

Appellant was employed as jigman, and also as a shift boss. He was during the shifts on which he worked in control of the operations of the mill and directed the men working therein as to their duties. A Mr. Bouchelle was foreman at the mill, and gave orders to the different bosses, including appellant. The foreman was on shift during the daytime, but not in the nighttime. He was not in the mill at the time of the accident, which occurred at night. During the day shift there was a "repair man" in the mill whose duty it was to keep all of the machinery in repair. The repair man worked in the mill under the directions of the mill foreman. The day before the accident a Mr. Pressler, while at work in the mill, was caught by the set screw that injured plaintiff. On the night in question, and a short time before

the accident occurred, owing to some trouble with the machinery on one of the lower floors, the motor stopped, which caused the line shaft to cease revolving, thereby stopping the movement of the tables. Appellant left the jig floor and went down to the floor where the trouble existed to ascertain if he could remedy it. He assisted the man there to adjust the machinery and to start it in operation. As he was returning to the jig floor he observed that the belt was off the pulley at the first or end table. He requested one of the men at work in the mill to assist him in replacing the belt onto the pulley. To do this appellant had to return to the jig floor, and from there crawl underneath some of the timbers along the subfloor where the line shaft was located. He proceeded to the point where the line shaft fitted into the bearing, and straddled the bearing on the timber, and commenced to put the belt onto the pulley by using a stick—a usual method there of putting on a belt. As he was thus engaged the set screw herein referred to, that projected above the collar, caught his clothing and threw him against the shaft. Appellant being unable to disengage his clothing from the set screw, it cut and tore the muscles of his leg. The extent of the injury is not in controversy, and hence we shall not review the evidence relating thereto. When he was caught by the set screw appellant called for help. Other workmen, hearing the call, threw the motor off and came to his assistance. The line shaft, when the mill was in operation, made 240 revolutions per minute, and, when so revolving, the set screws in the safety collars could not be seen. As stated, the day before appellant came in contact with the set screw on the occasion referred to a Mr. Pressler, who was working in the mill, had his clothing torn and ripped by coming in contact with the set screw that injured appellant. Appellant testified that he did not know, prior to the accident in which he received the injuries complained of that the set screw in question extended above and beyond the safety collar. And there is no evidence from which it may be inferred that appellant had any knowledge of the condition of the set screw until after the accident.

The undisputed evidence precludes us from holding that respondent was, as a matter of law, free from negligence. The only inference permissible from the record as it now stands is that the set screws in the mill, excepting the screw in question, were counter-sunk so that the tops or heads thereof were "flush" or even with the outside rim of the collars into which they were placed. The evidence shows that the head of the set screw projected above the rim of the collar from one-half to three-fourths of an inch, and could not be seen when the shaft was revolving.

[2] Some authorities hold that, as a legal proposition, it is not negligence for a master

to maintain and operate machinery in which are revolving shafts with collars held in place by set screws that project above and beyond the outside rim of the collars. The weight of authority, however, and, we think, the better reasoning, support the doctrine that ordinarily it is for the jury to decide whether it is negligence for the master to operate machinery in which are revolving shafts, couplings, and like contrivances held in place by unguarded protruding set screws. 4 Thomp. Neg. §§ 4022, 4124; 1 Bailey, Pers. Inj. p. 430; *Pruke v. S. P. Found. & Mach. Co.*, 68 Minn. 305, 71 N. W. 276; *Busch v. Ind. Mill Co.*, 54 Wash. 212, 103 Pac. 45; *Barr v. Guelph Patent Case Co.*, 129 Mich. 278, 83 N. W. 640; *Guinard v. Knapp-Stout & Co. Company*, 90 Wis. 123, 62 N. W. 625, 48 Am. St. Rep. 901; *Roth v. Northern Pac. Lumbering Co.*, 18 Or. 205, 22 Pac. 842; *Portland Gold Min. Co. v. O'Hara*, 45 Colo. 416, 101 Pac. 773; *Chopin v. Combined Locks Paper Co.*, 134 Wis. 35, 114 N. W. 95. See *Sipes v. Michigan Starch Co.*, 137 Mich. 258, 100 N. W. 447; *Homestake Min. Co. v. Fullerton*, 69 Fed. 923, 16 C. C. A. 545. Nor do we think that appellant, under the facts and circumstances, was as a matter of law, guilty of contributory negligence.

[3] Counsel for respondent contend with much earnestness that, as appellant was shift boss and in control of the mill, and was familiar with the machinery, he assumed the risk and hazards created by the projecting set screw in question. As the record now stands, it shows that, while appellant assisted in remodeling the mill, and had "worked in every part of it" and had inserted set screws into the collars "hundreds of times" he "never saw them stick out beyond the collar"; that they were "always flush with the collar [and] never projected out from the collar at all;" he did not know that the head of the set screw in question projected above and beyond the rim of the collar. Furthermore the evidence shows that it was the duty of appellant, while he was on shift, to keep the mill in operation except when it needed repairing or when the supply of ore ran short. It was not shown, nor is it suggested, that it was his duty, or that he would have been permitted, to close down the mill each time he went on shift to make a tour of inspection of the machinery, including the bolts and set screws, to see if the mill was in proper condition. And the evidence shows that the set screws that hold the collars on the shafts in place are invisible when the mill is in operation and the shafts are revolving. From the facts as they now appear it may well be inferred that the set screw which caused the injury complained of was placed in the collar by the repair man or some other employé after appellant assisted in remodeling the mill, and that respondent knew, or should have known, that it was inserted in such a way as to be a constant menace to the safety of the employes who,

in the discharge of their duties, were compelled to pass, or occasionally stand, in close proximity to it. We know of no rule or principle of law which holds that, under these circumstances, the servant assumes the extra risks and hazards produced by an unsafe appliance. The rule is elementary that it is the duty of the master to use due care to furnish the servant reasonably safe appliances with which to perform the work required of him under the contract of employment, and that the servant assumes the ordinary risks of the employment and those that are, by the exercise of ordinary care, readily discernible. 1 Shearman & Redfield, Neg. §§ 185, 189. *Texas & Pacific Railway v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, is a well-considered case, and the court, in the course of the opinion, says:

"In assuming the risks of the particular service in which he engages the employé may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfil his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and, whilst this does not justify an employé in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances."

The rule is also clearly, and, as we think, correctly, stated in *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573, as follows:

"It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and, when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation. *Gibson v. Erie Ry. Co.*, 63 N. Y. 449 [20 Am. Rep. 552]; *De Forest v. Jewett*, 88 N. Y. 264; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520 [5 N. E. 358, 54 Am. Rep. 722]; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Williams v. Delaware, Lackawanna, etc., Railroad*, 116 N. Y. 628 [22 N. E. 1117]. Those not obvious assumed by the employé are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures and appliances which by the exercise of reasonable care of the master may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. *Kain v. Smith*, 89 N. Y. 375; *McGovern v. Central Vermont Railroad*, 123 N. Y. 280 [25 N. E. 373]."

The judgment is reversed, with directions to the lower court to grant a new trial; costs to appellant.

FRICK, J. I concur. The only question upon which I entertain some doubt is the one respecting the relationship of the plaintiff and the defendant and their correlative duties growing out of that relationship. If the duty was cast upon the plaintiff to dis-

cover any defects in the machinery or appliances and to correct or report them when discovered, he, of course, would be precluded from complaining of a defect he himself should have discovered and corrected. To my mind, however, the evidence as it stands is not of that character which would authorize a court to determine the relationship of the parties and their correlative duties as matter of law. The court should therefore have submitted to the jury the evidence respecting plaintiff's duties, and should have directed them to find from the evidence what his duties were, and, if they found that it was his duty to discover and correct defects, or to discover and report them, then that he could not recover, but that, if they found that he was not charged with that duty, but was merely charged with the duties of an ordinary employé, then to be governed by the law as it is stated in the opinion of my Associate.

STRAUP, C. J. There is considerable evidence to show that the plaintiff was a vice-principal, and as such was, with others, charged with duties of inspection and to remedy or repair just such defects as he complains caused the injury. I am, however, not satisfied that the evidence on that point is so conclusive as to justify a withholding of it from the jury. I therefore concur.

(24 Wyo. 1)

IVEY v. STATE. (No. 834.)

(Supreme Court of Wyoming. Feb. 1, 1916.)

1. HOMICIDE \Leftrightarrow 86—ASSAULT AND BATTERY WITH INTENT TO COMMIT "MANSLAUGHTER"—NATURE OF OFFENSE—"MURDER IN SECOND DEGREE."

Comp. St. 1910, § 5792, declares that whoever purposely and maliciously, but without premeditation, kills any human being, is guilty of "murder in the second degree"; while section 5798 declares that whoever unlawfully kills any human being without malice, express or implied, either voluntarily upon a sudden heat of passion or involuntarily, but in the commission of some unlawful act, is guilty of "manslaughter." Section 5795 declares that whoever perpetrates an assault or assault and battery upon any human being with intent to commit a felony shall be imprisoned in the penitentiary not more than 14 years. Held that, while the offense of assault and battery with intent to commit manslaughter was unknown to common law, it was created by the statute, the specific intent to kill which accompanies and lifts an assault or assault and battery to the grade of a felony; for accused may intend to commit voluntary manslaughter, acting in a sudden heat of passion and without malice, and not intend murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 112; Dec. Dig. \Leftrightarrow 86.]

2. INDICTMENT AND INFORMATION \Leftrightarrow 189—CONVICTION OF OFFENSE INCLUDED IN CHARGE.

As manslaughter is included within the offense of murder in the second degree, one charged in the information with an assault and battery with intent to commit murder in the second

degree may be convicted of an assault and battery with intent to commit manslaughter.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. ¶189.]

3. HOMICIDE ¶86—OFFENSES—INTENT.

In a prosecution for assault with intent to commit murder in the second degree, where accused was convicted of assault with intent to commit manslaughter, proof of the specific intent to kill is necessary to a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 112; Dec. Dig. ¶86.]

4. HOMICIDE ¶145—ASSAULT WITH INTENT TO COMMIT MANSLAUGHTER—PRESUMPTION.

As, in the absence of evidence, one is presumed to have intended what he accomplished by his acts, there is no presumption in a prosecution for assault with intent to commit murder or manslaughter that accused, who shot another, intended to kill; this being particularly true where accused set up self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 262-264; Dec. Dig. ¶145.]

5. CRIMINAL LAW ¶662—EVIDENCE—CONFRONTATION OF WITNESSES.

The production of witnesses before the examining magistrate, where accused had an opportunity to cross-examine, is a sufficient confrontation to warrant the admission of their testimony on trial for the offense; the witnesses being dead or without the jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538-1548; Dec. Dig. ¶662.]

6. CRIMINAL LAW ¶419, 420—EVIDENCE—HEARSAY.

Where witnesses have died or have left the jurisdiction, evidence of their testimony given at a former trial between the same parties cannot be excluded on the ground of hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. ¶419, 420.]

7. CRIMINAL LAW ¶1036—EVIDENCE—OBJECTION FOR PURPOSE OF REVIEW—EVIDENCE GIVEN AT FORMER TRIAL.

Where accused made no objection to an affidavit of the prosecutor showing the death or absence of witnesses who testified at his examining trial, but merely objected to evidence of their testimony on the ground that no proper foundation was laid, the question of the competency of proof by affidavit was not preserved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. ¶1036.]

Error to District Court, Carbon County; V. J. Tidball, Judge.

Charles Ivey was convicted of assault and battery with intent to commit manslaughter, and he brings error. Reversed and remanded.

Chas. E. Blydenburgh, of Rawlins, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

SCOTT, J. An information was filed in the office of the clerk of the district court of Carbon county charging Charles Ivey, as defendant, and who will be so designated here, with the crime of assault and battery with intent to commit murder in the second degree. Upon the trial the jury returned a verdict of guilty of assault and battery with intent to commit manslaughter. Judgment was

pronounced on the verdict, and the defendant brings error.

[1, 2] 1. It is here contended that there can be no such thing under the law of this state as an assault or assault and battery with intent to commit manslaughter, and that, if an intent to kill is proven, the crime of necessity is an assault with intent to commit murder either of the first or second degree. The crime of assault with intent to commit manslaughter is not known to the common law, and, if it exists at all in this jurisdiction, it is by virtue of the statute. In other words, it is a creature of statute. "Murder in the second degree" is defined by section 5792 of our statute (Comp. Stat. 1910) as follows:

"Whoever purposely and maliciously, but without premeditation, kills any human being, is guilty of murder in the second degree, and shall be imprisoned in the penitentiary for any term not less than twenty years, or during life."

Section 5793, Id., defines "manslaughter" as follows, viz.:

"Whoever unlawfully kills any human being without malice expressed or implied, either voluntarily upon a sudden heat of passion, or involuntarily, but in the commission of some unlawful act, or by any culpable neglect or criminal carelessness, is guilty of manslaughter, and shall be imprisoned in the penitentiary not more than twenty years."

In the original statute enacted in 1890 (section 17, c. 73, S. L. 1890) the word following "malice" in this section is "express," instead of "expressed."

The crime with which the defendant was charged in the information is defined in section 5795, Id., which reads as follows:

"Whoever perpetrates an assault, or assault and battery, upon any human being with intent to commit a felony, shall be imprisoned in the penitentiary not more than fourteen years."

It is the specific intent to kill which accompanies and lifts the assault or assault and battery to the grade of a felony and that is the gravamen of the offense, and, if it cannot exist in the nature of the case, then there is no such crime. It will be observed, however, that in order to constitute manslaughter as a separate degree of criminal homicide the act of killing must be upon a sudden heat of passion and the outgrowth of such passion. The word "voluntary," as used in the statute, has a legal meaning, which has been construed by different courts under similar statutes. The word denotes the condition of the mind at the time of the homicide. It negatives accident or absence of intent to do the act complained of. It is the opposite in meaning of "involuntary." The accused wills the act, that is, intends the act, and, if such intent accompanies the overt acts to carry such intent into effect, the intent is coextensive as a matter of criminal pleading with the act charged to have been accomplished. We are of the opinion that one who upon a sudden heat of passion aroused by great and sufficient provocation,

but without malice, but as the result of the passion so aroused solely, voluntarily assaults another with intent to kill him, and inflicts upon him a wound causing death, is guilty of voluntary manslaughter under our statute. It is unlawful because voluntarily done; but it is not murder, because it was the result of the sudden heat of passion, and not of malice. In *Brantley v. State*, 9 Wyo. 102, 61 Pac. 139, the defendant was tried upon an information charging him with an assault and battery with intent to commit murder in the first degree, and was found guilty of an assault with intent to commit murder in the second degree. He contended that the trial court committed error in charging the jury that under the charge contained in the information they might find the defendant guilty of the principal offense charged, or of an assault with intent to commit murder in the second degree, or of assault with intent to commit manslaughter. This instruction was approved by this court as in line with the great weight of authority as well as the better reasoning. Upon the question of intent it was said:

"It is evident that in charging an intent to commit murder in the first degree there is necessarily included a charge of intent to commit murder in the second degree and voluntary manslaughter."

And further that:

"Proof cannot be made of assault with intent to commit murder in the first degree which does not at the same time furnish appropriate and sufficient evidence to sustain a verdict for the lower or included offenses of assault with intent to commit murder in the second degree and manslaughter."

As manslaughter is one of the lesser and included offenses of criminal homicide, an information will lie for an assault and battery with intent to commit murder of either the first or second degree or of voluntary manslaughter. We are of the opinion that the information charges the crime of an assault with intent to commit voluntary manslaughter and is sufficient, and would, as a pleading, sustain the verdict, and for that reason the defendant's contention is not sustained.

[3, 4] 2. It is contended that the court committed error in giving the following instruction over defendant's objection and exception, viz:

"The court instructs the jury that a man is presumed in law to intend the probable and natural consequences of his own unlawful act. If one purposely shoots another with a deadly weapon, at or near a vital part, and in such a manner that death would probably ensue, all the other elements of the crime concurring, the jury would be justified in believing that the defendant intended to kill the prosecuting witness, even if death did not ensue."

The specific intent to kill must be proved as any other fact in the case, to the satisfaction of the jury. In the absence of evidence to the contrary, the presumption is that the assault was made with the intention to accomplish that which actually resulted

from the assault. But, where an assault is thus committed, but which does not result in death, there is no presumption that the assailant intended to kill; that is to say, the presumption arising from the character of the assault with reference to the intent with which it is committed goes only to the result accomplished, and there is no presumption that he intended to do more than was actually accomplished. So, where the charge is that an assault was made with the intent to kill, and when death did not ensue, it is error to charge the jury that the presumption is that he intended the natural and probable consequences of the assault. Had death resulted from the assault, the presumption of intent as given by this instruction would have been applicable, but, as the assault and battery did not result in death, there is no predicate for the presumption as one of law, though such intent may be proven by a consideration of all the evidence in the case. The evidence tended to show that at the time of the alleged occurrence the prosecuting witness was in defendant's saloon in Rawlins, Wyo. The defense was self-defense, and the evidence was conflicting. By all the decisions the question of the felonious intent is a question of fact for the jury, and the presumption of intent as set forth in the instruction is a presumption of law applicable and inferable from proof of an assault and battery which resulted in death. In *Roberts v. People*, 19 Mich. 401, 414, the defendant was charged, tried, and found guilty of an assault with intent to murder committed upon the prosecuting witness by shooting him with a loaded pistol. Upon appeal the Supreme Court of that state said:

"The first question presented by the record is whether, under this information, the jury could properly find the defendant guilty of the assault with the intent charged, without finding, as matter of fact, that the defendant entertained that particular intent? We think the general rule is well settled, to which there are few, if any, exceptions, that when a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as matter of fact, before a conviction can be had. But especially, when the offense created by the statute, consisting of the act and the intent, constitutes, as in the present case, substantially an attempt to commit some higher offense than that which the defendant has succeeded in accomplishing by it, we are aware of no well-founded exceptions to the rule above stated. And in all such cases the particular intent charged must be proved to the satisfaction of the jury; and no intent in law, or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter."

The doctrine thus announced is supported by the great weight of authority, and was followed by this court in *Bryant v. State*, 7 Wyo. 311, 320, 51 Pac. 879, 56 Pac. 596, in which the foregoing excerpt is quoted, and this court said it was in full accord therewith. Chief Justice Potter, who wrote the opinion, and also the opinion on the petition for rehearing, in speaking for the court in

the latter, further said, in commenting on *Roberts v. People*, supra:

"That court, however, in the same case held further that it was unnecessary to prove the specific intent by direct, positive, and independent evidence, but, as the court remarked by quoting from one of its own earlier decisions, 'the jury may draw the inference, as they draw all other inferences from any facts in evidence which to their minds fairly prove its existence,' and then added, 'and in considering the question they may and should take into consideration the nature of the defendant's acts constituting the assault, the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce death, his conduct and declarations, prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made.'"

The court erred in giving the instruction in this kind of a case.

[5] 3. The defendant contends that the admission of the evidence of absent witnesses given at the preliminary examination over his objection was error. The objection was as follows:

"Mr. Blydenburgh. I object to the reading of this evidence before the jury at this time for the reason that it does away with the constitutional right of the defendant to be faced with the witnesses against him, and for this reason, further, that this testimony was taken in a hearing in which the same matters are not at issue. The question before the justice is whether a crime has been committed, and if there is probable cause that the defendant or the one accused is guilty. The question before this court for this jury is whether he is, beyond a reasonable doubt, guilty of the crime charged in the information, which is a different proposition. And the further reason that this testimony would show that there were objections to questions on cross-examination propounded by myself that were sustained by the justice, that there were objections made by myself that were overruled by the justice, and that I was unable to go into a full cross-examination, as I would have been allowed to do before this court. And there is still further objection—that a proper foundation has not been laid for the introduction of this testimony."

The defendant was present at the preliminary examination with his counsel, was confronted by the witnesses, was given an opportunity to cross-examine, and subjected the witnesses to a searching cross-examination. We discover nothing in the transcript of the evidence, the correctness of which is not questioned, which would indicate that defendant's latitude in cross-examination was narrowed to his prejudice in the manner of conducting the same. The right to use the evidence of absent witnesses given upon a former trial was held by this court in *Meldrum v. State*, 146 Pac. 596, and by the great weight of authority the same right prevails when the evidence is given before a committing magistrate, providing suffi-

cient foundation for admitting the evidence has been laid. The confrontation of witnesses required by the Constitution is in such case fully complied with. *State v. Hefferhan*, 22 S. D. 513, 118 N. W. 1027, 25 L. R. A. (N. S.) 868.

[6] It is said in section 336 (339), vols. 1 and 2, *Jones on Evidence*, that, when the foundation is laid, the hearsay character of the evidence so offered is removed, and that:

"It has long been settled as one of the exceptions to the general rule excluding hearsay that the testimony of a witness given in a former action or at a former stage of the same action is competent in a subsequent action or in a subsequent proceeding in the same action, where it is shown that the witness is dead or that a valid legal reason exists for his nonproduction, that the parties and questions in issue are substantially the same, and that such former testimony can be substantially reproduced upon the second hearing. It is necessary, therefore, to consider the question having regard to these prerequisites."

The proof in the case here was solely by an ex parte affidavit of the county and prosecuting attorney which was admitted without objection. The deponent was present in court, and, had the defendant objected to the affidavit for the purpose for which it was offered, the state could have proved the same matters covered by the affidavit by oral testimony of the deponent.

[7] Conceding that the showing of the facts necessary to the admission of such former evidence should have been made by oral testimony, instead of by ex parte affidavit of the prosecuting attorney, the introduction and reading of the affidavit was not objected to. The only objection was after it had been read; such objection being that a sufficient foundation had not been laid. This we understand to refer to the sufficiency of the facts stated in the affidavit, and not to the competency of the affidavit itself to show such facts, and therefore the question as to the admissibility of the affidavit is not before us. It is not pointed out wherein the facts stated in the affidavit are insufficient as a foundation for admitting the evidence, otherwise than as to the alleged incompetency and form of the proof to which defendant directed his argument.

Other assignments of error are here presented, but, as the questions may not arise in another trial of the case, we do not deem it necessary to discuss them.

The judgment will be reversed upon the erroneous instruction above discussed, and the case remanded for a new trial.

Reversed and remanded.

POTTER, C. J., and BEARD, J., concur.

(24 Wyo. 12)

**STOCKGROWERS' BANK OF WHEAT-
LAND v. GRAY (two cases).**

(Nos. 786, 790.)

(Supreme Court of Wyoming. Feb. 5, 1916.)

**1. APPEAL AND ERROR ⇐1074—REVERSAL—
PREJUDICIAL ERROR.**

If it was not prejudicial error for the trial court to allow amendment to the bill of exceptions, the Supreme Court cannot disturb the judgment on such ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248-4252; Dec. Dig. ⇐1074.]

2. EXCEPTIONS, BILL OF ⇐59—AMENDMENT.

Where the trial court predicated its action in allowing amendments to the bill of exceptions upon the record, files, and what appeared therein, and in no instance relied upon the memory of a witness or his individual recollection, its action was proper.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 106-111; Dec. Dig. ⇐59.]

3. MASTER AND SERVANT ⇐316 — CONTRACTORS—STATUS AS EMPLOYÉS.

Where there was no contract, between a bank and parties erecting a new building for it, for the erection of the building, such parties were not independent contractors, but employés merely of the bank, and doing the work under its supervision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. ⇐316.]

4. MASTER AND SERVANT ⇐316—INDEPENDENT CONTRACTORS—CHARACTER AS SUCH.

The mere fact that parties, erecting a new building for a bank, were contractors therefor, with the bank, was not sufficient to give them the character of independent contractors, or to establish that they were treated as such, unless the contract itself was susceptible of such construction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. ⇐316.]

5. MASTER AND SERVANT ⇐318—INDEPENDENT CONTRACTORS—ACTUAL RETENTION OF CONTROL—LIABILITY OF MASTER.

Where, by the terms of their contract with a bank to erect a building for it, builders became independent contractors, but the bank, nevertheless, in fact retained control and supervision of the work, any negligence of the builders, resulting in injury to an adjoining landowner, was imputable to the bank.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. ⇐318.]

6. MASTER AND SERVANT ⇐330—INJURIES TO THIRD PERSON — WORK OF INDEPENDENT CONTRACTOR—CONTRACT—BURDEN OF PROOF.

In an action by an adjoining landowner against a bank for damages caused by its excavation for a new building, where the bank alleged as a defense that the excavating was done by independent contractors for the erection of the building, the burden was on the bank to prove the contract alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. ⇐330.]

7. MASTER AND SERVANT ⇐330—INJURIES TO THIRD PERSON—INDEPENDENT CONTRACTOR — STATUS OF BUILDERS — SUFFICIENCY OF EVIDENCE.

In an action by an adjoining landowner against a bank for injuries from the excavation for its new building, evidence held sufficient to

support a jury finding that the bank had no contract to erect the building with both of two builders.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. ⇐330.]

8. MASTER AND SERVANT ⇐320—INJURIES TO THIRD PERSON—INDEPENDENT CONTRACTOR —LIABILITY FOR NEGLIGENT SELECTION.

Where a bank was negligent in making such a contract with unskillful and careless builders for the erection of its new building as to constitute them joint independent contractors, it was nevertheless liable to an adjoining landowner injured by the carelessness of the contractors in excavating, since the proximate cause of the injury was imputable to the negligence of the bank in procuring the work to be done by unskillful parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1261; Dec. Dig. ⇐320.]

9. MASTER AND SERVANT ⇐316—INJURY TO THIRD PERSON — WORK OF INDEPENDENT CONTRACTOR.

A bank employing a skillful and careful independent contractor to make an excavation not in its nature dangerous to adjoining property if done with reasonable care is not liable for any injury to the adjoining owner in consequence of the negligence of the contractor or his employés in excavating.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1242, 1243; Dec. Dig. ⇐316.]

10. ADJOINING LANDOWNERS ⇐4—RIGHT TO BUILD.

A bank had the right to construct a building on its land, having due regard to the rights of the adjoining lot owner so as not to weaken the support of her building.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ⇐4.]

11. ADJOINING LANDOWNERS ⇐4—LATERAL SUPPORT—LIABILITY FOR EXCAVATION.

A bank, which employed builders to erect its new building, who excavated unskillfully, carelessly, and negligently without giving notice to an adjoining landowner of the character and extent of the excavation in a time within which such landowner could protect her building from impending danger, was liable for the damages resulting from its negligence and that of its servants.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ⇐4.]

12. ADJOINING LANDOWNERS ⇐4—LATERAL SUPPORT—ACTION FOR INJURY TO BUILDING —NEGLIGENT EXCAVATING—SUFFICIENCY OF EVIDENCE.

In an action against a bank, for injuries to the building of an adjoining landowner, by its excavating for a new building, evidence that the mode of excavation was negligent held sufficient to support verdict for plaintiff.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ⇐4.]

13. APPEAL AND ERROR ⇐882—INVITED ERROR.

Where an interrogatory was submitted to the jury at defendant's request, it could not complain of error in the submission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. ⇐882.]

14. APPEAL AND ERROR ⇐1050—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action by an adjoining landowner for damages to her building against a bank, which,

by excavating for its new building, caused the collapse of plaintiff's wall, the admission of evidence as to a conversation between plaintiff's husband and a vice president of the bank, in which the vice president guaranteed not to damage plaintiff's wall, which evidence failed as an express undertaking of the bank by reason of failure to show authority of the vice president as agent to bind the bank, was harmless to it in view of findings that it was negligent, etc., because such conversation neither enlarged nor imposed any greater obligation or duty on the bank than existed at the time it occurred.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶1050.]

15. CORPORATIONS ¶491—ULTRA VIRES.

Corporations are liable for ultra vires torts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1902; Dec. Dig. ¶491.]

16. ADJOINING LANDOWNERS ¶4—DUTY OF EXCAVATORS—"TIMELY NOTICE."

A bank about to excavate for its new building was under legal duty to give due and timely notice to an adjoining landowner or her agent, "timely notice" being notice for a reasonable time before the proposed excavation for plaintiff to take the necessary measures to protect the wall and foundation of her building.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ¶4.]

17. ADJOINING LANDOWNERS ¶4—DUTY OF EXCAVATOR—NOTICE.

Notice to an adjoining landowner that an excavation was to be made was not notice that it would be made in a negligent manner, but that ordinary and reasonable care and prudence would be used, and that the excavation would be made in a workmanlike manner.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ¶4.]

18. ADJOINING LANDOWNERS ¶4—LATERAL SUPPORT—ACTION FOR INJURY TO BUILDING—EVIDENCE.

In an action by plaintiff for injury to her building through an excavation on adjoining land by a bank, where it was in issue under the pleadings whether timely notice that an excavation would be made was given plaintiff, evidence of a conversation between her husband and the vice president of the bank, in which the latter guaranteed that no injury would result to plaintiff, was admissible.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ¶4.]

19. ADJOINING LANDOWNERS ¶4—LATERAL SUPPORT—INJURY TO BUILDING—NEGLIGENCE.

In an action against a bank by an adjoining landowner for injuries to her building from an excavation, it was proper to consider on the issue of negligence the fact that the soil had been soaked and rendered soft with rainwater from the roofs of the plaintiff's and the bank's buildings and the weight of the material of which plaintiff's building was constructed.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ¶4.]

20. ADJOINING LANDOWNERS ¶4—LATERAL SUPPORT—DUTY OF EXCAVATOR.

The ordinary care required in excavating toward an adjoining landowner is the care and skill to meet the conditions which are apparent or known to the owner or contractor at the time of commencing the excavation, and, if the ex-

cavation or the manner of making it is reasonably liable to injure the adjoining lot or building thereon, its owner is entitled to reasonable notice, so that he can protect his property.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ¶4.]

21. ADJOINING LANDOWNERS ¶4—LATERAL SUPPORT—DUTY OF EXCAVATOR.

Where an excavation is made, the excavator cannot rely upon the inherent defects in the construction of an adjoining building to excuse him from liability for injury to it, in the absence of timely notice to the owner before excavating to give the latter opportunity to protect his property.

[Ed. Note.—For other cases, see Adjoining Landowners, Cent. Dig. §§ 21-36, 38-44; Dec. Dig. ¶4.]

22. DAMAGES ¶138—EXCESSIVENESS—INJURY TO REAL PROPERTY.

Where the jury is required to find the different items of damage to an adjoining landowner's property from an excavation, and to return them separately, and the amounts so found are within the proof, and, in the aggregate, are within the issues, the verdict is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 397, 398; Dec. Dig. ¶138.]

23. APPEAL AND ERROR ¶1011—REVIEW—QUESTIONS OF FACT.

The appellate court cannot review the finding of the trial court upon issues of fact as to which the evidence was conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ¶1011.]

24. NEW TRIAL ¶49—CONDUCT OF PARTY TOWARD JUROR.

The conduct of the husband of plaintiff, who acted as her agent during the trial, in handing a cigar to a juror while leaving the court room at a recess, was reprehensible and sufficient ground for the trial court to set aside the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97-99; Dec. Dig. ¶49.]

25. NEW TRIAL ¶49—MISCONDUCT OF PARTY.

Whether the act of plaintiff's agent during trial in giving a juror a cigar was misconduct justifying new trial does not depend only on the intention with which the cigar was given, or whether he knew the donee was on the jury, but rather on the impression the occurrence would make on the mind of the juror.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 97-99; Dec. Dig. ¶49.]

26. APPEAL AND ERROR ¶1026—HARMLESS ERROR.

The Supreme Court can only reverse for prejudicial error appearing upon the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030; Dec. Dig. ¶1026.]

27. APPEAL AND ERROR ¶978—DISCRETIONARY RULINGS—NEW TRIAL.

Where the appellate court cannot say from the record that the ruling of the trial court on its motion for new trial on account of the alleged misconduct of plaintiff's agent with a juror abused its discretion or erred in denying the motion, the ruling will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. ¶978.]

Error to District Court, Laramie County; William C. Mentzer, Judge.

Actions by Rachael E. Gray against the Stockgrowers' Bank of Wheatland. To review a judgment for plaintiff and to review a denial of its petition after term to set aside the verdict and judgment and for new trial, defendant brings error. Judgments affirmed.

See, also, 22 Wyo. 482, 144 Pac. 294.

Marion A. Kline, of Cheyenne, and O. O. Natwick, of Wheatland, for plaintiff in error. John D. Clark, of Cheyenne, for defendant in error.

SCOTT, J. These cases are docketed as separate cases, although they grew out of the same litigation and will be considered in this opinion in the order of their docket number. The bank was the defendant below and will here be referred to as the "bank," and Rachael E. Gray was plaintiff and in both cases will be referred to as such. Rachael E. Gray brought the action in the court below to recover damages for alleged negligence of the bank in excavating its lot which adjoined plaintiff's lot on which there was a one-story brick building, and causing the wall of her building to fall, to her damage. The issues were tried to a jury, which found a general verdict in plaintiff's favor, assessing her damages at the sum of \$5,540, and at the same time returned answers to certain interrogatories which the court submitted to them at the request of the bank. Judgment was rendered upon the verdict, and the bank brings error.

[1, 2] 1. The bill of exceptions when first filed failed to disclose certain exceptions, among which was the exception to overruling the motion for a new trial, an exception to the refusal to give certain instructions requested by the defendant, and exceptions to the giving of certain instructions over the bank's objection and exception, as a predicate for this court to permit the withdrawal of the bill and present the same to the trial court for amendment in accordance with the facts. Permission was accordingly granted. 22 Wyo. 482, 144 Pac. 294. The trial court permitted the proposed amendments in part and denied them in part. The plaintiff now moves to strike the amendments so allowed from the bill. It is unnecessary to enter at any great length into the discussion of this question, for, if it were not prejudicial error to have allowed the amendment, we would be precluded from disturbing the judgment on that ground. It is conceded and no question is here urged that the amendment carrying the exception to the overruling of the motion for the new trial into the bill by amendment was properly allowed. The requests, objections, and certain exceptions in the matter of the instructions were carried into the bill upon proof independent of verbal testimony or the recollection of the judge. Among other matters which it was sought by the motion was to amend the

bill so as to make it appear that all of the affidavits in support of and in opposition to the motion for a new trial were included in the bill. The court refused to make this amendment upon the ground that it had no sufficient memoranda upon which to base the same. It appears that the lower court predicated its action in allowing the amendments upon the record, files, and what appeared therein, and in no instance relied upon the memory of a witness or his individual recollection, and, that being so, we are of the opinion that that court acted clearly within its power, and for that reason the motion is denied.

2. It is assigned as error that the general verdict and special findings are not supported by the evidence, are contrary to law, and that the court erred in admitting certain evidence over defendant's objection. These assignments involve an examination of the evidence and for convenience may be considered together. The special interrogatories were submitted to the jury at the bank's request, and the jury returned answers to all but the second and fourth. The interrogatories so submitted and answers, in so far as the jury made answers thereto, are as follows, viz.:

"(1) Did Charles Goodrich and Frank Windom have a contract with the bank for the erection of the new bank building? No.

"(2) If your answer to the above question is 'yes,' state whether the making of the excavation on the bank's lot was included in the terms of said contract. No answer.

"(3) Did the bank have any control of the mode or manner in which said Goodrich and Windom were to do the work, other than to accept or reject the work as being in compliance or noncompliance with the terms of the contract? Yes.

"(4) Were the plans and specifications for the bank building sufficient to secure a safe construction of said building, including the making of the excavation? No decision.

"(5) Were Goodrich and Windom careful and prudent contractors? No.

"(6) Was the work of excavating for said cellar a work that was necessarily dangerous to plaintiff's building situated on the adjoining lot? Yes.

"(7) Did plaintiff or her agent, Irad W. Gray, have knowledge of the proposed excavation to be made on the bank's lot, before said excavation was begun? No.

"(8) Did Mr. Goodrich notify Mr. Gray that they were going to excavate at or about the time such excavation was begun? Yes.

"(9) Was reasonable and ordinary care used in making the excavation on defendant's lot? No.

"(10) Would the soil of plaintiff's lot have slipped and fallen into the excavation, if there had been no building erected on plaintiff's lot? No.

"(11) If your verdict is for the plaintiff in any amount, please answer the following additional questions: (a) What amount, if any, do you allow plaintiff as damages for injuries to her building? \$1,240. (b) What amount, if any, do you allow plaintiff as damages for injury to her furniture and fixtures? \$500. (c) What amount, if any, do you allow plaintiff as damages for injury to her stock in trade? \$3,200. (d) What amount, if any, do you allow plaintiff as damages for injury to her business? \$600."

[3-9] Of course, if there was no contract with Windom and Goodrich for the erection of the new bank building as found by the jury, they were not independent contractors, but employes merely of the defendant and doing the work under the latter's supervision. Nor is the mere fact that they were contractors sufficient to give them the character of independent contractors, or that they were treated as such unless the contract itself is susceptible of such construction, and even then if, notwithstanding the terms of such contract, the bank did in fact retain control and supervision of the work, any negligence resulting in injury would be imputable to the bank. The evidence tends to show that Windom submitted a written bid to construct the new bank building in accordance with the plans and specifications, and which bid was accepted on June 28th and a contract was ordered drawn up; but there is no evidence of any final agreement until in August after the accident, and that agreement does not appear in the bill, nor is it shown whether signed by Windom alone, or by Windom and Goodrich jointly, or by whom. The burden was on the defendant to prove the contract as alleged. The bank alleged as a defense that on or about June 15, 1912, through its authorized agents, it entered into a contract with Charles Goodrich and Frank Windom, independent contractors, by the terms of which said contract the said Goodrich and Windom agreed to erect for said defendant on its ground a new brick building according to certain plans and specifications. This is the only contract pleaded and relied upon, and, as the plaintiff was not a party thereto, we think to be of any effect as against third parties the defendant should be held to strict proof. There is no such contract proven, nor any contract shown to which the said Goodrich was a party. Within the issues and on this evidence, the jury could reasonably find that there was no contract with Windom and Goodrich to erect the building, although there may have been a contract with Windom alone to erect the building, the evidence of which consisted of the plans and specifications, the bid alone of Windom based thereon, and the acceptance of the bid by the bank. But whether the defendant let the contract to Windom alone, or to Windom and Goodrich as joint independent contractors, it could not escape liability if it was negligent in letting the contract to unskillful and careless contractors whose unskillfulness and carelessness resulted in the injury. In such case, the proximate cause of the injury would be imputed to the negligence of the defendant in procuring the work to be done by such negligent, careless, and unskillful contractors or workmen. The question as to whether Windom and Goodrich were careful and prudent contractors, and further that reasonable and ordinary care was not used in mak-

ing the excavation, was submitted to and found by the jury. Upon this question the court correctly gave the law in instruction No. 12, in which the jury were told what constituted an independent contractor and that if the jury should so find, and further found "that the work which said contractors agreed to do was not in its nature dangerous to the adjoining property, if done with reasonable care, and that such contractors were skillful and careful contractors, then the defendant cannot be held liable for any injury resulting to plaintiff in consequence of the negligence of said contractors or any of their employes in making said excavation."

[10-12] The lots of the respective parties were adjoining and parallel running north and south and facing to the north; the Gray lot being more particularly described as the west 25 feet of the east 50 feet of lots numbered 11, 12, 13, and 14 in block numbered 66 in the town of Wheatland in the then county of Laramie, now county of Platte, state of Wyoming. For many years both lots had been occupied for business purposes, and at the time of the injury complained of Mrs. Gray had a one-story brick store building on her lot, the east wall of which was close to the east line of her lot, which was also the west line of the bank's lot. There was no cellar under, and the foundation of the Gray store building was brick and had been built in a trench 12 inches deep and extended 12 inches above ground at the time of its construction. In June, 1912, the bank moved the old bank building from the lot out into and across the street, and on July 3d, following, commenced to excavate for a new bank building on the lot, which proposed new building, according to the plans and specifications, was to run 75 feet parallel, or practically so, with the foundation of the Gray building and to be sunk to the depth of 8 feet for concrete cellar walls and for foundation. The excavation was made by teams, plows, and scrapers, and when at the noon hour of July 5, 1912, a depth of about 5 feet had been reached, the earth caved from the Gray lot and the building thereon collapsed, resulting in loss to Mrs. Gray and further damage to her furniture, fixtures, and stock of merchandise contained therein.

The issues tendered by the pleadings were: First, as to whether the contractors were independent contractors, or whether the bank and they bore the relation of master and servant; second, whether the plaintiff was negligent in failing to shore up and protect her own building; third, as to whether the injury resulted through the unskillfulness and negligence of the bank or its agent in the matter of making the excavation. As to whether it was safe to dig the earth to the depth and length and flush or nearly so with the wall of the Gray building, instead of in sections, in such proximity to the Gray build-

ing and its foundation, was a matter of dispute in the evidence, and the jury found adversely to the bank's contention. There is not, nor could there be, any question of the bank's right to construct its building having due regard to the rights of the adjoining lot owner. It is not the right to construct the building at all which is here questioned, but the manner of making the excavation whereby it is alleged that the lateral earthen support to the foundation of the adjoining wall was withdrawn so that the earth caved and the building collapsed. Of course, if no duty was imposed on the bank to make the excavation in an approved and workmanlike manner so as to minimize the danger to the adjoining lot owner or occupant of the latter and of the superstructure thereon or to give timely notice to them of the character and extent of the excavation within which to protect the superstructure from impending danger either inherent or by reason of fault in the manner of making the excavation, there could be no recovery upon the facts in the case. If such were the law, there would be no redress for this or similar injuries and resulting damage. Such, however, is not the law. One cannot escape liability for damages to another which results from his own negligence and that of its or his employes, and if they were so unskillful, careless, and negligent in the performance of their work, which carelessness and negligence resulted in the injury, then the jury would be justified in finding and assessing such damage against the bank. The evidence was conflicting as to the skill and ability of the excavating builders and was gone into at great length. There was evidence tending to show that they had been engaged in erecting buildings in the vicinity of Wheatland for several years, and that they had made excavations like and in the same manner as the one here in the clay soil which prevailed in that vicinity and which soil stood without caving, and that noticeably, in one case across the street from the excavation of the cellar for the bank building, they theretofore had made an excavation several feet deep for the Coors building close to and parallel to the foundation and without injury to the wall of an adjoining two-story frame building which was being used as a hotel. We think the evidence as to that excavation, even though introduced by the bank, may well have been taken by the jury as showing the contractor's want of care in taking great risk that the adjoining wall would stand, and, as already stated, one of the issues for trial was the care and skill of the contractors. There was evidence to the effect that the proper manner and approved method of making the excavation for the foundation of the wall of the bank building and to have preserved the lateral support of the Gray lot and building was to have removed the earth in sections and filled

in the concrete foundation and wall in sections, and not to have made or tried to make the excavation its full length and depth before putting in the concrete or other proper supports. It is unnecessary to follow this line of discussion further. Upon all these issues, the evidence was conflicting, and we think there was sufficient evidence to support the verdict in that respect.

[13] As already stated, the court, at defendant's request, submitted the following, among other, interrogatories to the jury, viz.:

"(6) Was the work of excavating for said cellar a work that was necessarily dangerous to plaintiff's building situated on the adjoining lot?" To this interrogatory the jury answered, "Yes."

Defendant now contends that the court committed error in submitting this interrogatory to the jury on the ground that it was outside of the issues made by the pleadings. The issue was raised in the evidence without any objection, and, if it was error to have submitted the question to the jury, it was in the nature of invited error, of which defendant cannot complain.

The fifth interrogatory was directed to the issue as to whether the bank used care or was negligent in selecting its contractors. It was the duty of the bank to select careful, prudent workmen in the line of work involved. Like the sixth interrogatory, this inquiry was submitted to the jury at the request of the defendant, and it cannot now be heard to complain that the issue was submitted in the form of an interrogatory, or that the issue was not within the pleadings.

[14-15] 3. It is contended that the court erred in permitting the witnesses Irad W. Gray and John Falls to testify, and its refusal to strike out the testimony as to an alleged conversation had between the said Irad W. Gray and one D. Miller, before any evidence had been introduced to show that the said D. Miller who was vice president of the bank and was known to Gray to be such officer, had any power or authority to bind the bank by any promise that he might make, and before it was proven or shown by the evidence that the bank had any power or authority under its articles of incorporation to enter into any agreement or to make any such promise as the said D. Miller was alleged to have made. The order of proof is not ordinarily material so long as that some time during the trial the evidence is connected up by other competent evidence. The evidence to which objection was made tends to show that the conversation took place on the morning of July 4th, and in which Mr. Gray protested to D. Miller, who was on the ground, as to the manner of making the excavation and that he was afraid the wall would fall, and that Miller responded:

"We have got to put this excavation right flush with your wall, because we are going to

build a frame here—and he showed me how—and fill it with concrete, and we will have to go flush up with your wall in order to build the frame there and fill the concrete in. But we will take care of your wall. I will guarantee that we will not damage your wall. We will take care of it. We will take care of it with props and braces.”

Conceding that this evidence failed as an express or original undertaking of the bank by reason of failure to show authority of Miller as agent to bind the bank, yet evidence of this conversation and agreement, in connection with other evidence in the case, cannot be deemed to have been prejudicial to the bank, in view of the other findings, for the reason that it neither enlarged nor imposed any greater obligation or duty on the bank than existed at the time of such conversation. The action was not for breach of contract, but for negligence of the bank, and which negligence is claimed to have been the proximate cause of the injury. The rule of *ultra vires* has no application in actions for tort. 10 Cyc. 1207. The bank was under a legal duty to give due and timely notice to the plaintiff to protect her building, and it is conceded that such a notice to her agent would have been sufficient of the proposed construction of the new bank building including the excavation. By “timely notice,” we mean notice for a reasonable time preceding the proposed excavation for plaintiff to take the necessary measures to protect the wall and foundation of her building, and proof of her failure to do so would not prove contributory negligence unless the time was sufficient for that purpose, and the jury were in effect so instructed without objection. There was evidence to the effect that the work which would have been required to properly shore and prop up the wall of her building and render it safe and secure would have been six or seven days. It may be conceded upon the evidence that plaintiff and her agent had knowledge of the proposed excavation to be made on the bank’s lot before the excavation was commenced and the jury by their answer to interrogatory No. 8 found that Mr. Goodrich, one of the alleged contractors, did so notify Mr. Gray that they were going to begin to excavate at or about the time such excavation was begun. Such notice was only two days before the wall fell, one of which days was a legal holiday. It was the alleged negligent manner in which the excavation was made, in view of the conditions and surroundings as disclosed by the evidence, that is here complained of. Notice that the excavation was to be made was not notice that it would be made in a negligent manner, but that ordinary and reasonable care and prudence would be used and that the excavation would be made in a workmanlike manner. As to timely notice or when knowledge came to plaintiff was a material issue made so by the pleadings, it being alleged by the bank in its answer, and denied by plaintiff in her reply,

that she knew of the proposed manner of making the excavation long before the commencement of the work, and the evidence of the conversation in which the danger first became apparent to her or her agent of the alleged negligent manner of making the excavation was material and competent to show what and when that fact first became known or apparent to her.

[19-21] The jury found, and the evidence supports the special finding, by their answer to interrogatory No. 9, whereby they found that reasonable and ordinary care was not used in making the excavation, notwithstanding evidence to the effect that Goodrich and Windom had theretofore made the excavation for the Coors building and other buildings in the same character of soil and in the vicinity of and the same as they did in the bank excavation without the soil caving. These cases were not parallel cases to the one here, for there the evidence did not show, as it tended to show in this case, that the soil was soaked and rendered soft with rainwater from the roof and eaves of the old bank and Gray buildings, nor the difference in weight of the material of which the adjoining building was constructed. It was proper to take these facts into consideration as bearing on the question of negligence of the contractor or owner in constructing a building or making improvements, and fixing the degree of care required according to such physical conditions. The ordinary care that is required is the care and skill to meet the conditions which are apparent or known to the owner or contractor at the time of commencing the excavation, and if the excavation or the manner of making it is reasonably liable to injure the adjoining lot, building, or superstructure thereon, the owner is entitled to reasonable notice so that he may protect his property. The excavator cannot rely upon the inherent defects in the construction of the adjoining building, in the absence of such timely notice to the owner so that the latter may protect his own property. Such duty arises out of the nature of the case and a due regard for the rights of others. Such is the trend of modern decisions, although it may be conceded that the earlier English and state decisions were the other way. *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087, 21 Ann. Cas. 1. The bank having on the trial repudiated the conversation complained of or the authority of Miller to bind the bank by a guaranty of safety to the Gray building, and no evidence being introduced by it of timely notice, cannot now be heard to urge that plaintiff was bound by the negligence of the contractors in the manner of making the excavation. It is not the right to make an excavation at all, but the manner of making the one in question, that is here complained of. It is alleged that the excavation was carelessly and negligently made, and in view of the surrounding physical conditions, together

with evidence further tending to show the want of care and the want of skill and workmanship of the excavators, fully warranted and supports the finding of the jury to that effect by their answer to the ninth interrogatory. These issues were all submitted to the jury. We are of the opinion that the verdict, and findings are supported by, and that they are not nor is either of them contrary to, the evidence, nor contrary to the law, and that there was no prejudicial error in the matter of the admission or rejection of evidence.

[22] 4. It is assigned as error that the verdict was excessive and appears to have been the result of passion or prejudice. The jury were required to find the different items of damage and return them separately, and the amounts so found are within the proof, and in the aggregate are within the issues. We discover no indication of the jury acting under prejudice or passion in their finding or in the assessment of damages.

5. There are 72 assignments of error. They are mostly objections and exceptions to the refusal of the court to give instructions requested by the bank and objections to those given by the court. To discuss these alleged errors separately would unnecessarily prolong this opinion, and, in view of the theory upon which the case was tried as disclosed by the record and the discussion already had, we find no prejudicial error, and that the court correctly instructed the jury upon the law of the case, and for that reason we do not deem it necessary to prolong the discussion. Indeed, the case appears to have been carefully tried, and the learned trial judge is entitled to great credit for the ability and care displayed in the trial, both in the matter of ruling upon the evidence and the instructions given to the jury.

[23] 6. The errors assigned and which we have considered are and were raised by the motion for a new trial. After the term at which the case was tried, the defendant sought by a petition to set aside the verdict and judgment, and for a new trial upon the ground of, first, misconduct of the jury, and, second, for misconduct of the prevailing party, the evidence of which is alleged to have been unknown and that it could not with reasonable diligence have been discovered prior to the filing of such petition. Issue was joined, and, the matter coming on for hearing, the court denied the petition, and the bank brings error. The questions presented were issues of fact, and the evidence so far as before this court was conflicting, and for that reason the finding of the court cannot be disturbed.

[24-27] During the hearing upon this peti-

tion, the evidence developed that during the trial the husband of the plaintiff who was acting as her agent in and during the trial, and while leaving the courtroom at a recess of the court and in going down the stairway from the courtroom, took a cigar from his pocket and lit it, and then took another cigar from his pocket and handed it to one of the jurors who was a member of the trial jury. This matter was unknown to the defendant up to this time and was by amendment incorporated in the petition. This conduct was reprehensible, and, for one connected with the case as Mr. Gray is shown to have been, would have been sufficient ground for the trial court to have set aside the verdict; but whether this court sitting as a court of review should do so is another question. This court can only reverse for prejudicial error appearing upon the record. Gray said in his evidence that he had no recollection of the incident, was not acquainted with the juror, and did not know at the time that he was on the jury, but probably did give him the cigar by reason of force of habit and not otherwise. The question does not rest alone upon the intention with which the cigar was given, or the memory of Gray, or whether he knew the donee was on the jury, but rests rather upon the impression if any, the occurrence would make on the mind of the juror. It was a question of fact of which the trial court had original jurisdiction, and the witnesses, including the juror, were before that court during the trial, and that court had an opportunity to see and observe the juror and come to some conclusion as to whether he was or would be likely to have been influenced by the incident or if prejudice resulted to the bank thereby. These matters entered into the question then pending before the trial court, matters which it is obvious cannot be brought into the record and enter into the consideration of the question here. We cannot say from the record that the finding of the court or ruling on this question was prejudicial to the defendant, or that the court abused its discretion or erred in denying the motion, and for that reason the finding and ruling will not be disturbed, especially as the certificate of the trial judge to the amendment to the bill of exceptions recites that he is unable to state whether the bill as amended contains all of the affidavits in support of or in opposition to the application.

For like reasons, other alleged misconduct of the prevailing party cannot be reviewed.

Finding no prejudicial error in the record, the judgment will be affirmed.

Affirmed.

POTTER, C. J., and BEARD, J., concur.

(24 Wyo. 14)

FREMONT LODGE, NO. 11, I. O. O. F. v.
THOMPSON, County Treasurer.
(No. 816.)

(Supreme Court of Wyoming. Feb. 5, 1916.)

1. APPEAL AND ERROR \Leftrightarrow 353—EXTENSION OF
TIME—APPLICATION AFTER YEAR—INSUFFI-
CIENCY.

Where plaintiff in error, more than a year after the judgment appealed from became final, filed its application in the court below for an extension of time to institute proceedings in error, which was granted, and the petition in error was filed within the time fixed by the court, the proceeding must be dismissed, since the application for an extension was not filed within a year after the rendition of the judgment, as required by Comp. St. 1910, § 5122.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1920-1922; Dec. Dig. \Leftrightarrow 353.]

2. APPEAL AND ERROR \Leftrightarrow 353—TIME LIMIT—
EXPIRATION—APPLICATION FOR EXTENSION.

The action of the trial court in granting the extension of time after the year had expired did not operate to revive plaintiff in error's right to proceed in error, since such right had been lost by operation of law and it was not within the power of the trial court to restore it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1920-1922; Dec. Dig. \Leftrightarrow 353.]

Error to District Court, Fremont County;
Charles E. Winter, Judge.

Action between Fremont Lodge, No. 11 of the Independent Order of Odd Fellows, a corporation, and Fred L. Thompson, as County Treasurer and ex officio Collector of Taxes in and for Fremont County, Wyo. From a judgment for the latter, the former brings error. Proceedings in error dismissed.

E. H. Fourt, of Lander, for plaintiff in error. L. E. Winslow, of Lander, for defendant in error.

BEARD, J. The judgment of the district court which it is sought to reverse by this proceeding in error became final June 14, 1913. The petition in error was filed in this court October 7, 1914. The statute (section 5122, Comp. Stat. 1910) is as follows:

"No proceeding to reverse, vacate, or modify a judgment or final order shall be commenced unless within one year after the rendition of the judgment, or the making of the final order complained of: * * * Provided, however, that the court rendering such judgment or making such final order upon application of the party desiring to institute such proceeding and upon making to said court a sufficient showing that said party will be unavoidably prevented from instituting such proceeding within said time, shall, by an order duly entered of record, give to said party a reasonable extension of time, not exceeding eighteen months, within which to institute such proceeding."

[1, 2] It is perfectly clear that the proceedings in error in this case were not commenced in time, unless they come within the provision for an extension of time beyond the year. It appears from the record that on September 29, 1914, on the application of plaintiff in error, the judge of said court, at

chambers, made an order extending the time for instituting such proceedings until November 14, 1914. That order was made long after the year allowed for commencing proceedings in error had expired, and, unless it had the effect of reviving such right, this proceeding was not instituted in time, and this court is without jurisdiction. In *Casteel v. State*, 9 Wyo. 267, 62 Pac. 348, this court construed a similar provision with reference to extending the time for filing a motion for a new trial. That statute (section 5416, R. S., now section 6287, Comp. Stat. 1910) provided:

"An application for a new trial shall be by motion upon written grounds, which shall be filed at the term the verdict is rendered, and * * * shall be filed within three [now ten] days after the verdict was rendered, unless additional time be granted by the court upon good cause shown."

Mr. Justice Corn, in delivering the opinion of the court, said:

"The statute requires that the motion shall be filed within three days after the verdict was rendered. This court has no power or authority to disregard or set aside this provision. It is mandatory and binding upon us, and no authority is lodged in this court to change or modify its requirements. The exceptions to its operation are clearly set out in the statute itself, and ample provision is also made for obtaining additional time in cases where a proper showing is made to bring to the knowledge of the district court that additional time is necessary. Where a defendant has suffered the time to elapse without * * * any application to the court for additional time, his right is lost, and it is not in the power of this court or the district court to restore it in the face of the statute. * * * The utmost that can be inferred from the record is that after the expiration of the time, and when the defendant's right was barred by the statute, application was made to the court to permit the filing of the motion in disregard and violation of the statute. This the court had no power to do. The right of the defendant was lost by operation of law, and the court had no power to restore it."

In that case the party had but three days within which to file his motion or to apply for an extension of time, while in this case the plaintiff in error had an entire year within which to commence his proceeding or to apply for more time. It did neither until more than three months after its right was barred by the statute. The right was lost, and could not be restored by a subsequent order of the court or judge. In *Caldwell v. State*, 12 Wyo. 206, 74 Pac. 496, this court said:

"The law is well settled that, while an appeal may be a matter of right under the statute, yet the right given by the statute must be exercised under its provisions, and the essential acts required to effect an appeal must be performed within the time prescribed."

And in *King v. Penn*, 43 Ohio St. 57, 1 N. E. 84, it is said:

"That the commencement of a proceeding in error within the time prescribed by law is essential to clothe the reviewing court with jurisdiction to hear and determine it is too well settled to justify further discussion [citing cases]. It follows that the parties may not by private

agreement or consent, nor by voluntary appearance, confer upon this court power to hear and determine a proceeding in error commenced after the time expressly limited therefor."

While the right exists, the statute authorizes the district court to extend the time within which it may be exercised; but, when the right is lost by operation of law, there is no power vested in the court to restore it. The right to bring proceedings in error having expired on June 14, 1914, the order of September 29, 1914, did not restore that right. The proceedings not having been brought within the time allowed by law, this court is without jurisdiction, and therefore the proceedings in error are dismissed by the court on its own motion.

Dismissed.

POTTER, C. J., and SCOTT, J., concur.

(89 Wash. 335)

ANGELES BREWING & MALTING CO. et al. v. CARTER et al. (No. 12612.)

(Supreme Court of Washington. Jan. 19, 1916.)

1. COLLISION \Leftrightarrow 42 — INJURY TO VESSEL — NEGLIGENCE—EVIDENCE.

In an action by the owners of a steam vessel for damage sustained by her in collision with defendants' steam vessel, caused by the meeting of the vessels, evidence held sufficient to support a finding that defendants' vessel was negligent.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 42; Dec. Dig. \Leftrightarrow 42.]

2. COLLISION \Leftrightarrow 124—DAMAGE TO FREIGHT—SHIPMENT INVOICE—ADMISSIBILITY.

On arriving at the damages to freight in such action, duplicate invoices of the freight lost, furnished by the shippers showing the price of the freight, were properly allowed in evidence in the absence of a showing that the shippers' claims were fraudulent or that the prices were in excess of the actual value of the freight.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 262-265; Dec. Dig. \Leftrightarrow 124.]

3. COLLISION \Leftrightarrow 130—DAMAGES—REPAIR AND FREIGHT CLAIM PAYMENTS—INTEREST.

The allowance of interest on the amounts paid out for repairing and refitting plaintiff's vessel and paying claims for such lost and damaged freight from the date on which such repairs were completed and her run resumed, as an average day from which to compute interest, was improper and should have been allowed in each instance from the date of payment, since plaintiffs had use of the money until such date.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 284; Dec. Dig. \Leftrightarrow 130.]

Department 2. Appeal from Superior Court, King County; Vivian M. Carkeek, Judge.

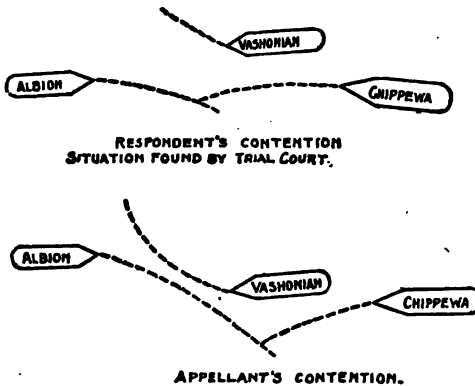
Action by the Angeles Brewing & Malting Company and G. M. Lauridsen, its receiver, against H. Carter, the Inland Navigation Company, and the Puget Sound Day Line. From a judgment for plaintiffs, defendants appeal. Reversed.

Bronson, Robinson & Jones, of Seattle, for appellants. A. W. Buddress, of Seattle, for respondents.

MORRIS, C. J. [1] This is an action by the Angeles Brewing & Malting Company and its receiver, owners of the steamer Albion, to recover damages for injury incurred by that vessel in a collision with the steamer Chippewa off West Point, near Seattle. From a judgment in favor of the plaintiffs, the defendants have appealed. The facts as to the collision are well stated by the trial court in his opinion, which we adopt, italicizing those portions over which the parties are in dispute. The accompanying diagram, although somewhat exaggerated and not drawn to scale, will also assist in an understanding of the situation.

The steamer Albion left Seattle at about 10:30 o'clock on the evening of August 2, 1910, bound for Port Angeles. The same evening the steamers Vashonian and Chippewa were coming to Seattle from down the sound. After turning Four Mile rock, the Albion was steering a course of north north-west, the steamer Vashonian was approaching the Albion and steering a course of south southeast, and the Chippewa was approaching the Albion and steering a course of south by east, and was therefore on a course that was nearly parallel with the Vashonian, but the Chippewa was considerably astern. All the vessels had the regulation lights, and the lights were properly burning. When the Albion turned Four Mile rock, the cabin lights of both the Chippewa and Vashonian were visible to her. The vessels mentioned continued to approach each other upon opposite courses until the Vashonian was ahead and to the port of the Albion, approaching the Albion, and when at a distance of some 500 feet the Albion blew one whistle and ported her helm three-quarters of a point. The Vashonian answered with one whistle and ported her helm three points. This gave her a heavy swing to the starboard and enabled both boats to pass each other with safety. At this moment the Chippewa, which had been coming astern and had about overtaken the Vashonian on her port quarter, blew two whistles as a signal to the Vashonian that it was the intention of the Chippewa to pass to the Vashonian's port, and immediately on blowing the two whistles the captain of the Chippewa starboarded her helm three-quarters of a point. Up to this time the Chippewa had not seen the Albion, but *was first aware of the proximity of the Albion by her red or port light coming into view as the Vashonian swung three points to the starboard.* After blowing the one whistle and then hearing the Chippewa's two whistles, known to pilots as a cross-signal, the Albion blew four whistles, the danger signal, and stopped and reversed her engines. After she stopped and reversed, she reversed a second time and stopped. The Chippewa, realizing that a collision was imminent, began to port her helm in an effort

to pass astern of the Albion and between the Vashonian and the Albion, and in doing so struck the Albion about amidships, inflicting the injuries which the plaintiffs complain of and for which they seek to recover from the defendants.



The crucial point of dispute in the case concerns the position of the Albion and the Vashonian just before the collision. The trial court found that the two vessels approached port to port, which is the respondents' contention. The appellants, however, contend that the Albion was on the starboard bow of the Vashonian, which would make the approach starboard to starboard. If this is true, then the Vashonian was directly between the Albion and the Chippewa, and the former was not visible to the latter, unless she could be seen over the upper works of the Vashonian. If, however, the Vashonian was to the port of the Albion, as found by the trial court, then the Vashonian being on the starboard of the Chippewa, which is undisputed, the Chippewa had an unobstructed view of the Albion, and failure to see her could be attributed only to the negligence of the Chippewa. The witnesses do not agree on this point. Those on the Albion at the time testified positively that the Vashonian was on her port bow, while Mr. Jackson, master of the Vashonian, testified that the Albion was on his starboard and crossed his bow. The evidence was sharply conflicting, but we are not prepared to say that the facts as found by the trial court are not supported by a preponderance of the evidence. The appellants, however, contend that the findings as to the facts of the collision, which are practically a copy of the opinion, are inconsistent and do not support the conclusion that the Albion's lights were not obscured from the Chippewa, and could have been observed by the exercise of reasonable diligence on her part. These claimed inconsistencies are stated as follows: If the Albion's lights came into view from behind the Vashonian so as to become visible to the Chippewa, as found by the court, then the Vashonian being on the Chippewa's starboard bow, it necessarily follows that the Albion was also on the Chippewa's starboard

bow, contrary to the finding that she was on the port bow. Also, if the Vashonian ported her helm and took a heavy swing to starboard to pass the Albion, it necessarily follows that the Albion was not on the port side of the Vashonian. On the other hand, if the Albion was on the port side of the Vashonian and ported her helm sufficiently to swing her three-quarters of a point to starboard, and if at that time she was, as is claimed, dead ahead of the Chippewa, which was passing distance to the port of the Vashonian, there was then no necessity for the Vashonian to make any swing to starboard. The trial court, however, adds that the Albion did not change her course to pass the Vashonian. But though this may be so, it is also apparent from the finding that the Vashonian had to swing 33 degrees around the circle to pass to port of the Albion, which means that they were approaching starboard to starboard. The court further found that the Albion was approaching the Vashonian and the Chippewa both port to port, and that the Albion at all times had the right of way. Such a finding as to right of way can only be made upon the assumption that the Albion was crossing the courses of the Vashonian and the Chippewa, having them upon her port side.

Although these findings may appear at first to be inconsistent, upon closer examination we do not find that they are irreconcilable with the previous findings. None of them are the basis for the finding that the Albion was on the port bow of the Vashonian, on which the finding of negligence must rest. The finding that the Chippewa was first made aware of the proximity of the Albion when the Vashonian swung to starboard is not necessarily a finding that the Albion was not in plain view of the Chippewa prior to that time, nor is the finding that the Vashonian swung three points to starboard conclusive proof that such a maneuver was necessary to enable her to pass the Albion in safety. The determination of which vessel had the right of way is unnecessary to a finding that the collision was due to negligence on the part of the Chippewa, since it is admitted that, when the Chippewa and the Albion discovered that there was a misunderstanding of intention, both vessels displayed proper seamanship, and that finding does not militate against the essential finding that the Albion was on the port bow of the Vashonian. Construing the findings as a whole, we fail to see wherein they are defective.

Appellants apparently find no fault in the rule of law applied by the trial court. That, under the facts as found by the trial court, the failure by the Chippewa to observe the lights of the Albion constitutes negligence as a matter of law is fully supported by the cases relied upon. *The Gazelle* (D. C.) 33 Fed. 301; *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *Brigham v. Luckenbach* (D. C.) 140 Fed. 322.

[2] Appellants, however, except to that portion of the judgment which was allowed as compensation for freight damaged in the collision, for the reason that the allowance made was the price of the freight lost, as shown by the duplicate invoices furnished by the various shippers in response to a request sent out by the adjusters of the cargo. These invoices were admitted over objection that they did not show the value of the goods lost, but in the absence of some showing that the shippers' claims were fraudulently made or that the prices were in excess of the actual value, the invoices were competent evidence of the actual value of the goods lost and the amount paid by the respondents on that account.

[3] Objection is made to the allowance of interest from October 2, 1910, the date on which the repairs on the Albion had been completed and she was returned to her run. The finding on which the judgment for interest was given is as follows:

"All of the repairs, refitting, refurnishing, and adjustments occasioned by the collision were made by and the boat returned to her run on October 2, 1910, and this is an average date from which to compute interest."

The damages allowed by the trial court were based on the amounts paid out by the respondents in repairing and refitting the boat, and in paying the claims for lost and damaged freight. These amounts could be determined by computation, and interest should be allowed from the date when a right to reimbursement arose. But as the award was to reimburse the respondents for money paid out, interest should not be allowed prior to the date of the original payment, as respondents had the use of the money until that time. The record does not disclose when the various payments were made, and we are unable to determine what would be a proper allowance of interest. Exhibit I is a bunch of vouchers for disbursements made on account of freight lost. The first of these vouchers shows payments of \$1,648.76, but no dates on which the claims were paid are given. Mr. Janecke, receiver of the brewing company, testified that it was probably a year and a half (evidently from the date of the collision) before these claims were paid in full. Other vouchers show payments between November 3, 1910, and September 23, 1911. Exhibit J, which consisted of vouchers for payments made for repairs, is not before us, and we find no testimony as to when these items were paid.

The judgment will therefore be reversed, and the cause remanded, with directions to the trial court to allow interest on the various amounts paid out by the respondents, on which a recovery was allowed, from the dates of their several payments.

FULLERTON, CHADWICK, and ELLIS, JJ., concur.

(89 Wash. 342)

STATE ex rel. ANGELES BREWING & MALTING CO. et al. v. SUPERIOR COURT FOR KING COUNTY et al. (No. 12743.)

(Supreme Court of Washington. Jan. 19, 1916.)

1. APPEAL AND ERROR \S 91 — ATTORNEY'S LIEN—OVERRULING MOTION TO STRIKE—APPEAL.

Where, after judgment in an action in favor of the receiver of a corporation, the court removed the receiver and appointed another in his stead, substituting the latter as plaintiff in such action, and B. as attorney for plaintiff, W. and O., attorneys for the former receiver in such action filed a lien on the judgment for services in obtaining it, which the substituted receiver moved to strike, which motion the court overruled on the ground that it was made at an improper time, but without passing on the validity of the lien or the right of W. and O. to file such lien on the judgment, no appeal will lie from the order overruling the motion, since no substantial rights of the parties were affected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 612-641; Dec. Dig. \S 91.]

2. CERTIORARI \S 5—ATTORNEY'S LIEN—MOTION TO STRIKE—APPEAL PENDING—REVIEW.

The court, however, having decided that the validity of such lien could not be determined by a motion to strike, and the motion being ancillary to the case in which the judgment was obtained, which was pending on appeal in the Supreme Court, certiorari was the proper procedure to review the ruling.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. \S 5.]

3. ATTORNEY AND CLIENT \S 192 — ATTORNEY'S LIEN—ENFORCEMENT.

Though Rem. & Bal. Code, § 136, providing for attorneys' liens on judgments makes no provision for procedure to enforce or destroy the lien, the court can adjudicate such lien in a proper proceeding therefor under its power to determine all questions for the judgment as between parties properly before the court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 425-427; Dec. Dig. \S 192.]

4. ATTORNEY AND CLIENT \S 192 — ATTORNEY'S LIEN—MOTION TO STRIKE—NECESSARY PARTIES—NOTICE.

The receiver of a corporation recovered judgment in an action. After his removal and the appointment of a substituted receiver, who was also substituted as plaintiff in the action, the attorneys for the original receiver filed a lien on the judgment, to which the substituted receiver addressed a motion to strike for invalidity. Certain insurance companies who had been subrogated in part to plaintiff's right in the judgment were not made parties to the proceeding, and other parties interested were not given the statutory notice provided for litigants. Held, that the motion to strike being an independent transaction between the substituted receiver and the filing attorneys who were not in court, except through the motion, and the insurance companies not being before the court at all, the motion was properly overruled, since the court could not pass on the validity of the lien where all the parties affected by the judgment were not before the court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 425-427; Dec. Dig. \S 192.]

Certiorari by the State, on the relation of the Angeles Brewing & Malting Company

and S. M. Lauridsen, its receiver, against the Superior Court for King County and Vivian M. Carkeek, as Judge pro tempore thereof, and O. L. Willett and Frank Olson, to review a decision of the court overruling relator's motion to strike an attorney's lien. Demurrer of respondents Willett and Olson to the petition for the writ of certiorari sustained.

A. W. Buddress, of Seattle, for relators.
Edward Judd, of Seattle, for respondents.

MORRIS, C. J. This is an original application for a writ to review an order of the superior court for King county, Vivian M. Carkeek, judge pro tempore, denying a motion to strike an attorney's lien filed against the judgment in *Angeles Brewing & Malting Co. v. Carter*, 154 Pac. 601.

Subsequent to the rendition of the judgment in that case the superior court of Clallam county entered an order removing J. F. Janecke as receiver of the brewing company, and appointing S. M. Lauridsen in his stead. Lauridsen thereupon retained A. W. Buddress as his attorney, and an order was entered substituting Lauridsen as plaintiff in place of Janecke, and Buddress as attorney for the plaintiff. Thereafter Willett & Olson, who had represented the receiver in the *Carter* case, filed in that case a notice of attorney's lien, in which they claimed a lien for \$4,000 on the judgment therein, for their services in obtaining the judgment. Relator Lauridsen thereupon filed a motion to strike the lien, the substance of which is as follows:

"Now come the plaintiffs in this cause and move this honorable court to strike from the records and files in the above-entitled cause the purported 'Notice of Claim of Lien' and the purported claim of lien, dated August 14, and filed August 15, 1914, in said cause, whereby O. L. Willett and Frank Olson, doing business under the firm name of Willett & Olson, as attorneys in the city of Seattle, state of Washington, wrongfully claim a lien upon the judgment rendered in the before entitled cause in favor of the plaintiffs and against the defendant H. Carter, Inland Navigation Company, a corporation, and the Puget Sound Day Line, a corporation. This motion is based on the records and files in said cause, and on the ground that said Willett & Olson have not, nor either of them, any lien upon nor claim to said judgment; that said purported claim of lien was made and filed after the said Willett & Olson withdrew from said cause and A. W. Buddress was substituted in their place and stead as the attorney for the plaintiffs; that no such lien is given nor authorized by law; that said Willett & Olson are barred from claiming any such lien by reason of the fact that they elected to hold one J. F. Janecke individually only for the total amount of all of their alleged demands, including the amount included in said claim of lien, by commencing suit in said superior court against said J. F. Janecke, individually, therefor and obtaining judgment against him for the same in cause No. 103,619 in said court; that said claim of lien was made and filed without any leave of court appointing said receiver, or any other court."

The trial court overruled the motion to strike for the reason:

"That the present is not the proper time to take any such action. No attempt is being made to foreclose the lien, and, from an examination of the records and the decisions, I am of the opinion that the motion is not well taken."

Relator now seeks by certiorari to review this decision. Respondents Willett & Olson appeared, demurred to the petition for want of facts, and also answered.

[1, 2] It is apparent from the views expressed by the trial judge that he did not in any manner pass upon the validity of the lien, nor upon the right of Willett & Olson to file a lien upon the judgment obtained by them in the *Carter* case, and as no substantial rights of the parties were affected, an appeal would not lie from the order; but since the trial judge did adjudicate that the validity of this lien could not be determined by a motion to strike the lien, and as the motion to strike was a proceeding ancillary to the *Carter* case which was at that time pending in this court on appeal, certiorari is the proper procedure to review the ruling. Relator argues entirely in his brief that the lien is void, but as the decision of the trial court touched only the manner of procedure to remove the lien and not its validity, the only question before us is one of procedure, unless we decide that the action taken was the proper procedure to test the validity of the lien.

[3, 4] The statute, Rem. & Bal. Code, § 136, which authorizes an attorney's lien on a judgment, makes no provision for the procedure to be followed in enforcing the lien, nor of any procedure that would destroy it. There can be no question but that, as between the parties to the action in which the judgment was entered, the court has a right to determine all questions affecting the judgment raised by parties properly before the court, in some form of proceeding by which the matters might be properly adjudicated. Our inquiry, then, must be whether the court had before it upon the motion to strike all the parties who would be affected by the action of the court in declaring the lien valid, or in declaring it invalid and striking it. It is not necessary to decide whether the motion to strike would be the proper procedure, if the validity of the lien were determinable from the record before the court, and we express no opinion upon that question, as we find that all the parties interested in the notice were not properly before the court, and that the validity and reasonableness of the lien could not be determined by the procedure adopted by the relator. The judgment in *Angeles Brewing & Malting Co. v. Carter* subrogated the Pacific Marine Insurance Company and the China Traders' Insurance Company "to the rights of the plaintiffs in the sum of \$1,809.20 of the judgment, found in favor of the plaintiffs" by reason of their position as insurers of the hull of the *Albion*. Neither of these companies, both of whom were affected by

the lien, was made a party to the proceeding in which the lien and the motion to strike were filed, and this is an attempt on the part of relator to litigate the validity of the lien by a proceeding in which all interested parties were not before the court; and as to those served, the statutory notice provided for litigants was ignored, and they were compelled to come before the court on six days' notice and have their claim determined in a proceeding in which no evidence could be taken to determine the right of respondents to the lien. Such procedure finds no support in law. As between parties to the suit, the court has the right to determine all issues raised by the pleadings; but the filing of the lien and the motion to strike involved an independent transaction between the new receiver and the former receiver's attorneys who are not in court, except through the motion to strike, and between the insurance companies which are not before the court at all in this proceeding. The lien and the motion concerned a question of debt for services rendered. If the respondents saw fit they could, after filing the lien, bring an action to foreclose and have the right to the lien and its reasonableness determined in any proper forum. The validity of such a lien, and the legality and justice of the claim, are questions which cannot in this instance be determined by a summary proceeding to strike. The lien here was filed in conformity with the statute granting it, and, if the court should deprive the lien claimants of this lien, or declare it reasonable as to parties against whom it might be enforced, in an action in which they were not properly before the court, it would be acting without authority of law and depriving litigants of rights granted them by law.

We are therefore of the opinion that the ruling of the trial court was correct, and the demurrer to the petition for the writ of certiorari is sustained. It is so ordered.

FULLERTON, ELLIS, and MAIN, JJ.,
concur.

(171 Cal. 664)

FILM PRODUCERS, Inc., et al. v. JORDAN,
Secretary of State. (L. A. 4360.)

(Supreme Court of California. Jan. 8, 1916.)
CORPORATIONS §62 — CORPORATE STOCK —
COMMON AND PREFERRED STOCK—"SHARE."

Civ. Code, § 290, subd. 6, permitting the issuance of preferred stock, declares that no preference shall be granted or any distinction made between the classes of stock, either as to voting power or the liability of the holders to corporate creditors. Section 307 gives to stockholders the right to vote to the extent of the number of shares held by each, while section 322 declares that each stockholder shall be personally liable for such proportion of the corporate debts as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock. The capital stock of a corporation was \$1,000,000, divided into 50,000 shares of common stock of the par value of \$1 each, and

47,500 shares of preferred stock of the par value of \$20 each. Held, that the articles of incorporation, providing for such a division of corporate stock, were contrary to the law, for if the shareholders were each allowed to vote according to shares the holders of the common stock would control the corporation, though their capital invested was much less than that of the holders of the preferred stock, "shares" of stock being but representatives of value, while if the shareholders were liable for such proportion of the corporate debts as the amount of their shares should bear to the whole of the capital shares the holders of the common stock would be liable in an excessive amount.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 164; Dec. Dig. § 62.

For other definitions, see Words and Phrases, First and Second Series, Share.]

In Bank. Petition by the Film Producers, Incorporated, for a writ of mandate against Frank C. Jordan, as Secretary of State. Writ denied.

Frank C. Hill, Lynden Bowring, and Geo. S. Hupp, all of Los Angeles, for petitioners.
U. S. Webb, Atty. Gen., for respondent.

HENSHAW, J. Mandate to the secretary of state, who has refused to file petitioners' articles of incorporation, seeking a judgment compelling him to do so.

The secretary's refusal is based upon his conviction that the articles of incorporation do violence to the laws of the state in the following particulars: The capital stock of this corporation is \$1,000,000, divided into 50,000 shares of common stock of the par value of \$1 each, and 47,500 shares of preferred stock of the par value of \$20 each. Our law (Civ. Code, § 290, subd. 6) permits the issuance of preferred capital stock, "provided, however, that no preference shall be granted nor shall any distinction be made between the classes of stock either as to voting power or as to the statutory or constitutional liability of the holders thereof to the creditors of the corporation." Touching the stockholder's liability, section 322 of the Civil Code declares that each stockholder shall be personally liable for such proportion of the corporation debts "as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

The preferences, which in terms the articles of incorporation give to the preferred stock or stockholders, are not in and of themselves in violation of our law. If our law is violated it is because by virtue of the differing par values between the common and the preferred stock, of necessity preference is given as to voting power to the common stock, while as to the stockholder's liability preference is given to the preferred stock. Section 307 of the Civil Code gives to stockholders the right to vote to the extent of the "number of shares" held by each. These sections of the Code thus given embody the law controlling the decision of the question.

Petitioners first contend that no violation is done to the law forbidding distinctions between the voting power of common and preferred stock, in that the law simply declares that each share of stock shall be entitled to its vote, and that under these articles of incorporation each share is so given its right to vote. This is unquestionably true. Touching the second position taken by the secretary of state it is argued that when section 322 of the Civil Code uses the words "stock" or "shares," it uses the words interchangeably as meaning the same thing, with the result that each stockholder's liability would be proportioned to the number of shares which he owned, regardless of the par value of the shares. Or, if this be not true, and the words above quoted, used as they are in the alternative, are to be construed as meaning different things, it would then follow that the owner of one share of common stock, who thus owned \$1 of the capital stock of the corporation, would be subjected to one-twentieth of the liability that would attach to the owner of one share of preferred stock, who thus owned \$20 of the capital stock of the corporation. This position would appear to be equally sound.

The difficulty with both of these positions, however, is that they take no account of the intimate relation necessarily existing under our law between the right to vote stock upon the one hand and the stockholder's liability upon the other. A brief discussion will show what is meant. "Shares" of stock are but representatives of value. They are but paper evidence of ownership of the capital stock of the corporation, and that ownership is precisely such as the share itself declares it to be. Where a corporation such as this has a capital stock of \$1,000,000, every owner of one preferred share of stock owns twenty-millionths of the capital stock of the corporation. Every owner of one share of common stock owns but one-millionth of the capital stock of the corporation. To say that each of these is a share and that each is given equal representation under the law because each stockholder is permitted to vote each share is but skimming the surface of the question. Each shareholder is entitled to vote in accordance with his ownership of the capital stock. Throughout the whole history of our law all shares of stock in any given corporation have been of identical par value, and no such questions as are here presented, therefore, have arisen or could arise. Every share represented an equal ownership in the capital stock, and it mattered not whether the law spoke of the right to vote or of the stockholder's liability as being based on and proportioned to "the amount of stock" or to "the number of shares."

Reaching into the vitals of the question, therefore, there is a plain distinction in these articles of incorporation made between the

classes of stock in that in one class of stock a single share, representing but one-millionth of the capital stock, is entitled to the same vote that another share representing twenty-millionths of the capital stock is given. Or, to epitomize the consideration, if all of the stock of this corporation is subscribed for at par, stockholders owning the common stock and having but \$50,000 of investment will control a corporation with a capital stock of \$1,000,000, leaving the owners of \$950,000 stock in a hopeless minority. Again we have said that there is an intimate correlation between the voting right and the stockholder's liability. It becomes conspicuous when consideration is paid to the latter question. If it shall be said that in this corporation a stockholder's liability is governed by the proportionate number of shares which he owns then it must result that one who owns a single share of common stock is subjected to the same liability as one who owns a single share of preferred stock, although his investment and ownership in the corporation will be but one-twentieth of that of the man who, with a larger holding, incurs a less liability. Upon the other hand, if it be said that section 322 is to be construed as imposing liability in proportion to the ownership of the subscribed capital stock, then we still encounter the difficulty that the owner of \$20 of the capital stock has a voting power only one-twentieth as great as that of the man who owns but a single dollar's worth of capital stock.

The truth of the matter is that our statutes were framed, and our decisions under them based, upon a capitalization represented by shares of a single par value. The market trading in and the market value of these shares can have no bearing upon the construction of the statutes. It was the clear design of our law that liability should be imposed in proportion to the ownership of the capital stock, and where the shares of capital stock had the same par value it was a matter of indifference whether the law declared that the liability should be in proportion to the owned shares or in proportion to the owned capital stock. The law, however, uses both phrases. When it comes to a stockholder's voting power in a corporation it may not be questioned for a moment but that that fundamental right to vote is based upon ownership of the capital stock as distinguished from shares and not merely upon shares, which are but representatives of value. And as little can it be questioned but that the voting power should be given to the stockholders in proportion to their interest in the capital stock of the corporation.

For these reasons mandate is denied, and the writ discharged.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; SHAW, J.; LAWLOR, J.

(29 Cal. A. 117)

SLYE et al. v. HUNT, Judge of Superior Court. (Civ. 1773.)

(District Court of Appeal, First District, California. Dec. 7, 1915. Rehearing Denied by Supreme Court Feb. 3, 1916.)

1. EXCEPTIONS, BILL OF \S 42—DELAY IN SETTLEMENT—WAIVER.

Where plaintiff obtained a verdict in December, 1913, on which judgment was entered, and defendant moved for a new trial and perfected an appeal, and, within the time allowed by law, prepared and served a proposed bill of exceptions, to which plaintiff in September, 1914, served proposed amendments not accepted by defendants, and defendants delivered them, together with their proposed bill of exceptions, to the clerk of the court for the judge, the taking up of the settlement in March, 1915, when counsel for both parties were present and participating, without objection to its settlement, was a waiver of any prior delay in the preparation or amendment of the bill, whichever party was responsible therefor.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. \S 72; Dec. Dig. \S 42.]

2. EXCEPTIONS, BILL OF \S 41—SETTLEMENT—LACHES.

In such case, where the court then suggested that counsel try to agree upon the amendments to be incorporated in the bill, and report as to matters on which they could not agree, and counsel for plaintiffs took and retained the original bill with the proposed amendments during the succeeding four months, for part of which time the court was in vacation, and where defendant put the matter of further proceedings for settlement of the bill on the calendar, there was no such laches on the part of defendant as would justify the court in refusing to settle the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. \S 65-71; Dec. Dig. \S 41.]

3. EXCEPTIONS, BILL OF \S 41—SETTLEMENT—BURDEN.

Ordinarily the burden is on the proponent of a bill of exceptions to bring the matter of its settlement to hearing and determination, even after he has left it, with its amendments, with the clerk for the judge.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. \S 65-71; Dec. Dig. \S 41.]

4. APPEAL AND ERROR \S 2—PENDING MOTION—STATUTE.

Where defendants took no appeal from an order denying their motion for new trial after verdict, although they appealed from the judgment and attempted to settle their bill of exceptions, a statutory amendment pending such appeal taking away the right of an independent appeal from an order denying a motion for a new trial and substituting a provision for a review thereof on the appeal from the judgment applied so as to entitle defendants to the benefit thereof; as laws affecting procedure apply to pending cases where no substantial remedies are impaired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3-7, 1882, 2421; Dec. Dig. \S 2.]

Petition by Joseph Slys and others for a writ of mandate against John Hunt, Judge of the Superior Court of the City and County of San Francisco. Writ to issue.

Louis H. Ward and Robert W. Harrison, both of San Francisco, for petitioners. Harold I. Cruzan, of San Francisco, for respondent.

PER CURIAM. This is an application for a writ of mandate, directed to the judge of the superior court of the city and county of San Francisco, requiring him to proceed to settle the bill of exceptions and statement in the case of Julia A. Roberts et al. v. Joseph Slys et al. (No. 52138), now pending in said court.

The facts of the case as they appear from the petition are briefly these: The said action of Roberts et al. v. Slys et al. was commenced in said court at some time during the year 1913, and came on for trial in the month of December of that year, at which trial a verdict was rendered in plaintiffs' favor on December 18, 1913, for the sum of \$4,500, upon which verdict judgment was entered in due course; that notice of intention to move for a new trial was duly given, and that within 60 days after said judgment an appeal therefrom was perfected to the Supreme Court. Thereafter, within the time allowed by law and the stipulations of counsel, defendants prepared and served a proposed bill of exceptions, embracing a statement of the case, consisting of 172 typewritten pages, to which the plaintiffs in due course prepared and served their proposed amendments, numbering 143, and containing some 87 pages of typewriting. Thereupon and in due time the defendants notified the plaintiffs of their nonacceptance of said amendments, and on September 21, 1914, delivered the same, together with their proposed bill of exceptions, to the clerk of the court for the judge thereof, accompanied by a number of affidavits upon which the motion for a new trial was to be made. Thereafter from various causes the settlement of the bill of exceptions, and consequently the motion for a new trial, were delayed for several months, but finally the former came up for hearing on March 24, 1915, and was then taken up by the court, counsel for both parties being present, and no objection to the settlement of the bill of exceptions being made. After the matter of the settlement had proceeded for some time the judge of the court requested counsel for both sides to confer and attempt to agree on certain of the amendments thereto, and report to him as to what could not be agreed upon, and the further hearing of the matter was continued until such report.

It appears that thereafter four months or thereabouts elapsed, during which some ineffectual efforts were made by respective counsel to come to an agreement, and, these having failed, counsel for the defendants caused the matter of the settlement of the bill to be again placed upon the calendar of the court. Thereafter the plaintiffs moved the court to dismiss the motion for new trial on the ground of defendants' laches in prosecuting the same. The matters of the settlement of the bill of exceptions and of the motion to dismiss were upon the law and mo-

tion calendar for August 20, 1915. The court granted the motion to dismiss the motion for a new trial solely upon the ground of defendants' laches in procuring the settlement of their bill of exceptions, and a few days later refused to settle the bill of exceptions and caused the same to be dropped from its calendar.

[1] We think the judge of the trial court should have settled the defendants' bill of exceptions. Whatever delays there may have been in the course of the preparation, proposal, or amendment of the bill prior to the 24th day of March, 1915, or whoever may have been responsible for such delays, the fact that on said last-named day the judge of the court took up and proceeded with the settlement of the bill, counsel for both parties being present and participating in such settlement without objection, constitutes a waiver and cure of previous delays. *Hicks v. Masten*, 101 Cal. 651, 653, 36 Pac. 130; *Horton v. Jacks*, 115 Cal. 29, 35, 46 Pac. 920; *O'Brien v. O'Brien*, 124 Cal. 422, 425, 57 Pac. 225.

[2, 3] On said March 24, 1915, and after the judge and counsel had made some progress toward the settlement of the bill, it appears that the judge suggested to respective counsel that they confer in an attempt to agree upon the amendments to be incorporated in the bill, and that they should at some time thereafter report as to such matters as they might not be able to agree upon. This suggestion was adopted; counsel for the plaintiffs taking, and since retaining, the original bill with its proposed amendments. There is some dispute as to who was responsible for whatever delay there was thereafter and during the succeeding four months; but it appears that during a portion of that time the court was in vacation. It is true, as suggested by plaintiffs' counsel, that the cases hold that ordinarily the burden is cast upon the proponents of a bill of exceptions to bring the matter of its settlement to hearing and determination even after the proponents of the bill have left it, with its amendments, with the clerk for the judge. *Miller v. Queen Ins. Co.*, 2 Cal. App. 267, 83 Pac. 287, and cases cited. The present case, however, presents a somewhat different situation. Here the judge, after proceeding some distance in the performance of his duty in the way of settling the bill, referred the matter to both counsel to confer, agree, if possible, and report back such matters as they could not agree upon to the judge. He thus constituted counsel for both parties in a sense his aids in the duty which was primarily his own, and by so doing invested each with the responsibility of reporting back to him their failure, if any, to agree upon the bill; and this, we think, would be peculiarly true when, as is admitted, plaintiffs' counsel took possession of the partly settled bill with its amendments and retained the same until af-

ter his motion to dismiss the motion for a new trial had been made. It appears, in addition, that it was the defendants' counsel who caused the matter of further proceedings for the settlement of the bill to be placed upon the calendar prior to notice of the plaintiffs' motion to dismiss.

We think these admitted facts make it clear that there was no such laches on the part of the defendants in these later proceedings subsequent to March 24, 1915, as would suffice to justify the judge of the court in refusing to settle the bill of exceptions.

[4] It is, however, contended by plaintiffs' counsel that, the defendants having taken no appeal from the order dismissing their motion for a new trial, no useful purpose can be subserved by the issuance of this writ, to which the defendants respond: First, that they are entitled to use the bill of exceptions upon their appeal from the judgment; and, second, that at the last session of the Legislature the law governing new trials and appeals was so amended as to take away the right of an independent appeal from an order denying a motion for a new trial, but substituting a provision which permits the appellants upon their appeal from the judgment to have reviewed the errors, if any, of the trial court in denying their motion for a new trial. The plaintiff, however, argues that these amendments are not to be construed as affecting pending, but undetermined, motions for a new trial at the time the law took effect. No authority is cited in support of this contention; and we are satisfied that the rule is well settled that such changes in the law affecting procedure apply to cases pending and conditions existing at the time the statutes take effect where no substantial remedies are impaired. This being so, the defendants are entitled to have their bill of exceptions settled and to whatever benefits they may derive therefrom upon appeal from the judgment.

It is therefore ordered that the writ issue as prayed for in petitioners' petition.

(29 Cal. A. 111)

SWEET v. RICHVALE LAND CO. et al.
(Civ. 1401.)

(District Court of Appeal, Third District, California. Dec. 3, 1915.)

1. VENDOR AND PURCHASER — REMEDIES OF VENDOR — RECOVERY OF LAND — RIGHT OF ACTION.

Where a contract for the sale of realty provided that the buyer should forfeit all rights upon his failure to comply with its terms, and that the owner should be released from all obligation at law or in equity to convey, and a payment of \$600 due under the contract was not made by the assignee of the buyer in possession, whereupon the owner demanded payment or possession of the premises, both of which were refused, and possession unlawfully withheld from the owner, who had complied and was

ready and willing to comply with all the terms of the contract, such owner had a cause of action in ejectment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837-842; Dec. Dig. § 299.]

1. PLEADING § 208—DEMURRER—SPECIFICATION OF OBJECTIONS.

Where defendants demurred to the complaint on the ground that it did not "state sufficient facts to constitute a cause of action" against them, and that the complaint joined "several causes of action," the demurrer was insufficient as failing to specifically point out the misjoinder of causes of action or of parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513-519; Dec. Dig. § 208.]

1. PLEADING § 208—DEMURRER—SPECIFICATION OF OBJECTIONS.

Defendants' demurrer to the complaint that it was "uncertain and ambiguous" was defective, in that it did not specifically point out the uncertainty and ambiguity.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513-519; Dec. Dig. § 208.]

1. APPEAL AND ERROR § 1039—HARMLESS ERROR—MISJOINDER OF CAUSES.

Any error of the vendor of realty, suing the assignee of the buyer and others in ejectment, in joining a claim for a money judgment for the balance due on the contract of sale, was harmless, where he waived any claim for such money judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.]

5. PLEADING § 248 — AMENDMENT AFTER SUBMISSION—PROPRIETY.

In an action of ejectment by the vendor of realty against the assignee of the buyer and others to recover possession upon a default in payment, the allowance, after submission of the cause, of an amendment to the complaint, which originally showed that by failure of defendants to comply with its terms they had forfeited the right to possession of the land, which alleged that the contract provided that, in the event of a failure to comply with its terms, the buyer should forfeit all right to the property, and the vendor be released from all obligation in law or equity to convey, was not improper, since the amendment did not change the cause of action of the complaint, while the court may allow an amended complaint to be filed to conform with the proof even after submission of the case, though under such permission plaintiff may not file an amended complaint stating new causes of action distinct from those contained in the original complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.]

3. PLEADING § 238—AMENDMENT AFTER SUBMISSION—NOTICE TO ADVERSE PARTY.

The fact that defendants had but one day's notice of the allowance of a formal amendment to the complaint after submission of the cause, which amendment was otherwise proper, was of no consequence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 602, 620-625; Dec. Dig. § 238.]

7. VENDOR AND PURCHASER § 299 — REMEDIES OF VENDOR—ACTION FOR POSSESSION—JUDGMENT.

In ejectment by the vendor of realty against the assignee of the buyer and others upon default in payment, where the contract provided that a default in any of the terms should work

a forfeiture, judgment for the plaintiff for possession of the property necessarily involved judgment of forfeiture by defendants, since the defendants' failure to make a payment, forfeiting their right to possession, was such a default as forfeited all their rights.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 837-842; Dec. Dig. § 299.]

8. COSTS § 47—PERSON LIABLE.

In ejectment by the vendor of realty against the assignee of the buyer and others upon default in payment, where the complaint stated no cause of action against a defendant which had and claimed no interest in the property, judgment for costs against such defendant was improper.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 185-191; Dec. Dig. § 47.]

9. APPEAL AND ERROR § 417—NOTICE OF APPEAL—SUFFICIENCY.

In ejectment by the vendor of realty against the assignee of the buyer and others upon default in payment, though the notice of appeal was not several in form, under the prevailing liberal practice as to such matters, it was sufficient as an appeal by a defendant, against whom the plaintiff stated no cause of action, and who claimed no interest in the property, from the portion of the judgment awarding costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.]

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Lucy A. Sweet against the Richvale Land Company and others. From a judgment for plaintiff, defendants appeal. Judgment affirmed, except as to costs against the named defendant.

J. Oscar Goldstein, of Chico, for appellants. J. R. King, of Gridley, for respondent.

BURNETT, J. The action is in ejectment. The basis of the controversy is an executory contract of sale, the parties thereto being plaintiff and one E. A. Rhinesmith, the latter's interest therein having passed by regular assignment to one John S. Hastings. The complaint alleges ownership and the right of possession of the property in plaintiff; that on the 1st day of October, 1912, said Rhinesmith and plaintiff entered into a contract of sale and purchase of said land (setting out said contract); "that under said contract said defendant took possession of said premises; that said contract provides that, in event of a failure to comply with the terms of said contract, defendants forfeit all right to said property, and said plaintiff is released from all obligation in law or equity to convey said property." Then follow allegations of the various assignments of Rhinesmith's interest terminating in said defendant John S. Hastings, "who is now in possession of said premises." It further appears that a payment of \$600 due under said contract on October 1, 1914, together with interest on deferred payments, was not made; that demand was made for said payment or possession of the premises, but that both

were refused and defendant "unlawfully withholds possession of said premises from plaintiff; that plaintiff has complied and is ready and willing to comply with all the terms of said contract."

[1] That a cause of action in ejectment is thus stated is entirely clear, and the proposition needs no elaboration. It is sufficient to refer to *Halle v. Smith*, 128 Cal. 415, 60 Pac. 1032; *Gervaise v. Brookins*, 156 Cal. 103, 103 Pac. 329; *Empire Investment Co. v. Mort* (Sup.) 153 Pac. 236. The general demurrer of defendants was therefore properly overruled.

[2, 3] Defendants also contend that there was a misjoinder of two causes of action, that is, for the recovery of the possession of the realty, and also of the amount of money due under the contract; furthermore, that defendant Richvale Land Company was improperly made a party defendant to the action. The demurrer, however, was as follows:

"The defendants Richvale Land Company and John S. Hastings, appearing herein by their attorney, J. Oscar Goldstein, demur to the complaint herein upon the grounds: First, that the complaint does not state sufficient facts to constitute a cause of action against the defendants herein; second, that the complaint joins several causes of action in one complaint and is uncertain and ambiguous."

Of course, if said defendants intended to rely upon a misjoinder of causes of action or of parties, it should have been specifically pointed out by the demurrer. Their effort in that regard was equally defective as their assignment of uncertainty and ambiguity. It may be said also that, if a demurrer had been interposed on behalf of said company alone, it probably would have been sustained. It is apparently true that no cause of action was stated against it, but the demurrer was a joint one on the part of said company and Hastings. So also in the subsequent proceedings they were treated by their attorney as sustaining the same relation to plaintiff and to the cause of action, and that the complaint and the evidence were sufficient as against Hastings there can be no kind of doubt.

[4] Another thing to be stated is that plaintiff waived any claim for a money judgment, in fact eliminating that feature altogether from the case. So that, if we concede that there was error in misjoining the said two causes of action, it is quite apparent that it was entirely without prejudice.

[5, 6] One or two other considerations remain to be noticed briefly. After the cause was submitted the court allowed an amended complaint to be filed to conform to the proof, and it is contended by appellants that thereby the cause of action was changed. But in this they are entirely mistaken. It is admitted by appellants that:

"The court had the right and power to allow an amended complaint to be filed to conform with the proof, even after submission of the case."

This practice has, indeed, been approved many times by the appellate courts. It has, however, been held that under such permission:

Plaintiff "is not entitled to file an amended complaint containing statements of new and distinct causes of action not contained in the original complaint." *Bowman v. Wohlke*, 166 Cal. 121, 135 Pac. 37, Ann. Cas. 1915B, 1011.

But a comparison of the original with the amended complaint here shows conclusively that no new cause of action was introduced by the latter. The only change of any moment was in adding the allegation:

"That said contract provides that in event of a failure to comply with the terms of said contract that defendants forfeit all right to said property and said plaintiff is released from all obligations in law or equity to convey said property."

This did not change nor affect the cause of action. The original complaint showed that this contract had been executed, and that by failure of appellants to comply with its terms they had forfeited the right to the possession of the land. Indeed, the cause of action was grounded upon this failure to pay the installments as required by said contract, and all that could be said is that the amended complaint stated the cause of action somewhat more fully than the original. The truth is, as we conceive it, that there was no necessity for filing the amended complaint, but it did no harm; neither was it of any consequence that appellants had only one day's notice of it. Indeed, appellants seem to have relied upon said contract, as they introduced it in evidence, and, of course, they were not prejudiced by an amendment to the complaint which simply added a formal allegation of one of the terms of said contract.

[7] As to the judgment of forfeiture by appellants of all rights under the contract, it may be said that it was necessarily involved in the judgment for possession. The right of possession depended upon the question whether appellants had complied with or violated the terms of said contract. And having found that the payments had not been made as provided, it necessarily followed, under the agreement itself, that the contract was forfeited, and therefore the right of possession of the land destroyed. The two considerations were inseparably connected and the determination of one necessarily involved the other, although the essential purpose of the action was to secure the possession of the land.

[8, 9] The only part of the judgment, it may be said, of which the Richvale Land Company can complain is that awarding costs to the extent of \$24.20. This seems to be unwarranted, since the complaint really states no cause of action against said defendant, and the evidence shows that said company had and claimed no interest in or to said property. The notice of appeal is somewhat defective, not being several in

form, but, under the liberal practice prevailing now, we think it should be held sufficient as an appeal by said company from said portion of the judgment.

The judgment for costs against said Richvale Land Company is therefore reversed, and in other respects the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(29 Cal. A. 92)

ULM v. PRATHER et al. (Civ. 1416.)

(District Court of Appeal, Third District, California. Dec. 1, 1915.)

1. APPEAL AND ERROR §544—RECORD ON APPEAL—SUFFICIENCY.

In an action for a partnership accounting, the court appointed a receiver upon plaintiff's prayer therefor. The transcript on appeal from the order of appointment contained only the complaint, the order, and the notice of appeal, but no bill of exceptions. The order of appointment recited that it appeared from the complaint that plaintiff had a cause of action and that the property was in danger unless a receiver should be appointed. Held that, even if it were conceded that the complaint was insufficient to warrant the appointment of a receiver, the record, in the absence of a bill of exceptions or other showing as to the proceeding had, was insufficient to present on appeal the question of the propriety of the appointment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.]

2. APPEAL AND ERROR §920—SCOPE OF REVIEW—DISCRETION OF TRIAL COURT—PRESUMPTIONS.

In the absence of an affirmative showing that the court abused its discretion in appointing a receiver pendente lite in an action for a partnership accounting, it will be presumed that the court's action was regular, and that the order was made on a sufficient showing of facts, though the facts alleged, taken alone, might not warrant the appointment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714-3721; Dec. Dig. § 920.]

3. APPEAL AND ERROR §634—SCOPE OF REVIEW—MOTION TO DISMISS—AFFIRMANCE.

Where the court acquires jurisdiction of a cause on appeal by the filing of the notice of appeal, and the record brought up fails to show on a mere inspection that the appellant is entitled to relief, the cause must on motion to dismiss be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2829; Dec. Dig. § 634.]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by John W. Ulm against Clarence M. Prather and another. From an order appointing a receiver, defendants appeal. Affirmed.

Taylor & Tebbe, of Yreka, for appellants. B. K. Collier and Tapscott & Tapscott, all of Yreka, for respondent.

HART, J. The plaintiff brought this action for an accounting and thereby a deter-

mination and adjudication of the amount to which the parties to this action are, respectively, entitled, by reason of an agreement of copartnership entered into by and between said parties on the 1st day of June, 1909. Besides praying for an accounting, the complaint asks that a receiver to act pendente lite be appointed by the court to take charge of the partnership property and assets, "to properly protect and care for the same, and, as soon as practicable and for the best interests of all concerned, market the aforesaid property, and the whole thereof, under the directions of the court, accounting to this court herein for the proceeds thereof." The court, accordingly, made an order appointing a receiver, naming one Parshall as such, said receiver immediately qualifying as such by taking the oath of office and entering into and filing an undertaking, with approved sureties, in the sum of \$6,000, the amount fixed by the court. This appeal is brought here by the defendants from the order appointing the receiver.

The complaint discloses that the plaintiff, a resident of Chicago, was the owner of a 2,000-acre tract of land in Siskiyou county, this state, and also owned farming implements and other personal property, which were, at the time the copartnership agreement was entered into, situated on said land; that defendants were also the owners of certain farming implements and other personal property suitable for farming purposes; that, by the agreement referred to, the defendants were to take possession of said land, together with the personal property belonging to both parties, and were to operate, farm, and manage said ranch for the mutual interest and benefit of the parties for the period beginning with the 1st day of June, 1909, and ending on the 30th day of September, 1913; that the returns to come from the operation of the ranch by the defendants as a stock and hay ranch should, after the payment of all necessary expenses in conducting the business of the ranch and of the money used in buying additional stock, tools, implements, etc., and the payment of the principal and interest of any borrowed money or capital used in the business, be divided equally between the parties, either in money or property. It was further agreed that the parties of the second part (defendants) "shall have the right and privilege of using not to exceed seventy-five dollars per month, during each month, of funds produced hereunder, toward defraying their family expenses, which shall be charged against them and against their interest herein," etc.

The complaint alleges that it was mutually stipulated and agreed by the parties to said agreement that the certain personal property heretofore referred to and separately owned by the parties was, as soon as the

agreement was signed, to become the joint property of the first and second parties to said agreement and be equally owned by them half and half, and that any amount due or furnished by the one party over the amount furnished by the other should be considered as money loaned by such party to the coparties, and should draw interest at the rate of 6 per cent. per annum and should be a first lien against such joint property and payable, principal and interest, from the joint sales of such property, or of the proceeds of the ranch, "and that, among the terms of said agreement, any party thereto contributing any amount in excess of the amount furnished by the other party should be considered as having loaned the coparties such amount, and same should be treated as above specified." The complaint further alleges that the plaintiff, under the provisions of the said agreement, has received the total sum of \$1,520, only, and that, excepting a lot of alfalfa seed of the value of \$73.80, he has never received any other or additional amount as his share of the proceeds of the said agreement or the profits derived from the operation of said ranch; that the amount of the advances made by the plaintiff under the said agreement during the life thereof, including interest thereon at the rate of 6 per cent. per annum, is the sum of \$3,289.70; that the amount received by the defendants under the provision of the agreement allowing them the privilege of using the sum of \$75 per month during each month out of the funds produced on the ranch is the sum of \$3,850, and that no portion of said sum has been paid by the defendants or either of them to said coparties, "or at all"; that the said agreement and the term of the life thereof expired on the 30th day of September, 1913, and prior to the filing of the complaint herein; that the plaintiff, prior to that date, notified the defendants that he desired a full and complete settlement at the expiration of the term of said agreement of all transactions had thereunder, "and at the expiration of said term of said agreement said plaintiff personally requested said defendants and each of them to comply therewith, but said defendants then refused, and ever since said last-mentioned date have refused so to do." It is alleged that the defendants have removed from the aforesaid ranch a large portion of the joint property of said parties to the aforesaid agreement, without the consent of the plaintiff, "and said plaintiff is, at this time, without definite knowledge as to the status, on September 30, 1913, or at any time since said last-mentioned date, of the business transacted under and in pursuance to the aforesaid agreement; * * * that by reason of the failure, neglect, and refusal of said defendants and of each of them to render to said plaintiff the statements and reports contemplated by the aforesaid agree-

ment, said plaintiff is unable to ascertain the true condition of affairs of the respective parties to said agreement on September 30, 1913, or since said date."

[1] It is contended by the defendants that the case made by the complaint, a substantially correct statement of whose averments is above given, is not sufficient to have authorized the court, under the terms of section 564 of the Code of Civil Procedure, to appoint a receiver to take charge of the property involved in this controversy and to dispose of the same as specified in the order under the directions of the court. This contention assumes, of course, that the order appointing the receiver was wholly predicated on the ex parte showing made by the complaint; but we cannot say, from the record before us, that such was the case, or that there were not other facts presented to the court in the proceeding than those appearing in the complaint.

There is no bill of exceptions in the transcript on appeal. Embodied in the transcript are the following papers and proceedings only: The complaint; the order appointing a receiver; the oath of the receiver; the bonds of that officer; the notice of appeal from the order appointing a receiver; and a stipulation by the attorneys of the respective parties allowing the defendants additional time over that prescribed by law for preparing and serving the transcript on appeal. Embodied in the transcript is also the certificate of the clerk of the court in which he declares that "the foregoing transcript contains full, true, and correct copies" of the above-enumerated documents, papers, proceedings, notice of appeal, stipulation, etc. It does not appear from the clerk's certificate or otherwise from the transcript that the court, in the appointment of the receiver, acted solely upon or at all considered the disclosures made by the complaint relative to the joint property of the parties or its situation, except in so far as the complaint disclosed that a cause of action existed in favor of the plaintiff and the nature of such action; nor is it made to appear by the transcript whether the court did or did not take oral testimony or receive affidavits or depositions in support of the application. In brief, there is, as stated, no bill of exceptions in the transcript and no record in any other form authorizing a review of the action of the court in appointing a receiver. The order appointing a receiver itself contains the only information furnished by the transcript of the proceedings directly culminating in the making thereof, and it cannot be determined therefrom upon what evidence or considerations the court founded its order. The preamble of the order recites that "it appearing to the court from the complaint that there exists a cause of action in favor of said John W. Ulm against said defendants, Clarence M. Prather and Mary L. Prather, and that there is in existence certain property referred to in

said complaint and hereinafter referred to, which is owned jointly by said plaintiff and said defendants, and it further appearing that the aforesaid property is in danger of being removed and the rights of said plaintiff therein jeopardized, * * * and here follows the order appointing one W. R. Parshall as receiver. Thus it will be noted that, as stated, the order itself does not disclose the nature and extent of the proceedings leading to the making of the order, or what constituted the basis of the court's action in making it.

[2] In the absence of an affirmative showing that the court abused its authority in appointing the receiver, the due regularity of the court's action in that regard will be presumed. In other words, there being no bill of exceptions or other record showing upon what evidence the court based its order, the presumption must be indulged, in support of the order, that the court had before it facts sufficient to justify it in making the order, notwithstanding that the facts which are disclosed by the complaint might not themselves, taken alone, be enough to warrant the appointment of a receiver under section 564 of the Code of Civil Procedure.

[3] But what was said by Chief Justice Sullivan, in the very recent case of *Borges v. Dunham* (Sup.) 145 Pac. 1011, is peculiarly pertinent to the record before us and is decisive of this case:

"If we consider the appeal as taken under the old method, it is ineffectual for the purposes of review, because it contains no bill of exceptions showing what papers were used or what evidence was introduced on the motion. If we consider the appeal as taken under the provisions of sections 953a, 953b, and 953c of the Code of Civil Procedure, the appeal is abortive, because appellant, after filing notice of appeal, took no further steps under those Code sections to procure a record to be used on appeal. For the reasons stated, it is impossible with the record before us to review the order appointing the receiver. As the filing of the notice of appeal in the court below, treating the appeal as taken under the new method, conferred jurisdiction upon this court, and as a mere inspection of the record shows that appellant is entitled to no relief, the proper order for this court to make in response to the motion to dismiss is to affirm the order appointing a receiver. *Hibernia Sav. & Loan Soc. v. Doran*, 161 Cal. 118 [118 Pac. 526]."

It follows from the foregoing that the order appointing the receiver must be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(29 Cal. A. 97)

WILLS v. E. K. WOOD LUMBER & MILL CO. (Civ. 1431.)

(District Court of Appeal, Third District, California. Dec. 2, 1915.)

1. FRAUDULENT CONVEYANCES \S 299—SUFFICIENCY OF EVIDENCE—TITLE OF CREDITOR.

Evidence in a wife's suit to quiet title to property alleged to have been purchased with

her money, though the deed was made to her husband, defended on the ground that defendant purchased the property at execution sale on a judgment against the husband, and that, as the husband was insolvent when he conveyed to plaintiff, the conveyance was fraudulent as to existing creditors, *held* to warrant a finding that prior to the conveyance to plaintiff the husband had the legal title unaffected, so far as his creditors were concerned, by any equity of his wife in the property.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. \S 876-890; Dec. Dig. \S 299.]

2. FRAUDULENT CONVEYANCES \S 297—SUFFICIENCY OF EVIDENCE—INSOLVENCY OF CREDITOR.

In such suit, evidence *held* to sustain a finding that on the date of the conveyance to plaintiff by her husband he was insolvent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. \S 891; Dec. Dig. \S 297.]

3. JUDGMENT \S 781 — JUDGMENT LIEN AGAINST GRANTOR AS ATTACHING TO LAND —HOMESTEAD.

Land conveyed by a husband to his wife, without consideration and in fraud of creditors, was subject to the lien of a subsequent judgment against the husband obtained by a creditor, though the wife has filed a declaration of homestead in the land.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. \S 1350; Dec. Dig. \S 781.]

4. BANKRUPTCY \S 207—TRUSTEE'S SUBROGATION TO LIEN—ACTION BY LIENOR—EFFECT.

Bankr. Act July 3, 1898, c. 541, \S 67b, 80 Stat. 564 (U. S. Comp. St. 1913, \S 8651), provides that, when a creditor is prevented from enforcing his rights as against a bankrupt debtor, the trustee shall be subrogated to the creditor's rights for the benefit of the estate: section 67c dissolves judgments entered within four months prior to the filing of the petition in bankruptcy, with the proviso that if the dissolution of such lien would militate against the best interests of the estate it shall not be dissolved, but the trustee shall be subrogated and empowered to perfect and enforce it as the holder might have done had not bankruptcy intervened; and section 67f provides that all judgments against an insolvent within four months prior to the filing of a petition in bankruptcy shall be void in case he is adjudged bankrupt, and that the property affected thereby shall pass to the trustee as part of the estate, unless the court orders the right under such judgment preserved for the benefit of the estate, whereupon it shall pass to the trustee. A judgment creditor, whose lien was dissolved by the debtor's petition in bankruptcy, consented to the trustee's subrogation, and on the trustee's petition for subrogation for the benefit of the estate was authorized to prosecute an action to enforce judgment in the name of the trustee and for the benefit of the estate. *Held*, that the judgment as a preferential lien in favor of the creditor was dissolved, but recognized as a lien for the benefit of all the creditors.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. \S 207.]

5. BANKRUPTCY \S 207—JUDGMENT—SUBROGATION OF TRUSTEE—SUIT.

Although the order in such proceeding in terms authorized the judgment creditor to proceed in the name of the trustee and for the benefit of the estate to annul the bankrupt's voluntary conveyance to plaintiff, his wife, it authorized the judgment creditor to proceed as it might deem best, or to proceed in the name of the trustee, though the method was immaterial,

as any favorable result would inure to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ¶207.]

6. BANKRUPTCY ¶433—DISCHARGE—LIENS.

A bankrupt's discharge releases him from personal liability only, and not from the liens existing against his property, which may be enforced after his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808-823; Dec. Dig. ¶433.]

7. FRAUDULENT CONVEYANCES ¶277—FRAUD—PROOF—STATUTE.

Under Civ. Code, § 3442, making a transfer fraudulent and void as to existing creditors as matter of law, where it is voluntary or without a valuable consideration by one insolvent or in contemplation of insolvency, proof of actual fraud is not necessary.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. ¶277.]

8. APPEAL AND ERROR ¶926—PRESUMPTIONS—CONSIDERATION OF IMPROPER EVIDENCE.

In a suit to quiet title as against defendant, claiming under a judgment against plaintiff's husband obtained on the ground that his prior conveyance to plaintiff had been in fraud of creditors, where the court allowed the husband to testify as to his declarations affecting his insolvency on the date of his conveyance to plaintiff, and, on objection, stated that his declarations subsequent to such conveyance would not be considered, it would be presumed on appeal that the court did as it said it would do.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735-3747; Dec. Dig. ¶926.]

9. HUSBAND AND WIFE ¶69½ — MARRIED WOMAN—SEPARATE ESTATE.

A married woman, not living separate and apart from her husband, and having no claim in her own right to lands, cannot acquire title to it as her separate estate by adverse possession.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 294, 300; Dec. Dig. ¶69½.]

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action to quiet title by Emily Wills against the E. K. Wood Lumber & Mill Company. Judgment for defendant, motion for new trial denied, and plaintiff appeals. Judgment and order affirmed.

Martin Stevens, of San Francisco, for appellant. Martinelli & Greer, of San Rafael, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to quiet her title to a certain lot situated in San Anselmo, Marin county, as against the claims which, it is alleged, defendant makes to the property. Defendant answered, denying plaintiff's ownership, and denying that defendant's claim to the property is without right. Further answering, it alleges: That defendant is the owner and entitled to possession of the property; that on October 8, 1906, and long prior thereto, plaintiff and one Hamilton Wills were and ever since have been and now are husband and wife, and on said day said Hamilton

Wills was the owner, seised in fee and in possession of the whole of said real property; that on said day he was indebted to defendant in the sum of \$4,432.72 for goods, wares, and merchandise theretofore sold and delivered by defendant to Hamilton Wills, and in addition to said indebtedness, the said Hamilton was also indebted to divers other persons in large sums of money, the amount of which defendant is unable to state; that on said date, and for a long time prior thereto, the said Hamilton Wills was unable to pay his debts in full from his own means as the same became due in the ordinary course of business, and was insolvent, all of which was well known to plaintiff; that on said day said Hamilton Wills, while so indebted and so insolvent, "and with full purpose and intent to hinder, delay, and defraud his creditors, and particularly this defendant, and designing to cheat his creditors, and particularly this defendant, did voluntarily and without valuable consideration make, execute, and deliver to plaintiff a conveyance transferring to plaintiff all of said real property"; that on February 12, 1908, there was still due from said Hamilton Wills to defendant on account of said indebtedness of \$4,432.72 a balance of \$2,680.82, and that thereupon, upon said last-named day, defendant commenced an action against said Hamilton Wills, in the superior court of said county, to recover said balance; that on June 25, 1908, a judgment was duly given, made, and entered in said action in favor of defendant and against said Hamilton Wills for said balance, together with \$15.50 costs of suit, which said judgment was duly docketed in the office of the county clerk of said county; that on the 31st day of October, 1910, a writ of execution was duly issued out of said court in said action, directed to the sheriff of said county, who did, after due proceedings had according to law, duly sell all of said premises to the defendant, and that a certificate of sale was duly issued by said sheriff to this defendant, and thereafter, on January 12, 1912, said sheriff duly executed and delivered to this defendant a deed conveying all of said property, which said deed was duly recorded on January 19, 1912, and ever since said 12th day of January, 1912, this defendant has been and now is the owner of all said property and entitled to possession thereof.

The court found the facts substantially as alleged in the answer, and as conclusions of law found that the transfer of said property by said Hamilton Wills to plaintiff on October 8, 1906, "was fraudulent and void as to this defendant," that plaintiff take nothing by her complaint, and "that defendant is entitled to the judgment and decree of this court that it is the owner of and entitled to the possession of all of said real property," etc. Judgment was accordingly entered for defendant, from which, and from the order de-

nying her motion for a new trial, plaintiff appeals.

Plaintiff testified:

"I am the owner of the property described in the complaint herein. I acquired said property in 1905, and went into possession thereof in September, 1905, and went to live upon the property at that time. At that time I had upon the property a little shack that cost about \$200. Ever since September, 1905, I have been living upon that property with my husband. Nobody but myself has been in possession of that property since September, 1905. I have paid all of the taxes which have been levied upon the property since September, 1905, and during all that time I have been in the exclusive possession of that property. I paid \$400 for the lot."

There was received in evidence on the part of plaintiff a declaration of homestead by plaintiff, in due form, of date July 7, 1908, duly acknowledged and recorded on that day, "for the joint benefit for myself and husband." The value of the property was "estimated to be \$5,000." On cross-examination she testified:

"I acquired the property in June or July, 1905, from Mr. Croker. My husband bought the property from my money. My husband did business for me. I had about \$1,500 at that time. I put my money in the First National Safe Deposit, and the next time my husband bought a safe I put it in his safe, in a little tin box, at San Francisco. * * * I came to California in 1888 or 1889. I came here in February, and married Mr. Wills in the following November. I had over \$1,000 when I married Mr. Wills. I do not know exactly how much over. I did not have any talk with Mr. Croker. (Mr. Croker conveyed the property to her husband.) I was very sick at the time. I earned money after I was married; I earn it still; I keep boarders. My husband went on the road. I kept boarders, and raised chickens, and made more money than he did. I loaned him money. In the sale and purchase of this property my husband was the agent for me on account of I was not acquainted with this language only a little. I was green to this country. Besides I was very sick. * * * Physically or mentally I was in no condition to transact business in 1905. My husband negotiated with and made the contract with Mr. Croker. Q. Do you know to whom Mr. Croker gave the deed to the property? A. Well, my husband done the business. I was in no condition to transact business. I don't know what they done. My husband took the money out of the safe deposit and paid cash for the property. He took it out of his safe. My husband kept the property in his name for quite a while and the papers were burned up; then I wanted the property recorded in my name; it belonged to me. * * * After the earthquake, when my husband went to the city, he said the whole thing is destroyed, safe and everything in his office, and after that he said, 'All my papers were destroyed.' He said, 'That is destroyed too.' I said, 'You had better go to Mr. Croker, and have a new deed, and have it recorded who it belongs to, in my name.' * * * About this deed I said [to her husband], 'How can we settle it, then? We have no deed. I want to have this property. I am well now, and I want to have it, make it my home, so if anything, business or like such things, I could always make a living on it.' I think he went to Mr. Croker a couple of months after that, when things were getting quiet."

At this point in plaintiff's testimony defendant introduced a grant, bargain, and sale deed, dated October 6, 1906, made by

Frederick Croker and his wife to Hamilton Wills, recorded on the same day; also, deed of gift, dated October 8, 1906, from Hamilton Wills to his wife (plaintiff), recorded on the same day. On further cross-examination, she testified:

"In 1905 a little shack was built on that lot. I bought it. My husband paid for it—the lumber. I gave him the bills. Not much lumber was bought from E. K. Wood Lumber & Mill Company. It only amounted to about \$300. My husband had the \$400 to buy the lot in his safe. I told him to take it when I was in the hospital. I gave my husband all the money I had just for this property. I wanted to have a home. The doctors told me I must go into the country if I wanted to live. My husband was then a contractor, building houses over in Marin county. I gave him that money to buy a home. * * * After I got out of the hospital, I came over to San Anselmo to live, and the property was bought in June or July, 1906. When I first came to San Anselmo I was just camping; lying on a cot in a tent. In May, 1906, when I was in hospital, I said to my husband, 'Take all you need to get a home—buy a home,' and he took all of the money. I saved all my life for it; that money was over a thousand dollars."

On re-examination she testified:

"Q. Was anything said by either of you as to whose name the property was to be taken in at that time? A. At that time I just say to my husband, 'Buy a property; buy a home.' At the time I just left everything to him as my agent; but I want to have it as my home. Q. You wanted him to buy a home for you with your money? A. Yes, sir; from my money. Q. Did he understand that from you? A. I guess he did. Q. Did you so tell him? A. Yes, sir."

On re-cross she testified:

"My husband handed me the deed, when he put the property in my name in 1906, and said, 'There is your property,' and I say, 'Now, for you to take the deed and put it in the safe deposit.' When he put it in my name, he showed it to me, and he went up to the city. I had no talk with him about the deed at all. I was glad; I had my property; that is all; I saw my name in the deed. * * * When he showed it to me, it had been recorded. I paid a dollar for recording it. * * * When he showed me the deed with my name, he came from San Rafael; it was already recorded; he showed it to me after it was recorded."

Plaintiff rested at this point of the evidence. Concerning the execution of the deed to her husband, witness Croker, Wills' grantor, testified:

"I know Hamilton Wills; known him since 1905. I sold to Mr. Wills a lot in Ross Valley Park, lot 187, being the lot described in plaintiff's complaint, for \$400, terms cash; he made a deposit of half the cost and within 30 days, I think, paid the balance; am not sure, though; within the 30 days I made the deed transferring the property to him."

"The Court: Q. What did he say in reference to the purchase, if anything to you? A. I don't remember. Q. Did he say he was purchasing it for anybody? A. No. Q. Other than himself? A. I think not."

Here was introduced a receipt, signed by Mr. Croker, dated June 21, 1905, acknowledging the receipt from Wills of \$200 deposit on account of \$400, the purchase price of the property. Balance was to be paid in 30 days. He testified that he afterwards made a deed to Wills.

"I made a second deed to him (above referred to, of date October 8, 1906). At the time I made this second deed to Hamilton Wills I do not know whether he asked me to execute the deed to his wife. I don't remember much about what was said by either of us at that time. I know he made some excuse for wanting the second deed. He did not at any time ask me to make a deed to his wife; he gave me some reason for wanting a second deed; it was satisfactory to me."

Witness Studley, before whom the deed was acknowledged by Croker, testified that he knew of the deed formerly given Wills by Croker and asked Wills why he had not recorded it.

"I had been collecting taxes, but I noticed the property was still assessed to Mr. Croker, and I asked him (Wills) why he hadn't recorded the deed. I do not remember his answer at all. Q. Did he at any time say to you the property was the property of his wife, Emily Wills? A. No, sir."

Witness Pitcher, manager of defendant corporation, testified that he knew the land involved and that his company—

"sold to Mr. Wills the materials for improvements or building on that land. He told me he bought the lot and wanted to build a house on it. That was in the fore part of 1905; that was the first business we did with him—to furnish material on this property in question. When we were furnishing lumber to him, he put up one house at first; then I think he put up another house afterwards, and the stable; he did not state to me that was his wife's property. Q. His statement to you was he had bought the property? A. He told me it was his property."

This occurred before Wills conveyed the property to his wife and after Croker had conveyed it to him.

The foregoing is the evidence bearing upon the question of plaintiff's ownership of the land on October 8, 1906, the date of the deed of gift to her by her husband. The court found:

That on that date "Hamilton Wills was the owner, seised in fee and in the possession, of the whole of the real property mentioned in plaintiff's complaint."

Mr. Wills was called as a witness by defendant and testified at some length, mainly concerning his condition as to solvency, which we shall have occasion to notice later. But he said nothing and was asked no question by either party as to what occurred when he made the purchase of the land in question.

The claim of plaintiff is that the property in question was purchased with her money and became her separate estate, though the deed originally was made to her husband, and that when he conveyed the property to her on October 8, 1906, her title was unassailable by the then creditors of her husband. The position of defendant is that on October 8, 1906, her husband was insolvent, and that the conveyance made by him to his wife was voluntary and without consideration, and, under section 3442 of the Civil Code, was fraudulent and void as to existing creditors, "and appellant has no right, title, interest, or claim in or to said property."

[1] It is not shown that defendant or any of the creditors of Wills knew that his wife claimed the property prior to October 8, 1906. Except as appears from her testimony, it was not shown that her husband understood that he was to make the purchase for her. His acts, unexplained, would seem to leave a strong inference that there was no such understanding. Without entering upon an analysis of plaintiff's testimony, we think the facts and circumstances thus far disclosed warranted the court in finding that on October 8, 1906, Hamilton Wills had the legal title unaffected, so far as his creditors were concerned, by any equity of his wife in the property.

[2] The question we are next to determine is: Was Mr. Wills insolvent at that time, and were the subsequent proceedings, as they appear in the record, sufficient to justify the finding that defendant, ever since the 12th day of January, 1912, "has been and now is the owner of all said property." There was evidence that on October 8, 1906, Wills was indebted to defendant in the sum of \$4,432.72, on which some payments were afterwards made, leaving due, in February, 1908, \$2,680.82, for which defendant brought suit, and on June 26, 1908, obtained judgment against Wills, "which was never vacated, modified, or set aside or appealed from, and duly became a final judgment in said action." It appeared that, on October 16, 1906, Wills made an assignment to E. B. Martinelli of his interest in certain building contracts for the construction of two two-story residences in Ross Valley—

"in trust to be applied by the said Martinelli to the payments of said amounts as may hereafter become due to any person, firm, or corporation on account of materials furnished or labor performed in completing said contracts. Any balance remaining of said moneys after full payment of all amounts which may hereafter become due after completing said contracts as aforesaid shall be paid by said E. B. Martinelli pro rata to the following named persons, who now have claims against the said contracts, to wit: E. K. Wood Lumber & Mill Company. Fox (electrician). Pearson (plasterer)."

It appeared that this assignment was made because Wills was financially unable to purchase the necessary materials to complete the buildings; that, prior to October 8, 1906, he had been pressed by defendant for payment but was unable to respond; that he paid some installments, and had reduced the debt, as above stated, when defendant brought suit against him. Wills was called as a witness by defendant, and testified that he was solvent at the above date; that he had \$1,000 or \$1,200 in bank and owned certain personal property the value of which he stated at about \$300, besides his interest in the said assigned contracts. His statement that he was solvent was disputed by uncontroverted evidence. He filed a voluntary petition in insolvency on July 10, 1908, on July 17, 1908, was adjudged an insolvent, and on October 31, 1908, he was duly discharged in

bankruptcy. In his petition he showed liabilities amounting to \$4,241.02 and assets amounting to \$3,416.35, of which \$658 was claimed as exempt. Among the liabilities was stated \$2,680 due defendant "1906-1907." On the schedule were the names of 19 other creditors in various amounts, some of which were of date 1905 and 1906 and some in 1907. Witness Pitcher, manager of defendant corporation, testified that his company continued to do business with Wills after October 8, 1906, and "sold him roughly \$9,000 worth of stuff, after October 8, 1906; the last date was February 12, 1909"; and plaintiff contends that this is inconsistent with the claim that Wills was insolvent October 8, 1906. Pitcher testified that of the \$4,432.72 due on that date Wills paid all but \$2,680.82; "that was part of the indebtedness due to defendant on October 8, 1906; no part of that \$2,680.82 has ever been paid to defendant," and this was the amount for which defendant obtained judgment, June 26, 1906, as stated above, and is the amount mentioned as due defendant in Wills' schedule of debts filed in the bankruptcy proceeding. There is no explanation as to the payments made on purchases from defendant after October 8, 1906. Presumably they were met at the time as the claims accrued.

It is urged as unlikely that defendant would continue doing business with Wills, if defendant knew him to be insolvent and unable to pay debts then due defendant. It is not unusual for creditors to give extensions or make advances to debtors to tide them over conditions of financial stress, in the hope that they may find relief from their embarrassments. Indulgences of this character may continue over a considerable space of time, but without favorable results, as appears to have been the case here. If Wills had paid his debts existing on October 8, 1906, and the liabilities which forced him into bankruptcy had arisen after the date named, there might be merit in the contention that he was not insolvent when he conveyed the property to his wife. But the evidence is that he was not then able to pay his debts out of his own means, nor was he so able at any later date. His insolvency existed on October 8, 1906, and continued to the date when he was declared an insolvent; his schedule of debts showing dates prior to 1906. The court found that on that day and for a long time prior thereto Hamilton Wills was indebted to defendant in the amount stated, "and was also indebted to divers and other persons in large and sundry sums of money, and that on said 8th day of October, 1906, Hamilton Wills was unable to pay his debts in full from his own means as the same became due in the ordinary course of business and was insolvent." We think there was evidence sufficient to support this finding.

[3, 4] It remains to notice by what means defendant obtained title to the land. Defendant's judgment was entered June 26,

1908, and Wills was adjudged a bankrupt on July 17, 1908. The judgment having been entered within four months prior to the filing of the petition in bankruptcy, it was dissolved by the adjudication of Wills' bankruptcy (subsection "e" § 67, Bankr. Act), and the trustee of the estate of such bankrupt "shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate" (Bankr. Act, § 67b). The consent of E. K. Wood Lumber & Mill Company to such subrogation was duly filed. On June 6, 1910, by the trustee of the estate of Wills, a bankrupt, a petition was filed for an order that "the trustee be subrogated to the rights of the said E. K. Wood Lumber & Mill Company, and that the rights under said judgment pass to and be preserved for the benefit of the estate of the said bankrupt, and for such other and further order as to this court may seem meet and proper." Section 67c, supra, further provides:

"Or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee * * * shall be subrogated * * * and empowered to perfect and enforce the same * * * as such holder might have done had not bankruptcy proceedings intervened."

In his petition the trustee alleged that Wills was the owner of the land in question on October 8, 1906; that on that day he conveyed the property to his wife without consideration; that he was then insolvent, and that said transfer was made with intent to delay and defraud the creditors of said Hamilton Wills; set forth also the facts as to the indebtedness of Wills to E. K. Wood Lumber & Mill Company and as to its obtaining judgment as hereinabove shown; that Emily Wills had executed a declaration of homestead on said property, as already shown; that Wills had filed his petition in bankruptcy and had been adjudicated a bankrupt, etc.

On June 6, 1910, Milton J. Green, referee in bankruptcy, made his order in which all the foregoing proceedings are recited as set forth in said petition of the trustee; also that said E. K. Wood Lumber & Mill Company had appeared in open court and agreed with the trustee herein that said company—"should prosecute, in the name of said trustee and for the benefit of the estate of said bankrupt, an action to set aside the conveyance of October 8, 1906, hereinbefore referred to, from said Hamilton Wills, Jr., said bankrupt, to Emily Wills, his wife, and * * * having further agreed in open court to indemnify the said trustee for all costs, that might be incurred in the said action. It is hereby ordered: [Then follows the order subrogating the trustee to all the rights of said company.] It is further ordered that said E. K. Wood Lumber & Mill Company * * * be and they are hereby authorized to commence and prosecute such action and to pursue such legal remedies as they may deem proper in order to enforce the rights arising out of the judgment hereinbefore referred to, and to set aside and annul that certain conveyance made by the said bankrupt to Emily Wills, his wife, on the 8th day of October, 1906, * * * and said E. K. Wood Lumber & Mill

Company is hereby authorized to prosecute such action in the name of the trustee herein and for the benefit of the estate of said bankrupt."

Section 67f of the Bankrupt Act provides as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. * * *

It will be recalled that the judgment was recovered June 25, 1908, by defendant against Wills, and on July 8, 1908, plaintiff filed her declaration of homestead upon the property. On July 16, 1908, Wills filed his petition in bankruptcy, and on the 17th was adjudged a bankrupt. The transfer by Wills to his wife being void as to creditors, defendant, but for the bankruptcy proceedings, would have been entitled to execution on its judgment and sale thereunder, notwithstanding the homestead declaration, for the latter was subject to the lien of the judgment. *First National Bank of Los Angeles v. Maxwell*, 123 Cal. 360, 371, 55 Pac. 980, 69 Am. St. Rep. 64; *Bekins v. Dieterle*, 5 Cal. App. 690, 694, 91 Pac. 173. The bankruptcy proceedings rendered it impossible for defendant to avail itself of this right. The trustee in bankruptcy became subrogated to defendant's rights, and had it not been for the saving clauses in the bankrupt act the provision of section 67c, under which the lien was dissolved, would have given vitality to the declaration of homestead and the bankrupt would have had the right under the act to have his homestead exempted. But here interposed the provision above quoted that:

"If the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved," etc.

The effect of the statute was to dissolve the judgment as a preferential lien in favor of the creditor, but recognized the lien and preserved it for the benefit of all the creditors. *First National Bank v. Staake*, 202 U. S. 141, 26 Sup. Ct. 580, 50 L. Ed. 967.

[5] It was under these provisions of the law that the proceedings above set forth were had, empowering defendant to act in the premises, and it thereupon on October 31, 1910, caused execution to issue on its said judgment and the property to be sold by the sheriff. On December 3, 1910, the sheriff issued his certificate of sale in due form, reciting that he had sold the property to said E. K. Wood Lumber & Mill Company, and on

January 12, 1912, he duly executed and delivered his deed to said property as sheriff to said company, in which the usual recitals in sheriff's deeds are set forth and said deed was duly recorded on the 19th of January, 1912.

Appellant calls attention in her brief to the order of the bankrupt court, authorizing defendant to commence proceedings to annul the conveyance to plaintiff, and now claims that the authority given was to proceed in the name of the trustee and for the benefit of the bankrupt estate, whereas defendant proceeded in its own name for its own benefit, and now holds the sheriff's deed in its own name. There was no demurrer to the answer, and no objection was made to the introduction of the proceedings in bankruptcy, except the general objection of immateriality and irrelevancy. The order is susceptible of the construction that the authority was given to the defendant to proceed as it might deem best or to proceed in the name of the trustee. It is clear, however, that in either case the result should, if favorable, inure to the benefit of the bankrupt estate, and we must presume that the trustee will see to it that the estate gets the benefit.

[6] Appellant is in error in assuming that the discharge of Wills from his liabilities had any effect upon the liens existing against his property. He is released from personal liability only. He has no concern with the property which passed to the trustee. Valid liens may be enforced after the bankrupt is discharged. *Loveland on Bankruptcy* (3d Ed.) § 385.

[7] Appellant is also in error in her contention that proof of actual fraud was necessary. Section 3442 of the Civil Code makes a transfer fraudulent and void as to existing creditors, as a matter of law, when the transfer is voluntary or without a valuable consideration, by one while insolvent, or in contemplation of insolvency. *Cook v. Cockins*, 117 Cal. 148, 48 Pac. 1025. The claim that the premises in question were always the homestead of plaintiff since 1905 is true only in the sense that they constituted her home. As a homestead in contemplation of the statute, free from the claims of her husband's creditors, it is not true. It was subject to the lien of defendant's judgment, as we have seen, and the lien thus created ripened into complete title adverse to plaintiff.

[8] Error is assigned in permitting the defendant, over plaintiff's objection, to make plaintiff's husband a witness against her without her consent. The court allowed questions to be answered as to declarations and acts of Wills affecting the question of his solvency or insolvency on October 8, 1906. The court, however, finally, on motion to strike out all of Wills' testimony "as to declarations made subsequent to the execution and delivery of deed of gift of October 6, 1906, to his wife," said:

"The Court: They will not be considered. I will simply make a general rule. I will not consider them in deciding the case. You cannot direct me to the particular things at this time. The motion will be granted, if there are any declarations subsequent."

We must assume that the court did as it promised to do. The insolvency of Wills was shown, irrespective of any testimony given by him which the ruling of the court excluded.

[9] Plaintiff claims that she established title by prescription; that her possession after October 6, 1906, was adverse, open, and notorious under claim of separate ownership and continued for more than five years prior to the commencement of this action; and that she paid all taxes which have been levied and assessed upon the premises. Defendant ignores this claim in its brief and has not given the court any aid in solving the question. The undisputed evidence was that plaintiff and her husband were in possession of the lot in 1905 under the deed from Croker to Wills; that on October 8, 1906, Wills conveyed the lot to plaintiff and the deed was recorded on that day; that plaintiff and her husband have ever since had possession of the lot, and plaintiff has paid all the taxes levied and assessed against the property since said date.

We held, in *Madden v. Hall*, 21 Cal. App. 541, 132 Pac. 291, that a married woman not living separate and apart from her husband and having no claim in her own right to land cannot acquire title to it as her separate estate by adverse possession. The deed to her by her husband we have held was null and void and conveyed no title. She therefore had no claim in her own right, and the rule just stated would seem to apply. If it should be said that her declaration of homestead imported color of title, five years had not elapsed from its date, July 8, 1906, before this action was commenced, to wit, September 23, 1912. It may be doubted, also, whether the adverse claim continued to run after the proceedings in bankruptcy were commenced, and the subrogation of the trustee to the rights of the E. K. Wood Lumber & Mill Company in the judgment which was a lien on the property. These proceedings were had in 1910, under which the property was in that year sold to satisfy the judgment, and the sale culminated in the deed the source of defendant's title.

We have thus endeavored to dispose of the somewhat complicated questions in the case so far as plaintiff has presented them in her brief. Our conclusion is that the evidence supports the findings and the findings support the judgment.

The judgment and order are therefore affirmed.

We concur: BURNETT, J.; HART, J.

In re EMMONS. (Cr. 431.)

(District Court of Appeal, Second District, California. Dec. 7, 1915.)

ATTORNEY AND CLIENT §39—DISBARMENT—CONVICTION AND PARDON.

An attorney cannot be disbarred solely on a record of conviction, where he has been pardoned.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 52; Dec. Dig. §39.]

Disbarment proceeding against E. J. Emmons. Proceeding dismissed.

W. H. Anderson, Loeb, Walker & Loeb, Anderson & Anderson, and E. G. Kuster, all of Los Angeles, and Rowen Irwin, H. E. Johnstone, and J. R. Dorsey, all of Bakersfield, for respondent. James F. Farragher, Deputy Dist. Atty., and Barclay McCowan, Dist. Atty., both of Bakersfield, amici curiae.

CONREY, P. J. At all times mentioned in the record of this proceeding respondent was, and he now is, an attorney at law admitted to practice in the courts of California. On the 6th day of August, 1915, a petition for his disbarment was filed in the Supreme Court by a bar association of Kern county, and the matter was thereafter transferred to this court. The petition is based upon a judgment of conviction whereby the respondent was convicted of a felony for asking and receiving a bribe, and a duly certified copy of the judgment of conviction is attached to the petition and is a part thereof. That judgment was rendered on October 31, 1905, and on the 12th day of March, 1908, was affirmed by the District Court of Appeal for the Third District. The sentence was for five years' imprisonment, the remittitur was filed on May 18, 1908, and the term of actual imprisonment began a few days later.

The petition for disbarment is based solely on the judgment of conviction. Apart from that judgment no charge is made that the respondent has committed any act involving moral turpitude, dishonesty, or corruption, or any other act which would be a cause of disbarment. Code Civ. Proc. § 287. Separate and direct charges would require separate and direct proof, and would open the case to examination by means of other evidence which might be produced by those prosecuting the charge, or by the respondent. Even if (which we do not decide) the judgment of conviction would be receivable as evidence upon such separate charges, it would not be the sole and conclusive evidence provided in a proceeding based solely upon a judgment of conviction of a felony. Code Civ. Proc., sec. 287, subd. 1. The petitioners having relied upon such judgment of conviction as the sole foundation for this proceeding, that judgment is conclusive against the respondent if it is admissible in evidence. If it is not admissible, the case against respondent must fall, because no other evidence can be received in this proceeding.

The respondent has filed herein certain objections which are in the nature both of a demurrer and an answer. We shall not find it necessary to discuss the demurrer. The answer sets forth that the conviction shown by the certified copy of the record of conviction annexed to the petition herein has been annulled and set aside in this, that on the 29th day of June, 1910, respondent received from the Governor of California a pardon for the offense set forth in the judgment of conviction. The respondent submitted to the court with his answer a copy, duly certified by the secretary of state, of the above-mentioned pardon. This document sets forth by way of recital the fact that the defendant had been released upon parole, and since such release had "proven himself to be an industrious, sober, and upright man," and that the state board of prison directors by resolution recommended to the Governor of the state that he do extend executive clemency to the defendant. Thereupon the document concludes that the Governor does, by virtue of the authority vested in him by law, "hereby pardon the said E. J. Emmons and order that he be restored to citizenship." It has been held that a pardon "releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366. This is nevertheless subject to the limitation that an attorney may be disbarred for acts of a felonious nature where a pardon has followed the conviction of a crime, since evidence of the criminal acts may constitute proof of the charge that the respondent is unfit to be an attorney at law. This is so for the reason that the pardon does not restore his good moral character. *Thornton on Attorneys*, § 863.

Among the cases to which we are referred is that of *People v. George*, 186 Ill. 122, 57 N. E. 804, which counsel (*amici curiæ*) assure us is "practically on all fours with the case at bar." From that decision we learn that Mr. George was disbarred, not only upon proof of charges showing that he had been convicted of a felony and thereafter pardoned, but also because after the pardon he had committed other acts of a criminal nature, convincing the court that, notwithstanding the pardon, the accused did not possess a good moral character, and that he was not a proper person to retain his license to practice law. The question as to whether or not a record of conviction could be made the sole basis of such a charge, and accepted as constituting the sole and conclusive ground for disbarment after the pardon had been granted, did not arise in that case. If that question had been presented, the decision very probably might have been in favor of the respondent. This is indicated by the fact that the court quoted with approval the decision of the Supreme Court of Maine in *Penob-*

scot Bar v. Kimball, 64 Me. 146. There the charge was that the respondent was found guilty of dishonesty and bad faith toward clients in several instances, and there was a separate specification that the respondent "does not possess a good moral character," in that at a certain term of court he was convicted of the crime of forgery. As to this particular specification the respondent proved that he had received a pardon for the offense of which he had been convicted. The crime for which he was convicted and sentenced was the forgery of a deposition and caption thereto annexed. Relying upon *Ex parte Garland*, supra, the court held that the effect of the pardon was not only to release the respondent from punishment—"but also to blot out the guilt thus incurred, so that in the eye of the law he is as innocent of that offense as if he had never committed it."

But it was pointed out that the respondent in his capacity as attorney had done more than commit the forgery of which he was convicted, in that afterwards he had offered the forged document as evidence in court.

"The executive pardon affords the respondent no protection from the consequences which the law attaches to this offense. Pardon for one crime does not release a party from the penalties and disabilities consequent upon the commission of another. A pardon for forgery does not prevent a party from suffering the consequences attached to a conviction for adultery or larceny, nor blot out the guilt inseparable from such crimes and give their perpetrator a new character for chastity and honesty. The indictment upon which the respondent was convicted contains no count for a violation of his official oath or for a fraud upon the court. The respondent's pardon for forgery can no more obliterate the stain of guilt for those offenses than the judgment in that case would be a bar to an indictment for their commission."

It seems clear that if, as in the case at bar, the *Kimball* Case had been one where it was sought to disbar the respondent solely upon the ground that he had been convicted of a felony, the subsequent pardon would have been recognized as a sufficient defense.

In *Scott v. State*, 6 Tex. Civ. App. 343, 25 S. W. 337, it was sought to obtain a judgment of disbarment founded upon article 226, Revised Statutes of Texas, reading thus:

"No person convicted of a felony shall receive license as an attorney at law; or if licensed, any court of record in which such person may practice shall, on proof of a conviction of any felony, supersede his license and strike his name from the roll of attorneys."

The plaintiff in error had been convicted of a felony but immediately thereafter pardoned by the Governor, several years before this proceeding was instituted against him. The court said:

"We are of opinion that after he received an unconditional pardon, the record of the felony conviction could no longer be used as a basis for the proceeding provided for in article 226. This record, when offered in evidence, was met with an unconditional pardon, and could not therefore properly be said to afford 'proof of a conviction of any felony.' Having been thus canceled, all its force as a felony conviction was

taken away. A pardon falling short of this would not be a pardon, according to the judicial construction which that act of executive grace has received. *Ex parte Garland*, 4 Wall. 344 [13 L. Ed. 366]; *Knote v. United States*, 95 U. S. 149 [24 L. Ed. 442], and cases there cited; *Young v. Young*, 61 Tex. 191. Cases may be found holding that a pardon does not operate as a bar against a proceeding to strike an attorney from the rolls on account of the professional misconduct involved in the transaction which culminated in the conviction. *Penobscot Bar v. Kimball*, 64 Me. 140; *In re —*, an Attorney, 86 N. Y. 563. In these cases the proceedings to disbar were not founded on statutes like ours, declaring the effect of a felony conviction, but upon facts showing professional misconduct. Where the proceeding, as in this case, depends alone upon the felony conviction, and that is wiped out by a pardon, the whole case falls."

In legal effect the case at bar comes within the rule, which we think is correctly stated in the Texas case. Notwithstanding that the respondent at one time stood convicted of a felony and that the record of conviction might have been used as the foundation for this proceeding while the judgment of conviction was in force, it is no longer possible, after the pardon, to disbar him by this statutory proceeding wherein, if it is maintainable at all, judgment must go against him without any opportunity to defend against any present imputation against his moral character. If those responsible for this prosecution believe, or have grounds for believing, that the respondent is not now a person of good moral character, or that he has committed any acts which should move the court in its discretion to disbar him at this time, those charges should be framed in such manner as will fairly test the respondent's rights by giving him a full opportunity to defend upon the merits.

The objections made by respondent are (as to the points discussed herein) sustained, and the proceeding is dismissed.

We concur: JAMES, J.; SHAW, J.

(23 Idaho, 338)

EPPERSON v. HOWELL et al., Board of Com'rs of Ada County.

(Supreme Court of Idaho. Jan. 8, 1916.)

1. MANDAMUS \S 154—DESIGNATION OF PARTIES.

Pursuant to the provisions of section 4955, Rev. Codes, a party prosecuting a special proceeding should be referred to as the plaintiff and the adverse party as the defendant.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 296-316; Dec. Dig. \S 154.]

2. TAXATION \S 906 $\frac{1}{2}$ —DISPOSITION OF TAXES COLLECTED—EMERGENCY EMPLOYMENT—COUNTIES.

Sections 12, 14, and 15, ch. 27, Sess. Laws 1915, which provide for diverting from the state treasury money due to the state from the counties, arising from taxation, and for paying it out, by the counties, to those engaged in emergency employment, violates section 7, art. 7, of the Constitution, and cannot be sustained.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1737, 1738; Dec. Dig. \S 906 $\frac{1}{2}$.]

3. STATES \S 130—EXPENDITURE OF PUBLIC FUNDS—APPROPRIATION—NECESSITY.

Section 18, art. 7, of the Idaho Constitution, providing that no money shall be drawn from the treasury, but, pursuant to an appropriation made by law, prohibits the payment, by the state, of any money except pursuant to and in accordance with an act of the Legislature expressly appropriating it to the specific purpose for which it is paid; and, since no money has been appropriated for that purpose, the state is precluded from paying its proportionate share of the expense of giving the emergency employment contemplated by chapter 27, supra.

[Ed. Note.—For other cases, see *States*, Cent. Dig. \S 128; Dec. Dig. \S 130.]

4. STATES \S 181—PAYMENT OF CLAIMS—EXAMINATION BY STATE BOARD—VALIDITY OF STATUTE.

Section 18, art. 4, of the Constitution grants to the state board of examiners power to examine all claims against the state, except salaries or compensation of officers fixed by law, and a legislative enactment, attempting to provide for the disbursement of funds belonging to the state in payment of claims without such examination, is in violation of that section and void.

[Ed. Note.—For other cases, see *States*, Cent. Dig. \S 169; Dec. Dig. \S 181.]

5. STATUTES \S 64—INVALIDITY OF PART-EFFECT.

The rule is well settled in this state that if the provisions of an act of the Legislature are connected in subject-matter, dependent upon each other, and designed to act for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the Legislature would have passed one without the other, if one part is unconstitutional the entire act is void.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 58-66, 195; Dec. Dig. \S 64.]

6. STATUTES \S 64—INVALIDITY IN PART—EFFECT—DIVERSION OF PUBLIC FUNDS.

Since sections 12, 14, and 15, ch. 27, supra, are clearly violative of the Constitution, and since, by sustaining the remaining sections, a considerable burden of expense would be placed upon counties called upon to give emergency employment to a large number of persons, from which burden counties required to employ few or none would be exempted, and since it is clear that it was not the intention of the Legislature to do so, the entire chapter must be held to be invalid.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. \S 58-66, 195; Dec. Dig. \S 64.]

7. STATES \S 131—EXPENDITURE OF PUBLIC MONEY—"APPROPRIATION."

An "appropriation" within Const. art. 7, \S 13, providing that no money shall be drawn from the treasury but in pursuance of appropriations made by law is authority from the Legislature, expressly given in legal form to the proper officers, to pay from the public moneys a specified sum and no more, for a specified purpose and no other.

[Ed. Note.—For other cases, see *States*, Cent. Dig. \S 129; Dec. Dig. \S 131.

For other definitions, see *Words and Phrases*, First and Second Series, *Appropriation*.]

Mandamus by James Wiley Epperson against William Howell and others, as the Board of County Commissioners of Ada County, Idaho. Demurrer to the application sustained, alternative writ quashed, peremptory writ denied, and case dismissed.

J. H. Peterson, Atty. Gen., and D. A. Dunning and Herbert Wing, Asst. Attys. Gen., for plaintiff. R. L. Givens, Pros. Atty., and E. P. Barnes, both of Boise, for defendants.

MORGAN, J. This proceeding was commenced for the purpose of procuring the issuance of a writ of mandate, requiring defendants, who constitute the board of county commissioners of Ada county, to immediately take action upon plaintiff's application for employment, made pursuant to chapter 27, Sess. Laws 1915 (page 80), or to employ him or show cause why they have not done so.

[1] In the application for the writ and in the return thereto the parties are denominated petitioner and respondents, respectively. The title of the cause has been reformed to read as above stated in order to conform to the provisions of section 4955, Rev. Codes, which provides:

"The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant." *Connolly v. Woods*, 13 Idaho, 591, 92 Pac. 573; *Bragaw v. Gooding*, 14 Idaho, 288, 94 Pac. 438.

[2] Plaintiff, in his application, alleges the necessary statutory facts entitling him to be employed under the provisions of chapter 27, supra. An alternative writ was issued and served and, by way of return, defendants admitted the facts alleged and demurred to the application, asserting that the legislative enactment under consideration violates the Constitution of the state of Idaho in a number of particulars, some of which will be hereinafter discussed. Chapter 27, supra, provides that the boards of county commissioners of the various counties in Idaho are authorized and required to designate certain work upon the public highway, or such other work as they may determine upon, as emergency employment, and to fix the compensation of persons employed in such work. It is therein provided that any person who is a citizen of the United States and who has been a resident of Idaho for not less than 6 months shall be entitled to emergency employment subject to the provisions of the chapter. An applicant for employment is required to appear before the clerk, or any member of the board of county commissioners, and to make oath or affirmation to the following facts: That he is a citizen of the United States; that he has been a resident of the state of Idaho for an uninterrupted period of not less than 6 months; that he is a resident of the county in which such application is made, and has been for more than 90 days last past; that he is unable to secure other employment; that he does not own or possess negotiable, real or personal property of a total value of more than \$1,000; that he has or has not, as the case may be, dependents, and if he has such dependents, name them individually and separately and state the relationship of each to him; that he has

or has not, as the case may be, been employed at emergency employment within the state of Idaho during the 12 months last past; that he will perform the labor to which he may be assigned with due and reasonable diligence and in a fair and workmanlike manner to the best of his ability, and such applicant must be identified and vouched for by some freeholder in the county where application is made.

The manner in which payment shall be made, out of the current expense fund of the county, for labor performed at emergency employment, and the manner of keeping account of such employment, and the manner of keeping account of such expenditures and of certifying the same to the county auditor, are provided for, and sections 12, 14, and 15 of the chapter are as follows:

"Sec. 12. The county auditor shall certify to the auditor of the state of Idaho in his annual return of state taxes from the county, a statement of the total sum expended within the county for emergency employment and fifty (50) per cent. of the amount of such total sum shall be deducted from the sum of the general taxes collected by the state of Idaho from the county in which such emergency employment was provided."

"Sec. 14. It shall be the duty of the auditor of the state of Idaho to certify to the state treasurer a correct account of all sums reported from the various counties of the state of Idaho as emergency employment deductions from the general state tax returns."

"Sec. 15. It shall be the duty of the state treasurer to keep in his office a true and correct record of all sums reported as emergency employment expenditures from the various counties."

It will be at once observed that this chapter provides for the deduction, by a county, from the moneys due from it to the state, arising from taxation, of one-half of the amount it has been required to expend in giving emergency employment. Defendants contend that the chapter is void because it is in conflict with section 7, art. 7, of the Constitution of Idaho, which provides:

"All taxes levied for state purposes shall be paid into the state treasury, and no county, city, town, or other municipal corporation, the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for state purposes."

This section of the Constitution is mandatory, and it is entirely clear that the legislative enactment under consideration, in so far as it provides for diverting from the state treasury money due to the state from the counties, arising from taxation, and for paying it out by the counties to those engaged at emergency employment, cannot be sustained.

[3, 7] No appropriation of money has been made with which to pay the state's proportion of the expense of giving emergency employment, and it is urged by defendants that the chapter is unconstitutional because it conflicts with section 13, art. 7, of the Constitution, which is as follows:

"No money shall be drawn from the treasury, but in pursuance of appropriations made by law."

An appropriation, within the meaning of the section of our Constitution last above quoted, is authority from the Legislature, expressly given in legal form to the proper officers, to pay from the public moneys a specified sum and no more, for a specified purpose and no other. It follows that no money may lawfully be paid from the treasury except pursuant to and in accordance with an act of the Legislature, expressly appropriating it to the specific purpose for which it is paid. No money having been appropriated for that purpose, the state is as effectually precluded by section 13, art. 7, from paying its proportionate share of the expense of giving emergency employment as is the county from retaining it from the state treasury by section 7, art. 7, of the Constitution. *Kingsbury v. Anderson*, 5 Idaho, 771, 51 Pac. 744; *Kroutinger v. Board of Examiners*, 8 Idaho, 463, 69 Pac. 279; and *Jefferys v. Huston*, 23 Idaho, 372, 129 Pac. 1065.

[4] Our attention is also directed to the fact that no provision is made for the submission of claims against the state, arising out of emergency employment, to the state board of examiners, but, upon the other hand, payment of funds belonging to the state, without such examination, is attempted to be provided for. This feature of the chapter is in contravention of section 18, art. 4, of the Constitution, which grants to that board power to examine all claims against the state, except for salaries or compensation of officers fixed by law. *Winters v. Ramsey*, 4 Idaho, 303, 39 Pac. 193.

Certain other objections have been made, touching the validity of this legislative enactment, but, in view of the conclusion reached upon those heretofore mentioned, it is not deemed necessary to discuss them.

[5, 6] It is contended by counsel for plaintiff that sections 1 to 11, inclusive, and sections 13 and 16 of the chapter under consideration constitute a complete rule of action, and that, conceding sections 12, 14, and 15, which attempt to provide for contribution by the state toward the expense of furnishing emergency employment, to be unconstitutional, the legislative enactment may still be sustained as a law requiring the several counties, unaided by the state, to furnish and pay for such employment. That the chapter is capable of being so divided, and that, by striking out sections 12, 14, and 15, a complete law would remain, placing the burden of giving emergency employment upon the several counties to persons residing therein, is true.

In support of the doctrine that if one provision of a statute is invalid the other provisions are not affected by its invalidity unless they are so dependent upon each other that they cannot be divided without defeating the object of the statute, we are cited to the case of *Gillesby v. Board of County Commissioners*, 17 Idaho, 586, 107 Pac. 71, wherein what seems to be the true rule is quoted from *Lewis' Sutherland Stat. Construction*, § 296, as follows:

"Where a part only of a statute is unconstitutional, and therefore void, the remainder may still have effect under certain conditions. * * * The point or test is * * * whether they are essentially and inseparably connected in substance. If so connected, the whole statute is void. If one provision of an enactment is invalid and the others valid, the latter are not affected by the void provision, unless they are plainly dependent upon each other, and so inseparably connected that they cannot be divided without defeating the object of the statute. And the converse is true."

It is said in *Cunningham v. Thompson*, 18 Idaho, 149, 108 Pac. 898:

"It is also settled in this state that if the provisions of an act are connected in subject-matter, dependent on each other, and designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the Legislature would have passed one without the other, then if one part falls the entire act must fall."

See, also, *Ferbrache v. Drainage Dist. No. 5*, 23 Idaho, 85, 128 Pac. 553, 44 L. R. A. (N. S.) 538, Ann. Cas. 1915C, 43, and additional cases therein cited on page 94.

It seems to us the provisions of the chapter under consideration are essentially and inseparably connected in substance; that they are plainly dependent upon each other, and that they cannot be divided without defeating the object of the Legislature, which was to give emergency employment to those in need of it and to share the burden of the expense thereby incurred between the county wherein the employment is given and the state at large. Since sections 12, 14, and 15 are clearly violative of the Constitution, and since by sustaining the remaining sections a considerable burden of expense would be placed upon counties called upon to give emergency employment to a large number of persons from which burden counties required to employ few or none would be exempted and since it is clear that it was not the intention of the Legislature to do so, the entire chapter must be held to be invalid.

The demurrer to the application for a writ of mandate is sustained, the alternative writ, heretofore issued, is quashed, a peremptory writ is denied, and the case is dismissed. Costs are awarded to defendants.

SULLIVAN, C. J., and BUDGE, J., concur.

(23 Idaho, 246)

PRICHARD v. MCBRIDE et al.

(Supreme Court of Idaho. Jan. 11, 1916.)

1. COUNTIES §51—COUNTY COMMISSIONERS—ELECTION OF CHAIRMAN—TERM.

Held that, under sections 1908 and 1909, Rev. Codes, it is the duty of the members of boards of county commissioners, at their first regular meeting on the second Monday of January next after their election, to elect a chairman from their number, who holds such position until the expiration of his term of office as commissioner, unless he resigns or is removed from or ceases to be a member of the board of county commissioners by operation of law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 62; Dec. Dig. §51.]

2. MANDAMUS §77—SCOPE OF PROCEEDING—ELIGIBILITY AND TITLE TO OFFICE.

Held, that the trial court did not err in holding that the eligibility of, or title to, the office of County Commissioner McBride, under appointment could not be inquired into in this proceeding.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 161-169; Dec. Dig. §77.]

Morgan, J., dissenting.

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Mandamus by R. G. Prichard against F. J. McBride and another. From a judgment for defendants, plaintiff appeals. Reversed.

Herman H. Taylor, of Sandpoint, for appellant. G. H. Martin, of Sandpoint, for respondents.

BUDGE, J. In this action the plaintiff below and appellant here filed his affidavit for a writ of mandate against defendants below and respondents here. An alternative writ of mandate was issued on July 10, 1915, and was made returnable on the 15th day of that month. This writ of mandate was sought by appellant for the purpose of restoring him to the position of chairman of the board of county commissioners of Bonner county, of which he and the respondents were members. To the alternative writ of mandate, respondents answered. The cause was tried before the court without a jury, upon the admissions made by the pleadings and a stipulation of facts entered into between counsel for the respective parties. Upon the facts admitted by the pleadings and the stipulated facts the court made findings of fact and conclusions of law, which findings recite substantially all of the facts relied upon by the parties to this proceeding, and upon which the judgment of the trial court is based. The trial court found among other things as follows: That the plaintiff, C. E. Hagman, and Don C. McColl were the duly elected and qualified members of the board of county commissioners of Bonner county on the second Monday of January, 1915; that at a regular meeting of the board on said date, Don C. McColl was duly elected chairman of said board; that the said McColl acted as the chairman of the board, performing the duties and functions thereof, up

to June 15, 1915, when he resigned such chairmanship; that at a regular meeting of the board on the 15th day of June, 1915, the plaintiff Prichard was, by a unanimous vote, duly elected chairman of said board of county commissioners; that on the 5th day of July, 1915, McColl ceased to act as a member of the board of county commissioners of Bonner county by reason of the creation of Boundary county, including practically all of Commissioner McColl's district No. 3, on which date defendant McBride qualified under appointment of the Governor of this state as a member of the board of county commissioners of Bonner county; that after the election of plaintiff as chairman of the board of county commissioners of Bonner county on June 15, 1915, up to the time of the appointment and qualification of McBride as county commissioner of said county, the plaintiff acted as chairman of the board; that immediately after the qualification of defendant McBride as commissioner, and at a regular meeting of the board, it was moved by Commissioner Hagman and seconded by Commissioner McBride that the action of the board in theretofore electing Commissioner Prichard chairman be reconsidered. Prichard refused to put the motion, whereupon it was put by Commissioner Hagman and carried by the vote of Hagman and McBride. It was thereafter moved by Commissioner McBride and seconded by Commissioner Hagman that the office of chairman be declared vacant. Prichard refused to put the motion, whereupon it was put by Commissioner McBride and the motion was carried by the affirmative vote of Hagman and McBride. It was then moved by Commissioner Hagman and seconded by McBride that McBride be elected chairman. Motion was put by Hagman and carried by the affirmative vote of Hagman and McBride. Thereafter the defendant McBride assumed to act, and has continued to act, as the chairman of the board of county commissioners of Bonner county. This action was brought by appellant, Prichard, against McBride and Hagman to determine whether Prichard or McBride is entitled to legally hold the chairmanship of the board of county commissioners of Bonner county, and to perform the duties and functions thereof. The trial court entered judgment in favor of respondent McBride. This is an appeal from the judgment.

Appellant relies upon three assignments of error: First. The court erred in holding that the office of chairman of the board of county commissioners was not a civil office, and could be declared vacant at any time at the will of the majority. Second. The court erred in holding that the defendant McBride did not unlawfully usurp and intrude into the office of chairman of said board, and that the defendants had not prevented and precluded

the use and enjoyment by plaintiff of his office as county commissioner. Third. The court erred in its conclusion of law that the qualifications and eligibility of McBride to be appointed as a county commissioner could not be inquired into or determined in this action.

[1] The first and second assignments of error may be consolidated. They both involve but the one question, viz., the right of appellant to the position of chairman of the board of county commissioners of Bonner county. We think that a solution of the question before us involves the construction of sections 1906, 1908, and 1909, Rev. Codes. Sec. 1906, *supra*, provides:

"The term of office of a commissioner is two years."

Section 1908 provides:

"The members of the board of commissioners must, at their first regular meeting on the second Monday of January next after their election, elect a chairman from their number."

Section 1909 provides:

"A majority of the board constitutes a quorum. The chairman must preside at all meetings of the board, and in case of his absence or inability to act, the members present must, by an order, select one of their number to act as chairman temporarily. * * *"

It seems to us that it was clearly the intention of the Legislature, from the foregoing sections of the statute, to provide for the selection of a permanent chairman at the first meeting of the board, whose right to preside at all meetings should extend during his term of office as county commissioner, unless he voluntarily resigned as the chairman of said board, or was removed from, or ceased to be a member of, the board. That a regularly elected chairman would have the right to resign as chairman or as a member of the board of county commissioners could not be seriously questioned. Such resignation, however, would not involve the existence of the board, and since, under the statute, two members of the board constitute a majority, upon the resignation of one of their members, either as a member of the board of county commissioners or as the chairman of said board they undoubtedly would have the power to recognize the board; and upon the election of one of their number as chairman, his right to perform the duties and functions of said position would extend to the end of his term. Or, in the event of the permanent absence or inability of the regularly elected chairman to act, a majority of the board would be authorized to select his successor. A construction of the statute to the effect that the commissioners may, at any or all of their regular meetings, make a change in the chairmanship of the board would result, in our judgment, in confusion and a lack of that orderly proceeding on the part of the board in dispatching public business which is contemplated by the statutes, and which the electors in the county have a right to expect.

154 P.—40

[2] We do not think that the eligibility of Commissioner McBride could be inquired into in this proceeding, and the trial court did not err in so holding. But we are of the opinion that the trial court did err in holding that the appellant was not the duly elected chairman of the board of county commissioners of Bonner county, of which position he had been wrongfully deprived, and that he had not been denied the right to exercise the duties and functions of such chairmanship. Our conclusions are, and the judgment of this court is, that the respondent McBride does not hold and is not entitled to hold, the position of chairman of the board of county commissioners of Bonner county, and that the appellant Prichard now holds that position, and is entitled to hold it until the expiration of his term of office as county commissioner, unless he resigns or becomes legally disqualified.

The trial court is therefore directed to vacate and set aside the judgment, heretofore entered, quashing the alternative writ of mandate, and to issue a peremptory writ of mandate, directed to the respondents, commanding them to admit appellant to the use and enjoyment of the position of chairman of the board of county commissioners of Bonner county. Costs are awarded to appellant.

SULLIVAN, C. J., concurring.

MORGAN, J. I dissent from all of the foregoing opinion except wherein it decides that the eligibility of a county commissioner may not be inquired into in a mandamus proceeding, and in that portion I concur.

This case was tried in the district court, and was appealed to this court, upon the theory that the position of chairman of the board of county commissioners is a civil office. This theory is erroneous. Section 18, art. 5, of our Constitution, as amended, provides for the election of a prosecuting attorney for each organized county of the state and section 6, art. 18, as amended, provides:

"The Legislature by general and uniform laws shall provide for the election biennially in each of the several counties of the state, of county commissioners, a sheriff, a county treasurer, who is ex officio public administrator and also ex officio tax collector, a probate judge, a county superintendent of public instruction, a county assessor, a coroner and surveyor. The clerk of the district court shall be ex officio auditor and recorder. No other county offices shall be established, but the Legislature by general and uniform laws shall provide for the election of such township, precinct and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office."

It will be at once observed that there is no such office as that for which appellant is contending, and that the Legislature is prohibited, by the Constitution, from creating it. Therefore section 1908, Rev. Codes (quoted in the majority opinion), cannot be construed to be more than a direction to the

board, fixing the time and manner of designating one of its members to preside at its meetings.

I have reached the conclusion that the Legislature has not fixed the tenure of office of the chairman of the board of county commissioners for two reasons: (1) Because it cannot be inferred from section 1909, Rev. Codes (quoted in the majority opinion), or from any other statute, that it was the legislative intent so to do; and (2) because there is no such office. The chairman is merely a member of the board of county commissioners, who has been designated by the board to discharge certain duties incidental to its chairmanship, and, no term during which he shall preside having been fixed, he cannot be heard to complain if the board sees fit to depose him and to designate another of its members to discharge those duties. Even though it be assumed that the office of chairman of the board of county commissioners can be, and has been, created by the Legislature, in order to reach the conclusion that it was the legislative intent to fix the tenure of that office, as found in the foregoing opinion, I must amend section 1908, Rev. Codes, and cause it to read:

"The members of the board of commissioners must, at their first regular meeting on the second Monday of January next after their election, elect a chairman from their number, who shall continue to act as such until his term of office as commissioner expires"

—or I must read into section 1909 a provision, which is not there, to the effect that, in case a vacancy occurs in the chairmanship, the board must elect a chairman to fill out the unexpired term for which the members were elected as commissioners. When the legislative intent has been fully and clearly expressed in a statute, courts should not, by way of interpretation, add new provisions to it.

The case of *State ex rel. Childs v. Kitchell*, 53 Minn. 147, 54 N. W. 1069, decided by the Supreme Court of Minnesota and reported in 19 L. R. A. 779, is somewhat analogous to this. It arose out of a dispute as to who should be president of the city council of Minneapolis, and involved the interpretation of the portion of the city charter, providing that:

"At the first meeting of the city council in January of each year, after a general state election, they shall proceed to elect by ballot from their number a president and vice president. The president shall preside over the meetings of the city council, and during the absence of the mayor from the city, or his inability from any reason to discharge the duties of his office, the said president shall exercise all the powers and discharge all the duties of the mayor."

Construing this provision, the court said:

"The sole purpose of the statute was merely to regulate the time when, and the manner in which, the city council should organize and elect their presiding officer, and to provide that, upon the happening of a certain contingency, such presiding officer, for the time being, whoever he might be, should perform the duties of

mayor. There is nothing indicating an intention to create a city office distinct from that of alderman."

After an able discussion the court further said:

"Our conclusion is that the president of the city council of Minneapolis is not an 'officer' of the city, within the meaning of the city charter or the Constitution, but that he is merely the officer or servant of the legislative body which elected him, and that, as such, he is removable at the will or pleasure of that body."

I have been entirely unable to perceive the force of the reasoning which impelled the majority of the court to reach the conclusion stated in the opinion to the effect that a construction of the statute permitting the board, at any regular meeting at which it sees fit to do so, to make a change in the chairmanship, would result in confusion and lack of orderly proceeding, on the part of the board, in dispatching public business. Had it been deemed to be expedient by the lawmaking branch of the government that the chairmanship of the board of county commissioners be a county office, and that one elected to it should hold it two years, it would seem the framers of the Constitution would not have prohibited it, and that the Legislature would have left nothing to be inferred, but would have expressly provided for it.

Under the construction placed upon the law by the majority of the court, I am unable to conceive of any lawful method of getting rid of a chairman, who has once been chosen, during his term of office as commissioner, however unsatisfactory his services as a presiding officer may prove to be, and regardless of the lack of orderly proceeding on the part of the board, in dispatching public business, his retention as chairman may occasion, unless he be guilty of such gross misconduct in office as to warrant his removal from the board in a judicial proceeding.

(28 Idaho, 312)

DIETRICH v. COPELAND LUMBER CO.
et al.

(Supreme Court of Idaho. Jan. 3, 1916.)

1. LIMITATION OF ACTIONS \S 58—ACTION ON NOTE—FOREIGN CORPORATIONS.

Where an action is brought on promissory notes executed by a foreign corporation which has not complied with the laws of this state in regard to filing its articles of incorporation and designating an agent upon whom service of process may be had, and it is sought to hold the president and secretary of such corporation personally liable under the provisions of section 2792, Rev. Codes, the action must be brought within three years, or the action is barred by the provisions of subdivision 1 of section 4051, Rev. Codes.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 324-328, 343, 347; Dec. Dig. \S 58.]

2. FOREIGN CORPORATIONS—OFFICERS—PERSONAL LIABILITY.

Under the provisions of section 2792, Rev. Codes, all officers, agents, and representatives

of a foreign corporation or persons claiming to be officers or agents of the same, who make or attempt to make any contract or agreement, or contract any indebtedness in the name of such corporation, or for its use and benefit, before such corporation has complied with the laws of this state, shall be jointly and severally personally liable upon and for all such contracts and agreements as principal contractors.

3. LIMITATION OF ACTIONS —58—STATUTORY LIABILITY—ACTION TO RECOVER—FOREIGN CORPORATIONS.

Held, that the liability sought to be imposed by this action on the defendants is a statutory liability, and was barred by the statute of limitations at the time this action was brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324-328, 346, 347; Dec. Dig. —58.]

4. CORPORATIONS —653—FOREIGN CORPORATIONS—CONTRACTS—ENFORCEMENT AGAINST STOCKHOLDERS.

Held, under the facts of this case, that the plaintiff cannot recover in this action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2547-2549; Dec. Dig. —653.]

5. LIMITATION OF ACTIONS —58—"LIABILITY CREATED BY STATUTE."

A "liability created by statute" within Rev. Codes, § 4054, subd. 1, providing that an action on a liability created by statute other than a penalty or forfeiture must be brought within three years, is a liability depending for its existence on the enactment of the statute, and not on the contract of the parties (quoting Words and Phrases, Second Series, Statutory Liability).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324-328, 346, 347; Dec. Dig. —58.]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by Michael G. Dietrich against the Copeland Lumber Company, a corporation, and others. From judgment for defendants, plaintiff appeals. Affirmed.

G. A. Buhrow, of Priest River, and G. H. Martin, of Sandpoint, for appellant. Herman H. Taylor, of Sandpoint, for respondents.

SULLIVAN, C. J. This action was brought to recover judgment on 13 certain promissory notes executed by the Copeland Lumber Company, a corporation, upon four causes of action. The defendants D. H. Chisholm and Isabella Chisholm, his wife, were joined as defendants, and the plaintiff sought to enforce against them the statutory liability provided by section 2792, Rev. Codes, on the ground that they had acted as officers, president and secretary, of said corporation, in the execution of said notes, which corporation, being a Washington corporation, had not complied with the laws of the state of Idaho in regard to filing its articles of incorporation and designating an agent upon whom service of process might be had in this state. Separate demurrers were interposed to the complaint by the Chisholms upon the ground

that the causes of action were all barred under subdivision 1 of section 4054, Rev. Codes, and for other reasons. The court sustained said demurrers as to the first three causes of action, on the ground that each action was barred by the provisions of the statute of limitations, and overruled the demurrer as to the fourth cause of action.

D. H. and Isabella Chisholm filed separate answers to the fourth cause of action, denying each and every allegation of said complaint, and pleaded as affirmative answers the defense that said cause of action was barred by the statute of limitations, and, further, that the plaintiff, Dietrich, was one of the prime movers, instigators, and incorporators of the defendant Copeland Lumber Company; that he was one of the trustees of the corporation; that the place where the principal business was transacted was Spokane, Wash., and that the board of trustees met there and transacted the business of the company; that the plaintiff had been ever since the incorporation of said company, and until the dissolution thereof, one of the trustees and an officer, to wit, vice president and treasurer, and was such officer and claimed to be such, and, as such, made an attempt to make contracts and agreements evidenced by the notes sued on in this action on behalf of the corporation, and contracted indebtedness in the name of said corporation for its use and benefit; that he, as such prime mover, instigator, and incorporator, undertook and promised that said corporation would comply with the laws of the states of Washington and Idaho, and, as such trustee and officer, it was his duty to do so; that the plaintiff knowingly, willfully, and unlawfully failed to have said corporation comply with the laws of the state of Idaho or to enforce compliance therewith by said corporation, as was his duty as an officer of said corporation; that he knowingly and willfully failed to act in said matter, and failed to have said corporation comply with the Constitution and laws of the state of Idaho relating to foreign corporations; that, he being the prime mover in the organization of said corporation, defendants had a right to and did rely upon the promise of the plaintiff in that regard; that plaintiff reported to defendants that a compliance with the laws of Idaho had been made at the time of making said agreement evidenced by said notes; that the agreement and notes sued on were the acts, agreement, and notes of the corporation solely, and not the acts, agreement, and notes of the defendants; that said agreement and notes were made in the state of Washington, and were not subject to the laws, nor under the penalties thereof, of the state of Idaho; that said promissory notes were made and executed by the plaintiff with said corporation with full knowledge of all the facts set forth in the answers, and were made long

prior to November 4, 1908; that the pretended consideration for said notes was the purchase by said corporation from the plaintiff of the stock he held in said corporation; that said pretended sale and purchase of said stock was entirely void and ultra vires; that the plaintiff has never delivered to the corporation his stock and interest in said corporation, and the consideration for the contract has wholly failed, and the agreement is and was void under the laws of the states of Washington and Idaho; that said corporation was dissolved in the state of Washington on February 23, 1910, for failure to pay to the state of Washington the license fees required under the law; that plaintiff is estopped, and in equity should be estopped, from maintaining this action, from enforcing and attempting to enforce any right under said contract or promissory notes, or collecting any portion thereof; that on December 18, 1911, plaintiff took possession of the personal property of the defendant corporation, and sold and disposed of the same, and received therefor \$1,000, and has pretended to set off \$878 of said sum against other indebtedness of said corporation to him, the plaintiff, which was barred by the statute of limitations; that defendant D. H. Chisholm never owned to exceed 2,000 shares of the stock of said corporation at the par value of \$1 each; and that the defendant Isabella Chisholm never owned to exceed 1,500 shares of the stock of said corporation.

Before the trial the defendant Isabella Chisholm died, and her codefendant, D. H. Chisholm, was appointed administrator of her estate, and was substituted as one of the defendants. During the trial considerable oral and documentary evidence was introduced by both the plaintiff and defendants.

At the close of the testimony, the plaintiff moved for a dismissal of said action as against the Copeland Lumber Company, and said motion was granted. Thereafter, plaintiff and defendants having closed and rested their case, motion was made by counsel for defendants for a directed verdict, which motion was granted by the court, and the jury thereafter rendered a verdict in favor of the defendants, and judgment was entered on said verdict. The appeal is from the judgment.

[1, 2] Three errors are assigned: First, that the court erred in sustaining defendants' demurrers to the first three causes of action; second, the court erred in directing a verdict; third, the court erred in not submitting to the jury the question as to the personal liability of the defendant D. H. Chisholm.

The order of the court sustaining the demurrers to the first, second, and third causes of action was based on subdivision 1 of section 4054, Rev. Codes, which subdivision provides that an action upon a liability created

by statute other than a penalty or forfeiture shall be barred in three years.

[3, 4] It is contended by counsel for respondents that, under the provisions of section 2792, Rev. Codes, which makes all officers, agents, and representatives of a foreign corporation, or persons claiming to be officers or agents of the same, who shall make or attempt to make any contract or agreement, or contract any indebtedness in the name of such corporation, or for its use and benefit before such original filings are made (referring to the filing of the articles of incorporation and designation of a statutory agent with the proper officer), or while such corporation is in default upon filing a reappointment as provided in said section, jointly and severally personally liable upon and for all such contracts and agreements as principal contractors, the liability imposed by those provisions is a statutory liability, and therefore barred in three years. This contention is clearly correct, since without the statute the liability would not attach. [5] The liability is created by the statute. It is stated in 4 Words and Phrases, Second Series, p. 686, that:

"A 'statutory liability' is one that depends for its existence on the enactment of the statute, and not on the contract of the parties."

The liability contended for in this action is one wholly dependent for its existence on the provisions of section 2792, *supra*. The court therefore did not err in sustaining said demurrers, since said causes of action were based on a statutory liability, and were barred by the statute of limitations at the time this action was commenced.

As to the other assignments of error, it appears from the record that the Copeland Lumber Company was incorporated in the state of Washington about December 23, 1906, to do business in both Idaho and Washington; that plaintiff, Dietrich, and his wife and the defendant Chisholm and his wife were the incorporators and trustees; that Dietrich looked after the incorporation of said company and employed an attorney to prepare the articles of incorporation. It appears that Dietrich was to look after all of those matters and see that the law was properly complied with in the incorporation of said company, but he failed to have said corporation comply with the laws of the state of Idaho in regard to foreign corporations doing business in this state, and because of the failure to pay the license tax in the state of Washington said corporation was dissolved in that state.

On the motion of plaintiff at the close of the testimony, the cause was dismissed as against said corporation, and plaintiff sought to hold the other defendants under the liability imposed on certain corporate officials by the provisions of said section 2792.

It must be borne in mind that the consideration given for the notes sued on in the

urth cause of action was stock of said corporation held or owned by the plaintiff, Dietch. This purchase by the corporation of its own stock amounted to a reduction of the capital stock of the company, which reduction in that manner is in violation of the statute. Sec. 2732, Rev. Codes, as amended by laws 1909, p. 159. However, the most serious objection to the right of plaintiff to recover, as we view it, and on which, no doubt, the trial court directed a verdict, is that the plaintiff is estopped to assert a statutory liability against his codirectors and co-officers, he himself being one of the directors and officers in fault and acting and assuming to act for the corporation, and chargeable with the knowledge that the corporation had failed to comply with the laws of the state of Idaho. Participation by a director or officer of a corporation in the proceedings of the corporation and assistance in making contracts ultra vires, or contrary to law, stops such officer from recovering against its codirectors or officers personally on notes and accounts of the company which he has bought up.

It was stated in *Rogers v. Bonnett*, 2 Okl. 53, 37 Pac. 1078, a case that involved illegal acts or acts in violation of the statute, as follows:

"The plaintiffs, as well as the defendants, were directors in the corporation, and joined in the act forbidden by the statute, under which they had just formed the corporation in whose name they undertook to contract. * * * It was their duty as directors to know all of the liabilities resting upon them, as well as the rights provided for them by the statute. If they did not know them otherwise, the proposition to create a liability more than four times as great as the subscribed capital stock should have caused them to halt, to inquire, and to inform themselves of the law. We believe the circumstances in this case were such as to render ignorance of the illegality inexcusable, and that, upon the present assignment of error, the plaintiffs must be left where their wrongful action has placed them."

So in the case at bar. At the time this contract was made and said notes executed the plaintiff knew, or was charged with the knowledge, that the corporation had not complied with the laws of the state of Idaho, and that all of its acts in regard to said contract in the purchase from him of corporate stock was in violation of law, and he must be left where his wrongful acts have placed him.

After a careful examination of the whole record, we are satisfied that the trial court did not err in sustaining the demurrers to the first three causes of action, and in directing a verdict and entering judgment in favor of the defendants, and that plaintiff cannot recover in this action.

The judgment must therefore be affirmed, and it is so ordered, with costs in favor of respondents.

BUDGE and MORGAN, JJ., concur.

(38 Idaho, 368)

CADY et ux. v. KELLER.

(Supreme Court of Idaho. Jan. 14, 1916.)

1. APPEAL AND ERROR §109—DECISIONS APPEALABLE—DENIAL OF JUDGMENT NOTWITHSTANDING VERDICT.

In the Idaho practice, no provision is made for an appeal from an order denying a motion for judgment notwithstanding the verdict, and it is not therefore an appealable order.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §109.]

2. TRIAL §295—INSTRUCTIONS.

The instructions given to the jury in a case must be read and considered together, and if they are not in conflict with each other and, taken as a whole, correctly state the law applicable to the facts of the case, the circumstance that an isolated paragraph is obscure, incomplete, or indefinite, will not, of itself, constitute ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. §295.]

3. PLEADING §236—AMENDMENT—DISCRETION.

Granting or refusing to grant permission to amend a pleading is largely a matter of discretion of the trial court, and, unless the exercise of such discretion deprives a party to the action of some substantial right, it is not error.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. §236.]

4. APPEAL AND ERROR §1175—REMANDING OF CAUSE—JUDGMENT.

Although as a general rule the judgment in an action of replevin, if for the plaintiff and the property has not been delivered to him, should be in the alternative, for the return of the property or its value in case return cannot be had, and although the verdict is in the alternative and the judgment makes no provision for the return of the property, if it clearly appears from the record that return cannot be had, the case will not be remanded to the trial court with instruction to enter judgment in the alternative, since no useful result would follow such action, and since no substantial right of either of the parties has been invaded by the form of the judgment entered by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. §1175.]

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by Sidney Cady and wife against Ernest B. Keller. From judgment for plaintiffs, defendant appeals. Affirmed.

Lynn W. Culp, of Cœur d'Alene, for appellant. Roger G. Wearne, of Cœur d'Alene, for respondents.

MORGAN, J. This action was commenced by respondents against appellant to recover possession of a team, harness, and farm wagon, or the value thereof in case delivery could not be had, together with damages for the taking and detention of the property. It appears that appellant came into possession of the property, which respondents claim was exempt from execution under the provisions of section 4480, Rev. Codes, in his official capacity as constable, first under and by virtue of a writ of attachment and, thereafter, under and by virtue of a writ of execu-

tion issued out of the justice's court in a case wherein Branson-Max Hardware Company, Limited, a corporation, was plaintiff, and respondent, Sidney Cady, was defendant. It further appears that thereafter appellant sold the property pursuant to the execution.

The trial resulted in the following verdict by the jury:

"We, the jury in the above-entitled action, hereby render our verdict in favor of plaintiffs and against defendant as follows: For the immediate return of the two mares, harness and wagon described in plaintiffs' complaint to plaintiffs, or in lieu thereof the payment to plaintiffs by defendant of the sum of \$350 the value of the property at the time it was taken from plaintiffs; and for the further sum of \$200.00 damages for the taking and detention of said property."

Appellant moved for judgment in his favor notwithstanding the verdict, which motion was by the court denied, and judgment was entered in favor of respondent and against appellant wherein it was, among other things rected:

"It appearing from facts developed during the hearing that said property cannot now be returned to plaintiffs, therefore it is ordered, adjudged, and decreed, and this court does order, adjudge, and decree, that plaintiffs do have and recover judgment against defendant, Ernest B. Keller, in the full sum of \$350, together with the further sum of \$200, being the total sum of \$550, together with the costs and disbursements of this action as taxed in the sum of \$42.50 and allowed herein."

From the order denying appellant's motion for judgment notwithstanding the verdict of the jury and from the judgment made and entered in this case, this appeal is prosecuted.

[1] Section 4800, Rev. Codes, provides:

"A judgment or order, in a civil action, except when expressly made final, may be reviewed as prescribed in this Code, and not otherwise."

Section 4807, Rev. Codes, fixes the time within which appeals may be taken from judgments and certain orders made and entered in district courts to this court, but no provision is made for an appeal from an order denying a motion for judgment notwithstanding the verdict, and, in the absence of such a provision, it is not an appealable order. This will therefore be treated as an appeal from the judgment alone.

Appellant assigns as error the action of the court in admitting in evidence respondent's exhibits, marked for identification "E," "F," "G," "H," "I," and "J," and contend that they were not properly identified and were incompetent, irrelevant, and immaterial. These exhibits are a part of the files of the justice's court in the case above mentioned; Exhibit E being a motion supported by the affidavit of respondent Sidney Cady for the release from attachment of the property in question as being exempt from execution. Exhibit F is a supplemental motion demanding the release of the property upon the ground that the affidavit of attachment was false. Exhibit G is the answer of plaintiff in said suit to the motion above mentioned.

Exhibit H is the affidavit for attachment. Exhibit I is the undertaking on attachment. Exhibit J is the affidavit of Cady claiming the property in question as exempt from execution and alleging the facts upon which that claim was based.

During the trial of this case in the district court, while the justice of the peace was upon the witness stand, counsel for respondents was attempting to prove, by the witness, the contents of certain documents, which were files in the justice's court, whereupon a controversy arose between counsel for the respective parties as to the proper method of making this proof, and resulted in an agreement being reached that all records and files in the justice's court pertinent to the issue in the district court might be accepted in evidence.

At the close of taking testimony, counsel for respondents attempted to read the supplemental motion marked "F," above mentioned, to which objection was made by counsel for appellant upon the ground that it was not offered or introduced in evidence and was no part of the record, upon which objection the court made the following ruling:

"Overrule the objection on the ground that it is one of the papers that the court understood was offered in evidence. Counsel claims it was offered. I will say that at the time this justice's docket and other papers were offered in evidence the court understood it was agreed that all the papers subsequent to the writ of attachment might be offered in evidence, and the court understood they were offered in evidence; and if they were not, and it is now desired to put them in, the court will reopen the case and allow them to be offered, and if the attorney desires to offer any evidence in their rebuttal he may do so."

And upon further objection being made by counsel for appellant, the court said:

"The court has already made its ruling on that matter; and, if it is deemed necessary to complete the case and have a proper hearing of it in this suit, those papers may be offered, in order that we may not have a piecemeal trial."

Thereupon the documents marked "E," "F," "G," "H," "I," and "J" for identification were offered and admitted in evidence over the objection of appellant to the effect, among other things, that they had not been identified as files of the justice's court, to which objection the court made the following ruling:

"If the court understood the agreement, they are within the agreement. The docket was identified by the justice yesterday on the stand."

We find no error in the rulings of the court in this particular. The transcript of the proceedings had while the justice of the peace was upon the witness stand discloses that the court was justified in concluding that no objection would be made to the introduction of any records and files of the justice's court material to the issue in the district court; that identification of the various documents was waived; and that such was, in fact, the understanding of the parties at the time.

[2] Certain other assignments of error are

predicated upon portions of the instructions given by the court to the jury and upon his refusal to give an instruction requested by appellant, which will not be quoted or discussed at length. The instructions given, taken as a whole, correctly and clearly state the law applicable to the facts in the case. The rule is well settled in this state that all of the instructions must be read and considered together, and if they are not in conflict with each other and, taken as a whole, correctly state the law applicable to the facts of the case, the circumstance that an isolated paragraph is obscure, incomplete, or indefinite will not, of itself, constitute ground for reversal. *Tilden v. Hubbard*, 25 Idaho, 677, 138 Pac. 1133; *Osborn v. Cary*, 28 Idaho, —, 152 Pac. 473, and cases therein cited.

[3] Appellant makes the following assignments of error:

"The court erred, when, after all the evidence was in, and both sides had rested, defendant moved for a dismissal for the reason that the amended complaint did not state a cause of action, and the court had sustained the motion to dismiss, on his own motion to offer to plaintiffs to allow them to amend their complaint, and to offer proof to sustain the amendment, and, when plaintiffs refused to avail themselves of the opportunity so offered, to disregard his own ruling and continue the case."

This assignment is not fully borne out by the record. The transcript discloses that upon the motion mentioned in the assignment of error being made the court ruled as follows:

"I think I will sustain the contention as to the pleading, and allow you to amend your complaint to conform to your proofs, or, if the proof is not in as you desire it, I will allow the case to be reopened and proof offered on that point."

Thereupon, although no amendment was actually written into the complaint, the trial proceeded as if it had been so written and the exhibits above mentioned were read to the jury.

Granting or refusing to grant permission to amend a pleading is largely a matter of discretion of the trial court, and, unless the exercise of such discretion deprives a party to the action of some substantial right, it is not error. *Idaho Placer Min. Co. v. Green*, 14 Idaho, 294, 94 Pac. 161; *Harrison v. Russell Co.*, 17 Idaho, 186, 105 Pac. 48; *Snowy Peak Min. Co. v. Tamarack & Chesapeake Min. Co.*, 17 Idaho, 630, 107 Pac. 60; *Pennsylvania-Coeur d'Alene Min. Co. v. Gallagher*, 19 Idaho, 101, 112 Pac. 1044; *Mantle v. Jack Waite Min. Co.*, 24 Idaho, 613, 135 Pac. 854, 136 Pac. 1130; and *Trousdale v. Winona Wagon Co.*, 25 Idaho, 130, 137 Pac. 372. We have reached the conclusion that the court acted within its discretionary power in permitting the amendment and in admitting the proof, and that in so acting no error was committed.

[4] Other assignments of error are predicated upon the action of the court in denying appellant's motion for a judgment notwith-

standing the verdict and question the sufficiency of the evidence to sustain the verdict and judgment. An examination of the record convinces us that the evidence is sufficient and that the court committed no error in making the ruling complained of.

Appellant urges that the judgment is void for the reason that it is contrary to the verdict, in that the verdict is in the alternative, while the judgment is for the value of the property and makes no provision for the return of it to the respondents. While undoubtedly it is the general rule that the judgment in an action for replevin, if for the plaintiff and the property has not been delivered to him, should be in the alternative, for the return of the property or its value in case return of it cannot be had, it is said in 34 Cyc. 1549:

"If for any reason a return cannot be had, where it would be the appropriate remedy, the judgment need not be in the alternative, but may be for the assessed value of the property only, including such damages as may be allowed, and it has been held that where plaintiff brings replevin and fails to procure possession of the property, but continues the action as one for damages, an alternative judgment for the return of the property or its value is not required." *Babb v. Aldrich*, 45 Kan. 218, 26 Pac. 658.

In this case the trial court recited in its judgment that it appeared from the facts developed during the hearing that the property could not be returned, and the record fully sustains this finding. Prior to the trial in the district court appellant had sold the property and it had passed from his possession and control, and while we might, were the facts otherwise than as above stated, remand the case with instruction that a judgment in the alternative be entered, in view of these facts it is clear that no useful result would follow such action upon our part. Furthermore, section 4231, Rev. Codes, provides:

"The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." *Schultz v. Rose Lake Lumber Co.*, 27 Idaho, 528, 149 Pac. 728, and cases therein cited.

Since a return of the property cannot be had, it does not appear to us that any substantial right of either of the parties has been invaded by the failure of the court to enter a judgment directing appellant to return respondents' property to them (which it is impossible for him to do), nor does it appear to us that the judgment entered for the value of the property and damages for the taking and detention thereof should be disturbed.

The judgment of the trial court is affirmed. Costs are awarded to respondents.

SULLIVAN, C. J., and BUDGE, J., concur.

(28 Idaho, 358)

DUVALL v. NATIONAL INS. CO. OF MONTANA.

(Supreme Court of Idaho. Jan. 12, 1916.)

1. INSURANCE — 400—LIFE INSURANCE—PERIOD OF CONTESTABILITY—CHANGE BY CONTRACT.

Under the provisions of section 42, Sess. Laws 1911, p. 748, as amended by Laws of 1913, p. 406, § 22, it is provided that an insurance policy, so far as it relates to life or endowment insurance shall be incontestable after two years from the date of issue, except for nonpayment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war, etc. That provision of the statute does not prohibit the parties from contracting that the period of contestability shall be less than two years, nor from agreeing that the policy shall not be contestable after its delivery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. —400.]

2. INSURANCE — 400—LIFE INSURANCE—INCONTESTABLE CLAUSE — APPLICATION — FRAUDULENT STATEMENTS.

A clause in a policy of life insurance, providing that "this policy is incontestable from its date, except for nonpayment of premiums," precludes any defense after the stipulated period on account of false statements in the application for the policy, even though they were fraudulently made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. —400.]

3. INSURANCE — 400—LIFE INSURANCE—INCONTESTABLE CLAUSE — APPLICATION — FRAUDULENT STATEMENT.

Held, under the facts of this case, that the court did not err, in sustaining the demurrer to the answer and entering judgment in favor of the plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1086; Dec. Dig. —400.]

Morgan, J., dissenting.

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by Gertrude Duvall against the National Insurance Company of Montana, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

H. H. Taylor, of Sand Point, for appellant.
G. H. Martin, of Sand Point, for respondent.

SULLIVAN, C. J. This action was brought by the widow of the insured, as beneficiary, to recover upon a policy of life insurance issued by the appellant company and delivered about the 10th of December, 1913, to the deceased, Luther F. Duvall, who died about the 14th of March, 1914. A copy of the insurance policy, which was for \$2,000, is attached to the complaint and made a part thereof, \$100 having been paid thereon. The prayer is for judgment for \$1,900, with interest and costs.

The answer denied liability and set up five affirmative defenses, alleging false and fraudulent answers made by the deceased to material questions contained in his application and in the examination by the medical examiner; that the answers were made with intent to defraud the company, were believed

and relied upon by the company, were material, and known by the deceased to be untrue; that the truth of the statements was warranted by the deceased and was a consideration for the contract, and that such falsity and fraud rendered the policy null and void; that the deceased, when making application for the policy, and when examined by the defendant's medical examiner, and when he received the policy, had tuberculosis of the lungs, and had had such disease for a long time prior to his said application, and from which disease bronchial pneumonia developed, from which the insured subsequently died; that the appellant had offered to return to the plaintiff the \$111.94, together with interest from the date of payment.

To this answer and each affirmative defense the plaintiff interposed a demurrer, upon the ground that the facts stated in said answer and defenses did not constitute a defense to the plaintiff's cause of action. Said demurrer was sustained by the court and the defendant refused to plead further. Upon the facts found the court entered judgment in favor of the plaintiff for \$1,900, with interest and costs of suit. The appeal is from the judgment.

The policy contained the following incontestable clause:

"This policy is incontestable from its date, except for nonpayment of premiums."

[1] The only point involved on this appeal is the right of defendant to set up and prove fraud committed by the plaintiff in making material and false warranties and statements in his application for the policy, and whether this incontestable clause deprives the defendant of the right to set up the defense of fraud. It will be observed that it is provided that said policy was incontestable from its date, with the one exception, namely, for the nonpayment of premiums.

Section 42 (Sess. Laws 1911, p. 732) of an act relating to the insurance department in and for the state of Idaho, as amended by Laws of 1913, p. 406, provides, among other things, as follows:

"That the policy, so far as it relates to life or endowment insurance, shall be incontestable after two (2) years from its date of issue, except for nonpayment of premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war."

The latter exception is not involved in this case. Under the provisions of said statute, the contestability of the policy is limited to two years; but that does not prevent the parties from contracting that the period of contestability shall be less than two years, or from agreeing that the policy shall not be contestable after it is delivered. It does, however, prohibit the parties from extending the time of contestability beyond two years.

In 25 Cyc. at p. 873, it is stated as follows:

"A clause, now often inserted in policies, that after being in force a specified time they shall not be disputed or shall be incontestable precludes any defense after the stipulated period on account of false statements which were warranted to be true, even though they were made fraudulently."

[2, 3] The policy under consideration is stipulated to be absolutely incontestable from its date, except for nonpayment of premiums and for violation of the condition of the policy relating to military and naval service in time of war. It was held in *Patterson v. Insurance Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899, under an incontestable clause such as in the case at bar, that in determining the rule that should be adopted by the court there were numerous considerations which deserve attention; that it must be borne in mind that the suicide clause has become so universal in policies that its absence at once attracts attention; that it can hardly be otherwise than that the agent soliciting insurance under such a policy as the one under consideration would at once call attention to this apparent liberality, in that there was no suicide clause, and, further, that there was in addition an absolute incontestable clause, and that the average layman, not to say lawyer, in looking it over, would conclude that it was in fact a very favorable policy to the insured; that such provisions were all carefully framed by the insurance company and expressly framed to induce people to insure; that it is a familiar rule of construction that where an insurance policy is capable of two meanings, that which is the more favorable to the insured should be adopted; that it was claimed by the defendant in that case that the evidence tended to show a fraudulent scheme on the part of Patterson when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing a suicide and defrauding the company for the benefit of his children; that doubtless this would be a good defense, if shown, unless it was cut off by the incontestable clause; that it should be a defense not based on suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step, but that the difficulty was that that court had been unable to find any evidence which would justify the submission of that question to the jury; that it is said that the insured falsely represented his state of health in his application, and concealed some of the grounds upon which he had previously made application for a pension; that there does not seem to be much merit in this claim; that he submitted himself for examination to the company's medical examiner, who reported that he had dyspepsia and was a second-class risk; that the company had full notice that he was not in first-class health, because the insured stated in his application that he had

dyspepsia, and had had malaria, and had applied for a pension on the ground that he had indigestion, brought on by exposure in the army; that the incontestable clause would seem to effectually bar this defense; that if said incontestable clause be not altogether a glittering generality, put in for no other purpose than to induce men to insure, it would seem that it must cover such misstatements or omissions as are alleged; that no reason appears why an insurance company may not take the risk of ascertaining for itself the condition of the health of the insured.

We think the above suggestions in the *Patterson Case* apply with force to the facts of this case. The physician of the insurance company examined the defendant and reported that he was not a first-class risk, by reporting simply that he was a "good risk" when he was required to report whether the applicant was a "first-class risk," a "good risk," or only a "fair risk"; that there were symptoms of asthma, etc.; and recommended that said application for insurance in the amount of \$3,000 be reduced to \$2,000, and that a policy issue for that amount, which was done. The copy of the plaintiff's application for insurance contained in the record shows that he applied for only \$2,000 insurance, but the report of R. G. Dun & Co. sent to the insurance company, and the report of the company's physician, Dr. T. C. Witherspoon, both show that the application was for \$3,000, and that it was reduced to \$2,000. The certificate of the chief medical director contains the following indorsement: "Will accept \$2,000. 20 End. G. C. R. [Signed.] T. C. Witherspoon."

And immediately following is this indorsement:

"Accepted Dec. 4, 1913.

"[Signed] T. C. Witherspoon."

Immediately following the medical examiner's indorsement, A. T. Morgan made the following indorsement:

"No inspection necessary; issue policy. Date Dec. 5, 1913.

"[Signed] A. T. Morgan, General Manager."

It was also contended by counsel for respondent on the oral argument of the case that the application was for \$3,000, and that it was reduced to \$2,000, and that oral statement was not denied by counsel for appellant. The insurance company had the application for the policy; it had its resident medical examiner's report on the health of the applicant; it had the report of R. G. Dun & Co. as to the financial standing of the applicant; and it also had the chief medical examiner's certificate and indorsements, as above stated. The company was evidently fully advised as to the condition of the health of the insured, and they issued the policy containing the incontestable clause above quoted.

As was suggested in the *Patterson Case*, no reason appears why the insurance com-

pany may not take the risk of ascertaining for itself the condition of the health of the insured. The company had full notice that the insured was not in first-class health, and refused to issue him a policy for the amount for which he applied. The incontestable clause of the policy was evidently carefully framed by the company itself, and expressly framed to induce people to insure, and reserved the right to contest a recovery on the policy on only one ground, aside from the military or naval one, and that was a failure to pay the premiums. If the insurance company intended by the incontestable clause to except the ground of fraud in the procurement of the policy, why did it not include it, the same as it did the clause in the case of failure to pay premiums, and in case of suicide within a year after the policy issued?

It was held in *Insurance Company v. Fox*, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. Rep. 885, that a condition in a life insurance policy that it shall be incontestable for fraud in the application therefor, or in the medical examination preceding it, is not void as against public policy. In the case at bar the insurance company has agreed not to contest the policy on any ground, except those included in the incontestable clause, which we think the company had a right to do. It was stated in the *Fox* Case, *supra*, that if fraud may be waived at all, certainly the parties may stipulate the grounds on which the waiver may be made. It is clear to us that they may fix the conditions upon what incontestability may rest. They may agree that nonpayment of premiums may be the only ground of contest, and they may also agree that such incontestable provision may take effect from the date of the delivery of the policy. Had the insurance company desired to reserve the right to contest for fraud, it was its duty to specify fraud as one of the grounds of contest.

So far as the health of an applicant for life insurance is concerned, the insurance company has competent physicians to thoroughly examine such applicants, and it is the company's duty, before issuing its policy, to thoroughly satisfy itself as to his physical condition. It is well recognized that many people have ailments that they know nothing of, and that might have a tendency to make such applicant more readily subject to attacks of pneumonia and other diseases. The record shows that the insured died of pneumonia, and it is a well-recognized fact that pneumonia often attacks the most robust of men and causes their death in a very short time.

While we are aware that there are many authorities that hold that an incontestable clause, although not specifying fraud as one of the grounds of contest, if that were included, such provision would be void as against public policy, we are not in accord

with that line of decisions, but are in accord with the rule laid down in the *Patterson* Case, *supra*, and other cases which hold that misstatements or omissions of the insured respecting his health are covered by the incontestable clause in the policy, where it is provided that the policy is incontestable, except for default in the payment of premiums.

We therefore conclude that the judgment of the district court must be affirmed; and it is so ordered, with costs in favor of the respondent.

BUDGE, J., concurs.

MORGAN, J. (dissenting). It appears to me the foregoing decision violates some elementary principles of law. We must not overlook the fact that the case has not been tried upon its merits, that it was decided upon demurrer to the answer, and that the answer properly and sufficiently alleged fraud upon the part of the insured whereby he procured appellant to issue to him the policy of life insurance which forms the basis of this action. This state of facts invites the application of the fundamental rule that the demurrer admits all matters of fact which are sufficiently pleaded. *Bouvier's Law Dict. (Rawle's Third Rev.)* 841. So, although life insurance companies have competent physicians to thoroughly examine an applicant, and although it is the company's duty before issuing its policy to thoroughly satisfy itself as to his physical condition, and although it is well recognized that many people have ailments they know not of that might have a tendency to make them subject to attacks of pneumonia and other diseases, and although it is a well-recognized fact that pneumonia often attacks robust men and causes death in a very short time, nevertheless, for the purposes of this case, it must be taken as admitted that insured, knowingly and purposely, tricked and defrauded appellant into entering into the contract here sued upon, and that it would not have entered into it, had it not been so tricked and defrauded. Since the fraud is admitted by the demurrer, its effect upon the contract is stated in another fundamental rule as follows:

"It may be laid down as a general rule that any false representations of a material fact, made with knowledge of its falsity, and with intent that it shall be acted upon by another in entering into a contract, and which is so acted upon, constitutes fraud, and will entitle the party deceived thereby to avoid the contract or to maintain an action for the damages sustained." 9 Cyc. 411.

Since the application for insurance, the report of the examining physician, the report of R. G. Dun & Co., and the report of certain officials of the insurance company which appear as exhibits attached to the answer, are commented upon in the opinion, and the contents thereof are apparently acted upon

by the majority of the court as established facts tending to show that appellant was not defrauded, the admission made by the demurrer notwithstanding, it might be well to call attention to another rule, which has been heretofore considered settled in this state, to the effect that pleading an instrument by attaching a copy to a complaint or an answer as an exhibit thereto does not tender an issue, or involve an assertion of the truth of the statements and recitals contained in the exhibit. *Sweeney v. Johnson*, 23 Idaho, 530, 130 Pac. 997; *Schultz v. Rose Lake Lumber Co.*, 27 Idaho, 528, 149 Pac. 726. Therefore the statements of purported facts recited in these exhibits cannot be taken as allegations, or weighed as evidence, with a view to disproving the fraud, even though the demurrer do not admit it, which it does.

The case of *Patterson v. Insurance Company*, quoted from at some length in the majority opinion, does not appear to be in point. That case was tried upon the merits, and the defense was that the insured, while sane, committed suicide. The court held that suicide, while sane, does not avoid a life insurance policy, in the absence of the provision therein to that effect; but, speaking of the contention that the evidence tended to show a fraudulent scheme on the part of the insured, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide and defrauding the company for the benefit of his children, the court said:

"But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury."

In the case at bar that difficulty does not arise; the demurrer admits the fraud, and admits that it was by means of fraud the issuance and delivery of the policy were procured.

Another rule generally accepted and applied throughout the United States is: A provision in a contract of life insurance that it shall be incontestable from date is void, as against public policy, so far as it tends to exclude the insurer from contesting upon the ground of fraud in procuring the contract. *Welch v. Union Cent. Life Ins. Co.*, 108 Iowa, 224, 78 N. W. 853, 50 L. R. A. 774; *New York Life Ins. Co. v. Weaver*, 114 Ky. 295, 70 S. W. 628; *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478; *Reagan v. Union Mut. Life Ins. Co.*, 189 Mass. 555, 76 N. E. 217, 2 L. R. A. (N. S.) 821, 109 Am. St. Rep. 659, 4 Ann. Cas. 362. The application of this rule ought not to be questioned, much less denied, in Idaho, where the policy of the law has been expressed in the statutes, and the length of time within which such contracts

are contestable has been definitely fixed. Section 42, c. 228, p. 748, Sess. Laws 1911, as amended by section 22, c. 97, p. 406, Sess. Laws 1913, provides what shall be contained in certain policies of insurance, and one of the provisions to be so included is to be found in subdivision second of said section and is as follows:

"That the policy, so far as it relates to life or endowment insurance, shall be incontestable after two (2) years from its date of issue, except for nonpayment of premiums, and except for violation of the conditions of the policy relating to military or naval service in time of war."

Subdivision 4 of section 46, c. 228, p. 753, Sess. Laws 1911, is as follows:

"No company or agent shall issue or deliver in this state any policy which conflicts with any provision of this act. A policy issued in violation of this act shall be held valid and shall be construed as provided in this act, and when any provision in a policy is in conflict with any provision of this act, the rights, duties and obligations of the company and policy holder and the beneficiary shall be governed by the provisions of this act."

The legislative intent that a policy of life or endowment insurance shall be read and construed to provide that it shall be incontestable after two years from its date, other than for the causes by law expressly excepted, regardless of what may be recited in the contract attempting to fix a longer or shorter period of time, and that the two years' provision expressed in the statute shall govern the rights, duties, and obligations of the company and policyholder and beneficiary, and that the recitations in the contract to the contrary shall not govern them, is so clearly expressed that it ought to successfully resist and withstand all effort to place any other construction upon it.

If any more law is needed to guide us to a correct decision of the sole question in this case, which is stated in the majority opinion in effect to be whether the incontestable clause in the policy deprives appellant of the right to set up the defense of fraud, it is to be found in section 3321, Rev. Codes, which is as follows:

"Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

I am forced to conclude that the clause in the contract of insurance attempting to make it incontestable from its date is in conflict with the policy of the law as expressed in the statutes above quoted and that it is void; also that the case should be brought to trial upon its merits, with a view to determining the truth or falsity of the allegations of fraud contained in the answer.

(28 Idaho, 390)

COULSTON v. DOVER LUMBER CO.

(Supreme Court of Idaho. Jan. 15, 1916.)

1. MASTER AND SERVANT ⇨221—INJURY TO SERVANT—ASSUMPTION OF RISK—PROMISE TO REPAIR.

Where an employé has full knowledge of the unsafe condition of the premises or appliances in and with which he has to work, he is deemed to have voluntarily assumed the special risk incident to such employment, subject, however, to the exception that in case the servant notifies the master of such unsafe condition and objects to continue working under the special risk incident thereto, but is induced to continue working under such risk by a promise of the master to remove the danger within a reasonable time, the servant does not thereafter assume the risk during such time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. ⇨221.]

2. MASTER AND SERVANT ⇨221—INJURY TO SERVANT—ASSUMPTION OF RISK—PROMISE TO REPAIR.

In such cases the servant is deemed to have no cause of action, unless he prove that his reliance upon the promise of the master was the moving consideration for his consent to continue subjecting himself to such special risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. ⇨221.]

3. MASTER AND SERVANT ⇨278—INJURY TO SERVANT—DEFECTIVE APPLIANCES—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

Held, under the evidence in this case, that the alleged defective guide of a band saw was not the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. ⇨278.]

4. MASTER AND SERVANT ⇨185—INJURY TO SERVANT—DUTY PERFORMED BY COEMPLOYÉ—NEGLIGENCE OF FELLOW SERVANT.

If the act of one employé that caused an injury to another was an act pertaining to the duty owed by the master to a servant, the master is responsible for the manner of its performance, irrespective of the rank or grade of the servant or employé to whom it was intrusted; but if it was an act pertaining only to the duty of an operative under such employment, the employé performing such act is a fellow servant of his coemployés, whatever his rank or grade may be, and in the latter case the master is not liable for an injury caused by the negligence of such employé. *Larsen v. Le Doux*, 11 Idaho, 49, 81 Pac. 600, cited and followed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. ⇨185.]

5. MASTER AND SERVANT ⇨279—INJURY TO SERVANT—FELLOW SERVANT—SUFFICIENCY OF EVIDENCE.

Under the facts of this case, *held*, that the sawyer was a fellow servant of the plaintiff, and not a vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. ⇨279.]

Appeal from District Court, Bonner County; Robert N. Dunn, Judge.

Action by Charles H. Coulston against the Dover Lumber Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

H. H. Taylor, of Sandpoint, and Jas. A. Williams and Geo. D. Lantz, both of Spokane, Wash., for appellant. William J. Costello, of Sandpoint, for respondent.

SULLIVAN, C. J. This action was brought to recover \$50,000 damages for personal injuries sustained while working in appellant's sawmill. It is alleged in the complaint that the defendant company, who is appellant here, owns and operates a certain sawmill, and for the purpose of manufacturing lumber, a certain appliance or apparatus, commonly known as a carriage, was used to hold in place the log which is being sawed; that said carriage is operated and moves back and forth upon a track by means of steam power; that on said carriage there are blocks or knees which are used to hold, follow up, and push forward the log as it is being sawed, and as each board is sawed from the log to push the log forward toward the saw that the next board may be sawed therefrom; that said carriage was operated by a head sawyer in the employ of the defendant company, who had the control and direction of the men employed in and around said carriage, which men consisted of a head sawyer, a setter, a rider, and a tail sawyer or off-bearer; that plaintiff was the tail sawyer; that in the operation of said carriage, the head sawyer's orders are given to and obeyed by the tail sawyer, rider, and setter, and at the time of the happening of the injuries complained of, they were working under the orders and directions of said head sawyer; that the defendant maintained over said saw a certain sliding or adjustable gauge or guide which is used to keep the saw steady and keep it from jumping from side to side, which gauge or guide is adjustable to conform to the thickness of the log being sawed; that it was the duty of the tail sawyer to adjust said guide to the size of the log; that on the 30th of July, 1912, the plaintiff was employed as tail sawyer, and had been so employed from about the 1st of June, 1912; that for some time prior to the accident said gauge had been in a defective condition, and that it had not stayed in place but kept sliding down, of which defective condition plaintiff had notified the defendant company through its foreman who informed the plaintiff that he would look after it, but he failed to do so; that because of the defective condition of said gauge plaintiff was compelled to and was giving his almost constant attention to keep said gauge in place in order to avoid an accident; that on the 12th day of July, 1912, the plaintiff being engaged as the tail sawyer, and while exercising due care and caution in the performance of his duties and with his attention fixed on said defective gauge or guide, the last board of a log which had just been sawed struck plaintiff on the

left leg and caused the injuries complained of; that it was the duty of the head sawyer to exercise due care and caution before starting the carriage back to see that the last board of the log being sawed was clear of the carriage; that the cause of said board's striking plaintiff and causing the injury was due to the negligence and carelessness of the head sawyer in starting back the carriage before said board had entirely cleared the carriage, causing the end of said board to be caught by the carriage block; that said carriage blocks were operated and controlled by means of springs which were used to draw the blocks back into position for the reception of another log. Plaintiff prayed for \$50,000, and costs of suit.

The answer denied all of the material allegations in regard to the negligent operation of said mill, and put in issue the material allegations of the complaint, and set up four separate defenses: (1) That plaintiff was a man of mature age and discretion, and was familiar with the work in which he was engaged, and was aware of all the dangers incident to said employment, and that any injuries received by him were the ordinary result of the ordinary risks and dangers of said employment and were voluntarily assumed by him. (2) That the injuries received by plaintiff were the result of the negligence of the plaintiff himself, proximately contributed thereto, and not the result of any act for which the defendant was liable. (3) That the injuries received by plaintiff, except as stated in the second answer and defense, were received as the result of negligence of fellow servants of plaintiff engaged in common employment with the plaintiff. (4) That after plaintiff had received said injuries he made a claim that this defendant was liable for such injuries, which claim was denied by the defendant, and thereupon for the purpose of settling and adjusting the matter, said plaintiff, for a valuable consideration to him paid, did, on the 24th of August, 1912, release and discharge the defendant from said claim so made. A copy of said release is set forth in the answer. The consideration therefor was \$275 paid to the plaintiff. The prayer of the answer is that the plaintiff take nothing in this action, and that defendant recover his costs.

Plaintiff filed a reply to the averments of the answer in regard to the release set up therein, and alleges that he did not read said release before he signed it because of a severe headache with which he was suffering at that time, that said release was obtained by deception, fraud, and false representations made by the defendant company, and that said release was wholly without consideration and a fraud upon the plaintiff's rights.

Upon the issues thus made the cause was tried by the court with a jury, and verdict

and judgment were given and entered in favor of the plaintiff for \$5,000, and costs of suit amounting to \$141. A motion for a new trial was denied, and the appeal is from the judgment and the order denying a new trial. Numerous errors are assigned, because of which it is contended a new trial ought to be granted.

Apart from appellant's alleged liability because of the alleged negligence of the sawyer, the only claim of negligence was that the guide was out of repair so that it required extra attention. The guide referred to was a mechanical contrivance used to keep the saw in place to keep it from vibrating when it passes through the log, and is raised and lowered by steam power. Its action up and down is controlled by the tail sawyer with a lever in the nature of a throttle. It is necessary to raise the guide before the last board is cut off the log.

The respondent testified that said guide worked well at times, and at other times it did not, and it is contended by appellant's counsel that said guide had nothing whatever to do with the respondent's injury. Respondent testified that he had called the foreman's attention to the fact that said guide or gauge was not working properly, a couple of times, and also that the guide had worked that way all the time he was tail sawyer with the exception of a day or two; that he started to work as tail sawyer six or seven weeks before he was injured; that he had told the foreman twice in the first two weeks he worked there about said guide, and whether the foreman did anything with it the last time he told him, he could not say. It would work well at times, and at other times it would not.

It is under this promise to repair that the respondent seeks to bring his case within the exception to the doctrine of assumed risk. The record contains no evidence showing that respondent continued to work as tail sawyer upon the alleged promise of said foreman to repair the guide; and in order to bring his case within the exception referred to, he must have alleged and proved that he continued his work as tail sawyer in reliance upon the promise of the foreman to repair the guide. The injury was not caused by the alleged defective guide, but by a board being pushed against plaintiff's leg by some other part of the machinery.

[1] The general rule is that where an employé has full knowledge of the unsafe condition of the premises on which he is working, he is deemed to assume the special risk incident to the employment, subject, however, to the exception that where a servant notifies the master of a special risk and objects to continuing the work under existing conditions and is induced to continue by a promise to remove the danger within a reasonable time, he does not assume the risk

during such time. *Notthoff v. Los Angeles Gas & Elec. Co.*, 161 Cal. 93, 118 Pac. 436.

[2] An analysis of the decisions involving the effect of a promise in such cases shows that the servant is deemed to have no cause of action, unless he prove that his reliance upon such promise was the inducing motive for his consenting to subject himself to the given risk. 1 *Labatt on Master and Servant*, § 418; *Roy v. Hodge*, 74 N. H. 190, 66 Atl. 123.

[3] In the case at bar it was claimed, and the evidence shows, that two of the alleged promises to repair said guide were made several weeks before respondent received his injury, which, under the law, rendered them of no effect, since it is held that a promise to repair is without effect after such period of time has elapsed that it precludes a reasonable expectation that the promise will be kept. 26 Cyc. 1213. It appears from the evidence that the guide worked all right subsequent to the time such promises were made. When the complaint was made to the foreman, the evidence shows that he said he would have to see about it.

The true doctrine in regard to this matter relates only to the promise or assurance made by the master to the servant upon discovery of defects in tools or appliances upon the objection of the servant to use them, such as would induce him to continue in the service. It was held in *Gulf, C. & S. F. Ry. Co. v. Garron*, 96 Tex. 605, 74 S. W. 897, 97 Am. St. Rep. 939, that there was nothing in the nature of such a promise in the casual remark of the engineer to the defendant in error. Under the authorities, the alleged promise to repair added nothing to respondent's rights. He had assumed the risk of an injury from the guide. The record shows that it was not the defective guide that caused the injury, but the plaintiff attempts to show that it was because he was giving his attention to the defective guide, and not to his other duties, that the injury occurred. The condition of the guide was relied upon by the plaintiff to relieve him of the imputation of negligence which would follow from a failure to take the boards from the carriage so that it would clear them on its return, which was the most important part of his duties. It would appear that the respondent need not have neglected his duty of watching the boards in order to see that the guide remained in its place, and his duty was to see that the boards were not where they would be taken back by the carriage on its return.

The record shows that by keeping the lever pressed back the guide would stay up, and the respondent had his left hand on the lever. He need not then have watched it in order to keep it in place. He testified that even though he had been watching the boards instead of the guide, he "might or might not" have been able to see the board in time to

avoid the injury. The evidence shows that the carriage ordinarily moved back and forth, shuttle fashion, at such speed that what would occur at a given second of time could not be easily distinguished. He also testified that he was not devoting his entire attention to the guide, but that he had his eye on the boards.

The evidence in the record relating to the actual condition of the guide at the time the accident occurred is far from satisfactory. Respondent is not corroborated in his testimony to the effect that the guide was working imperfectly on that day, by any other witness, although three witnesses testified to its working imperfectly upon other occasions. Upon the other hand, the foreman denied that he had been asked by respondent upon that day to adjust the guide, and the sawyer knew nothing of its being out of order. Respondent does not contend that the alleged defective condition of the guide was the proximate cause of his injury, and a careful analysis of the evidence fails to show that it was necessarily even a secondary cause.

The next contention of respondent is that his injury was directly due to the negligence of the sawyer with whom he was working at the time of the accident, in that the sawyer reversed the carriage before the sawn boards were free therefrom, thereby carrying them back and allowing one of them to strike respondent's leg with great force, breaking and mangling it; that the sawyer in his control and operation of the carriage was acting as the vice principal of the defendant corporation, and performing a nondelegable duty.

It appears from the record in this case that the sawyer was a member of a band sawmill crew consisting of three other men besides himself, known respectively as the tall sawyer, setter, and rider. Each of these men had well-defined duties which were performed in concert or collaboration, and often with the aid of signals. These signals were most frequently given by the head sawyer, whose duty it was to determine the dimensions of the lumber to be sawed from a given log in order to utilize the material to the best advantage. He controlled the log carriage and was evidently the most important man on the crew, in the sense that his part required more skill and judgment than that of the others, who were therefore guided in the detail of the work to some extent by his direction. But it does not appear from the evidence in this case that he filled the position of boss or foreman in this crew. He had no power to hire or discharge workmen. There was a regular mill foreman or superintendent to whom such duties were delegated, who kept the time of the men employed about the mill and had general supervision of its operation.

[4, 5] There is little material conflict in

the evidence as to how the injury occurred. As we have already stated, it was the duty of the tail Sawyer to remove the sawn boards from the carriage before the carriage returned in order to repeat the operation of sawing another board from the log. On the occasion of the accident, the last cut in the log had been made. For some reason the tail Sawyer did not succeed in removing the board from the carriage, and the carriage started to return with it. Under those circumstances it was the duty of the Sawyer to reverse the carriage at once in order to prevent injury to members of the crew or the machinery. It does not in any way appear from the testimony that he was negligent in doing this, but the fact appears to be that owing to the great speed with which the empty carriage is returned, he was not able to reverse it in time to prevent the accident. The injury might, therefore, have been occasioned by the negligence of the injured person himself; it might possibly have been occasioned by the negligence of the Sawyer, or it may not have been due to actual negligence on the part of either. The record fails to supply positive and satisfying proof in this regard, which is not surprising when the great speed with which the machinery was operated is considered, so that the different acts accompanying the accident seemed to the onlookers to take place almost simultaneously. But even if it be conceded that the Sawyer was actually negligent, in view of the circumstance that this question of fact was so determined by the verdict of the jury, the question of law, as to whether the Sawyer under the conditions stated was a fellow servant or vice principal, still remains to be considered.

Respondent's counsel relies particularly upon a line of decisions in the state of Washington, holding that the head Sawyer of a sawmill crew is a vice principal, and, although he admits that the rule of decision in this class of cases is not the same in this state as it is in the state of Washington, he contends that the courts of both states agree in the proposition, as announced in the case of *Jacobsen v. Rothchild*, 62 Wash. 127, 113 Pac. 261:

"That it is not the rank of the servant, but the character of the act which determines the relation of coemployes"—citing *Lucey v. Stack-Gibbs Lumber Co.*, 23 Idaho, 628, 131 Pac. 897, 46 L. R. A. (N. S.) 86.

But it is apparent from the language used by the Washington court in the case of *On-garo v. Twohy*, 57 Wash. 668, 107 Pac. 834, that it was clearly of the opinion "that the rule as to fellow servants, as applied in that state [Idaho] differs widely from the rule as we have applied it here," and that court accordingly declined to apply the Washington rule in a personal injury case where it appeared that the injury had been sustained in the Idaho jurisdiction.

In his brief respondent's counsel quotes at

length from the opinion of the Washington court in the case of *King v. Page Lumber Co.*, 66 Wash. 123, 119 Pac. 180, wherein the court said:

"A Sawyer and dogger under certain conditions may be fellow servants, but this court had repeatedly announced the rule that the Sawyer, when charged with a nondelegable duty of his master, becomes and is a vice principal" (citing the cases referred to).

In this case the Washington court cites with approval the case of *Dyer v. Union Iron Works*, 64 Wash. 577, 117 Pac. 387, wherein it is said:

"We have held that where a master employs a number of servants to work with a dangerous agency and gives to one servant exclusive control of the agency with power to direct where the other servants shall work and the manner in which they shall work, the one given control is the representative of the master, that his negligence is the negligence of the master."

More than ten years ago, in the case of *Larsen v. Le Doux*, 11 Idaho, 49, 81 Pac. 600, this court had occasion to refer to the divergence of authority in the application of the master and servant rule as exemplified in what is known as the Ohio doctrine or rule, on the one hand, and the New York doctrine on the other. In that case pains was taken to point out particularly wherein the two doctrines differed, and it was announced that in the opinion of this court the New York rule was the correct principle to apply in this class of cases; that is to say, that "the master is liable for the negligence of an employe who represents him in the discharge of his personal duties toward his servants. Beyond this he is liable only for his own personal negligence." The Ohio doctrine, known also as the superior servant rule, holds that when the master has given to an employe supervisory control and management of some particular department of his business, such person, while so acting, stands in the place of the master, and the master is accordingly liable for his negligence whereby a coemploye is injured. This is the rule followed in the state of Washington, and some other jurisdictions, but it does not appear to be supported by the weight of authority.

"In most of the states the superior servant rule is either expressly or impliedly repudiated, and it is held that the fact that the person whose negligence caused the injury was a servant of a higher grade than the injured servant, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not prevent the application of the fellow-servant rule so as to make the master liable." 26 Cyc. 1309.

See, also, *Labatt, Master and Servant* (2d Ed.) § 1478, where all the decisions of all the states on this question are elaborately summarized.

Under the facts shown in the case at bar, it may well be doubted whether even under the Washington rule the head Sawyer could be deemed a vice principal, for this happens,

to quote again the language of the Washington court:

"Where a master employs a number of servants to work with a dangerous agency and gives to one servant exclusive control of the agency with power to direct where the other servants shall work and the manner in which they shall work."

It does not appear from the evidence in this case that the sawyer whose negligence alleged to have caused the injury had any such unqualified authority over his fellow employes, or that his control over them in the performance of their joint labors was anything more than directory, subject to appeal to the mill foreman or superintendent, if any trouble or disagreement between them occurred.

After a very careful consideration of the facts in this case and the law applicable to them, we are not disposed to recede from the rule of decision adopted by this court in the case of *Larsen v. Le Doux*, supra, with regard to the distinction to be applied in cases of this kind between a fellow servant and a vice principal, and are therefore obliged to conclude that the sawyer, Archie Doe, whose alleged negligence caused the injury complained of, according to the great weight of authority, as well as the previous decisions of this court, was a fellow servant of the plaintiff, and that the defendant corporation was not therefore liable for his negligence under the facts stated.

A number of other errors are assigned involving the admission and rejection of evidence, and also as to the giving and refusing to give certain instructions. However, the views announced by the court upon the questions already considered in this opinion appear to be so far decisive of the case that it seems unnecessary to pass upon the remaining assignments of error, since under our view of the law and the facts a new trial could not result in a judgment in favor of the plaintiff.

The judgment is reversed, and the cause remanded to the trial court, with instructions to enter judgment in favor of the appellant. Costs awarded to the appellant.

BUDGE and MORGAN, JJ., concur.

(28 Idaho, 455)

CHAS. L. JOY & CO., Limited, v. CARLSON et al.

(Supreme Court of Idaho. Jan. 27, 1916.)

1. INTOXICATING LIQUORS 45—LICENSES—REPEAL OF STATUTE.

Section 1510, Rev. Codes, providing that "all persons selling spirituous, malt or fermented liquors or wines in any quantity, not to be drunk in, on or about the premises where sold, shall pay a license of two hundred dollars per year," which was originally enacted in 1899 as an amendment to an act entitled "An act to regulate the sale of intoxicating liquors," is repealed by chapter 28 of the Laws of 1915, p. 83, and therefore has no application to the sale

of pure alcohol as provided by chapter 11, Laws 1915, p. 41.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 47; Dec. Dig. 45.]

2. INTOXICATING LIQUORS 49 — LICENSES—TAX—DRUGGISTS.

Held, that under the provisions of chapter 11, Laws 1915, p. 41, druggists employing licensed pharmacists as required by law may import and sell pure alcohol for mechanical, scientific, and medicinal purposes by procuring a permit for the importation thereof from the probate court of the county where the pure alcohol is to be used, and by limiting the sale to purchasers who have obtained a permit therefor from said probate court, and said druggists are not required to pay a license tax as provided in section 1510, Rev. Codes.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 50; Dec. Dig. 49.]

Original proceeding for writ of prohibition by Charles L. Joy & Co., Limited, a corporation, against August Carlson and others. Peremptory writ of prohibition granted.

Oppenheim & Hodgkin and Jay M. Parrish, all of Boise, for plaintiff. Raymond L. Givens and E. P. Barnes, both of Boise, for defendants.

BOTHWELL, District Judge. This is an original application to this court for a writ of prohibition to restrain the county commissioners, sheriff, and prosecuting attorney of Ada county from demanding and collecting from plaintiff the sum of \$200, license tax, to authorize the sale by plaintiff of pure alcohol for mechanical, scientific, or medicinal purposes.

It is alleged in the affidavit that the defendants August Carlson, William Howell, and Mans H. Coffin, as the duly elected, qualified, and acting county commissioners of Ada county, at the January meeting of the board of county commissioners, beginning on the 10th day of January, 1916, proceeding without authority of law and in excess of the jurisdiction of the said board of county commissioners, gave notice of their intention of requiring and compelling, and did notify the sheriff and prosecuting attorney of the said Ada county, to require and demand of plaintiff the sum of \$200 license tax before the said plaintiff would be allowed to sell, on a proper permit from the probate court, pure alcohol for mechanical, scientific, or medicinal purposes; that affiant is informed and believes, and therefore alleges the fact to be, that the defendants demanded the payment of said license tax from plaintiff under and by virtue of the terms and provisions of section 1510, Rev. Codes.

Affiant further alleges that plaintiff is regularly engaged in the retail drug business at Boise City, Ada county, state of Idaho, and has on hand a quantity of pure alcohol which plaintiff desires and will sell to any person lawfully authorized to purchase the same and holding a proper permit from a probate court of the state of Idaho. Affiant alleges

that plaintiff has not paid said license tax of \$200, or any other license tax, to the state of Idaho or to Ada county, but plaintiff employs a licensed pharmacist, under the laws of the state of Idaho, in each of its several places of business in said county.

The alternative writ of prohibition was issued, and upon return day thereof the defendants filed their demurrer and answer, wherein they allege that plaintiff's affidavit on application for writ of prohibition does not state facts sufficient to constitute a cause of action.

[1, 2] The question for determination in this case is whether or not the plaintiff, a drug company employing licensed pharmacists as required by law, and engaged, among other things, in the sale of pure alcohol for mechanical, scientific, and medicinal purposes in Ada county, is required to pay to said county a license tax of \$200 before said plaintiff is allowed to sell, on proper permit from the probate court, pure alcohol for scientific, mechanical, or medicinal purposes.

Counsel for plaintiff urge that the license tax should not be paid, because, first, section 1510, Rev. Codes, upon which defendants rely for their authority in collecting said tax, is null and void, and is no longer in force and effect and has been repealed in toto by chapter 11, Sess. L. 1915, p. 41, and by chapter 28, Sess. L. 1915, p. 83; second, that if said section 1510 is still in force, plaintiff is exempted from its provisions by the terms of section 1521, Rev. Codes.

Upon an examination of section 1510, Rev. Codes, which is as follows:

"All persons selling spirituous, malt or fermented liquors or wines in any quantity, not to be drank in, on or about the premises where sold, shall pay a license of two hundred dollars per year. No license issued under this section shall be for less or longer than one year. Every person violating the provisions of this section shall be guilty of a misdemeanor and shall be punished therefor as provided for in section 1518"

—we find that said section was originally enacted in 1899 as an amendment to section 23 of an act entitled "An act to regulate the sale of intoxicating liquors," Sess. L. 1890-91, p. 33, and was re-enacted in 1901 (Laws 1901, p. 13), as "An act to regulate liquor licenses," as an amendment to section 23 of the act of 1899 (Sess. L. 1899, p. 21).

Section 1527, which was included within the original act as section 21, defines the words "intoxicating liquors" as used in said act to include—

"spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters that may be used as a beverage and produce intoxication."

This court had under consideration the term "intoxicating liquors" as defined in this act, in construing section 31 of Senate Bill No. 62, Sess. L. 1909, p. 9, in the case of State v. Osmer, 21 Idaho, 18, 120 Pac. 163. The court in that case at page 25 of 21 Idaho,

at page 167 of 120 Pac., discusses at length the uses of pure alcohol, and says that within the meaning of that act—

"pure alcohol is not a beverage but a violent irritant. There is no question but that the Legislature may absolutely prohibit the manufacture and sale of alcohol and all intoxicants for beverages."

The license required by section 1510, supra, was for the sale of spirituous, malt, or fermented liquors or wines not to be drank in or about the premises where sold, and did not contemplate a license for the sale of pure alcohol for scientific or mechanical purposes. The phrase, "not to be drank in, on or about the premises where sold," is explanatory of the use for which the license was required. This section must be construed in pari materia with the entire chapter of which it was made a part in 1899 and re-enacted in 1901. The paragraph of section 1521, Rev. Codes, being a part of the same chapter but enacted in 1890-91, which provides that "it shall also be lawful for druggists, without the license herein provided, * * * to sell alcohol for mechanical and scientific purposes," might suggest at first thought that the Legislature recognized alcohol to be included in section 1510 as a spirituous liquor, in the sense that it is a beverage, and therefore especially provided that it might be sold by a regular druggist for mechanical and scientific purposes without license.

This contention, however, is without merit. Section 1521 was originally enacted as section 15 of "An act to regulate the sale of intoxicating liquors," enacted in 1890-91 (Sess. L. 1890-91, p. 83). Thus it will be readily seen that the phrase, "it shall also be lawful for druggists, without the license herein provided," contained in section 1521, Rev. Codes, had no application to section 1510 at the time of its enactment, because this latter section was not enacted until the year 1899. Nor can it be maintained that since the court has held that this section should be construed in pari materia with the entire chapter, that section 1510, though enacted in 1899, should be construed in connection with all of the sections in the original act which included the provisions of section 1521, that "it shall also be lawful for druggists, without the license herein provided, * * * to sell alcohol for mechanical and scientific purposes," and that at the time of the enactment of section 1510 the Legislature recognized its former legislation, and that therefore section 1510 was given to the people stamped with the acknowledgment that alcohol was included within the term "spirituous liquors," in the sense that it is a beverage, and but for the enactment of said section 1521 a license would be required before a druggist could lawfully sell alcohol for mechanical and scientific purposes. Construing it in pari materia with section 1521 and the other sections of the act of 1890-91, our attention is naturally directed to section 1 of the act, which

defines the purpose for which a license is required, and is as follows:

"It shall be unlawful for any person, by himself, by agent, or otherwise, to sell spirituous, malt or fermented liquors or wines to be drank in, on, or about the premises where sold, without having first procured a license and given a bond as hereinafter provided."

To construe that the enactment of the provisions of section 1521 as above quoted was a recognition by the Legislature that the sale of alcohol for mechanical and scientific purposes by druggists came within the license provisions of the act of 1890-91, p. 33, would be to hold that the Legislature recognized such a sale as a sale for the purpose of a beverage. There can be no similarity between the meaning of a sale of intoxicating liquors for a beverage and a sale of alcohol for mechanical and scientific purposes. To so hold would be to say that a beverage is a mechanical and scientific purpose.

We must keep in mind the intent of the Legislature as expressed in the title of the act of 1890-91 and 1899, viz., "to regulate the sale of intoxicating liquors," that is, the intoxicating liquors therein defined as those that may be used as a beverage, and since it is manifest that pure alcohol may not be used as a beverage, we are constrained to hold that said paragraph of section 1521 is simply descriptive of a right and does not operate as an integral part of chapter 33, Rev. Codes, the absence of which would require regular druggists to pay a license tax of \$200 for selling alcohol for mechanical and scientific purposes, and that section 1510 has no application to the sale of pure alcohol by druggists for mechanical and scientific purposes.

Under chapter 11 of the Laws of 1915, p. 41, druggists employing licensed pharmacists, as required by law, may import and sell pure alcohol for mechanical and scientific purposes by procuring a permit from the probate court where the pure alcohol is to be used, for the importation thereof and by limiting sales to purchasers who have obtained a permit therefor, from the said probate court, and this court has held that "scientific purposes," as used in said chapter, includes medicinal purposes. See *In re Crane*, 27 Idaho, 671, 151 Pac. 1006.

As heretofore held, section 1510 was enacted "to regulate the sale of intoxicating liquors" used as a beverage. The sale or disposal of intoxicating liquors for beverage purposes is no longer permitted in the state of Idaho, and this section of the Revised Codes is repealed by chapter 28 of the Laws of 1915, p. 83, and therefore can have no application to the sale of pure alcohol as provided by chapter 11, Laws 1915, p. 41.

It necessarily follows that druggists employing licensed pharmacists, as required by law, may import and sell pure alcohol for mechanical, scientific, and medicinal purposes by procuring a permit from the probate

court where the pure alcohol is to be used, for the importation thereof, and by limiting sales to purchasers who have obtained a permit therefor from the said probate court, and are not required to pay a license tax as provided in section 1510, Rev. Codes.

We desire to say in passing, however, that pure alcohol can only be sold upon a strict compliance with the law, and that chapter 11 of the Laws of 1915, p. 41, which permits pure alcohol to be sold for mechanical, scientific, and medicinal purposes, and none other, must be adhered to literally by the carrier, probate court, seller, and purchaser, and the officers of this state are charged with the enforcement of this statute under a strict construction of its provisions; all of which are mandatory.

The peremptory writ must issue; and it is so ordered. Costs awarded to plaintiff.

BUDGE and MORGAN, JJ., concur.

(54 OKL. 722)

WEATHERS v. BOARD OF COMRS OF COAL COUNTY. (No. 6064.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

COUNTIES ~~124~~—CONSTRUCTION OF COURT-HOUSE—CONTRACT WITH ARCHITECT—DAMAGES—LIABILITY OF COUNTY.

On the 5th day of November, 1908, the county commissioners of Coal county, having decided to erect a courthouse for that county upon the "rental plan," entered into a contract with W. to prepare plans for same and superintend its construction, for which he was to be paid 5 per cent. of the sum expended in construction. For legal reasons, the project was abandoned. Afterwards bonds to provide funds for the construction of the courthouse were voted. W. offered his services as architect as provided in the original contract. The same was refused, the original contract ignored, and the county commissioners employed other architects. *Held*, the county was not liable to W. for damages sustained.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 185; Dec. Dig. ~~124~~.]

Commissioners' Opinion, Division No. 4. Error from District Court, Coal County; Robt. M. Rainey, Judge.

Action by P. H. Weathers against the Board of County Commissioners of Coal County. Judgment for defendant, and plaintiff brings error. Affirmed.

Fooshee & Brunson, of Coalgate, for plaintiff in error. G. T. Ralls, Co. Atty., of Coalgate, for defendant in error.

MATHEWS, C. The county commissioners of Coal county, Okl., having decided to erect a courthouse for that county upon what is known as the "rental plan," on the 5th day of November, 1908, entered into a written contract with the plaintiff wherein he agreed to prepare plans and specifications for said building and to superintend its construction for 5 per cent. of the sum to be expended in the

construction. Owing to an adverse decision of the Supreme Court, rendered January 19, 1909, wherein it was decided that section 2, art. 8, c. 32, p. 256, Session Laws 1897, which expressly permitted the erection of court-houses on the "rental plan," was inoperative, being repugnant to section 26, art. 10, of the Constitution, the plan was abandoned, and this suit followed, based on the aforesaid contract, and the defense set up was that the county commissioners had no right or authority to enter into such a contract and that the same was void and unenforceable. The plaintiff proved at the trial the execution of the contract, and that he was to receive 3 per cent. of the cost of the proposed building when a contract was entered into for the construction of the building and the remaining 2 per cent. as the work progressed. It also was shown that on the 31st day of December, 1908, the defendant board passed a resolution reciting the execution of the contract on the 5th of November, 1908, and that on the 29th day of December, 1908, a contract had been entered into with a construction company for the erection of said building, and further acknowledged in said resolution that 3 per cent. upon the contract price was then due the plaintiff and therein pledged the said board to make the necessary levy for the fiscal year beginning July 1, 1909, to pay the plaintiff the said 5 per cent. due and to be due him under the contract for his services. It further developed at the trial that, on account of the aforesaid decision of this court, the proposed project to erect a courthouse for Coal county upon the "rental plan" was abandoned, but later there was submitted to the voters of that county the proposition to vote a bond issue for that purpose which proposition carried at the submission. The plaintiff then offered his services to defendants under the original contract, but they refused to employ plaintiff and made a contract with other architects to prepare plans and supervise the erection of the courthouse to be constructed through the bond issue. At the close of the testimony, the plaintiff requested the court to instruct a verdict in his favor; but the request was denied, and the jury directed to return a verdict in favor of defendant, from which action of the court the plaintiff prosecutes this appeal.

It will be observed that, at the time this contract was executed, the law of 1897, supra, provided for the erection of courthouses upon the plan proposed in the contract under consideration, but on January 19, 1909, the opinion in the case of Campbell et al. v. State ex rel. Brett, County Attorney, 23 Okl. 109, 99 Pac. 778, was rendered by Justice Williams, and therein it was held that the said law of 1897 was repugnant to section 26 of article 10 of the Constitution.

Plaintiff in his brief does not attack the general proposition advanced by the defendants that the board of county commissioners

had no authority to make a contract which calls for expenditures that exceed the income and revenues provided for that fiscal year, but advances the argument that the only evidence introduced by the defendants was that no bonds had been voted to build a courthouse at the time the contract was entered into, but that defendant did not show that the contract exceeded the statutory limitation or was in excess of the tax levy. While the evidence upon this point is not as direct and explicit as it should be, yet facts were proven from which no other reasonable conclusion can be drawn than that the proposed expenditure exceeded the tax levy.

It developed in plaintiff's testimony that the defendants pledged themselves on December 31, 1908, by a resolution to make a levy to pay plaintiff's claim during the fiscal year of 1909, thus plainly showing that the funds to pay his claim had not been provided for at the time the contract was made. At that very time more than one-half of the sum promised him was due, and so acknowledged and confessedly no provisions had been made for its payment, and it was then being proposed to make such a provision for the next fiscal year.

But even conceding plaintiff's contention that defendant wholly failed to prove that the expenditure called for in the contract did not exceed the statutory limitation or was not in excess of the levy for that fiscal year or, going further, and admitting that a levy had already been made for that identical purpose and that the entire sum was then in the hands of the county treasurer, still the plaintiff should not prevail for three reasons:

First. He entered into a contract with the board of county commissioners to assist them in doing an illegal act; that is, to erect a courthouse when no funds had been provided for that purpose.

Second. Plaintiff contends that, as the funds for the construction of the courthouse were provided by the issuing of bonds voted by the citizens of Coal county after it was decided that a courthouse could not be erected upon the "rental plan," still the defendants were legally bound to carry out the contract with him after the funds were thus provided by said bond issue.

The case of O'Neil Engineering Co. v. Incorporated Town of Ryan et al., 32 Okl. 738, 124 Pac. 19, presents a much stronger case in favor of the losing party than does the case at bar in favor of plaintiff. It seems that in that case that the board of trustees of Ryan having in contemplation the construction of a system of waterworks and sewers, and a light plant, to be afterwards submitted to the voters of the town for their adoption, by voting a bond issue for that purpose, on November 30, 1908, entered into a contract with the O'Neil Engineering Company for it to prepare and furnish plans and specifications therefor, with an estimate of the cost of construction and, after the bonds are voted, to superintend

the construction and furnish certain tools, and do certain work to be paid for as stipulated in the contract; the contract further providing that nothing should be due and payable until the bonds had been voted, sold, and paid for. On June 15, 1909, the bond issue was authorized by the voters of the town, but the board of trustees repudiated its contract with the said engineering company and did not permit said company to perform said contract on its part. The facts in that case are so closely allied to the facts in the case at bar, and the remarks of Judge Brewer, who rendered the opinion, are so pertinent to this case, that we take the liberty of quoting approvingly therefrom at length:

"The intention and plain effect of the provision of the Constitution under consideration is to require municipalities to carry on their operations upon the cash or pay as you go plan. The revenues of each year must take care of the expenses of such year; and any liability sought to be incurred by contract, express or implied, executed or executory, in excess of such current revenue, in hand or legally levied, is void, unless it be authorized by a vote of the people, and within the limitation therein required. * * * We think the contract in this case attempted to impose a present obligation and liability upon defendant, notwithstanding the contingency as to payments to be made thereunder. So far as the city officers were concerned, nothing further was to be done by them. No option of any kind was to be exercised by them. The contract was not to be, and was not, submitted to the voters. It was plainly and manifestly the purpose and plan of the parties to anticipate the action of the voters—let the plaintiff in on the 'ground floor'—and in effect appropriate and expend the funds before they were provided. It would certainly be unfortunate, were we compelled to sustain the contention made by plaintiff. If the agents of this town could effectually dispose of \$6,500 of this fund before it was authorized, by an evasion of the restrictions of the Constitution, by the mere use of words, then they could, under the same doctrine, have contracted the expenditure of the entire \$69,000 months before any authority was given to provide the funds. To hold so would mean that hereafter every corporate expenditure, dependent upon a vote of funds, would be contracted away to enterprising concerns months, and perhaps years, before the funds were voted. It is easy to see how dangerous this would be. If a number of firms were interested, through profitable contracts, one to furnish the engineering and the excavating, another the brick, lumber, and cement, and still another the machinery and apparatus, what a possibility would be presented, especially in small towns, for influencing the less thoughtful voters to vote funds the municipality could ill afford to expend. This ought not and must not be permitted. It is contrary to the real intent of the provision discussed, and to the spirit and policy running through the entire Constitution. And while it is true that the provisions of the Constitution should never be given a strained or forced construction, so as to defeat legitimate contracts brought fairly within its terms, yet the courts should at all times, with firm hand and inflexible purpose, heedless alike to public clamor and the public improvement craze, hold to the steady course and safe channels charted by that instrument.

"It has been said that the strict enforcement of these constitutional and statutory limitations and restrictions against municipal indebtedness,

which may require the invalidation of contracts, will often result in hardship. This may be true. Restless and impatient spirits, however honest and worthy, in pursuing the mad race for business, have and doubtless will continue to seek municipal contracts with no investigation, and scarcely a thought, as to the power of the agents with whom they deal. But the hardships that may so arise are not comparable with those to be suffered by the citizens of this commonwealth, if these wise and salutary limitations, imposed by the people themselves against themselves, shall be swept aside, or evaded by ingenious reasoning, to meet the supposed necessities of a situation, or even the apparent equities of a particular case."

For further authorities, see those collated in the above case. *Haskins & Sells v. Oklahoma City*, 36 Okl. 57, 126 Pac. 204; *In re Application of State to Issue Bonds to Fund Indebtedness*, 33 Okl. 797, 127 Pac. 1065; *Faulk v. Board of Com'rs of Marshall County*, 40 Okl. 705, 140 Pac. 777.

Third. The contract sued on ends with this clause:

"In case no contract for erection of the building is awarded and the party of the first part is for any cause beyond its control restrained from proceeding with this work, then this contract shall be annulled and the party of the second part has no claim in any manner whatsoever against the county of Coal."

It is thus apparent that this provision in the contract expressly precludes the plaintiff from recovering, because the board of county commissioners of Coal county could not proceed with the erection of a courthouse upon the rental plan as contemplated at the time the contract was executed in the face of the decision of *Campbell et al. v. State ex rel. Brett*, County Attorney, *supra*, and a contingency was provided for in the above stipulation that under such conditions the plaintiff should have no claim of any kind against the county of Coal.

The contract entered between plaintiff and defendants on the 5th of November, 1908, had no connection with or relation to the erection of a courthouse in Coal county after the voting of bonds for that purpose which was done more than two years after this contract was nullified by the above-mentioned decision, and, even if the plan to vote bonds in case of the failure of the "rental plan" was contemplated at the time the contract was signed, still the rule laid down in the opinion in the case of *O'Neil Engineering Co. v. Incorporated Town of Ryan*, *supra*, renders the contract still void.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 731)

SWAIN v. ARCHER. (No. 6267.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

TROVER AND CONVERSION §36—CONVERSION OF MORTGAGED CHATTELS—EVIDENCE.

Where a stock of merchandise is traded for land, notes secured by chattel mortgage are ex-

ecuted for the difference between the two properties, and the mortgagor sells at public sale such chattel property, and mortgagee, acting as clerk of such sale, retains the proceeds and is sued for conversion thereof, *held*, that evidence of the entire transaction between the parties is competent.

[Ed. Nota.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 217-224; Dec. Dig. § 36.]

Commissioners' Opinion, Division No. 3. Error from District Court, Grant County; W. M. Boles, Judge.

Action by R. C. Archer against Ira E. Swain. Judgment for plaintiff, and defendant brings error. Affirmed.

F. G. Walling, of Tulsa, for plaintiff in error. J. B. Drennan, of Medford, and James M. Ready, of Wellington, Kan., for defendant in error.

RITTENHOUSE, C. This action was instituted by R. C. Archer against Ira E. Swain to recover the sum of \$1,112.15, wherein it is claimed that on September 26, 1911, plaintiff advertised and sold at public sale certain chattel property owned by him; that defendant, as clerk of said sale, collected the proceeds and has failed and refused to account for the sum of \$1,112.15, and by reason thereof has converted the same to his own use. Defendant answered by general denial, admitting that he acted as clerk of said sale, but alleging that he was owner of a certain chattel mortgage on the property, and that the proceeds of said sale were applied in part payment of the debt secured thereby; that on September 17, 1911, the parties hereto had a full and complete settlement and accounting as to all the business affairs and transactions between them; and that in such settlement the sum sued for in this action was fully accounted for, and plaintiff was given credit for said amount. These questions were submitted to the jury, and verdict was rendered for plaintiff for the amount sued for.

The first question presented is that the court admitted incompetent evidence. It appears from the evidence that in the month of September, 1911, the defendant traded a certain stock of merchandise in Caldwell, Kan., to plaintiff for plaintiff's equity in a farm in Grant county, Okla., and notes were given in the sum of \$10,678.18; the same being the difference between the values of these two properties. The notes were secured by a chattel mortgage covering the property sold, the proceeds of which defendant is charged with having converted. In pursuance of this exchange or trade, plaintiff took possession of the stock of merchandise and defendant went into possession of the farm. Thereafter, on September 26, 1911, by agreement of the parties, a public sale of the personal property covered by the mortgage was held. Plaintiff continued in possession of

the stock of merchandise until the evening of October 14, 1911, at which time defendant repurchased the stock of merchandise from plaintiff, paying plaintiff therefor his said notes and certain other considerations. It is urged here that evidence of the original transaction was incompetent and prejudicial to defendant, on the ground that the issues in the case were strictly limited by the pleadings to the question of the conversion of the sum of \$1,112.15, and that all evidence given outside of this one question was error. We can see no merit in this contention. In order to arrive at a just and intelligent verdict, it was necessary for the jury to have before it the entire transaction, and the evidence of the original contract and the subsequent sale of personal property and the final settlement of October 14, 1911, were all competent to go to the jury, in order to ascertain whether or not there was a conversion at the time the mortgaged property was sold.

We have examined the entire record and find no error, and, as there was evidence reasonably tending to support the verdict of the jury, the same will not be disturbed by us on the weight of the evidence.

The judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 689)
LINKHART v. KIRKHART. (No. 5292.)
(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR § 1170—HARMLESS ERROR—EVIDENCE.

Record examined, and *held*: (1) That the evidence adduced upon the trial is sufficient to sustain the judgment; (2) that the exclusion of certain evidence was not prejudicial to the rights of plaintiff; and (3) that upon examination of the entire record it does not appear that the errors complained of have probably resulted in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right.

[Ed. Nota.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4036, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.]

Commissioners' Opinion, Division No. 8. Error from County Court, Okmulgee County; George A. Johns, Judge.

Action by Harry A. Kirkhart against Dallas B. Linkhart. Judgment for plaintiff on appeal from a justice's judgment, and defendant brings error. Affirmed.

James M. Hays, of Okmulgee, for plaintiff in error. Van H. Albertson, of Okmulgee, for defendant in error.

BLEAKMORE, C. This action was commenced in a justice court of Okmulgee county in May, 1912, by Harry Kirkhart, seeking to recover \$102.50 alleged to be due him by Dallas B. Linkhart for work as a farm laborer. Defendant pleaded a set-off and counterclaim and prayed judgment against the

plaintiff in the sum of \$55.35. There was judgment for plaintiff before the justice. Appeal was had to the county court, where, upon trial to a jury, plaintiff again prevailed, recovering judgment for \$35.50, and defendant has brought the case here.

As grounds for reversal defendant urges: (1) That the evidence is wholly insufficient to sustain the judgment; and (2) that the trial court erred in the exclusion of certain testimony.

The evidence is conflicting, but on the whole strongly supports the verdict. To review at length the testimony offered and excluded would serve no useful purpose. The action of the court in this respect does not constitute prejudicial error. Suffice it to say that upon an examination of the entire record we are of opinion that no error was committed upon the trial of this case which has resulted in a miscarriage of justice, or which amounts to a substantial violation of any statutory or constitutional right of the plaintiff. Section 6005, R. L. 1910, provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 757)

ST. LOUIS CORDAGE MILLS v. WESTERN SUPPLY CO. (No. 6672.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. APPEARANCE §9—GENERAL APPEARANCE—MOTION TO DISMISS.

A defendant who seeks to enter a special appearance in a cause by motion and sets forth therein both jurisdictional and nonjurisdictional grounds for dismissal, the filing of such motion amounts to a general appearance, and the fact that he denominates it a special appearance avails him nothing.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. §9.]

2. GARNISHMENT §195 — BOND TO DISCHARGE GARNISHEE — LIABILITY OF OBLIGORS.

Section 4838, Rev. Stat. Okl. 1910, Ann., being section 5727, Snyder's Stat. of Oklahoma 1909, provides: "The defendant may, at any time after the garnishment affidavit is filed, and before judgment, file with the clerk of the court an undertaking, executed by at least two sureties, resident freeholders of the state, to the effect that they will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against such defendant in the action, with all costs not exceeding a sum specified, which sum shall not be less than double

the amount demanded by the complaint on file, or in such less sum as the court shall, upon application, direct." And sections 4839 and 5728 respectively of the same statutes, contain the following: "If the judge find the sureties sufficient he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk of the district court. Thereafter all the garnishees shall be discharged, and the garnishment proceedings shall be deemed discontinued, and any money or property paid or delivered to any officer shall be surrendered to the person entitled thereto." Held, that the execution, filing, and approval of a bond in compliance with these statutes, estops the defendant from questioning the regularity of the garnishment proceedings, and renders the obligors on the bond absolutely liable for the amount of any judgment the plaintiff may recover in the action, without regard to whether the garnishment proceedings were regular or not.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 385; Dec. Dig. §195.]

3. SALES §261 — "WARRANTY" — REPRESENTATIONS BY SELLER.

No particular words or form of expression is necessary to create a warranty, nor need the word "warranty" be used. If the representation is positive and relates to a matter of fact, and not to an expression of an opinion, and the other party receives the statement as true, and relies and acts on it in making a trade, such representation will constitute a "warranty."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. §261.]

For other definitions, see Words and Phrases, First and Second Series, Warranty.]

4. PRINCIPAL AND AGENT §104—POWER OF AGENT—SALES—WARRANTY OF QUALITY.

General authority given by a principal to an agent to sell personal property carries with it, by necessary implication, the power to warrant the quality of the property so as to bind the owner.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 294-297; Dec. Dig. §104.]

5. PRINCIPAL AND AGENT §124—AUTHORITY OF AGENT—QUESTION FOR JURY.

The apparent authority of an agent is to be gathered from all the facts and circumstances in evidence and is a question of fact for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. §124.]

Commissioners' Opinion, Division No. 4. Error from County Court, Tulsa County; Conn Linn, Judge.

Action by the Western Supply Company, a corporation, against the St. Louis Cordage Mills, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

R. W. Kellough and Lee Daniel, both of Tulsa, for plaintiff in error. Bell & Fellows, of Tulsa, for defendant in error.

ROBERTS, C. This action was brought in the county court of Tulsa county on the 19th day of April, 1913. The petition alleges that plaintiff is a domestic, and the defendant a foreign corporation; that in October, 1912, plaintiff purchased from defendant two Trojan cables, for which it paid the sum

of \$925.53; that said purchase and sale was made under the express representation and warranty of defendant that said cables were first-class cables, of superior quality, and suitable for the use to which such cables were ordinarily put, viz., drilling, repairing, and operating oil and gas wells; that plaintiff relied on said warranty, and believed said representations and warranty to be true, and was induced thereby to make purchase thereof; but said cables were not of the quality represented, and were of an inferior grade and quality, and by much less than ordinary use they became stranded and drew, and unfit for the use and purpose for which they were purchased by plaintiff. Plaintiff further alleges that it sold said cables in its regular course of retail business, and, because of the inferior grade and quality thereof, it was compelled to pay to its vendee the sum of \$300, which was a just and fair difference in the price paid to defendant for said cables, and the actual value thereof, and by reason thereof plaintiff was damaged in the sum of \$300, for which he prays judgment.

The parties will be designated plaintiff and defendant herein, the same as below.

[1] After the commencement of the suit, plaintiff instituted garnishment proceedings against the Oklahoma Iron Works, a local corporation. The defendant attempted to question the jurisdiction of the court, because of irregularities in the praecipe for, as well as the issuance and service of, summons; but we find that all these objections were waived by the appearance of the defendant, at different times, and seeking to call into power the affirmative action of the court. The motion of defendant to set aside and quash the summons, and service thereof, for the reason that the defendant had not been properly named, filed on the 23d day of May, 1913, does not raise or question the jurisdiction of the court, and especially is this true where the motion is not supported by affidavit or other offer of proof. On the same day and before the motion to quash had been passed on, the defendant filed a motion to discharge the garnishee, on the grounds: "(a) That the affidavit of garnishment was insufficient in law; (b) no bond for garnishment had been given."

All defects in the garnishment proceedings were waived by the defendant filing a bond, approved by the court, providing for the payment of the judgment and costs which might be rendered against it in such action. On the 1st day of July, 1913, the court entered an order discharging the garnishee in pursuance of said bond.

[2] Section 4838, Rev. Stat. Okl. 1910, Ann., provides that the garnishee may be discharged on giving bond for payment of the judgment. This statute was taken from Kansas, and, before its adoption in Oklahoma, the Supreme Court of that state, in

Washer v. Campbell, 40 Kan. 747, 21 Pac. 671, said:

"Now, if the defendants in error in this case had a right, or would have had a right if said bond had not been given, in any manner to keep alive or preserve their garnishment proceedings so as to make them effective in satisfying the judgment which might finally be rendered in their favor 'on final hearing of this case' in the court in which the case might eventually be on such 'final hearing,' as they undoubtedly had such right, and if they gave up this right, as they undoubtedly did, for no other reason than merely the giving of the bond sued on in this case, then there was certainly a sufficient consideration for the giving of the bond, in whatever way it may be construed."

Our own court, in an attachment proceeding, in Moffitt v. Garrett, 23 Okl. 398, 100 Pac. 533, 32 L. R. A. (N. S.) 401, 138 Am. St. Rep. 818, says:

"An obligor on a bond to discharge an attachment, under the provisions of section 4404, Wilson's Rev. & Ann. St. Okla. 1903, conditioned that the defendant will perform the judgment of the court in the action in which the attachment is issued, is absolutely liable in an action against him on the bond for the amount recovered in the action in which the bond was given, without reference to the question whether the attachment was rightfully or wrongfully issued, and the defendant is precluded by such bond from controverting the grounds of the attachment."

The case of Myers v. Smith, 29 Ohio St. 120, is clearly in point, wherein the rule is laid down that where, in an attachment proceeding, to obtain a release of the attached property, the defendant entered into an undertaking, agreeing to pay the judgment of the court, it was held that the effect of the bond was to supersede all proceedings under the attachment, and to bind the sureties on the bond, and estop the defendant from controverting the attachment.

There are many authorities holding that the obligors on such bonds are absolutely liable for the amount of the judgment recovered, within the limits of the bond, without regard to whether the attachment was rightfully or wrongfully obtained. Among which are Rachelman v. Skinner, 46 Minn. 196, 48 N. W. 776; Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072; Fox v. MacKenzie, 1 N. D. 298, 47 N. W. 386; McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Bunneman v. Wagner, 18 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306; Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004; Ferguson v. Glidewell, 48 Ark. 195, 2 S. W. 711.

This disposes also of the question of the verification of the garnishment affidavit. All defects were waived by giving the bond.

On the 6th day of February, 1913, the defendant answered by general denial—not verified. On the 5th day of December, 1913, the case was called for trial. We gather from the record that after the jury was impaneled and sworn to try the case, and the opening statements made by counsel, and the witnesses sworn, the defendant filed an amended answer, containing (a) a general denial; (b) denying expressly that defendant is a corpora-

tion. Thereafter, on the same day, plaintiff moved to strike the amended answer from the files. This motion was sustained, and exceptions saved. The defendant then moved the court for leave to verify the original answer, filed on the 6th day of August, 1913. To this the plaintiff objected, "for the reason that a verification of said answer would place upon plaintiff the burden of proving the corporate existence of the defendant." To this the following ruling was made:

By the Court: "A verified denial, such as is offered by the defendant, does not put the corporate existence of defendant in issue."

Thereupon leave to verify was granted, and plaintiff saved exceptions. The record fails to show that defendant took advantage of the permission of the court to verify the answer—probably because of the statement of the court as to the effect of the verification of the general denial. By failure to verify the answer, the incorporation was admitted by defendant. Upon these issues the case was tried to a jury, which resulted in a verdict and judgment for plaintiff for \$300. Motion for new trial was overruled, and defendant brings error. Counsel for defendant make some thirteen assignments of error, but in their briefs seem to contend for three propositions only, as follows:

"First. The court erred in not dissolving the garnishment proceedings and discharging the garnishee.

"Second. The court should not have permitted judgment to be entered against the defendant, and the motion for new trial should have been sustained.

"Third. The court erred in its application of the rule as to the measure of damages."

The first proposition as to the garnishment proceedings has heretofore been disposed of against the contentions of the defendant. By giving the bond to respond to the judgment the defendant waived all errors as to the garnishment proceedings.

The second proposition, that the court erred in overruling the motion for new trial, is certainly too general; but we will try to consider such matters as counsel present in their briefs and argument. The action of the court in not permitting the defendant to file amended answer was discretionary. The only question is: Did the court, under all the circumstances, abuse that discretion? We think not. The case had been pending in the county court for about nine months; the original answer was filed on the 6th day of August; the offer to amend by denying the existence of the corporation was on the 5th day of December, after the jury had been impaneled and sworn to try the case; the witnesses had been subpoenaed and sworn; the opening statements of counsel made. No excuse for failure to enter this plea sooner was made or offered. We cannot say that

there was an abuse of discretion on the part of the trial court in so ruling.

[3] The same may be said of the application for continuance. Under this head counsel for defendant also contend, in substance, that neither the petition nor the evidence are sufficient to authorize a recovery upon an express warranty. Without again quoting the pertinent part of the petition, we may admit that the allegations were somewhat meager in that particular; but we think they were sufficient, in the absence of any motion to make more definite and certain. The question of the sufficiency or weight of the evidence was for the jury. There was some evidence tending to support the findings and verdict of the jury. It has so often been decided that, where there is any evidence to support the verdict, it will not be disturbed by this court, that it seems unnecessary to cite authorities thereon. On the question of the sufficiency of the evidence to establish an express warranty, the court correctly instructed the jury as follows:

"The court instructs the jury that no particular words or form of expression is necessary to create a warranty, nor need the word 'warranty' be used. If the representation is positive and relates to a matter of fact, and not to an expression of an opinion, and the other party receives the statement as true, and relies and acts on it in making a trade, such representation will constitute a 'warranty.'"

[4] In 31 Cyc. 1353, it is said:

"It seems not to be doubted that general authority given by a principal to an agent to sell personal property carries with it, by necessary implication, the power to warrant the title to the property so as to bind the owner."

[5] And in *Ricker Nat. Bank v. Stone*, 21 Okl. 833, 97 Pac. 577, it is said:

"The apparent authority of an agent is to be gathered from all the facts and circumstances in evidence, and is a question of fact for the jury."

Defendant claims that there was attached to the cables, when sold, a card, the purport of which was to notify the plaintiff or other purchaser in writing that "defendant sells no goods with a warranty," and that this fact rebuts the proposition that the articles were sold with a guaranty. A complete answer to that is that the record fails to show that this card was brought to the attention of the plaintiff, and, if there was any evidence tending to show it, it was a question for the jury.

The question of the amount of recovery was likewise a question of fact, and properly left to the jury.

From a careful consideration of the entire record, we are unable to say that any prejudicial error was committed by the trial court, and therefore the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 742)

HULSEY v. JACKSON et al. (No. 6405.)
(Supreme Court of Oklahoma. Jan. 18, 1916.)*(Syllabus by the Court.)***APPEAL AND ERROR — 773 — FAILURE TO PROSECUTE—DISMISSAL.**

Dismissed for failure to prosecute under rule 7 (137 Pac. ix).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.]

Commissioners' Opinion, Division No. 2. Error from District Court, Hughes County.

Action by John Hulsey against Ida Jackson and others. Judgment for defendants, and plaintiff brings error. Dismissed.

Crump & Skinner, of Holdenville, for plaintiff in error.

PER CURIAM. It is recommended that the above cause be dismissed under rule 7 (137 Pac. ix) for failure of the plaintiff in error to prosecute the appeal.**PER CURIAM.** Adopted in whole.

(54 Okl. 705)

M. J. SPAULDING IMPLEMENT CO. v. GOFORTH. (No. 6004.)
(Supreme Court of Oklahoma. Jan. 18, 1916.)*(Syllabus by the Court.)***1. JUSTICES OF THE PEACE — 154 — APPEAL—TECHNICAL DEFECTS.**

Appeals are favored, and mere technical defects or omissions, that do not go to the jurisdiction of the court, should be disregarded as far as possible, without obstructing the course of justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 520; Dec. Dig. § 154.]

2. JUSTICES OF THE PEACE — 159 — DEFECTIVE APPEAL BOND—OPPORTUNITY TO CURE DEFECTS.

Where an appeal bond, filed and approved by a justice of the peace, is insufficient in form or amount, or contains clerical errors, or is even lacking in material particulars, which could be readily cured, the party appealing should be given an opportunity by the appellate court where the appeal is pending to amend or cure the defects or renew the bond before the appeal is dismissed for such defects.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.]

3. JUSTICES OF THE PEACE — 159 — APPEAL BOND—VARIANCE IN NAMES.The practice in regard to misnomers, like the doctrine of *idem sonans*, has been broadened by modern decisions to include the rule that a variance in names, to be material, must be such as to mislead the opposite party to his prejudice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.]

4. JUSTICES OF THE PEACE — 159 — APPEAL BOND—CONSTRUCTION OF STATUTE.

The statute providing for appeals shall be liberally construed, with a view to promote its object, and assist parties in obtaining justice.

And when the initials of a name of one of the parties, such as "J. M.," is used in some parts of the case interchangeably with "M. J.," and the proper or correct name can be ascertained from the entire record, the action should not be dismissed, but proceed to judgment in the correct name of the party.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.]

Commissioners' Opinion, Division No. 4. Error from County Court, Craig County; S. F. Parks, Judge.

Action by A. P. Goforth against the M. J. Spaulding Implement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph A. Gill, of Vinita, for plaintiff in error. F. M. Smith, of Vinita, for defendant in error.

ROBERTS, C. On the 12th day of October, 1912, A. P. Goforth commenced this action before a justice of the peace in Craig county against M. J. Spaulding Implement Company to recover judgment for \$160 as purchase price for a hay press. The bill of particulars was entitled "A. P. Goforth v. J. M. Spaulding Imp. Co." The cost bond filed by plaintiff gave "M. J. Spaulding Imp. Co." as defendant. The body of the summons showed "J. M. S.," but the return of the sheriff shows the summons served on "M. J. S." The record shows that the initials of Spaulding were used interchangeably in several different places. The defendant answered: (a) Stating its true name to be M. J. Spaulding Implement Company; (b) a general denial; (c) by claiming a set-off and counterclaim for the sum of \$197.91.

The case was tried before a justice of the peace, and judgment rendered in favor of defendant against the plaintiff in the sum of \$15 and costs. In due time the plaintiff appealed said case to the county court, and in the appeal bond defendant was designated as "J. M. Spaulding Implement Co." The bond was duly approved by the justice of the peace and the case lodged in the county court. The defendants then filed its motion to dismiss the appeal, which motion is as follows:

"In the County Court of Craig County, State of Oklahoma.

"A. P. Goforth, Plaintiff, v. J. M. Spaulding, Defendant.

"Motion to Dismiss Appeal.

"Comes now M. J. Spaulding Implement Co., defendant, and moves the court to dismiss this appeal for want of an appeal bond herein for the reasons following, to wit:

"(1) Because said bond does not bind any person as surety thereon.

"(2) Because the purported bond for appeal herein runs to a different obligee than defendant.

"(3) Because said bond bears no particular date.

"(4) Because the judgment attempted to be appealed from and for which this appeal bond was given is in favor of J. M. Spaulding, and

not in favor of J. M. Spaulding Implement Co., as described in said purported appeal bond.

"All of which is respectfully submitted.

"M. J. Spaulding Implement Co.,
"By Joseph A. Gill, Its Attorney."

The appeal bond is as follows:

"State of Oklahoma, County of Craig—ss.:

"Before Ed. A. Stanley, Justice of the Peace, Vinita Justice of the Peace District, Craig County, Oklahoma.

"Know all men by these presents, that A. P. Goforth, as principal, and _____ and _____, as sureties, are held and firmly bound unto J. M. Spaulding Imp. Co. in the sum of \$100.00 for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators firmly by these presents:

"The condition of the above obligation is such that, whereas, the said A. P. Goforth intends to appeal to the county court of Craig county from a judgment rendered against him, in favor of J. M. Spaulding Imp. Co., in the justice of the peace court of said county of Craig, State of Oklahoma, on the 11th day of January, 1913, at Vinita, in said county: Now, if the said A. P. Goforth, appellant, shall prosecute said appeal to a determination with due diligence, and will abide by, fulfill, and perform whatever judgment, decree, or order may be rendered against him, * * * then this obligation to be void; otherwise, to remain in full force and effect. Witness our hands and seals this _____ day of January, 1913.

A. P. Goforth.
J. S. Martin."

"[Qualification of surety.]

"Taken and approved by me this 15th day of Jan'y. 1913.

"Ed. A. Stanley, Justice of the Peace."

The motion to dismiss was overruled, exceptions duly saved, and bill of exceptions taken by defendant, and allowed and signed by the court. In the bill of exceptions the defendant is designated as "M. J. Spaulding Implement Company."

We gather from the record that the case was then tried to a jury, although the evidence is not brought up, and judgment rendered in the county court in favor of the plaintiff, against the defendant, in the sum of \$128.55. A motion for new trial was filed by defendant, in the name of M. J. Spaulding Implement Company. Among other grounds for a new trial, is the following:

"Because the court was without jurisdiction to submit said case to the jury for want of an appeal bond in said cause."

Other grounds were set up in the motion, but were not supported by citations and argument in the brief, presumably because they were not well taken. The motion for new trial was overruled. Several applications for extension of time to make and serve the case-made were presented to the court and allowed by the judge. In all of these applications the defendant appears in the name of M. J. Spaulding Implement Company. A stipulation as to the record and contents thereof was filed by the parties which is as follows:

"It is hereby stipulated and agreed by the parties that the foregoing case-made contains full, true, and accurate copies of all records, pleadings, transcript, and appeal bond filed in the justice of the peace court and transmitted by the justice of the peace to the county court on appeal and includes the motion of M. J. Spaulding Implement Co. to dismiss the appeal and bill of exceptions thereon, and also its mo-

tion for new trial, the journal entry of judgment of the county court, and extensions of time in which to make and serve case-made, and constitutes true and accurate copies of all matters in the record in connection with said cause of action to bring before the Supreme Court for its decision in said cause the question as to whether an appeal had been taken in said action from the justice of the peace court to the county court, by giving an appeal bond therein, and as to whether or not said appeal was properly lodged in said county court, so that it could try said cause on appeal and pronounce judgment on the merits therein."

A certificate of the clerk of the court as to the contents of the record is as follows:

"This is to certify that the foregoing case-made contains a full, true, and accurate record and copy of all pleadings, papers, and records, including transcript from the justice of the peace court on appeal and the appeal bond transmitted to the county court on the appeal in the above entitled cause; also a true and correct copy of the motion by M. J. Spaulding Implement Co. to dismiss said appeal, together with a correct copy of the bill of exceptions, signed by the county judge, bringing said motion upon the records in said cause; also a true and correct copy of the journal entry of judgment therein, and true and correct copies of extension of time in which to make and serve case-made.

"In witness whereof I have hereunto set my hand and seal of court this 14th day of January, 1914."

The specifications of error are as follows:

"First. That said court erred in overruling the motion of plaintiff in error to dismiss the appeal from said justice of the peace's court for want of an appeal bond.

"Second. That said county court erred in assuming jurisdiction and trying of said cause without an efficient appeal having been taken.

"Third. That said county court erred in pronouncing judgment upon the verdict of the jury in the trial of said cause in favor of the defendant in error and against plaintiff in error.

"Fourth. That said county court erred in overruling the motion of the plaintiff in error for a new trial in said cause, and in not granting said motion for new trial and dismissing said appeal for want of appeal bond."

It will be seen from the foregoing that the only question brought up by the case-made, which will be treated as a transcript, is the ruling of the trial court in denying the motion to dismiss the appeal because of the insufficiency of the appeal bond.

[1] In passing upon this question it is well to bear in mind the rule that appeals are favored, and that mere technical defects or omissions are to be disregarded as far as possible, without obstructing the course of justice.

[2] The rule laid down in *St. L. & S. F. Ry. Co. v. Hurst*, 52 Kan. 612, 35 Pac. 211, is as follows:

"Where an appeal bond, filed and approved by a justice of the peace, is insufficient in form or amount, the party appealing should be given an opportunity by the district court where the appeal is pending to change or renew the bond before the case is dismissed for a defect therein. * * * The trial court committed error in dismissing the appeal."

It cannot be said that this bond was absolutely void. It refers with directness to the court in which the judgment was rendered, gives the correct date and amount of the

judgment, the proper and correct name of the plaintiff, states that judgment was rendered in favor of the defendant, which was correct, the transcript of the justice, showing all the proceedings, was filed with the bond, and the only matter seriously complained of is that the defendant was designated "J. M. Spaulding Implement Co.," instead of "M. J. Spaulding Implement Co." No one could have been misled or injured by this technical error.

[3,4] The rule of *idem sonans* has been largely extended by recent decisions, to include the doctrine that a variance in names, to be material, must be such as to mislead the complaining party of his injury.

The fact that the names of the principal and surety were left out of the body of the bond is immaterial. In *St. L., K. & S. W. Ry. Co. v. Morse*, 50 Kan. 99, 31 Pac. 676, cited by plaintiff in error, Justice Valentine, speaking for the Supreme Court of Kansas, says:

"An appeal bond not absolutely void would probably carry the case to the district court, however irregular it might be, and would probably constitute such an appeal as to enable the appellate court to take jurisdiction of the case and to do whatever might be right and proper in the case."

On proper application by the defendant below, the plaintiff, appellant from the justice court, could, and no doubt would, have been required to correct any irregularities or technical defects in the bond; but under all the circumstances, including the condition of the record as shown by the transcript of the justice of the peace, we are of opinion that the trial court did not err in overruling the motion to dismiss the appeal. In *McClelland v. Allison*, 34 Kan. 155, 8 Pac. 239, Chief Justice Horton of the Supreme Court of Kansas, in speaking of appeals, says, in substance:

"The statute should be liberally construed with a view to promote its object, and assist parties in obtaining justice, that appeals should be favored, and mere technical defects or omissions should be disregarded."

And this has long been the rule of this court. The case should be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 680)

DUNCAN et al. v. DEMING INV. CO.
(No. 4537.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. JUDGMENT \S 572—RES ADJUDICATA—"ON THE MERITS."

A judgment rendered upon a demurrer to a petition in a former suit between the same parties and upon the same facts pleaded in a subsequent action is a judgment "on the merits," and is final and conclusive until reversed on appeal, and is a bar to the subsequent action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1041, 1047-1049; Dec. Dig. \S 572.

For other definitions, see Words and Phrases, First and Second Series, Merits.]

2. JUDGMENT \S 585, — RES ADJUDICATA — FACTS NOT PLEADED.

In the absence of exceptional facts excusing a failure to do so, a party should plead all the material facts that constitute his claim or defense, and failure so to do cannot be made the basis of another action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1182; Dec. Dig. \S 585.]

Commissioners' Opinion, Division No. 3. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by the Deming Investment Company, a corporation, against James W. Duncan and another. Judgment for plaintiff, and defendants bring error. Reversed.

W. W. Hastings, of Tahlequah, and Rowland & Talbott, of Bartlesville, for plaintiffs in error. Curtis M. Oakes, of Ottawa, Kan., for defendant in error.

BLEAKMORE, C. This action was commenced on November 25, 1911, in the district court of Washington county, by the Deming Investment Company, as plaintiff, against James W. and John C. Duncan, as defendants, to recover upon ten promissory notes executed on diverse dates in the years 1901 and 1902, all of which matured on April 1, 1906, alleging payment of a certain sum upon each of said notes in July, 1910, and that the defendants, the makers thereof, acknowledged the indebtedness represented by said notes in writing on July 18 and August 16, 1910, and on January 6 and January 14, 1911. Defendants answered, pleading former adjudication as follows:

"Defendants, further answering, say that the plaintiff is estopped from prosecuting this action by reason of the fact that all of the matters and things in controversy herein have been finally determined in a certain suit pending in the district court of Cherokee county, Okl., wherein the plaintiff herein was plaintiff and the defendants herein were defendants, said cause being numbered 386, and the defendants say that in the said suit the said district court of Cherokee county, Okl., had jurisdiction of the parties to this suit and had jurisdiction of the subject-matter alleged herein, and on the 18th day of September, 1911, a final judgment was rendered therein, from which the plaintiff prayed and was allowed an appeal. Defendants say that on account of the final adjudication of the cause of action involved herein as above set forth the plaintiff cannot now be heard to prosecute this action. Attached hereto as exhibits are the plaintiff's petition, the defendants' demurrer, and the court's final judgment thereon, together with the application of the defendants to withdraw appeal and the court's adverse ruling thereon; same constituting a complete transcript of the files in said cause."

Plaintiff replied, admitting the fact of former action by it against the defendants seeking judgment upon the same notes sued on herein, and the jurisdiction of the court in that action of the subject-matter and the parties and the order sustaining the demurrer, but alleged that thereafter plaintiff filed in said cause its motion to amend its peti-

tion and for an extension of time within which to amend the same, and, further, that on October 13, 1911, it filed in said cause a dismissal thereof, which it averred was the last pleading filed and worked a complete dismissal of said action.

In the former suit the petition contains ten counts declaring on the identical notes upon which recovery is sought in this action; the only difference being the failure of the former to set forth the alleged payments on the notes made in 1910 and the acknowledgment by the makers of their indebtedness thereon within the period of limitation. The judgment in the former suit recites:

"* * * This cause came on for hearing upon the demurrer filed on behalf of defendants to the petition upon the following grounds: First, that the petition upon its face shows that the notes sued upon in each count thereof are barred by the statute of limitations. * * *

"The petition herein was filed on July 31, 1911. The demurrer and the petition having been presented to the court, and the court having heard argument of counsel, both for the defendants and the plaintiff, and the court being well and sufficiently advised, and the court finding that more than five years had elapsed from the date each note should become due before the institution of the suit, the court sustains the first ground for demurrer, and orders the petition dismissed at plaintiff's cost, and overrules the second ground. The attorney for plaintiff excepted to the ruling of the court sustaining the first ground of the demurrer, and asked that his exceptions be allowed, and the attorney for the defendants excepted to the rulings of the court overruling the second ground of the demurrer, and asked that his exceptions be allowed, and the plaintiff prayed an appeal from the ruling of the court sustaining the first ground of the demurrer, and the defendants prayed an appeal upon the ruling of the court overruling the second ground of demurrer, which appeal and cross-appeal was allowed by the court, and 90 days were given to each party to prepare and present a case-made, and it is so ordered."

The motion of plaintiff in the first action for permission to withdraw its application for an appeal from the ruling of the court sustaining the demurrer and to amend its petition on the ground that its attorneys since the sustaining of said demurrer had learned that one of the defendants had acknowledged his liability on the notes sued on prior to the bringing of that suit and promised in writing to pay the same, and that a payment of \$23 had been made thereon in July, 1910, was overruled by the court, and later plaintiff filed in said cause what it terms a dismissal, as follows:

"Comes now the plaintiff, the Deming Investment Company, by E. L. Graves and W. E. Dunaway, its attorneys, before final submission of the cause herein, and before answer filed or cross-relief prayed, and hereby dismisses said cause without prejudice; said dismissal being under section No. 5918, Snyder's Compiled Laws of Oklahoma, this 10th day of October, 1911."

There was also introduced in the instant case evidence showing a payment of \$23 on the indebtedness evidenced by the notes in suit, made in July, 1910, a portion of which was applied by the plaintiff on each of the ten notes, and that one of the defendants acknowledged the indebtedness represented

by said notes in writing in July, 1910, and in January, 1911. There was no payment upon such indebtedness or acknowledgment thereof by the defendant subsequent to the bringing of the former action in Cherokee county. The case was tried to the court, and judgment rendered for plaintiff.

[1, 2] In determining this cause we need to consider but one question presented by the assignments of error, viz.: Was the judgment of the district court of Cherokee county in the former action a bar to the present proceeding? In our opinion, it was. In the two suits the parties are the same. The action in the district court of Cherokee county was upon the identical notes involved in this suit. It is admitted that the causes of action are identical in all respects, save that in the instant suit it is alleged that certain payments upon and acknowledgments of the indebtedness evidenced by the notes were made within the period of the statute of limitation, and that such allegations were absent from the petition in the former suit in which judgment was rendered sustaining the demurrer. But such payments and such acknowledgments of the indebtedness are alleged and proved to have been made prior to the bringing of the former action; and the motion to amend, filed and overruled after the rendition of the judgment sustaining the demurrer to the petition in that action, was made in order that the plaintiff in that suit might plead these same payments and acknowledgments of indebtedness there. If the court in that case erred in overruling such motion, the remedy was by proper application to the trial court, or by appeal. The adjudication in that case that the plaintiff's cause of action on the notes declared on in the instant case was barred, whether erroneous or otherwise, was a judgment on the merits, and, until vacated or reversed upon appeal, no act of the plaintiff alone could extinguish such judgment, render nugatory its effectiveness, or relieve it of its final and conclusive character. Plaintiff's attempt to dismiss that case after the rendition of the judgment therein upon the demurrer was a nullity, and in no way affected such adjudication or the rights of the parties thereunder. In *Pettis et ux. v. McClain et al.*, 21 Okl. 521, 98 Pac. 927, it is held:

"A judgment rendered upon a demurrer to a petition or complaint between the same parties and on the same facts pleaded in the subsequent action is final and conclusive until reversed on appeal, and is a bar to any subsequent action based thereon."

The court quotes with approval from *Free-man on Judgments* (4th Ed.) § 267, as follows:

"A judgment upon demurrer may be a judgment on the merits. If so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence submitted to the court or jury. No subsequent action can be maintained by the plaintiff if the judgment is against him on the same facts stated in the former complaint. If any court errs in sustaining a demurrer and entering judgment for defendant thereon

when the complaint is sufficient, the judgment is nevertheless 'on the merits'; it is final and conclusive until reversed on appeal. Until then the plaintiff cannot disregard it and maintain another action. The effect of a judgment still in force is never diminished on account of any mistake of law on which it is founded." *City of El Reno et al. v. Cleveland-Trinidad Paving Company*, 25 Okl. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650.

In *Pioneer Tel. & Tel. Co. v. State*, 40 Okl. 417, 138 Pac. 1033, it is held:

"A regular judgment, whilst it remains in force, is conclusive as to every matter that might have been given in evidence or pleaded to the action in which it was rendered, except matters growing out of separate and independent causes of action, which might have been pleaded in offset."

In *Prince v. Gosnell*, 149 Pac. 1162, not yet officially reported:

"In an action in ejectment, a former judgment of a court of competent jurisdiction between the same parties and involving the same subject-matter is conclusive, not only as to every matter involved in the former case, but as to every matter which might have been pleaded or given in evidence, whether the same was pleaded or not."

"In the absence of exceptional facts excusing a failure to do so, a party should plead all the material facts that constitute his claim or defense, and a failure to do so cannot be made the basis of another action."

See *Baker v. Leavett et al.* (No. 5117) 153 Pac. 1099, not yet officially reported, where the authorities are fully collated.

The judgment of the trial court should be reversed.

PER CURIAM. Adopted in whole.

(54 Okl. 743)

LEE v. LOFTIS. (No. 6406.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 773—FAILURE TO FILE BRIEF—REVERSAL.

Same as in *Midland Elevator Co. v. Harrah*, 44 Okl. 154, 143 Pac. 1168.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. \Leftrightarrow 773.]

Commissioners' Opinion, Division No. 2. Error from District Court, Hughes County; John Carruthers, Judge.

Action by A. M. Loftis against Norman Lee. Judgment for plaintiff, and defendant brings error. Reversed.

Crump, Skinner & Anglin, of Holdenville, for plaintiff in error.

BRETT, C. The defendant in error, as plaintiff below, recovered a judgment against the plaintiff in error, as defendant below, in the sum of \$66.47. The defendant in error in 1910 purchased a tract of land from the plaintiff in error, which had a mortgage of \$1,000 against it, which the plaintiff in error assumed and agreed to pay. The evidence shows that subsequent to the purchase

the defendant in error paid \$16.12 taxes on this real estate; also, \$50.25 interest on the mortgage. But the plaintiff in error insists that the evidence fails to disclose that defendant in error was not under obligation to pay these taxes, or was not reimbursed. And further insists that the evidence does not disclose whether the amount paid as interest was for past-due interest or interest which accrued after the assumption of the mortgage by the defendant in error, and, upon the theory that the evidence therefore did not show any liability upon which a judgment against the plaintiff in error could be based, demurred to the evidence, which was overruled by the court. The plaintiff in error elected to stand upon his demurrer, and offered no evidence. Judgment was rendered by the court, in favor of defendant in error, for these two items.

This cause was duly filed in this court May 14, 1914, and the brief of the plaintiff in error was filed May 29, 1914. The defendant in error has filed no brief, and assigns no reason for his failure to do so. We have examined the brief of plaintiff in error, and find it reasonably supports his contention. We will therefore not search the record to find some theory upon which the judgment may be sustained. And upon the authority of *Midland Elevator Co. v. Harrah*, 44 Okl. 154, 143 Pac. 1168, and the authorities therein cited, recommend the judgment be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(54 Okl. 733)

C. D. OSBORNE & CO. v. WHITE.

(No. 6359.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 1001—JUDGMENT—EVIDENCE—REVERSAL.

It is the well-established rule of this court that, where there is any evidence which will sustain the verdict of the jury and the judgment of the trial court, this court will not interfere; but the rule is otherwise where there is an entire absence of any evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. \Leftrightarrow 1001.]

2. COMPOSITIONS WITH CREDITORS \Leftrightarrow 2—MUTUALITY OF CONTRACT—NECESSITY.

In order to constitute a valid composition, there must be a mutuality of contract between the debtor and creditor; and a mere unilateral agreement, which purports to bind only the debtor, cannot be enforced by nor against the creditor until it has been accepted by him.

[Ed. Note.—For other cases, see Compositions with Creditors, Cent. Dig. § 1; Dec. Dig. \Leftrightarrow 2.]

Commissioners' Opinion, Division No. 2. Error from County Court, Oklahoma County; John W. Hayson, Judge.

Action by C. D. Osborne & Co. against Fannie White. Judgment for defendant, and

plaintiff brings error. Reversed, with directions to grant new trial.

Nicholas & Lyle and R. H. Towne, all of Oklahoma City, for plaintiff in error. G. A. Paul, of Oklahoma City, for defendant in error.

HOOKEE, C. This suit was instituted by the plaintiff in error, C. D. Osborne & Co. against the defendant in error, Mrs. Fannie White, to recover a judgment upon an account, the correctness of which is not in dispute. The only defense offered was that prior to the filing of the suit the defendant in error, being in a failing condition, made a composition with all of her creditors, including the plaintiff in error, whereby she had paid to them a part of the indebtedness due each, which had been accepted in full satisfaction of the claims against her. This was denied by the plaintiff in error, and upon a trial in the lower court a verdict was returned for the defendant in error.

The court properly told the jury that the duty rested upon the defendant in error to sustain her defense by a preponderance of the evidence, and a careful consideration of all the instructions of the court leads us to the conclusion that the jury were correctly advised; but if not the plaintiff in error is not in a position to complain, as under the rule announced in *Elaminger v. Beman*, 32 Okl. 818, 124 Pac. 289, the exception saved by the plaintiff in error in the following language: "We desire to except to the instructions of the court as given to the jury"—is not a sufficient reservation of an exception to any particular instruction contained in the charge. Within due time plaintiff in error filed a motion for a new trial, which, among other things, alleged that the verdict of the jury was contrary to the evidence, which motion was by the trial court overruled.

[1] The well-established rule of this court is that, if there is any evidence to sustain the finding of the jury and the judgment of the trial court, this court will not disturb the same; yet the rule is otherwise if there is an entire absence of evidence. What evidence is shown here that plaintiff in error ever accepted the composition offered by Mrs. White, or agreed to accept the same? The entire evidence of the defendant in error may be stated as follows: Mrs. White, being in a failing condition, and in order to save court costs and expense, and to pay her creditors as much as possible, caused her attorney to write to all of her creditors as to her financial condition, and offering them a settlement or composition (to which letter it is admitted that the plaintiff in error did not reply), and thereafter various attorneys, representing her creditors, met with her attorney, and after consultation it was agreed that this composition of settlement should be made, and that

the same was acceptable to the creditors there represented. (It is admitted that plaintiff in error was not present, nor was it represented at this meeting, nor had any knowledge thereof.) Shortly thereafter her attorney mailed plaintiff in error a check, which check at the time of the trial, some eight months thereafter, had not been cashed at the bank upon which it was drawn, and the receipt of the check was positively denied, or any agreement or intention upon its part to accept the composition or settlement, and the only evidence supporting the acceptance of the composition is the testimony of the attorney that he mailed the check, while it is denied that it was received by the plaintiff in error.

[2] We do not think that this is any evidence of an agreement to accept the composition, or of an acceptance thereof, and especially so where it is admitted that the check has never been paid. In order to constitute a valid composition, there must be mutuality of contract between the debtor and creditor, and the mere unilateral agreement, which purports to bind only the debtor, cannot be enforced by nor against the creditor until accepted by him. This record does not contain any evidence that the plaintiff in error agreed to or accepted said offer of composition, but to the contrary.

Wherefore we recommend that this cause be reversed, with directions to grant to the plaintiff in error a new trial.

PER CURIAM. Adopted in whole.

(54 Okl. 712)

NORTH BRITISH & MERCANTILE INS.
CO. v. WRIGHT et al. (No. 6039.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. **INSURANCE** \S 330—**FIRE INSURANCE POLICY—PROVISION AGAINST INCUMBRANCES—PROMISSORY "WARRANTY."**

A fire insurance policy drawn under the regular Oklahoma standard form, being section 3482, Rev. Laws of Okla. 1910 Ann., and section 3800, Snyder's Comp. Stat. 1909, which contain a provision that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," is a promissory warranty on the part of the assured that the property covered by the policy is, and will be kept, free from incumbrance, and if the terms of said provision are violated the policy becomes null and void, and no recovery can be had on said policy for the loss or damage of said property by fire, unless the insurer had notice of such incumbrance, and in some manner waived the same.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 829-839; Dec. Dig. \S 330.]

2. **INSURANCE** \S 377—**WAIVER—KNOWLEDGE—FILING OF CHATTEL MORTGAGE—EFFECT AS NOTICE—INSURANCE.**

Section 4032, Rev. Laws of Okla. 1910 Ann., provides: "The filing of a mortgage of personal property, in conformity to the provi-

sions of this article, operates as notice thereof to all subsequent purchasers and incumbrancers of so much of said property as is at the time * * * located in the county or counties wherein such mortgage or authenticated copy thereof is filed." Held, that the classes of persons to whom constructive notice is given by the filing of a chattel mortgage in the office of the register of deeds are subsequent purchasers and incumbrancers of the property covered by the mortgage, and creditors of the owners thereof, but such filing in no wise affects an insurance policy upon personal property covered by a chattel mortgage when insured; the registry laws were not intended for such purpose.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.]

3. INSURANCE § 377—FIRE INSURANCE POLICY—PROVISION AGAINST INCUMBRANCES—WAIVER.

If an insurance company is to be held to have waived matters vitiating a policy, it, or its agents, must have actual notice, or notice of such facts as would put a reasonably prudent person upon inquiry; the public record of incumbrances and instruments affecting an insured's title, alone, will not charge an insurer with notice of such matters.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.]

Commissioners' Opinion, Division No. 4. Error from District Court, Adair County; John H. Pitchford, Judge.

Action by J. A. Wright and others, copartners as Wright & Brigrance, against the North British & Mercantile Insurance Company, a corporation. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Scothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. Helton & Winslow, of Stilwell, for defendants in error.

ROBERTS, C. The parties herein will be designated plaintiffs and defendant, the same as below. The action was brought by plaintiffs against the defendant, in the district court of Adair county, to recover for loss by fire of certain personal property covered by the insurance policy involved. The policy is the regular Oklahoma standard form and contains a provision that:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property, and be, or become incumbered by a chattel mortgage. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions or conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The defendant answers by alleging, and proving, that at the time the policy was issued there were two chattel mortgages against the property, one for \$230 and the other for \$206, and that said defendant at the time of issuing said policy had no knowledge or notice of said mortgage. To this answer the plaintiffs reply that they purchased the property involved from one R. H. Gamber, and at the time of said purchase they inquired of Gamber whether there were any chattel mortgages or other liens against said property, and were advised by him that there were none, and that they had no knowledge or notice of said mortgages until after the property had been destroyed by fire, except such notice as might be imparted by reason of the filing of said mortgages in the office of the register of deeds of the county, and that the defendant had the same notice by reason of such filing, as was imparted to the plaintiffs. The defendant tenders into court, for the use of the plaintiffs, the sum of \$33.37, being the amount of premium collected upon the policy. There is no evidence of any agreement, notice, or waiver by the local agent. The case was tried without a jury, and the court found the facts practically as alleged in the pleadings, and herein set out, and rendered judgment in favor of the plaintiffs for the sum of \$476.25. The appeal was lodged in this court on the 14th day of February, 1914, and briefs of plaintiff in error duly served and filed on the 12th day of August, 1914. Summons in error was waived by counsel for plaintiffs, and notice of submission and oral argument served in due time. Up to this time, January 6, 1916, the plaintiffs have failed to file briefs, or make any excuse or showing why they have not done so. The defendant stands upon the proposition that the policy is void, because of the existence of the mortgages on the property insured, at the time the policy was issued, even though the assured had no notice or knowledge of such mortgages.

[1] It is well settled, not only by the decisions of this state, but of many other states, that the agreement of the assured that the property covered by the policy is not mortgaged, or otherwise incumbered, or that said property shall not be mortgaged or incumbered during the existence of the policy, comes within that class of contracts known as promissory warranties, and that the effect of the breach of the warranty is to annul the policy without regard to the materiality of the subject of warranty, or whether the breach had anything to do in producing the loss. That such warranty is in the nature of a condition precedent, and a full compliance with the conditions of the contract must be performed by the insured before he can demand performance on the part of the insurer.

In support of their contention, counsel for

defendant cite the recent case of *St. Paul Fire & Marine Ins. Co. v. Peck*, 40 Okl. 396, 189 Pac. 117, wherein the court says:

"It is elementary, and the decisions uniformly hold, that, where a policy of insurance contains a provision 'that, if the title to the property be or become incumbered, the policy shall be void,' in that event, if at the time the policy is issued the property is incumbered and the insured conceals that fact, or if subsequent to the issuance of the policy the insured incumbers the property without the consent of the company, he cannot recover."

In the case of *Forbush et al. v. Insurance Co.*, 4 Gray (70 Mass.) 337, the Supreme Court of Massachusetts says:

"A warranty, in a policy of insurance, is an express stipulation that something then exists, or has happened, or been done, or shall happen or be done; and this must be literally and strictly complied with by the assured, whether the truth of the fact, or the happening of the event, be or be not material to the risk, * * * or not connected with the cause of loss. It is a strict condition. Its effect is that the assured takes on himself the responsibility of the truth of the fact, or the happening or not of such contingency; and, unless the warranty be strictly complied with, the policy does not take effect. It is a condition precedent, and the assured is estopped from denying or asserting anything contrary to his express warranty."

And in *Trench v. Insurance Co.*, 7 Hill (N. Y.) 122, the court says:

"A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with. 'The very meaning of a warranty,' observed Ashurst, J., in the same case, 'is to preclude all questions whether it has been substantially complied with; it must be literally so.' In a case of warranty it is perfectly immaterial whether the misdescription is the result of fraud or mistake; it is a condition precedent, and no excuse can be received for the nonperformance of it."

The Supreme Court of Virginia, in *Virginia Fire & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191, states the doctrine as follows:

"The stipulation is undoubtedly a warranty, made so by the express contract of the parties, and the jury ought to have been instructed that a literal compliance with it was essential to a recovery by the plaintiff. 'An express warranty,' says May 'is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. By a warranty the insured stipulates for the absolute truth of the statement made and the strict compliance with some promised line of conduct upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with.' May, *Ins.* § 156. This is the language of the decided cases and of this court in *Insurance Co. v. West*, 76 Va. 575 [44 Am. Rep. 177]. And the author correctly adds that whether the fact stated or the act stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised, and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer or the intervention of the law or the act of God, the insured can have no claim.

'One of the very objects of a warranty,' he continues, 'is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed.'"

We do not want to be understood as approving the doctrine, as to the materiality or immateriality of the breached warranty, to the full extent stated in the last case, but quote it for the purpose, only, of showing that, at least a material warranty, such as we have here, is a condition precedent, and must be strictly complied with to authorize a recovery.

In the case of *Deming Inv. Co. v. Shawnee Fire Ins. Co.*, 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607, the Supreme Court of the territory says:

"The parties had a right to make their own contract upon terms and conditions in this respect as they saw fit, and, if the plaintiff chose to make his representations warranties, the question of their materiality becomes unimportant; for under such stipulation the defendant was relieved from showing, and the plaintiff was estopped from denying, that they were material to the contract, and we are not permitted to say that the defendant did not deem them material to the risk, or that it would have made the contract upon other terms than it did. The secretary of the insurance company testified that the matter of incumbrance was material; and, had the company have had any knowledge of the incumbrance, it would not have issued the policy. And it may be that from experience he may be satisfied that the matter of incumbrance upon property sought to be insured is material to the risk, and, while this materiality he may not be able to prove to the satisfaction of the court or jury, he has a right to refuse to insure property incumbered, and to insist that the statements of the applicant in his application as to such matters shall be a warranty by the insured to be true; and when, as in this case so made, it was an agreement on the part of the plaintiff not only to warrant the truth of such matters, but that they are material to the contract, and that, if false, the contract shall be void, therefore all the statements and representations contained in the application must be treated as warranties, and must be true to authorize a recovery upon the policy. *American Ins. Co. v. Gilbert*, supra; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183-189, 7 Sup. Ct. 500, 30 L. Ed. 644; *Northern Ins. Co. v. Grand View Building Assn.*, supra."

In a very recent case decided by this court (*Brown v. Conn. Fire Ins.*, 153 Pac. 174), in the sixth syllabus, it is said:

"The forfeiture clause in an insurance policy, wherein it is stipulated and agreed that, if the property named therein, or any part thereof, shall hereafter be or become mortgaged or incumbered, 'this entire policy shall become null and void,' is a promissory warranty, and renders said policy an indivisible contract, and, if said property, or any specific part or parcel thereof, designated in said policy as insured, is thereafter mortgaged or otherwise incumbered, the entire policy is void; and no recovery can be had for the loss or damage of said property, or any part thereof, whether included in the mortgage or not; and held, further, that in an action to recover for the loss or damage of the property, under such circumstances, an allegation in the plaintiff's petition, 'that the making and exist-

ence of said mortgages on said land and barn in no way contributed to the loss herein complained of, and in no way incited, induced, or caused any person to set fire to said barn, or to set out fire that did get to said barn, but that said fire was incendiary, and not by any person in any way interested in said land, or in said barn, or the property therein, does not state facts sufficient to relieve the plaintiff from his acts in violating the terms of said contract, nor to entitle him to recover thereon."

[2] The theory of the trial court that the filing of the chattel mortgages with the register of deeds of the county imparted constructive notice of the mortgages to defendant cannot be sustained.

The section relied upon (4032, Rev. Laws of Okla. 1910 Ann.) is as follows:

"The filing of a mortgage of personal property, in conformity to the provisions of this article, operates as notice thereof to all subsequent purchasers and incumbrancers of so much of said property as is at the time mentioned in the preceding section located in the county or counties wherein such mortgage or authenticated copy thereof is filed."

It is plain to be seen that the notice imparted therein does not include insurance companies.

In the case of *Mutual Fire Ins. Co. v. Diehl*, 18 Md. 27, 79 Am. Dec. 673, it is said:

"An insurance company is not chargeable with notice at the time of insurance of the state of the title to the premises insured, as disclosed by the land records, so as to prevent its relying, in order to defeat the action on the policy, on any objection to the title of the assured, which might have been ascertained by inspection of such records."

In the case of *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915, the second paragraph of the syllabus reads as follows:

"The classes of persons to whom notice was to be given by the record of a mortgage were creditors of the mortgagor, subsequent purchasers and mortgagees, or lienholders in good faith. Such record does not affect an insurance policy upon personal property, under a chattel mortgage when insured."

It will be observed that the Oklahoma statute is very similar to the Texas statute. The filing of a chattel mortgage operates as notice thereof to all subsequent purchasers and incumbrancers.

In another Texas case (*U. S. Ins. Co. v. Moriarty* [Civ. App.] 36 S. W. 943) it is said:

"The fact that a mortgage executed on insured property is recorded does not constitute notice thereof to the insurer. To bind the company, it must have actual notice, or notice of such facts as to put it on inquiry."

In a later case the same court, in *Hartford Fire Ins. Co. v. Wright* (Tex. Civ. App.) 125 S. W. 363, said:

"Proof of actual knowledge on the part of defendant insurance company's agent of the existence when the policy was issued of mortgage liens on plaintiff's property was essential to show a waiver of a stipulation against incumbrances."

The Supreme Court of Indiana, in the case of *Insurance Company v. Overman*, 21 Ind. App. 516, 52 N. E. 771, said:

"A mortgage of record before the issuing of a policy providing against incumbrance is not notice thereof to the insurer."

In the case of *Shaffer v. Insurance Co.*, 17 Ind. App. 204, 46 N. E. 557, the court say:

"Insurance companies that issue policies of insurance with express conditions that the policy shall be void if at the time the property is or shall become incumbered by mortgage, etc., are not required to examine public records to see whether or not the insured is violating a stipulation in the policy, under and by which he must be bound."

At page 807, 19 Cyc., it is said:

"An insurer is not chargeable with constructive notice of the existence of an incumbrance or transfer, although it be duly recorded, for the registry laws are not intended for such purposes."

[3] In *Cooley's Brief on Fire Insurance*, at page 2547, the same rule is laid down in the following language:

"If an insurance company is to be held to have waived matters vitiating a policy, it or its agents must have actual notice or knowledge of such matters. Constructive notice is not sufficient. Therefore the public record of incumbrances and instruments affecting an insured's title will not charge an insurer with notice of such matters, though the record is constructive notice to all the world of its contents."

The rule laid down in the third and fourth headnotes in *Brown v. Conn. Fire Ins. Co.*, supra, are applicable here, and are as follows:

"A contract in writing, if its terms are free from doubt or ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to contracts of insurance."

"In an action on an insurance policy, a pleading which sets up that the assured failed to keep and perform the conditions in the policy because of ignorance of such conditions, but which fails to allege fraud, misrepresentation, or concealment, is insufficient to relieve the plaintiff from the effect of a violation of the plain and unmistakable terms of the policy."

We have carefully gone over the record, and are of opinion that the briefs of plaintiff in error fully sustain the assignments, and, under the rules of this court, the judgment should be reversed, and the case remanded.

PER CURIAM. Adopted in whole.

(54 Okl. 701)

ATCHISON, T. & S. F. RY. CO. v. LYNN & HUDSON. (No. 5868.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. CARRIERS ⇨ 227—SHIPMENT OF CATTLE—PLEADINGS—ISSUES—EVIDENCE.

It is error for the court to allow the introduction of evidence tending to support an issue

not raised by the pleadings, where objected to on that ground.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 232, 953-956; Dec. Dig. § 227.]

2. INTERSTATE SHIPMENT CONTRACT—WAIVER OF PROVISIONS.

Quere: Under the rules of decision of the Supreme Court of the United States, in construing the Carmack Amendment (Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 584, 595, amending Act Cong. Feb. 4, 1887, c. 104, § 20, 24 Stat. 379, 386 [U. S. Comp. St. 1913, § 8592]), can a waiver of the provisions of a contract for an interstate shipment of live stock, requiring notice in writing of any damage to the stock before their removal from the place of destination, etc., be shown in any other way than that named in the contract? viz.: "The written notice herein provided for cannot and shall not be waived by any person, except a general officer of the company, and he only in writing."

Commissioners' Opinion, Division No. 1. Error from County Court, Pawnee County; Geo. E. Merritt, Judge.

Action by Lynn & Hudson against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Cottingham & Hayes and Geo. M. Green, both of Oklahoma City, for plaintiff in error. Hayes & Cleeton, of Cleveland, for defendants in error.

BREWER, C. This is a suit for damages to a shipment of cattle from Pawnee, Okla., to Kansas City, Mo. In the county court, to which the case was taken by appeal, the railway company, as defendant, filed its answer of a general denial, and for a second defense set up a written contract, under which the shipment moved. Section 8 of said contract is as follows:

"That in order that any loss or damage to be claimed by the shipper may be fully and fairly investigated and the facts and nature of such claim or loss preserved beyond dispute and by the best evidence, it is agreed that as a condition precedent to his right to recover any damages or any loss or injury to his said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim therefor to some officer of said company, or to the nearest station agent, or, if delivered to consignee at a point beyond the company's line, to the nearest station agent of the last carrier making such delivery, before such stock shall have been removed from the place of destination, or from the place of delivery of the same to the consignee, and before such stock shall have been slaughtered or intermingled with other stock, and will not remove such stock from such station or stockyards until the expiration of three hours after the giving of such notice, and a failure to comply in every respect with the terms of this clause shall be a complete bar to a recovery of any and all such damages. The written notice herein provided for cannot and shall not be waived by any person, except a general officer of the company, and he only in writing, nor shall any such damages be recoverable, unless

written claim therefor shall be presented to the company within 91 days after the same may have occurred."

This was followed by an averment that the shippers, Lynn & Hudson, had wholly failed to comply with the above provision as to the matter of giving notice of any claim for damages, according to its provisions, and that in fact no claim in writing had ever been made for damages, loss, or injury to such stock to the defendant or any of its officers or agents, before such stock were removed from the place of destination, etc. This answer was verified, and the cause went to trial on the bill of particulars and this answer, without any reply.

[1] At the trial, plaintiffs offered evidence, which was intended to show a waiver upon the part of the railway company of the provision of the contract requiring notice. All this evidence was objected to on various grounds and for various reasons, including the one that the proof was not within the issues raised by the pleadings. The evidence along this line tended to show that the company, some months after the delivery of the cattle, had received a claim for damages, and had given it a number, and had corresponded with plaintiffs concerning the same, and that a claim agent had talked with plaintiffs in an effort to settle the claim. After the evidence was all in, the court, over the objection of the railway company, instructed the jury on the question of waiver. This point is urged here for a reversal of the case, and it seems to us that it is well taken. As the pleadings stand, the execution of the shipping contract as alleged in the answer is admitted, and no plea of a waiver of its terms was made. Therefore, as the case stood at the time of trial, it was incumbent upon plaintiffs to show a compliance with the terms of the contract relative to giving the notice as provided therein. No issue of a waiver of the terms of the contract was presented; and when the evidence was offered, tending to show the same, it should have been refused, when objected to on the ground that it was not within the issues.

[2] In the case of *Chicago, R. I. & Pac. Ry. Co. v. Spears*, 31 Okl. 469, 122 Pac. 228, this question was squarely before the court, and Justice Williams in the opinion, after setting out the instruction of the court, submitting to the jury the question of whether or not a similar clause in the contract of shipment had been waived, said:

"This instruction was submitted on an issue not raised by the pleadings. The evidence was also objected to on the ground that same was incompetent, because no such issue had been joined. This instruction, without considering its form, was reversible error. *American Jobbing Association v. James*, 24 Okl. 460, 103 Pac. 670. We neither mean to say that an issue that is not made by the pleadings may not be raised by the introduction of evidence, when such evidence is offered and admitted without objection. * * *

Of course, as suggested in the above quotation, if evidence of a waiver had gone in without objection, the pleadings might be considered as amended, so as to raise that issue; but, as has been pointed out, the proof that went in along this line was carefully objected to, and the specific reason of its inadmissibility pointed out. This error of the court requires a reversal of the case, and we, under the circumstances, shall not go into the question, strongly urged by the railway company, that a waiver of the provision of this contract, covering, as it does, an interstate shipment, could only be shown in the manner designated in the contract; that is to say, that it was made by a general officer of the company in writing. We feel inclined, and think our duty is best served, by leaving the question for the court proper to determine, as it would involve the harmonizing of some of our own cases with each other, and with the views expressed in numerous cases by the Supreme Court of the United States, which in the last analysis will be the final authority in this class of cases.

The cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

(53 Okl. 33)

APPLE et al. v. FRENCH. (No. 4811.)

(Supreme Court of Oklahoma. Oct. 12, 1915.
Rehearing Denied Feb. 8, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐1001—REVIEW—VERDICT—EVIDENCE.

Where the evidence reasonably tends to support the verdict of the jury, the judgment of the trial court will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. ⇐1001.]

Error from County Court, Carter County; M. F. Winfrey, Judge.

Action by J. P. French against S. A. Apple and another. Judgment for plaintiff, and defendants bring error. Affirmed.

J. A. Bass, of Ardmore, for plaintiffs in error. Guy Green, of Waurika, for defendant in error.

TURNER, J. On January 8, 1912, in the county court of Carter county, J. P. French sued S. A. Apple and Wirt Franklin on their past-due promissory note, which reads:

"\$919.90. Ardmore, Oklahoma, March 22, 1911.

"October 22, 1911, after date we promise to pay to the order of J. P. French nine hundred nineteen and ⁰⁰/₁₀₀ dollars, with interest at 8 per cent. per annum.

S. A. Apple.
"Wirt Franklin."

For answer defendants admitted the execution and delivery of the note as alleged, and pleaded a partial failure of consideration therefor. After issue joined by reply

there was trial to a jury and judgment for plaintiff, and defendants bring the case here.

The judgment is neither contrary to the law or to the evidence. After plaintiff had made a prima facie case on the note and rested, defendants, in support of their plea of failure of consideration, proved that on the day the note was made, executed, and delivered there was pending at Cornish before a justice of the peace a suit in unlawful detainer for some 400 acres of land wherein defendants were plaintiff and one Jesse Northcutt and others were defendants; that Northcutt and the others were tenants of the plaintiff in this suit who there appeared with counsel to defend. To defend his possession in that case he relied upon a lease of the land theretofore executed by one Ravon, as natural guardian of a certain minor, the owner thereof, to one Horniday, dated January 24, 1910, and duly recorded, under which he had entered and made valuable and lasting improvements. The evidence further discloses that Apple and Franklin, the plaintiffs there, had since the execution of said lease purchased the land, and in that action were seeking to recover possession. On the day aforesaid all parties in interest met at Cornish for the trial of that cause, but first proceeded to secure an amicable adjustment of their differences. During negotiations for a settlement of the case French, the defendant herein, admitted, upon investigation, that his lease was of no validity, and suggested that he would settle the case and yield possession if plaintiffs would pay him for his improvements which, the evidence discloses, were worth the amount of the note. So far there is no dispute of the facts, but here the testimony conflicts. French adduced evidence tending to prove that the note was given in payment for his improvements and for his surrender of possession of the premises. Defendants adduced evidence tending to prove that after the note was executed it occurred to them that they were entitled to a release from French of his claim to the land, whereupon they came to him as he was leaving town, and, they say, as part of the same transaction, presented him the following, which was then and there signed by all parties in interest:

"Cornish, Okl., March 22, 1911.

"This agreement witnesseth that in settlement of the suit filed before Hon. W. C. Hogan, this day set for trial—Apple & Franklin v. Jess Northcutt et al., J. P. French, of Ft. Worth, Texas, for the sum of \$1,125.00 (\$205.10 this day paid) and note for the sum of \$919.90, does this day surrender possession of the land in controversy, and will at once execute and deliver to said Apple & Franklin a quitclaim or release of any title papers he may have thereon.

"J. P. French.

"Apple & Franklin."

They further proved that, while French had yielded them possession, they had neither demanded or received of him the release

as agreed. On the other hand, it was shown that said release was secured before the commencement of this suit, and, to the best recollection of witness, in due time sent to defendants as plaintiff had agreed. In short, the case was defended upon the theory that a surrender of possession and release constituted practically the sole consideration for the note sued, and that the release had never been executed and delivered, and, besides, that French had nothing to release, but had secured their note for nothing.

But the jury found for the plaintiff under instructions which are uncomplained of, and, as there is evidence reasonably tending to support the verdict, the judgment is affirmed. All the Justices concur.

(54 Okl. 745)

McCLELLAN v. FICKLEN. (No. 6419.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

TAXATION \S 608—**EQUALIZATION—REMEDIES**
—**APPEAL—INJUNCTION.**

The same as in *Thompson et al. v. Brady et al.*, 42 Okl. 807, 143 Pac. 6.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1230-1241; Dec. Dig. \S 608.]

Commissioners' Opinion, Division No. 2. Error from District Court, Craig County; Preston S. Davis, Judge.

Injunction by Charles E. McClellan against E. D. Ficklen. Judgment for defendant, and plaintiff brings error. Affirmed.

Riddle, Bennett & Mitchell, of Vinita, for plaintiff in error. Willard H. Voyles, of Vinita, for defendant in error.

HOOKE, C. The plaintiff in error alleges in his petition that he was the owner of the real estate involved herein at the time of its assessment in the year of 1911; that it was properly assessed for said year, and its value equalized by the proper boards during said year, and that when the value of the real estate in Craig county was certified by the proper authority to the state board of equalization, that his property appeared thereon assessed at its fair cash value; that thereafter the state board of equalization, when equalizing the value of the real estate of the various counties of the state ordered a raise in the valuation of the real estate in the city of Vinita in Craig county, where the property of the plaintiff in error was located, of 50 per cent., and that thereafter the county clerk of said county, acting under the authority of this order of the state board of equalization, increased the assessed value of his property accordingly. The plaintiff in error attempted to enjoin the collection of this tax for the aforesaid reason, alleging that the same was illegal and unjust and exceeded the fair cash value of the property, and was therefore contrary to the Constitu-

tion of the state, and he offered to pay the tax due upon said property based upon the assessment as the same existed before the order of the state board of equalization was made. A demurrer was sustained to the petition of the plaintiff in error in the lower court, and, declining to plead further, he appealed to this court.

His contentions are no longer open questions in this state, for this court in a number of cases has uniformly held adversely to him, thereby sustaining fully the authority of the state board of equalization to make the raise, and the duty of the county clerk to place the same upon the tax rolls, and denying any right to an injunction to any party having property within the taxing district.

Upon the authority of *Carrico et al. v. Crocker et al.*, 38 Okl. 440, 133 Pac. 181, and the cases therein cited, and also of *Thompson et al. v. Brady et al.*, 42 Okl. 807, 143 Pac. 6, *Rumph, Treas., v. Joines*, 38 Okl. 30, 131 Pac. 1095, and the cases therein cited, we recommend that the judgment of the lower court be affirmed.

PER CURIAM. Adopted in whole.

(54 Okl. 76)

PRESSLEY et al. v. INCORPORATED TOWN OF SALLISAW et al.

(No. 6541.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 882—**INVITED ERROR—INSTRUCTION.**

Where, at the request of a party to the cause, an erroneous prejudicial instruction is given by the trial court to the jury, the party at whose instance such instruction is given cannot, on appeal to this court, urge a reversal based upon such error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3591-3610; Dec. Dig. \S 882.]

2. CONTRACTS \S 176 — **CONSTRUCTION OF UNAMBIGUOUS CONTRACT — QUESTION OF LAW—INDEPENDENT CONTRACTOR.**

Whether or not a party to an unambiguous contract is an independent contractor is a question of law, to be determined by the court from an inspection of the contract, in the light of the surrounding circumstances.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. \S 176; Trial, Cent. Dig. \S 326.]

3. APPEAL AND ERROR \S 1046—**GROUND FOR REVERSAL—REMARKS OF COURT.**

In the presence of the jury in the trial of the cause, the court ex mero motu made the following statement, and did not afterwards withdraw the same, or caution the jury not to regard it: "Now, this contract is introduced here. I have heard Mr. Wheeler testify. He is the engineer for the town. I have heard this contract read, and the specifications, and all that, and it occurs to me at this time that the town of Sallisaw is not liable in this matter. Well, I haven't decided the question, but, as I say, if the town is liable, it is under this contract, and the view of the court at this time is

that under that contract the city would not be liable. I will instruct the jury in the matter."

Held, that the making of such statement in the presence of the jury was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. § 1046.]

4. MUNICIPAL CORPORATIONS § 751—INJURY TO SERVANT—INDEPENDENT CONTRACTOR — CONSTRUCTION OF CONTRACT.

The contract in evidence in this case carefully considered, and defendant Oklahoma Engineering Company *held* not to be an independent contractor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.]

5. DEATH § 32—RECOVERY BY "CHILDREN" —RIGHT—AMOUNT.

Under section 5281, Rev. Laws 1910, the right of recovery is not limited to children of a deceased father up to their majority, but extends to all children of deceased, regardless of their ages; but the recovery had, whether by minor or adult children, must be based upon the reasonable expectancy of pecuniary benefit, of which they were deprived by the death of their father.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 4, 7, 48; Dec. Dig. § 32.

For other definitions, see Words and Phrases, First and Second Series, Children.]

6. MASTER AND SERVANT § 187 — NEGLIGENCE OF VICE PRINCIPAL—LIABILITY OF PRINCIPAL.

Where the relation of principal and vice principal exists, as in this case, the principal is liable in damages for the wrongful killing of a father, caused by the negligence of the vice principal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 422-426; Dec. Dig. § 187.]

Commissioners' Opinion, Division No. 1. Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Ora Pressley and another, infants, by Emmett N. Ellis, as guardian, against the Incorporated Town of Sallisaw, a municipal corporation, and another. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

This action was brought by Ora and Una Pressley, minors, by their guardian, Emmett N. Ellis, against the Incorporated town of Sallisaw, a municipal corporation, and the Oklahoma Engineering Company, a corporation, to recover damages under sections 5281, and 5282, Rev. Laws 1910, for the death of Kin Pressley, father of said minors: Said sections read:

"5281. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"5282. In all cases where the residence of the party whose death has been caused as set forth

in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in the said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

Hereinafter the parties will be designated as they were in the trial court.

The material evidence was: That the said town of Sallisaw entered into a contract with said Oklahoma Engineering Company for the construction of a sewer system for said town. That said contract, among other things, contained the following provisions:

"The word 'engineer' in these specifications refers to the engineer in charge or to any other person employed by the board of town trustees for the purpose of directing and inspecting the construction of the sewers and disposal plant of the town of Sallisaw. The engineer will designate the order of time in which the different parts of the work shall be done, as well as the mode of doing the same.

"Should any dispute arise between the engineer and contractor as to the true meaning of the drawings or specifications in any point, the decision of the engineer shall be final and conclusive. * * * The contractor shall employ competent foremen and skilled mechanics and laborers, and shall discharge immediately, whenever requested to do so by the engineer, any man found to be incompetent, dishonest or disposed to be disorderly, and such person shall not be employed on the work again. So far as possible, the contractor shall employ permanent residents of Sallisaw for all classes of labor. * * *

"The board of town trustees may, at any time before the final completion of the work, by written notice, order additional work to be done or any portion of the work to be omitted, or to make any change that may be deemed necessary or advisable. Additional work will be paid for at the rate stipulated in the proposal for that class of work, or if of a nature not provided for in the proposal, the contractor will be paid at the rate of its costs, plus ten per cent. as determined by the engineer's account of labor and material. It is expressly understood that any work ordered omitted shall not constitute a claim for damages to the contractor for anticipated profits. * * *

"All instructions to the contractor relating to the work shall be given through the engineer and the contractor shall obey all instructions concerning the method of procedure throughout the work. * * *

That the death of said Kin Pressley was caused by the caving of a ditch dug in constructing said sewer system, in which deceased was, as an employé of said company, working as a laborer. That the caving of said ditch was due to the negligence of said company. That said plaintiffs, Ora and Una Pressley, were minors. That the expectancy of life of said Kin Pressley was 32.50 years. That he was a healthy, sober, and industrious man. That he properly cared for his family, but had accumulated no estate. That there had been no administration upon the estate of said deceased.

During the trial of the case, the court, in the presence of the jury and without being in any manner, so far as the record discloses, called upon so to do, made the fol-

lowing statement, which was duly excepted to:

"Now, this contract is introduced here. I have heard Mr. Wheeler testify. He is the engineer for the town. I have heard this contract read, and the specifications, and all that, and it occurs to me at this time that the town of Sallisaw is not liable in this matter. Well, I haven't decided the question, but, as I say, if the town is liable, it is under this contract, and the view of the court at this time is that under that contract the city would not be liable. I will instruct the jury in the matter."

Said statement was not afterwards withdrawn by the court, or the jury cautioned by the court not to be influenced thereby.

The court, upon request of plaintiff, instructed the jury as follows:

"No. 1. You are instructed that when a municipal corporation, such as the incorporated town of Sallisaw in this case, contracts for the making of a public improvement under the supervision and direction of its own engineer or other proper officer, by and under the terms of which contract, the contractor is subject to the orders and control of such engineer or other officer, and said engineer or officer having authority to direct the manner and mode of doing the work or the control of the employés of the contractor, then under the terms of such contract the municipal corporation is liable in damages for the neglect and wrongful killing of an employé of such contractor."

The court also instructed the jury as follows, which instruction was duly excepted to:

"No. 12. If your verdict should be for the plaintiff, you will assess the damages at such a sum as will compensate them for their pecuniary loss, resulting from the death of their father. And in that connection you are instructed that said plaintiffs would not be entitled to any compensation on account of the death of the deceased for a period beyond the time of their attaining their majority."

The jury returned a verdict in favor of the town of Sallisaw and against the Oklahoma Engineering Company in the sum of \$1,350, to which said verdict plaintiffs duly excepted. Plaintiffs filed a motion for new trial, which was overruled, excepted to, and judgment entered in accord with the verdict. To reverse said judgment plaintiffs appeal to this court. Defendants insist that no prejudicial error intervened in the trial of this cause, and ask that the judgment, which includes an award against defendant Oklahoma Engineering Company in the sum of \$1,350, be affirmed.

Roy Frye and Joe Bailey Allen, both of Sallisaw, for plaintiffs in error. Curtis & Pitchford, of Sallisaw, Read & McDonough, of Ft. Smith, Ark., and J. H. Jarman, of Sallisaw, for defendants in error.

COLLIER, O. (after stating the facts as above). The request of defendants, in their brief, that the judgment against defendant Oklahoma Engineering Company in the sum of \$1,350 be affirmed, is an admission that the death of Kin Pressley was due to the negligence of said company, for which said company was liable. This admission leaves the following questions for our consideration:

(1) Was the Oklahoma Engineering Company an independent contractor? (2) Did the court commit prejudicial error in the statement made in the presence of the jury in regard to the nonliability of the town of Sallisaw? (3) Were said minors, daughters of deceased, entitled to compensation on account of the death of their father for a period beyond the time of attaining their majority?

[1, 2, 4.] That said Oklahoma Engineering Company was not an independent contractor, under the provisions of the contract hereinbefore recited, entered into with the town of Sallisaw, is not an open question in this jurisdiction. *Missouri, K. & O. Ry. Co. v. Ferguson*, 21 Okl. 266, 96 Pac. 755; *Chas. T. Derr Const. Co. et al. v. Gelruth*, 29 Okl. 538, 120 Pac. 253; *Chicago, R. I. & Pac. Ry. Co. v. Bennett*, 36 Okl. 358, 128 Pac. 705; *Chicago, R. I. & P. Ry. Co. v. Bond*, 148 Pac. 103; *Muskogee Elec. Trac. Co. v. Hairel et al.*, 148 Pac. 1005. See, also, *New Orleans, M. & C. R. R. Co. v. Hanning*, 15 Wall. 649, 21 L. Ed. 220; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440; *Bibbs, Adm'r, v. N. & W. R. R. Co.*, 87 Va. 711, 14 S. E. 163; *De Palma et al. v. Weinman et al.*, 15 N. M. 68, 103 Pac. 782, 24 L. R. A. (N. S.) 423; *Connors v. Hennessey*, 112 Mass. 96.

Whether or not the Oklahoma Engineering Company was an independent contractor was a question of law for the court to determine from the face of the contract, in the light of surrounding circumstances, and it was prejudicial error to submit this question as a question of fact to the jury. *Chicago, R. I. & P. Ry. Co. v. Bond*, supra; *Muskogee Elec. Trac. Co. v. Hairel et al.*, supra. But the question of whether or not the Oklahoma Engineering Company was an independent contractor was submitted to the jury as a question of fact, under instruction No. 1, requested by plaintiff. Therefore the insistence of plaintiff that such action of the court was prejudicial error, or even error, has no basis upon which to stand. Certainly it is unnecessary to cite authorities to sustain the proposition that one cannot complain on appeal to this court of errors which he caused the trial court to commit, and to which no exception was, or could have been, saved.

[3] The statement of the court, in the presence of the jury, that the town of Sallisaw was not liable, was made entirely ex mero motu, so far as the record discloses, and was duly excepted to by plaintiffs. This statement was not withdrawn from the jury by the court, or the jury instructed to disregard such statement. That said statement of the court made a lasting impression upon the jury, affecting their verdict, is shown by the inconsistent verdict returned by the jury, finding in favor of the town of Sallisaw and against the Oklahoma Engineering Company, notwithstanding the court, in its in-

struction No. 1, in effect instructed that, if the Oklahoma Engineering Company was liable, the town of Sallisaw was also liable. Said statement in the presence of the jury, we think, was reversible error. When remarks, made by a judge in the progress of a trial, are calculated to mislead the jury, or prejudice the party complaining, and the verdict of the jury conclusively shows that such remarks affected their verdict, the making of such remarks in the presence of the jury is reversible error. *City of Guthrie v. Carey*, 15 Okl. 276, 81 Pac. 431; *Skelly v. Boland*, 78 Ill. 438.

[5] The instruction of the court that said plaintiffs would not be entitled to any compensation on account of the death of their father, beyond the time of attaining their majority, does not correctly state the law. This action was brought under sections 5281 and 5282, Rev. Laws 1910, supra, and to hold the measure of damages as instructed by the court to be correct would be to read into said section 5281 the words "minor children," which cannot be legally done. The action for damages for the wrongful killing of the father is given to the widow and children of the deceased, regardless of the ages of the children; and that adult children, as well as minor children, are embraced in the word "children," used in said section, is emphasized by the provision in said statute that the damages are "to be distributed in the same manner as personal property"; and, also, by the provision in said section that, if there be no widow or children, the right of recovery is given to the next of kin.

[6] In an action to recover damages for the wrongful killing of a father, the right of a son of the deceased to recovery for any pecuniary loss he may have sustained by the death of his mother is not limited to his minority, but also extends to and includes any such loss sustained to his majority. *Valente et al. v. Sierra Ry. Co.*, 158 Cal. 412, 111 Pac. 95.

In *Tuteur, Adm'r. v. Chicago & N. W. R. Co.*, 77 Wis. 505, 46 N. W. 897, it is held:

"The fact that the children were all of age when their mother's death was caused by negligence would not preclude a recovery for the loss of such pecuniary benefits as they had a reasonable expectation of securing from her additional accumulations."

"Under the statute giving children a right of action for negligence causing the death of their father, the right of action is not limited to minors. * * *." *Beaumont Trac. Co. v. Dillworth* (Tex. Civ. App.) 94 S. W. 352.

"There is no sufficient legal reason for limiting the * * * damages [in such an action (to recover damages for a wrongful death)] to the minority of the children, if the jury are legally persuaded that they will continue after that age." *Tilley, Adm'r. v. Hudson River R. Co.*, 29 N. Y. 252, 86 Am. Dec. 297.

"Our statute, which gives a right of action to the administrator of one negligently killed, for the benefit of the wife, husband, parent, and children, * * * does not exclude an action for the benefit of adult children. * * *"

Petrie v. Columbia & Greenville R. Co., 29 S. C. 303, 7 S. E. 515.

"In an action on behalf of a minor to recover damages for the wrongful death of his mother, * * * the recovery is not limited to the pecuniary loss suffered by the minor prior to his majority. * * *." *Butte Elec. Ry. Co. v. Jones*, 164 Fed. 308, 90 C. C. A. 240, 18 L. R. A. (N. S.) 1205.

Under a statute conferring a right of action on the surviving husband, wife, and children, the word "children" as used in such statute, may include persons over the age of 21 years. *Galveston, H. & San Antonio Ry. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127.

It is unnecessary to further cite authorities to show that the right of recovery in an action by children for the wrongful death of their father is not confined to pecuniary loss sustained during their minority, but may continue after such children reached their majority, as it is, in effect, directly so held by this court on rehearing, in *Atchison, T. & S. F. Ry. Co. v. Eldridge*, 41 Okl. 463, 139 Pac. 254. See, also, *Shawnee Gas & Elec. Co. v. Motesenbocker*, 41 Okl. 454, 138 Pac. 790.

In an action, under said section 5281, supra, by the children of a deceased, the correct measure of damages is the pecuniary loss, regardless of the age of the children, suffered by them by reason of being deprived by the death of their father of an expectancy of pecuniary benefits, to be determined by the age, physical condition, occupation, earning capacity, habits, and the use made by deceased of his earnings. *Big Jack Min. Co. v. Parkinson*, 41 Okl. 125, 137 Pac. 678; *Oklahoma Gas & Elec. Co. v. Lukert*, 16 Okl. 397, 84 Pac. 1076; *Western Union Tel. Co. v. McGill*, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818; *Bartlett v. Chicago, R. I. & P. Ry. Co.*, 21 Okl. 415, 96 Pac. 468.

As said Oklahoma Engineering Company, under the provisions of the contract entered into by it with the town of Sallisaw, was not an independent contractor, but the servant and agent of said town, said town is liable for the negligent acts of said company as its agent, within the scope of its authority. *Chas. T. Derr Const. Co. v. Gelruth*, supra; *Muskogee Elec. Trac. Co. v. Hair et al.*, supra.

This case should be reversed and remanded.

PER CURIAM. Adopted in whole.

WILSON et al. v. JONES. (No. 4668.)
(Supreme Court of Oklahoma. Dec. 21, 1915.
Rehearing Denied Feb. 8, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — §323—JOINT JUDGMENT—CASE-MADE—NECESSARY PARTIES.

Where a joint judgment has been rendered against two defendants, only one of whom filed a motion for a new trial, but both join in a pe-

tion in error in this court, there is a want of necessary parties in order to treat the record as a case-made, as the proper foundation for an appeal by case-made was not laid in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1796, 1798-1805; Dec. Dig. § 323.]

2. PLEADING § 355—DEPARTURE—MODE OF OBJECTION—MOTION FOR JUDGMENT.

Treating the record as a transcript, the only question attempted to be raised is that of a departure in the pleadings, and as the objection to the pleadings on the ground of a departure is made by a motion for judgment on the pleading, and not by a motion to strike, the same does not present error to this court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1102-1110; Dec. Dig. § 355.]

Commissioners' Opinion, Division No. 3. Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by George Jones against Isaac N. Bailey and others. Judgment for plaintiff, and the defendants Bailey and Wilson bring error. Affirmed.

E. G. Wilson, of Tulsa, for plaintiffs in error. Bailey, Wyand & Moon, of Muskogee, and Watts & Molony, of Wagoner, for defendant in error.

RITTENHOUSE, C. The judgment in this case, in part, is as follows:

"It is further considered, ordered, and adjudged that the plaintiff have judgment against the defendant Isaac N. Bailey and defendant E. G. Wilson for the sum of \$675 and interest thereon, * * * which the court finds to be the sum of \$946. That on and after the expiration of six months * * * issue an order of sale * * * the proceeds arising therefrom, be paid as follows: First, the sum of \$146.87 to F. W. Casner taxes paid by him; * * * second, the unpaid costs of this action; third, amount found due F. W. Casner, to wit, the sum of \$1,277, * * * and the residue, if any, to the amount of \$946, * * * be paid to plaintiff. * * *"

The decree further provides that E. G. Wilson, Isaac N. Bailey, and Lillie E. Bailey are forever barred and foreclosed from all right, title, estate, interest, or equity of redemption in or to the property in controversy. A motion has been filed to dismiss this appeal, for the reason that this is a joint judgment, and that the defendant Bailey is a necessary party to the appeal.

[1] The judgment is a joint judgment. Isaac N. Bailey did not file a motion for a new trial, and the fact that the petition in error purports to be in the name of both of the defendants in no wise cures the neglect to properly lay the foundation for appeal in the lower court. Bowles et al. v. Cooney et al., 146 Pac. 221.

[2] The record is sufficient, however, to be treated as a transcript, and it is insisted that there was filed in the case three petitions, and that the last-amended petition was a palpable departure from the two previous petitions, which alleged that the defendant in error sold and conveyed the land in ques-

tion to plaintiff in error Bailey, and that Bailey procured the abstract thereto, and that the sale and conveyance was by warranty deed, and that Bailey was to pay for the land in the future upon a satisfactory showing of an abstract to be made in the future; while the last-amended petition alleges the terms of an oral contract to sell real estate and deliver a deed only upon the payment of the purchase price agreed upon, thus insisting that the latter petition contradicts the previous verified petitions, in this, that Jones did not sell and convey to Bailey by warranty deed the land in question on the date on which the oral contract to sell is alleged to have been entered into. And in support of this contention plaintiff in error has cited Johnson v. Bank, 59 Kan. 250, 52 Pac. 860; Bank v. Woodruff, 14 N. M. 502, 94 Pac. 957; Nugent v. Powell, 4 Wyo. 173, 33 Pac. 23, 20 L. R. A. 199, 62 Am. St. Rep. 17; Myers v. Presbyterian Church, 11 Okl. 544, 69 Pac. 874. We do not think that the error complained of has been properly presented to this court. A motion for judgment on the pleading was filed and overruled by the court, and the plaintiff in error attempts to raise the question of a departure in the pleadings under his motion for judgment on the pleadings. It was held in Merchants' & Planters' Ins. Co. v. Marsh, 34 Okl. 453, 125 Pac. 1100, that:

"An objection to a pleading on the ground of a departure must, in this jurisdiction, be raised by a motion to strike. It cannot be raised by demurrer, or by an objection to the introduction of evidence."

And in the case of St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., 23 Okl. 79, 99 Pac. 647, wherein it was held that there was a departure in the pleadings, but that the question of a departure could not be raised by an objection to the introduction of evidence under the pleadings, and that the defendant waived the defect by failing to move to strike the reply and going to trial on the issues thus raised. In the instant case, the question of departure in the pleadings was attempted to be raised by a motion for judgment on the pleadings; this motion is a plea in the nature of a demurrer, and admits, for its purpose, the truth of all the facts, which are well pleaded by the opposite party. O. El. Sharp Lbr. Co. v. Kansas Ice Co. et al., 42 Okl. 689, 142 Pac. 1016.

We therefore conclude that the failure to file a motion for a new trial by the co-defendant, Isaac N. Bailey, precludes this court from examining the errors alleged to have occurred during the trial; and treating the record as a transcript, the question of a departure in the pleadings not having been raised by motion to strike, that question is not presented for our review.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 730)

HAMRA et al. v. FITZPATRICK et al.
(No. 5859.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. APPEARANCE §10 — GENERAL APPEARANCE—OVERRULING OF SPECIAL APPEARANCE—WAIVER OF ERROR.

After a special appearance, objecting to the jurisdiction of the court over the persons of defendants has been overruled, defendants, by filing an answer alleging that they have been damaged by the granting of a temporary injunction, and praying judgment against plaintiffs for the amount of such damages, enter a general appearance and waive any error in overruling such special appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 53, 54; Dec. Dig. §10.]

2. NEW TRIAL §110—POWER TO GRANT—MOTION.

It does not constitute error for a trial court at the same term at which judgment is entered to grant a new trial on its own motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 231; Dec. Dig. §110.]

3. HOMESTEAD §96—EXEMPTION—PURCHASE MONEY.

Under the provisions of sections 2 and 3, art. 12, Constitution, and section 3346, Rev. Laws 1910, the purchasers have no homestead exemption against levy and sale under execution to satisfy a judgment for a part of the purchase price of the tract of land in which the exemption is claimed, even though the vendor may have lost or waived his vendor's lien upon such land.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 147-153; Dec. Dig. §96.]

4. HUSBAND AND WIFE §14—CONVEYANCE TO HUSBAND AND WIFE.

Where a tract of land has been conveyed in fee to husband and wife, the conveyance indicating no intent to create an estate in joint tenancy, they hold as tenants in common.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71-86, 88, 89; Dec. Dig. §14.]

5. HOMESTEAD §96—EXEMPTION—PURCHASE MONEY—HUSBAND AND WIFE—TENANTS IN COMMON.

Where the vendor of a tract of land conveyed by him to husband and wife as tenants in common has judgment for the balance unpaid of the purchase price against the husband alone, neither the husband nor the wife can claim a homestead exemption in such land to prevent the levying upon and sale under execution of the interest of the husband in said land to satisfy such judgment.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 147-153; Dec. Dig. §96.]

Commissioners' Opinion, Division No. 1. Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by Joseph E. Fitzpatrick and others against H. J. Hamra and others. Judgment for plaintiffs, and defendants bring error. Reversed, with directions.

McDougal, Lytle & Allen, of Sapulpa (Robert Wheeler, of Tecumseh, of counsel), for plaintiffs in error. P. O. Cassidy and E. D. Reasor, both of Shawnee, for defendants in error.

RUMMONS, C. This action was commenced in the district court of Pottawatomie county by the defendants in error, hereinafter styled the plaintiffs, to restrain the plaintiffs in error, hereinafter styled the defendants, from selling certain real estate in Oklahoma county under an execution issued out of the district court of Pottawatomie county upon a judgment in favor of the defendant Hamra and against the plaintiff Joseph E. Fitzpatrick. The defendants filed a special appearance, objecting to the jurisdiction of the district court of Pottawatomie county over their persons, and over the subject-matter of the action, which being overruled, they excepted, and answered the petition of the plaintiffs setting up facts to defeat plaintiffs' recovery and also setting up a claim for damages against the plaintiffs in the sum of \$402.50 because of the wrongful issuing of a temporary injunction in the case, and praying judgment against the plaintiffs for that sum. The plaintiffs replied to this answer. The cause was tried to the court, resulting in a judgment finding that the judgment the execution of which was sought to be restrained was for a part of the purchase price of the tract of land in Oklahoma county, that said tract of land was the homestead of plaintiffs, and exempt from levy and sale under the judgment recovered by the defendant Hamra, and granting plaintiffs a perpetual injunction against the defendants restraining them from levying upon or selling the said tract of land to satisfy the judgment of defendant Hamra. The defendants in due time filed their motion for new trial, to the overruling of which they excepted, and appeal to this court.

[1] The first assignment of error urged by defendants complains of the overruling of their special appearance. Whatever error there may have been in the overruling of this special appearance has been waived by the defendants. The action of injunction being a transitory action, defendants could not object to the court's jurisdiction of the subject-matter of the action and their special appearance could only go to the jurisdiction of the trial court over their persons. When the defendants sought to counterclaim against the plaintiffs for damages because of the issuing of a temporary injunction, as they did in their answer, they submitted themselves to the jurisdiction of the court, and waived any error the court may have committed in overruling their special appearance. *Austin Manufacturing Co. v. Hunter*, 16 Okl. 86, 86 Pac. 293; *Wm. Cameron & Co. v. Consolidated School District*, 44 Okl. 67, 143 Pac. 182; *Commonwealth Cotton Oil Co. v. Hudson* (No. 5483), 155 Pac. 577, not yet officially reported.

[2] It seems that there had been a former judgment in this cause rendered, and that the trial court on its own motion grant-

ed plaintiffs a new trial at the same term of court at which such judgment was rendered. The defendants assign this ruling of the court as error upon the authority of *Long v. Board of County Commissioners*, 5 Okl. 128, 47 Pac. 1063. The holding of the territorial Supreme Court in that case as to the granting of a new trial by the court upon its own motion during the term has been expressly overruled by this court in the case of *Todd v. Orr*, 44 Okl. 459, 145 Pac. 393. So the trial court committed no reversible error in granting the new trial of which defendants complain.

[3] The only remaining assignment of error presents the most serious question in this case, which is whether the tract of land in Oklahoma county being occupied by plaintiffs as their homestead was exempt from levy and sale under execution upon the judgment of defendant Hamra against the plaintiff Joseph E. Fitzpatrick; it being admitted that such judgment was for a part of the purchase price of said tract of land. Section 2, art. 12, of our Constitution provides:

"The homestead of a family shall be and is hereby protected from forced sale for the payment of debts, except for the purchase money thereof or a part of such purchase money."

Section 3, art. 12, of the Constitution says:

"Provided, that no property shall be exempt for any part of the purchase price while the same or any part thereof, remains in the possession of the original vendee, or in possession of any purchaser from such vendee, with notice."

Section 3346, R. L. 1910, provides:

"The exemption of the homestead provided for in this chapter shall not apply where the debt is due: First, for the purchase money of such homestead or a part of such purchase money."

It is contended by the defendants that under the constitutional and statutory provisions above quoted the plaintiffs had no homestead exemption in the tract of land against the judgment of the defendant Hamra. On the other hand, the plaintiffs contend that the homestead is exempt as to the judgment for the reason that at the time the defendant Hamra conveyed the tract of land to plaintiffs he waived his vendor's lien for the unpaid purchase money by taking other security therefor, and for the further reason that the title to the tract of land was conveyed to plaintiffs, who are husband and wife, and stands in the names of both of them, and that therefore it cannot be sold while occupied by them as a homestead to satisfy the judgment against the plaintiff Joseph E. Fitzpatrick.

We have examined the authorities cited in the briefs of counsel for both plaintiffs and defendants, and have made some investigation into other authorities, and from the view we take of the case it is unnecessary to determine whether or not the defendant Hamra had waived his vendor's lien upon the tract of land sought to be sold by him upon execution. The homestead exemption

provisions of most of the states contain the same exception as to the purchase price or any part thereof of the homestead; and it seems that the overwhelming weight of authority is to the effect that the homestead exemption does not apply as to a judgment for the purchase price thereof, or any part thereof, independently of any question as to the right of the holder of the judgment to a vendor's lien upon the land. In the case of *Greer v. Oldham*, 10 Ky. Law Rep. 889, 11 S. W. 73, the Court of Appeals of Kentucky says:

"A vendee in part payment of the purchase money, executed his note to a creditor of the vendor. Held that, while the holder of that note is not entitled to a lien, yet, as it was executed for a part of the purchase money, the vendee cannot claim a homestead as against it."

In *Boone County Bank v. Hensley*, 62 Ark. 393, 35 S. W. 1104, the Supreme Court of Arkansas says:

"The Constitution of this state ordains: 'The homestead of any resident of this state, who is married or the head of a family, shall not be subject to the lien of any judgment or decree of any court, or to sale under execution, or other process thereon, except such as may be rendered for the purchase money, or for specific liens,' etc. Const. art. 9, § 3. The statutes do not enlarge or change the exemptions allowed by the Constitution, but provide how they may be claimed. The Constitution determines what the exemptions of a debtor, including the homestead, shall be. When he claims its benefits, he must take them subject to its exceptions. In the exceptions there are no exemptions."

"The Constitution, in providing that homesteads shall not be exempt from sales for the purchase money, does not undertake to create liens, but to deny to the debtor the right to hold his homestead exempt from sale under executions issued on judgments for the purchase money which he owes for the same, and to subject it to sale in such cases. No man has a right to hold property for which he is owing his creditor in any such manner. No such dishonesty is tolerated by the Constitution. *Kimble v. Eaworthy*, 6 Ill. App. 517; *Williams v. Jones*, 100 Ill. 362; *Bush v. Scott*, 76 Ill. 524; *Smith v. High*, 85 N. C. 93; *Fox v. Brooks*, 88 N. C. 234; *Hoskins v. Wall*, 77 N. C. 249; *Whitaker v. Elliott*, 73 N. C. 186."

In the case of *Bentley v. Jordan*, 71 Tenn. (3 Lea) 353, the Supreme Court of Tennessee says:

"The Constitution of 1870 provides as follows: 'A homestead in possession of each head of a family, and the improvements thereon, to the value in all of \$1,000.00, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. This exemption shall not operate against public taxes, nor debts contracted for the purchase money of such homesteads, or improvements thereon.' * * * Article 11, § 11."

"Under these provisions it is obvious that the homestead is not exempt from sale 'for the satisfaction of any debt or liability contracted for its purchase.' It may be sold by execution issued on a judgment recovered on such a debt, or otherwise subjected by legal process. * * * The creditor proceeds, not by virtue of the vendor's lien, which is only enforceable in equity, and may be lost by waiver, but by virtue of the general right of a creditor to subject his debtor's property by 'legal process'; the homestead exemption not applying to such a debt."

In *Williams v. Jones*, 100 Ill. 362, the Supreme Court of Illinois says:

"Counsel for Jones contend that the object of this limitation of the homestead exemption was merely 'to protect the vendor's lien,' and hence insist that, the vendor's lien being waived by taking personal security on the original notes, the protection of the statute is lost. There is no ground for saying the limitation in the statute was intended merely to protect the vendor's lien. It is not so limited by its words."

In *Reynolds v. Williams* (Ky.) 4 S. W. 178, it is held by the Court of Appeals of Kentucky that:

"Under Gen. St. Ky. c. 38, art. 13, § 9, the debtor has no right of homestead in land as against the vendor's claim for the purchase money; and, although the vendor upon the sale of the land waives his lien for the purchase money, he can, in a suit on the purchase-money note, levy his execution on the land." *Lane v. Collier*, 46 Ga. 580; *McElmurray v. Blue & Stewart*, 91 Ga. 509, 18 S. E. 313; *Carpenter's Executor v. Kearns*, 4 Ky. Law Rep. 825; *Brown v. Ennis*, 69 Ark. 123, 61 S. W. 379, 86 Am. St. Rep. 171, at page 175; *Greeno v. Barnard*, 18 Kan. 521; *Waples on Homestead and Exemptions*, pp. 333 to 337.

In fact, we have been able to find no case holding that the exception to the homestead exemption, making it inapplicable to judgments for the purchase price, or a part thereof, is dependent upon the question of whether or not the vendor has a lien for such purchase price, except the opinions of the Supreme Court of California construing the homestead law of California, which makes the exception applicable to vendor's liens alone. We therefore conclude that the homestead exemption does not exist as against a judgment for purchase money of the homestead claimed.

[4] We then come to the consideration of the effect of the title to this tract of land being vested in the husband and the wife. In the case of *Gooch v. Gooch*, 38 Okl. 300, 133 Pac. 242, 47 L. R. A. (N. S.) 480, this court holds that the homestead may consist of more than one tract of land, and may be owned by either the husband or by the wife, or by both jointly; so that the plaintiffs were entitled to hold the tract of land held by them as tenants in common as their homestead. It has been held in this jurisdiction that the common-law estate of tenancy by the entirety is not applicable to the conditions in Oklahoma, and does not obtain here, and that a conveyance to husband and wife which indicates no intent to grant an estate in joint tenancy conveyed to each an undivided one-half interest in the land conveyed as tenants in common. *Helvie v. Hoover*, 11 Okl. 687, 69 Pac. 958.

[5] Does the fact that the defendant Hamra conveyed this tract of land to the plaintiffs as tenants in common, taking only the obligation of the husband for the purchase price, preclude him from levying upon the land and selling the same under execution to satisfy a judgment recovered against the

husband upon the obligation for such purchase price? The provisions of our Constitution being identical, in substance, with the constitutional provisions of the states the opinions of whose courts of last resort we have above quoted as to homestead exemptions, and the exceptions thereto, we have reached the conclusion, following the reasoning given by the courts in those opinions, that as to a purchase money judgment the homestead exemption is inoperative. In other words, as to such a judgment there is no homestead exemption, and the homestead character is not impressed on the land. That being true, neither of the plaintiffs in this case, it being conceded that the judgment sought to be enforced is for the purchase money of the land sought to be claimed as exempt, can set up a homestead exemption as against it. It therefore follows that the judgment creditor in this case had a right to levy upon and sell under execution the interest of the judgment debtor in the land sought to be levied upon and sold, free from any claim of homestead exemption. To hold that, because the vendor had conveyed the land to the husband and wife, taking only the obligation of the husband for the purchase money, either the husband or wife, or both, could claim the land purchased as a homestead, would be to defeat the constitutional exception as well as the plain provision of the statutes that the exemption of the homestead shall not apply where the debt is due for the purchase money or a part thereof.

We therefore conclude that the trial court erred in granting the perpetual injunction restraining defendants from levying upon and selling under execution the interest of the plaintiff Joseph E. Fitzpatrick in the lands claimed as a homestead.

The judgment of the trial court should therefore be reversed and remanded, with directions to dissolve the injunction so far as the same restrains defendants from levying upon and selling the undivided one-half interest of plaintiff Joseph E. Fitzpatrick in said tract of land under execution upon the judgment against him.

PER CURIAM. Adopted in whole.

(55 Okl. 235)

CHICAGO, R. I. & P. RY. CO. v. NAGLE.
(No. 6007.)

(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 8, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT—§265—INJURY TO SERVANT—NEGLIGENCE—PROOF.

The mere fact that the servant received injury does not establish, even prima facie, the negligence or breach of duty of the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908, 955; Dec. Dig. §265.]

2. MASTER AND SERVANT §205—INJURY TO SERVANT—NEGLIGENCE—PROOF.

While in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the common carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against it, for there is *prima facie* a breach of its contract to carry safely; a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. §265.]

3. MASTER AND SERVANT §90—NEGLIGENCE OF MASTER—WHAT CONSTITUTES—DETERMINATION.

Whether or not a defendant is guilty of negligence depends upon the question whether he exercised reasonable care under the circumstances existing at the time; not whether he had done everything which it was possible to do in the light of every possible danger that might arise.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. §90.]

For other definitions, see Words and Phrases, First and Second Series, Negligence.]

4. MASTER AND SERVANT §278—INJURY TO SERVANT—NEGLIGENCE—PROOF.

Negligence must be shown by evidence. Proof of injury is not proof of negligence. The evidence, to justify a finding of negligence, must show a breach of duty on the part of the defendant, such that a reasonable person should have foreseen would as a natural consequence cause an injury; not necessarily would probably cause an injury in the sense of more likely to cause an injury than not, but the likelihood must be such that a reasonable person could foresee that injury would result in the ordinary course of things—that injury was one of the probable results and likely to happen. A mere possibility of the injury is not sufficient, where a reasonable man would not consider injury likely to result from the act as one of its ordinary and probable results.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 958-958, 960-969, 971, 972, 977; Dec. Dig. §278.]

5. NEGLIGENCE §1—WHAT CONSTITUTES.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. §1.]

6. MASTER AND SERVANT §97—INJURY TO SERVANT—ACCIDENTAL INJURIES.

For accidental injuries, or such as occur without any act of negligence on the part of the master, the master is not liable to the injured servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. §97.]

7. NEGLIGENCE §59—"PROXIMATE CAUSE."

In order that an act of negligence may be deemed the proximate cause of an injury, it must be such that a person of ordinary intelligence would have foreseen that the injury was liable to be produced in the act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. §59.]

For other definitions, see Words and Phrases, First and Second Series, Proximate Cause.]

8. NEGLIGENCE §59—PROXIMATE CAUSE—DETERMINATION.

The test of whether an act was the remote or proximate cause of the injury complained of is whether the injury was one to be anticipated.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. §59.]

Commissioners' Opinion, Division No. 4. Error from County Court, Seminole County; A. S. Norvell, Judge.

Action by John Nagle against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

R. J. Roberts, O. O. Blake, and W. H. Moore, all of El Reno, and J. G. Gamble, of Des Moines, Iowa, K. W. Shartel, of Oklahoma City, and John W. Willmott, of Wewoka, for plaintiff in error. H. L. Harris, S. S. Orwig, and T. S. Cobb, all of Wewoka, for defendant in error.

ROBERTS, C. This case comes from the county court of Seminole county. The parties herein will be designated plaintiff and defendant, the same as below. One of defendant's freight trains was wrecked on its road near the town of Lima, on or about the 31st day of May, 1913, and several cars were demolished, and the contents misplaced and scattered along the road and right of way. Plaintiff was at the time in the employ of defendant as a section hand, or common laborer, and with a large number of other employés was called to clear the wreckage. While performing these services in removing the debris, and changing freight from the wrecked cars to other cars in good condition, in passing along the road embankment, he slipped and fell into a ditch, into which some of the debris and broken timbers of the wrecked cars had been thrown by other employés of the company, and in falling stepped or lit upon a nail protruding from a piece of a board in the bottom of the ditch, which was taken from one of the wrecked cars. The plaintiff details the circumstances under which he was injured as follows:

"Q. Were you injured down there in clearing that wreck? A. Yes, sir; I was. Q. What were you doing at the time you were injured? A. Transferring hay from the right of way to an empty box car. I was loading the car. Q. Had the hay been taken from the wrecked cars? A. Yes, sir. Q. What was the condition of the ground there with reference to the covering of hay on it? A. Well, sir, the wreckage and the woodwork of the cars was scattered and covered up with scattered hay, as some of the wires on the bales was loose from the hay. Q. You had been directed to conduct the work of transferring the hay there at the wreck, had you not, Mr. Nagle? A. The roadmaster gave me orders. Q. Did you sustain any injury as the result? A. Yes, sir; indeed I did, sir. Q. Just state how it happened. A. Now, gentlemen, it was on the 31st night of May, on Saturday night. Q. What were you doing at the time you were injured? A. Transferring hay from the right of way to an empty car, and had come down from the dump with a bale of hay. Q. Did you step on something? A. Stepped on a board, about

five inches of a nail went through my foot, and I hollowed to some young fellow, and I turned loose of the hay. The foreman asked me if I could walk, and I climbed upon the right of way, and had to keep my shoe off, and just left the sock on, and he gave me some stuff, and put a bandage on it Saturday night at 10 o'clock, and it stayed on until the following Tuesday afternoon, when I got to the hospital in McAlester. Q. John, did you know that the board with the nail upturned was there? A. No, sir; I didn't. Q. You didn't step on it, knowing it was there? A. No, sir. Q. That was the first you knew of it? A. Yes, sir; the first I knew of it, sir. Q. Was it there that loose hay was scattered around? A. Yes, sir. Q. What was the condition of the ground around there at the time you were injured, with reference to loose hay? A. That was on part of the ground where the loose hay was, and the hay was the only thing I could see on the ground. Q. Were these cars broken up at the wreck? A. Yes, sir. Q. And the boards which came off of them scattered? A. Yes, sir; and the ends of the cars was busted in order to get the hay out. Q. After the cars had been moved, had the ends been taken out before you begun to load the hay into the new cars? A. Yes, sir; with the exception of one, and that car had been burned. Q. That car was burned? A. Yes, sir. Q. You say that the car to which you were taking and loading the hay was moved so as to be nearer the car that originally contained the hay? A. Yes, sir. Q. Is that correct? A. Yes, sir. Q. How many trips had you made to this car? A. I can't say. When we would get the closest hay, we had to move further, and when we got that car full, we had to go further after the rest. Q. The hay was partly broken up, wasn't it? A. The wires was, sir. Q. When you took the hay out of the cars, a good many bales were broken loose, were they not? A. Yes, sir. Q. And consequently the hay was scattered out? A. Yes, sir. Q. Did you notice this board? A. No, sir. Q. Did you know it was there? A. No, sir. Q. How large was the base of that board? A. The edges, where the nail was, was about six inches, sir. Q. It was a large timber, was it not? A. Yes, sir. Q. About how long was it, John, if you remember? A. About six feet long, and broke in two. Q. Was that timber a part of the wrecked car? A. Yes, sir; part of the wrecked car. Q. You were walking on top of the dump, were you not? A. Yes, sir. Q. And slipped? A. Yes, sir. Q. And fell into the ditch? A. Yes, sir. Q. Struck the nail in the ditch, didn't you? A. Yes, sir. Q. How deep do you estimate that ditch was? A. Between four and five feet from the bottom of the ditch to the top of the bank. Q. You were walking along, carrying a bale of hay? A. Yes, sir. Q. Was it up at the end of the ties? A. It was away from the ties. Q. Upon the dump, then? A. Yes, sir. Q. And there was loose hay there? A. Yes, sir. Q. And you say you slipped? A. Yes, sir; slipped off the bank on the loose hay. Q. And down into the ditch? A. Yes, sir; I believe it was four feet, sir, between four and five feet sir, my belief is, from the bottom of the ditch to the top of the bank, sir. Q. Did you fall directly on this nail in your attempting to get out of the ditch? A. No, sir. I held there, for the nail went through my foot. Q. Did you land directly on the nail when you slipped? A. The weight of the bale of hay and myself took the nail directly through my foot, sir. Q. The timber you stepped on was a part of the wrecked car, did you say before? A. Yes, sir. Q. Was it a part of the car that burned? A. Yes, sir; and the wrecking crew didn't pick it up. Q. You saw them burn it, did you? A. Yes, sir."

At the conclusion of the evidence the defendant requested, with others, the following

instructions, which were refused by the court and duly excepted to by defendant:

"(3) One of the duties which the law ordinarily imposes upon the master is to furnish the servant with a reasonably safe place in which to work. But you are instructed that this rule of law has its exceptions, and that such rule has no application in those cases where the servant is at the time employed or engaged in the work of making a dangerous place safe, or in the conduct of work under such condition that the condition of the place with regard to safety changes as the work progresses."

"(4) The degree of care which the defendant company was required to use in the conduct of its business was what is known as ordinary care; that is, such a degree of care and diligence as the ordinarily prudent and careful man uses in and about the ordinary affairs of life."

"(5) You are instructed that, in carrying on the work where the condition of the place is constantly changing as the work goes on, the rule that the master must furnish to the servant a reasonably safe place in which to work has no application; and if you find from the evidence in this case that the work in which plaintiff was engaged at the time of the alleged injury was of such a character that the condition of the place where the plaintiff was required to work was constantly changing as the work or clearing up of the wreck progressed, then you are instructed that the plaintiff assumed the risk incident to such work, and the changing condition thereof, and in such event you will find for the defendant."

"(7) You are further instructed that, where the work in which the servant is employed consists in making a dangerous place safe, the rule that the master is bound to furnish the servant a safe place in which to work does not apply; and if you find from the evidence in this case that the plaintiff at the time of the injury complained of was engaged in the business of making a dangerous place safe, then you are instructed that he took and assumed the risk of all such injuries as were incident to such dangerous employment, and in case you so find you will return a verdict for the defendant."

"(9) If you find from the evidence that the direct and proximate cause of the injury complained of was the slinging of the plaintiff upon the hay, as testified to by the plaintiff, then you will find for the defendant. For accidental injuries, or such as occur without any act of negligence on the part of the defendant company, the company is not liable to the injured servant."

The court gave, among others, the following instructions, which were excepted to by defendant:

"(5) If you believe from the evidence that the plaintiff sustained the injury alleged in the petition while in the performance of his duty as an employé of the railroad company by stepping or falling upon the nail mentioned in said case, and that the stepping or falling upon the nail was the proximate cause of plaintiff's injury, and that he could not have observed the nail and board by ordinary diligence, and further that said board with the nail therein was placed at the said point by the negligence of the railroad company, and plaintiff was injured without fault of his, you should find for the plaintiff, in such amount as would compensate him for the injury received. If you do not so believe from the evidence, you should find for the defendant."

"(6) You are instructed that it was the duty of the defendant company to exercise such care towards the plaintiff in the work of clearing up the wreckage where the alleged injury occurred as a reasonably prudent man would in the exercise of his own business, under same or similar circumstances."

"(7) The negligence of a fellow servant is in law negligence of his principal. And if you find from the evidence in this case that Cooper Bray did tear the boards from the car, and throw the same where the plaintiff was required to pass in the course of his employment, and that such was negligence as above defined, then your verdict should be in favor of the plaintiff, unless you should believe from the evidence that the plaintiff himself was negligent."

"(8) The theory of the defense is that the injury sustained by plaintiff was while he was in discharge of his duty in helping to clear the wreckage hereinbefore mentioned, and that he assumed all the risks incident thereto, and the injury received by plaintiff would not entitle him to recover, if he received any injury. And you are instructed in this connection that if the plaintiff was possessed of the same knowledge of the danger, and had the same means of knowing that the plank with the nail protruding therein was at the point where plaintiff fell or stepped upon it, and he received injury therefrom, then in that event the railroad company would not be liable, and you should so find."

"(9) You are instructed that, in carrying on the work where the condition of the place is constantly changing as the work goes on, the rule that the master must furnish to the servant a reasonably safe place in which to work has no application; and if you find from the evidence in this case that the work in which plaintiff was engaged at the time of the alleged injury was of such character that the condition of the place where the plaintiff was required to work was constantly changing as the work of clearing up the wreckage progressed, then you are instructed that the plaintiff should exercise a greater degree of care and watchfulness in the progress of such work, and in the changing conditions thereof, as would be required of him in ordinary circumstances and ordinary conditions; and upon the other hand the defendant would be required to exercise a greater degree of care than it would under ordinary circumstances."

"(10) You are further instructed that if the plaintiff knew of the plank or board with the nail driven through same being placed at the point where he received the injury, or had a reasonable chance and opportunity of knowing the same was there, and did not move it, but in face of this fact proceeded or passed over it, and fell and received the injury, the defendant in this event would not be liable, and you should so find in your verdict."

"(11) In case you find for the plaintiff you will state in your verdict such sum as will compensate the plaintiff for the loss of time as resulted from said injury, if any, and for such physical pain and mental anguish that he suffered, if any, as a result of such injury."

The jury returned a verdict for the plaintiff, and, upon overruling the motion for new trial, defendant brings error.

From the foregoing it is apparent that the trial court submitted this case to the jury upon the questions of contributory negligence and the assumption of risk on the part of the plaintiff, which, under our Constitution, must be left to the jury. But, as we view the case, the first and most important matter to be determined is the question of primary negligence on the part of the defendant. The mere fact that the plaintiff was injured is not enough, of itself, to create a liability against the defendant. In order to entitle a party to maintain an action for tort, there must be a violation of some duty, either of commission or omission on the part of the defendant, prejudicial to the rights of

the plaintiff, and the burden is upon the complainant to establish such wrongful acts by a preponderance of the evidence; and the mere fact of the injury is not sufficient proof of the defendant's negligence. The question of the sufficiency of the evidence to establish primary negligence on the part of the defendant is not included within the terms of the Constitution, which provides that:

"The defense of contributory negligence and assumption of risk shall, in all cases whatsoever, be a question of fact, and at all times be left to the jury."

The question here presented is not the sufficiency of the evidence to establish the negligence of the defendant, but was there any evidence tending to prove negligence? The plaintiff testifies that he was an experienced employé of the defendant; that he was at the time engaged in clearing the track of a wrecked train, consisting of crushed and broken freight cars; that the track and right of way were strewn and literally covered with the debris of demolished cars and freight; and that he received the injuries complained of while so employed.

Necessarily all trains were delayed, and the work was being done with all possible haste. Cars were being demolished and thrown from the track. The particular board containing the nail which caused the plaintiff's injury was thrown into a ditch from four to six feet deep, and the plaintiff testifies that while walking along the embankment he slipped and fell into this ditch, and onto the nail, and was thereby injured. There was no other evidence tending to establish negligence on the part of the defendant.

[1, 2] The question now is: Was the defendant, under these circumstances, guilty of such negligence as would make it liable to the plaintiff for the injuries sustained? The rule laid down in *Essex County Elect. Co. v. Kelly*, 57 N. J. Law, 100, 29 Atl. 427, is as follows:

"The mere fact that the servant received injury does not establish, even prima facie, the negligence or breach of duty of the master."

In *Levins v. Bancroft*, 114 La. 105, 38 South. 72, it is said:

"The fact itself of the happening of an accident does not prove or even tend to prove negligence on the part of the servant."

In *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341, 72 N. E. 1060, the Supreme Court of Illinois says:

"The mere fact that an employé has been injured is not sufficient to establish negligence on the part of the employer, 'and may have no tendency to show' such negligence, 'but the manner of and circumstances under which an injury was received may furnish proof of such negligence.'"

Bearing in mind the fact that the plaintiff herein was an employé of the defendant, we call attention to the language of Justice Brewer in *Patton v. Texas Pacific Ry. Co.*, 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361, wherein it is said:

"Upon these facts we make these observations: First. That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for here is prima facie a breach of his contract to carry safely (*Stokes v. Saltonstall*, 13 Pet. 181 10 L. Ed. 115); *Railroad Company v. Pollard*, 2 Wall. 341 [22 L. Ed. 877]; *Gleeson v. Virginia Midland Railroad*, 140 U. S. 435, 443 [11 Sup. Ct. 859, 35 L. Ed. 458]), a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence."

The further citation of authorities is not necessary to support the well-established rule that negligence of the defendant will not be inferred from the mere fact that the injury occurred.

The only testimony tending to establish the negligence of the defendant is the fact that one of the other employés of the company threw the board containing the protruding nail into the ditch. This board was taken from one of the demolished cars, which was afterwards burned. The ditch was from four to six feet deep.

[7] The rule applicable here is stated in *Mayne v. C.; R. I. & P. Ry. Co.*, 12 Okl. 10, 69 Pac. 933, as follows:

"In order that an act of negligence shall be deemed the proximate cause of an injury, it must be such that a person of ordinary intelligence would have foreseen that the accident was liable to be produced thereby."

In *Okl. Gas & Elect. Co. v. Lukert*, 18 Okl. 397, 84 Pac. 1076, the court says:

"The true rule in determining what is proximate cause is that the injury must be the natural and probable consequence of the negligence."

[8] Again in *City Nat. Bank v. Crow*, 27 Okl. 107, 111 Pac. 210, Ann. Cas. 1912B, 647, it is said in substance:

"The test of whether an act was the remote or proximate cause of the injury complained of is whether the injury was one to be anticipated."

[9] Taking these rules for our guidance, can it be said that, in throwing this board into the ditch under the circumstances, a person of ordinary intelligence would have foreseen that the injury was liable to be produced by the act? Or that such an injury could have been anticipated, or was the natural and probable consequence of the act? Must it be said by this court that it was the duty of the employés, while engaged in demolishing the wrecked cars and clearing the track, to stop and remove every protruding nail as they proceeded with the work? The question of due care and negligence is controlled very largely by the surroundings and circumstances of each particular case. The doctrine is clearly and forcibly stated by Commissioner Ames in *Sloan v. Warrenburg*, 36 Okl. 525, 129 Pac. 720, as follows:

"Whether or not a defendant is guilty of negligence depends upon the question whether he exercised reasonable care under the circumstan-

ces existing at the time, not whether he had done everything which it was possible to do in the light of every possible danger that might arise. It may well be that after an accident has actually happened, in order to prevent its recurrence, an owner might exercise extraordinary care, and in so doing take precautions which would never have occurred to him but for the accident, and which are not usually observed in the business. A party's conduct must be judged by the circumstances, conditions, and duties existing at the time, and which are known to him, or in the exercise of reasonable care should be known to him."

Although discussing, in the main, the question of the assumption of the risk, the Circuit Court of Appeals of this Circuit, speaking through Justice Lochren, in *Florence & C. C. R. Co. v. Whipps*, 138 Fed. 13, 70 C. C. A. 443, makes use of language that is peculiarly applicable here, as follows:

"It is a general rule of law governing the relation of master and servant that it is the duty of the master to use ordinary care to furnish and maintain a reasonably safe place for the servant in which to perform his work. This rule as to 'safe place' only applies to such place as the master constructs, prepares, or selects for such purpose. It has a very limited application to the erection of new buildings or structures, though it may apply to stagings and the like supplied by the master, and does not render the master responsible for dangers which necessarily inhere in the work and are only to be guarded against by the care the servants themselves shall exercise in its performance. * * *

So in the pulling down of structures, and in the removal of debris after some catastrophe or accident which has made the place unsafe and unfit for the use to which it has been devoted, and where the very object of the work is to clear away the wreckage and restore the place to a condition of safety and usefulness. If by such catastrophe a railroad used for the transportation of passengers, freight, and mails is obstructed, the removal of the obstruction is a necessity admitting of no delay, whether the exigency arises in the daytime or at night; and servants employed, who undertake and engage in such work, necessarily assume the incidental risks. *Gulf, etc., Ry. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507; *Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344; *Porter v. Silver Creek, etc., Coal Co.*, 84 Wis. 418, 423, 54 N. W. 1019; *Colo. Coal & Iron Co. v. Lamb*, 6 Colo. App. 255, 266, 40 Pac. 251; *Carlson v. Railway* [21 Or. 450] 23 Pac. 497."

The language used in *Carlson v. Oregon S. L. Ry. Co.*, 21 Or. 450, 28 Pac. 497, approves the same doctrine as to negligence of defendant, under like circumstances, adopted herein, in which the court says:

"Here the road of defendant was known to the deceased to be out of repair and in a dilapidated condition, so much so that the traffic thereon was entirely suspended, and the deceased was employed to assist in putting it in a reasonably safe condition for the passage of trains. In accepting such employment, and undertaking to perform the services required of him, he voluntarily and necessarily assumed, as part of his contract of employment, the risks incident thereto, among which was the dilapidated condition of the track. The rule that the master is bound to use reasonable care and skill to furnish his servants safe and suitable instruments and appliances to perform the services in which they are engaged only applies when such instrumentalities are placed in their hands for use. *McKin. Fel. Serv.* § 26; *Murphy v. Railroad Co.*, 88 N. Y. 146 [42 Am. Rep. 240]. It has no application to the safety and condi-

tion of the thing which the servant is employed to repair. Where a servant is employed to put a thing in a safe and suitable condition for use, it would be unreasonable and inconsistent to require the master to have it in safe condition and good repair for the purpose of such employment. The effect of such a rule would be to render the master liable as an insurer of the safety of his servant, and entirely abrogate the well-settled doctrine that the servant assumes the risks and perils incident to his employment. Where a servant is employed to assist in repairing or opening a railroad, which is in a dilapidated condition and out of repair, the master does not owe to him the same duty to furnish a safe roadbed as to that portion of the road out of repair as it does to a servant engaged in the operation of trains upon the road in the ordinary course of business, or in riding upon the road in the course of his employment."

These authorities are cited simply for the purpose of showing the degree of care required of railroad companies under such conditions, and not upon the question of the assumption of the risk by the employé. After a careful consideration of the case, we are clearly of the opinion that no negligence is established, and there is no evidence whatever tending to prove negligence on the part of the defendant. By the wreckage of the train, the railroad, used as a public thoroughfare for the purpose of transporting passengers, mails, and freight, was entirely obstructed, and the removal of the wreckage was a present, pressing necessity, admitting of no delay. Public necessity demanded all possible haste in putting the road into condition for use at the earliest possible moment. It would be carrying the doctrine of due care and safety too far to require such public carriers under these circumstances to guard against such an accident as is shown in this case.

[8] Among the instructions requested by the defendant, and refused by the court, was the following:

"For accidental injuries, or such as occur without any act of negligence on the part of the company, the company is not liable to the injured servant."

To our mind this instruction is a clear, plain statement of the law applicable to this case, and should have been given by the court. The question now presented is whether, admitting the truth of the plaintiff's evidence, together with such inferences and conclusions as can be reasonably drawn from it, there is any evidence to reasonably sustain a finding of negligence on the part of the defendant. That question we must answer in the negative.

[4, 5] We fully approve the doctrine laid down by Judge Rosser in *C. R. I. & P. Ry. Co. v. Watson*, 36 Okl. 1, 127 Pac. 693, wherein it is said:

"The question of the effect of evidence is always for the jury. The question of whether there is any evidence at all is for the court. It would seem that the statement of the facts of this case ought to be all that is necessary. If the company is responsible in this case, then the

rule, so often announced, that the railroad company is not responsible for mere accidents, is not the law. Many people believe that they should be made insurers of the safety of their employes, but the writer of this opinion believes the legislative department of the state should make law, and believes that it is a usurpation for a court to change the law, whether the change is a needed one or not. To lay down a wrong rule against a corporation in one case will inevitably lead, sooner or later, to some private individual suffering from the application of it, or, what is much worse, an uncertain and fluctuating construction of the law, absolutely intolerable in a government by law. Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done. *Anderson Law Dict.* Negligence must be shown by evidence. Proof of injury is not proof of negligence. The evidence, to justify a finding of negligence, must show a breach of duty on the part of the defendant, such that a reasonable person should have foreseen would as a natural consequence cause an injury; not necessarily would probably cause an injury, in the sense of more likely to cause an injury than not, but the likelihood must be such that a reasonable person could foresee that injury would result in the ordinary course of things—that injury was one of the probable results and likely to happen. A mere possibility of the injury is not sufficient where a reasonable man would not consider injury likely to result from the act as one of its ordinary and probable results."

As we look upon this case, the evidence totally fails to disclose any negligence on the part of the defendant; therefore the judgment of the trial court should be reversed, and the case remanded.

PER CURIAM. Adopted in whole.

(54 Okl. 32.)
BAILEY v. LANKFORD, Bank Com'r.
(No. 5054.)

(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 889—BANKS AND BANKING \S 77—INSOLVENCY—ACTION BY BANK COMMISSIONER—PLEADING—PETITIONS DEEMED AMENDED.

A suit to collect a note which the bank commissioner has taken over as part of the assets of an insolvent bank should be brought in the name of the state on the relation of the bank commissioner; but, where suit is brought in the name of the bank commissioner, and no one can be prejudiced thereby, the petition will be treated as amended here.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3621, 3622; *Dec. Dig.* \S 889; *Pleading*, Cent. Dig. \S 1355; *Banks and Banking*, Cent. Dig. \S 165-176½; *Dec. Dig.* \S 77.]

2. EVIDENCE \S 441—CONTEMPORANEOUS PAROL AGREEMENT—DEFENSE.

Allegations in an answer that the parties made a parol agreement at the time the note was executed that the maker should not be bound to pay one-half the amount of the note does not set up a defense pro tanto in law.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 1719, 1723-1763, 1765-1845, 2030-2047; *Dec. Dig.* \S 441.]

**BANKS AND BANKING §77—INSOLVENCY
—ACTION BY BANK COMMISSIONER—SET-OFF
—AFTER-ACQUIRED CLAIMS.**

After a bank is declared insolvent and the bank commissioner has taken charge, a person indebted to the defunct bank cannot acquire by assignment the claims of other depositors and dead them as an offset against his own indebtedness.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. §77.]

Commissioners' Opinion, Division No. 6. Error from County Court, Kiowa County; I. W. Mansell, Judge.

Action by J. D. Lankford, Bank Commissioner, against S. D. Bailey. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. V. Rakestraw, of Snyder, for plaintiff in error. O. B. Riegel, of Snyder, for defendant in error.

HATCHETT, C. J. D. Lankford, bank commissioner, as plaintiff, after having declared the Bank of Snyder insolvent and taken possession of the same with its assets, instituted this suit against the defendant, S. D. Bailey, and set up six causes of action, the first being upon a promissory note for \$350, interest and attorney's fees, alleged to have been given by the defendant to the Bank of Snyder on the 1st of March, 1911, and the other five upon checks drawn by he said S. D. Bailey against the said bank at various times which were paid by the bank. The defendant filed a demurrer to the petition, which the court overruled, and he defendant on the 8th day of November, 1912, filed an amended answer admitting the execution of the \$350 note, but alleged that one George Benson owed the bank \$350 and had deposited with the bank as collateral three shares of stock in the Safety Investment Company; that this defendant and the bank entered into an agreement to buy the three shares of stock, each to own one-half interest therein, and the defendant, at the bank's solicitation, executed his note for \$350 in lieu of the Benson note for that amount, and when that note became due the defendant renewed it. He admits his liability for one-half the amount of the note, and offers to pay that sum, but alleges that the agreement with the bank was that the note should not bear interest, and he therefore denies any liability for interest or attorney's fees.

Defendant further answered to the cause of action on the checks that on the 16th of December, 1910, he had on deposit at the bank \$3,013.49, and from that date to April 3, 1911, he deposited \$1,151.40, and says that before the bank closed he drew a number of checks against this deposit, but did not know the amount, and alleged "that, if said bank paid out of said deposit the face value of all said checks so issued, including those set

out in the petition of plaintiff in his second, third, fourth, fifth, and sixth causes of action, then and in that case this defendant would have a balance on deposit to his credit in said bank," and asks that the books and canceled checks be brought into court, and that it be ascertained what the status of his account really was.

The defendant further alleged that after the bank became insolvent the Home Mercantile Company assigned its claim for \$217.60, which was held as a deposit in the bank to the defendant, and that the Safety Investment Company likewise assigned to the defendant its claim of \$51.85, which it held as a deposit, and defendant asks that said amounts be set off against his indebtedness, and that he be given judgment for such amount as might be found due.

Thereafter the plaintiff filed a motion to strike from the amended answer the first defense as a whole, and the second defense as a whole, the third defense and set-off as a whole, and the fourth defense and set-off as a whole, because none of said defenses state facts sufficient in law to entitle the defendant to any relief, and also moved to strike the entire answer as filed. The motion was sustained, the answer stricken, and judgment rendered for the plaintiff.

The defendant in error has filed a motion to strike the brief of the plaintiff in error because of the failure to comply with rule 25 of this court, but we think under the liberal practice that there was a sufficient compliance for us to consider the brief of plaintiff in error, and therefore overrule the motion.

[1] The first question presented is whether the trial court erred in overruling the demurrer to the petition. It set up three grounds: First, a defect of parties plaintiff; second, that the petition did not allege insufficient funds of the defendant in the bank to pay the checks; and, third, that the petition did not state a cause of action. We think the ruling of the court in overruling the second and third ground of the demurrer was clearly correct. As to the first ground setting up a defect of parties plaintiff, it presents a more serious question. This court, in *State ex rel. Taylor v. Cockrell*, 27 Okl. 630, 112 Pac. 1000, held that the bank commissioner is a state officer, and the funds of a failed bank belong to the state, and in *Lovett et al. v. Lankford et al.*, 145 Pac. 767, held that a suit would not lie against the bank commissioner and the banking board, for the reason that it was in reality a suit against the state. Then, the state being the real party in interest in winding up the affairs of an insolvent bank and collecting the assets, we think that the suit should be brought in its name on the relation of the bank commissioner, but, as this suit was in reality brought and prosecuted for the bene-

dit of the state, if this were the only error, we would follow the holding in *Dolezal, Co. Clk., et al. v. Bostick, Co. Atty.*, 41 Okl. 743, 139 Pac. 964, and treat the petition as amended here.

The second question presented is whether or not, if the answer was insufficient, it could be attacked by motion to strike instead of demurrer. We think that a demurrer would have been the proper method of attacking the answer, but as to whether or not, if that were the only error, it would be sufficient to reverse the case, or whether this court would treat the motion as a demurrer, we express no opinion.

[2] The third question presented is whether or not the answer set up a defense in whole or in part as to the note sued upon. While the answer does not allege whether the agreement between the defendant and the bank in regard to the \$350 note was oral or in writing, yet we take it from the allegations of the answer and the manner in which the parties treated it in their briefs that it sets up an oral agreement. We therefore will deal with it as such. The defendant says that he and the bank entered into an agreement to buy three shares of stock in another concern from one Benson, who owed the bank a \$350 note, and that the defendant executed his note for \$350 in payment of the note Benson owed the bank, and when the note became due he renewed it by executing another note for that sum, but that by agreement between him and the bank he was to pay only one-half of the note without any interest when the three shares of stock so purchased were divided and the business transaction settled up. We construe that to mean that the defendant is attempting to prove a parol agreement to the effect that he was not liable for one-half of the note. It seems to be well settled that that cannot be done. *Tacoma Mill Co. v. Sherwood et al.*, 11 Wash. 492, 39 Pac. 977. One who signed a note cannot by parol prove an oral agreement that he should not be liable. *Colbert v. First Nat. B'k of Ardmore*, 38 Okl. 391, 133 Pac. 206; *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936, 50 Am. St. Rep. 839. Drawer not permitted to show by parol that he was not to be held liable upon failure of drawee to pay. *Gurney v. Morrison et al.*, 12 Wash. 456, 41 Pac. 192; *Barnard v. Robertson*, 29 S. W. 697; *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; *Bank v. Foote*, 12 Utah, 157, 42 Pac. 205; *Leonard v. Miner et al.*, 52 Pac. 655, 120 Cal. 403; *Bishop v. Dillard*, 49 Ark. 285, 5 S. W. 341; *Altman v. Anton*, 91 Iowa, 612, 60 N. W. 191; *Dominion Nat. Bank v. Manning*, 60 Kan. 729, 57 Pac. 949; 17 Cyc. 589, 593, and authorities cited. So we hold that that part of the answer set up no defense in law.

The next question presented is whether or not the defendant set up a defense as to the

overdrafts. He alleges the amount on deposit prior to the time the bank was taken over by the commissioner, and says he does not know the amount of the checks which he drew against that deposit, but says that, if all of them had been paid out of his deposit, he would still have a balance left. He further alleges that the bank has refused to render him a statement, and he has no means of ascertaining the exact status of his account. We think these allegations set up a sufficient state of facts to entitle the defendant to a trial, and the court erred in striking out that part of the answer.

[3] The next question presented is whether the defendant, having acquired by assignment after the bank's insolvency the claims of two depositors, can now set them up as against his indebtedness to the bank. It is true that, when a bank becomes insolvent and is taken over by the bank commissioner, any one being sued can offset against an indebtedness which he owes the bank any other indebtedness which the bank owes him. 5 Cyc. 570, and *Briscoe v. Hamer et al.* (No. 4529), 150 Pac. 1101, recently decided by this court, but not yet officially reported. But, when the insolvency is declared and the bank commissioner takes charge of a bank and its assets, the status of all parties is at that time fixed, and any person who owes the bank cannot by assignment secure claims of other persons and offset them against his indebtedness. This proposition seems to be well established by the authorities, and we think it is sound. 5 Cyc., and list of cases there cited.

The last question presented is whether the answer asked for affirmative relief beyond the jurisdiction of the county court, and, if so, whether or not it should have been stricken, or whether, if its allegations had been established by the proof, it would have served only to defeat the action of the plaintiff. We have carefully read the answer and the respective briefs, and do not think that the answer asked for relief beyond the jurisdiction of the court.

Having arrived at the above conclusions, we recommend that the judgment of the lower court be reversed, and the cause remanded for further proceedings in accord with this opinion.

PER CURIAM. Adopted in whole.

(54 Okl. 656)

J. I. CASE THRESHING MACH. CO. v.
BARNEY et al. (No. 4962.)
(Supreme Court of Oklahoma. Jan. 18, 1916.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES—§162, 168—POSSESSION OF PROPERTY—RIGHT—"CONVERSION."
Where a chattel mortgage contains a clause giving the mortgagee the right, upon default by the mortgagor in making payments provided for,

to take possession of the property and sell it, upon such default the mortgagee has the right to take peaceable possession, and although he has not the right to use force in taking possession, yet the mere fact that the mortgagor refused to consent to the taking does not constitute "conversion."

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 286-293, 301; Dec. Dig. ¶ 162, 168.]

For other definitions, see Words and Phrases, First and Second Series, Conversion.]

2. CHATTEL MORTGAGES ¶ 278, 281—FORECLOSURE—EVIDENCE—PURCHASE AT RECEIVER'S SALE.

Where the judge has appointed a receiver and ordered the property sold and the sale has been effected, it is error for the court, upon the trial of the cause to foreclose the mortgage, to peremptorily discharge the receiver and set aside his acts under the receivership and to exclude the evidence of the purchase of the property by the plaintiff at the receiver's sale.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 529, 567; Dec. Dig. ¶ 278, 281.]

3. CHATTEL MORTGAGES ¶ 169, 282—FORECLOSURE—INSTRUCTIONS—DAMAGES.

It is error for the court to instruct the jury that the defendants, the mortgagors, are entitled to recover the value of the property from the plaintiff when the plaintiff took possession of it, under a chattel mortgage authorizing it to do so upon default by the mortgagors, when the taking did not constitute a conversion.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 302-304, 568; Dec. Dig. ¶ 169, 282.]

Commissioners' Opinion, Division No. 6. Error from District Court, Woods County; R. H. Loofbourrow, Judge.

Action by the J. I. Case Threshing Machine Company against W. H. Barney and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

T. J. Womack, of Alva, and Keaton, Wells & Johnston, of Oklahoma City, for plaintiff in error. E. W. Snoddy and J. P. Grove, Sr., both of Alva, for defendants in error.

HATCHETT, C. This action was brought on the 11th day of June, 1908, in the district court of Woods county, by the J. I. Case Threshing Machine Company against W. H. Barney et al., on notes aggregating \$2,412.13 and interest and \$100 attorney's fee, and to foreclose the mortgage on a threshing outfit. On the 29th day of June, 1908, the court made an order appointing a receiver to take charge of the property, authorizing and directing him to sell the same at public auction upon notice. On the 11th day of July, 1908, the receiver sold the property to the plaintiff for \$1,400. On July 10th, the defendants filed their answer, in which they set up that at the time the notes and mortgage were executed the plaintiff's agent orally agreed that the same should be paid solely out of the earnings of the machinery, and also pleaded that the plaintiff had converted the property, and that it was of the value of \$3,000, and also that the plaintiff had taken

possession of the property in the fall of 1907 and failed to protect it, and that parts became lost and it depreciated in value. At the trial the court excluded evidence of the first defense set up in the answer, to wit, the oral agreement to pay the notes out of the earnings of the thresher, and that question is not before us. Evidence was introduced on the issues formed by the other portions of the answer, and verdict was rendered for the defendants and judgment entered thereon, and plaintiff has appealed.

During the trial the court of its own motion made an order setting aside the former order appointing a receiver, and discharged the receiver and set aside all of his acts.

The evidence showed that one Brewer, as agent for the plaintiff, took possession of the property and moved it to the city of Alva, where it remained for several months before the receiver's sale. The defendants contend that the taking possession by the plaintiff was a conversion. The defendant Barney, who had the machine under his control, testified as follows:

"He [Brewer] came to me and wanted me to deliver the outfit to him without any words; just turn it over to him; and I says: 'No; I will not;' and he said he would take it anyway; said he had that authority; and I says, 'It looks to me like you would have to take some legal steps;' and he said he could take it wherever he found it at any time if he felt himself unsafe and insecure. I told him I had cleaned up the machine and emptied the water out of the boiler so as to protect it. Q. What did he say, if anything? A. He went down and seen Mr. Stewart and hired him to get the machine and bring it down town, and then I suppose he got to thinking about it—Q. Don't tell what he thought. A. He told me he was going to Alva, but next morning he came back—I think it was the next morning. Mr. Stewart came, and I told him I didn't want him to touch it, and he wouldn't, so Mr. Brewer took the machine. Q. State whether or not he took it over your protest and your wishes. A. Yes, sir. Q. Do you know where they took the outfit to? A. They brought it to Alva and placed it back of Fred Hanford's hardware store. Q. Did you tell Mr. Brewer why he couldn't have the outfit? A. I told him I had no right to deliver it; that it belonged to the company, and we are all equally responsible for the care of that machine."

The witness Stewart testified on that point as follows:

"A. He [Brewer] came to me and wanted me to bring it [the machine] in, and I asked him what he would pay me and he told me, and I told him I would bring it if it was all right with the company; if everything was satisfactory with them—I didn't want to get in any trouble with any of the fellows of that company—and he said all right, he would stand between me and any trouble; and the water tank wasn't with the machine and we took a team and went and got the wagon. There was a cook shack on it, and we went and unloaded the shack and put the tank on the wagon, and Mr. Barney told us he wasn't willing to give up the machine, I believe—Q. Go ahead. A. I told him if it wasn't satisfactory with them I wouldn't bring it, and I went back home, but it wasn't long until Brewer came over, and he said he fixed it so Mr. Barney wouldn't have any hard feelings against me about it, and he wanted me to go

ahead and bring it in, and so I went over there and we finally filled up the boiler and fired up and run it in to town."

[1] The mortgage contained the clause giving the mortgagee the right, upon default of the payment of any of the notes or part thereof, to take possession of the mortgaged property and sell the same. We think the taking possession under the circumstances related by the witnesses was not a conversion. 7 Cyc. 78-80; *Singer Mfg. Co. v. Ryos*, 96 Tex. 174, 71 S. W. 275, 60 L. R. A. 143, 97 Am. St. Rep. 901.

While the plaintiff did not have the right to take the property by force, yet we think the mere refusal of the defendants to consent to the taking was not sufficient to constitute the taking conversion.

[2] The plaintiff complains that during the trial, when it offered to introduce evidence of the appointment of the receiver and sale of the property, the court excluded the same, and of its own motion set aside the receivership and the acts of the receiver thereunder. No authorities are submitted on this question in either of the briefs. The authority of the judge to appoint a receiver and order the property sold is not questioned, and without passing thereon we will assume that he had that power. We think then it was error for the court to peremptorily revoke the order and set aside the receivership after the sale had been made under the terms of the order and to refuse to permit the plaintiff to show that it had purchased the machine at a sale which had theretofore been ordered.

[3] The court gave the following instruction which is complained of by the plaintiff: "You are instructed that the defendants are entitled to be credited on their notes with an amount equal to the actual value of the property at the time it was taken into the possession of the plaintiff on the 26th day of November, 1907, and if you find that the amount credited upon the notes, plus the value of the property at the time it was taken, equals or exceeds the amount then due on the notes to the plaintiff, then your verdict should be in favor of the defendants; but if you find from a preponderance of the evidence that the amount credited upon the notes, plus the value of the property at the time it was taken by the plaintiff, is less than the amount then due on the notes, then your verdict should be in favor of the plaintiff for such difference, together with interest thereon to this date."

This instruction is tantamount to an express holding by the court that the acts of the plaintiff constituted a conversion, and that the defendants were entitled to recover the value of the property at the time plaintiff took possession of it. Having held that the taking under the circumstances did not constitute conversion, and there being no evidence as to what finally became of the property, then this instruction was clearly erroneous. The court should have charged the jury that the taking in the first instance did not amount to conversion. The fact that the plaintiff waited several months after taking

the property to commence proceedings to foreclose its mortgage under the facts in this case does not constitute conversion. The evidence showed that after the property was taken over by the plaintiff there was some negotiation toward effecting a settlement. We do not think the delay under the circumstances amounted to a conversion of the property. *Croze v. St. Mary's Canal Mineral Land Co.*, 143 Mich. 514, 107 N. W. 92, 313, 114 Am. St. Rep. 677, and cases cited.

We think, however, that the plaintiff was probably guilty of negligence in retaining the property for so long a time, and the defendants are entitled to recover damages if the machinery was injured. The measure of damages would be the difference between the value of the property when taken over by the plaintiff and its value when disposed of.

It may be that the receiver's sale was void or so irregular as to make the plaintiff guilty of a conversion when it bought the property. The facts relating to the sale not having been gone into at the trial, we are not presuming to say whether or not they amounted to a conversion.

We, therefore, recommend that the judgment of the trial court be reversed, and the cause remanded for further proceedings.

PER OURIAM. Adopted in whole.

(49 Okl. 654)

GARLAND et al. v. UNION TRUST CO. et al.
(No. 6265.)

(Supreme Court of Oklahoma. Jan. 11, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 564—CASE-MADE—TIME FOR MAKING AND SERVING.

Where a case is submitted to the court upon an agreed statement of facts which eliminates all questions of fact, a motion for new trial is not authorized, and the time for making and serving a case-made runs from the date of the rendition of the judgment, unaffected by such motion or the order overruling the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2501-2506, 2555-2559; Dec. Dig. \S 564.]

2. APPEAL AND ERROR \S 281—MOTION FOR NEW TRIAL—NECESSITY—AGREED STATEMENT.

In order to obviate the necessity for motion for a new trial when submitting a case to the court upon an agreed statement of facts, there must be an agreement as to all the ultimate facts, and if the statement merely embraces an agreement as to certain facts, leaving certain ultimate facts to be found by the court from the testimony and evidential facts, the necessity for a motion for new trial to obtain a review of the findings of fact made by the court will not be dispensed with.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1650-1661, 3024, 3281; Dec. Dig. \S 281.]

3. USURY \S 119—QUESTION OF FACT.

Where instruments executed for the loan of money are apparently fair on their face, and the interest reserved thereby, as disclosed by the terms of the instruments, is within the legal

limit, but the claim is made that usury was, in fact, retained, and that such usurious charge is evidenced by a collateral instrument or by some agreement or device intended as a cloak for such usurious transaction, as, for instance, the charging of a commission by the lender, the question as to whether such collateral instrument or such commissions were taken or reserved with the intent to charge a higher rate of interest than that allowed by law, and whether said transaction was a cloak or device to evade the law against usury, is a question of fact for the jury or the court sitting as a jury.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 343-357; Dec. Dig. § 119.]

4. APPEAL AND ERROR § 807—WRONGFUL DISMISSAL—REINSTATEMENT.

Where plaintiffs in error have complied with the law by taking all steps necessary to perfect an appeal to this court, and petition in error in due form with case-made attached thereto is lodged in the office of the clerk of this court within the time allowed by law, and where said petition in error is wrongfully dismissed, the order of dismissal will be set aside, and the cause reinstated and determined on its merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177-3188; Dec. Dig. § 807.]

Kane, C. J., dissenting.

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by the Union Trust Company, a corporation, trustee, against D. N. Garland and others. Judgment for plaintiff, and defendants bring error. Motion to set aside order recalling mandate overruled, and case retained for decision on its merits.

Stuart, Cruce & Cruce and L. D. Mitchell, all of Oklahoma City, for plaintiffs in error. Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendant in error.

HARDY, J. On the ——— day of January, 1913, the Union Trust Company, a corporation, and the Union Trust Company, a corporation, trustee, filed suit in the district court of Oklahoma county against plaintiffs in error, who will be referred to as defendants, and R. S. Rowland and Silas Rowland, asking judgment in the sum of \$50,000 upon 50 certain notes bearing date of May 25, 1912, in the sum of \$1,000 each, due on different dates, 35 of which matured June 1, 1913, said notes being made payable to bearer or the registered holder thereof, and also to foreclose a deed of trust or mortgage upon a certain ten-story building in the city of Oklahoma City given to secure the payment of said notes, which mortgage was made in favor of the Union Trust Company, trustee. The petition alleged the execution of said notes and mortgage, and copies thereof were attached to the petition. The notes bore interest at the rate of 6 per cent. per annum from date until paid, and after maturity at the rate of 10 per cent. per annum. The plaintiff further alleged that its lien upon said property was a first and prior lien, and alleged that the defendants R. S. Rowland

and Silas Rowland claimed to have some interest in or title to the real estate in plaintiff's mortgage described, and expressly alleged that the interest or title of said R. S. Rowland and Silas Rowland was inferior to and subject to the lien of plaintiff. The petition further alleged that, according to the terms and conditions of said mortgage, plaintiff had elected to declare the entire indebtedness secured thereby due and payable, and prayed judgment for the full amount and for foreclosure of its mortgage, and a decree that the interest or title of said defendants R. S. Rowland and Silas Rowland be decreed to be inferior to and subject to plaintiff's lien.

Defendants filed answer denying each and every allegation in plaintiff's petition, except such as were therein admitted, and as a second defense admitting the execution of the notes and mortgage or deed of trust sued upon, and delivery of same to plaintiff Union Trust Company, but alleged that the consideration for same was the loan of \$50,000, and that plaintiff, through its officers and agents, knowingly and wrongfully, and with intent to violate the laws of the state with reference to the charging of usurious interest, charged, reserved, and received from defendants and that defendants paid to plaintiff as interest for the use of said money from the date of the execution of said instruments until December 21, 1912, the sum of \$2,500 cash, a note for \$2,750, and interest payments amounting to \$1,572.22, making a total sum of \$6,822.22, being interest at the rate of 27 per cent. per annum, and that by reason of such usurious charge defendants were entitled to offset against plaintiff's demand twice said sum so reserved, to wit, the sum of \$13,644. Other paragraphs of the answer alleged that said transaction was usurious in other particulars than as above stated, but we deem it unnecessary here to state the allegations thereof in detail. By an amendment to the petition a count was added demanding judgment on the note for \$2,750, and for foreclosure of mortgage by which same was secured, same having matured in the meantime.

To this answer plaintiffs filed a reply, denying generally and specifically the allegations of new matter therein contained, and alleged that at the time of the execution of said notes, to wit, May 25, 1912, the plaintiff, Union Trust Company, loaned and advanced to said defendants said sum of \$50,000, and at the time of the execution of said notes and deed of trust defendants paid plaintiff the sum of \$2,500, and executed and delivered to the Union Trust Company their note for \$2,750, with interest at 8 per cent. per annum, payable May 25, 1913, secured by a second mortgage upon said property; that the sum of \$2,500 paid in cash at the time and the sum of \$2,750 represented by said note which defendants promised to pay plaintiff on May

25, 1913, together with the several interest payments alleged to have been made by said defendants, were a part of the interest which accrued upon said loan for the entire time said loan was to run, and were not payments of interest for the dates set forth in the answer and cross-petition of said defendants. The reply then sets out the sums which plaintiff alleges it would have been entitled to charge under its theory of the law and facts, and denies that there was any usury in said transaction.

The defendant Silas Rowland filed a disclaimer. W. J. Walker, who was the assignee of the Rowland mortgage, filed answer and cross-petition, asking judgment against plaintiffs in error on certain notes in the sum of \$15,750, with 10 per cent. interest thereon from date until paid, and for foreclosure of a certain mortgage upon said property.

Issues were joined upon this answer or cross-petition, and the cause came on for trial on the 26th day of September, 1913, all of the parties being present, and it was agreed that the issues between plaintiff and defendants and the issues between defendants and defendant Walker should be tried separately; and thereupon the parties dictated into the record a stipulation or agreement as to certain facts about which there was no dispute, and the notes and mortgages sued upon were introduced in evidence, and the issues between plaintiff and defendants were argued to the court and taken under advisement. On the 29th day of September, 1913, the cause coming on for hearing upon the answer and cross-petition of defendant Walker, the parties appeared and waived a jury, and the matter was continued until the 20th day of October, 1913, at which time same was heard, and on said day the court rendered judgment in favor of plaintiff and against defendants in the sum of \$52,668.67, with interest from October 20, 1913, at 6 per cent. per annum, together with 10 per cent. additional as attorney's fees, and foreclosure of said deed of trust, and also rendered judgment in favor of plaintiffs and against defendants on the note for \$2,750 and for foreclosure of the mortgage by which same was secured, and found that the interest and title of the defendants Silas Rowland and W. J. Walker in and to the property described was inferior and subject to the judgment of plaintiff, and on said day rendered judgment upon the issues between defendants and defendant Walker in favor of defendant Walker in the sum of \$12,600, and decreed a foreclosure of his mortgage upon said property, subject to the judgment of the Union Trust Company. Motions for new trial were filed and overruled, and case-made duly prepared and served.

Upon the case being lodged in this court, plaintiff filed motion to dismiss upon the ground that, the issues between plaintiff and defendants having been tried upon an agreed

statement of facts, no motion for new trial was necessary, and case-made was not prepared and served within the time allowed by law. Upon consideration of this motion an opinion was rendered dismissing the cause, and petition for rehearing was denied. Leave was granted to file second petition for rehearing, which, upon consideration, was sustained, and the former opinion withdrawn. Pending this latter action mandate had issued and been transmitted to the trial court, and by it spread upon the journal and order of sale issued upon the judgment and the property advertised for sale.

Upon sustaining the second petition for rehearing, an order was made recalling the mandate, and the matter is now submitted upon motion of plaintiff to set aside said order, and the case of *Thomas v. Thomas*, 27 Okl. 801, 109 Pac. 825, 113 Pac. 1058, 35 L. R. A. (N. S.) 124, 183, Ann. Cas. 1912C, 713, is relied upon. The *Thomas Case* was submitted in this court upon its merits, and a decision rendered thereon, after which mandate was regularly issued without any fraud, accident, inadvertence, or mistake. This case was not submitted upon the merits, but was dismissed upon the theory that this court was without jurisdiction by reason of the case having been submitted in the trial court upon an agreed statement of facts motion for new trial was unnecessary, and no case-made was prepared and served within the time prescribed by law or any lawful order of the court.

There was a sharp issue in the pleadings as to the existence of usury, and, while there was a stipulation as to certain facts, the same did not dispose of all the issues of fact presented to the trial court, but left certain ultimate facts to be determined from the facts agreed upon and the evidence introduced. The instrument providing for 6 per cent. interest from date until maturity, and for 10 per cent. after maturity, no usury was apparent upon the face of the contract. Defendants allege, however, that the plaintiff retained from the sum loaned \$2,500 in cash, and required the defendants to execute a note in the sum of \$2,700, and that this payment and note were a cloak and device to cover a usurious charge; while plaintiff alleged in its reply that said sums were interest calculated upon the full time the loan was to run, and were not a charge for the time the loan actually was permitted to run. The parties stipulated that defendants promised to pay plaintiff as a commission \$5,250, \$2,500 cash, and note for \$2,750, and that defendants actually paid to plaintiffs and plaintiffs received \$2,500 in cash, and a note for \$2,750, and, in addition thereto, paid the sum of \$1,572.22 as interest on said loan, making a total sum of \$6,822.22, which, if actually paid and charged for the loan or forbearance of said sum for the time same was permitted to run, would constitute interest thereon at

the rate of more than 27 per cent., and, in addition thereto, judgment was rendered against defendants for an attorney's fee in the total sum of \$5,581.96.

[3] In order for a contract to be usurious there must be, in fact, an excessive charge, and said charge must be made with the unlawful and corrupt intent to take interest in excess of the lawful rate (*Covington v. Fisher*, 22 Okl. 207, 97 Pac. 615; *Merchants' & Planters' National Bank v. Horton*, 27 Okl. 689, 117 Pac. 201); and, where the contract is apparently fair on its face, and the interest reserved thereby as disclosed by the terms of the instrument sued on is within the legal limit, but the claim is made that usury was, in fact, retained, and that such usurious charge is evidenced by other collateral instruments or by some agreement or device intended as a cloak for such usurious transaction, as, for instance, the charging of a commission on the part of the lender, it then becomes a question of fact as to whether such sums were, in truth and in fact, reserved and charged as commissions, and whether the charge for services rendered, if any, were excessive or reasonable, and, if excessive, whether such excess, together with the amount of interest reserved in the contract, would amount to usury, and in such case the intention of the parties at the time the contract was entered into or the commission retained is a question of fact to be determined from all the facts and circumstances in the case, and should be submitted to a jury, or to the court sitting as a jury (*Perghal v. Cotton States Bldg. Co.*, 25 Tex. Civ. App. 390, 61 S. W. 428; *Polk Co. Savings Bank v. Harding*, 113 Iowa, 511, 85 N. W. 775; *Patillo v. Allen West Com. Co.*, 108 Fed. 723, 47 C. C. A. 637; *Merchants' Ex. Nat. Bank v. Com. Warehouse Co.*, 49 N. Y. 635; *Covington et al. v. Fisher*, supra; *Cockle v. Flack*, 98 U. S. 344, 33 L. Ed. 949; *Hutchinson v. Hosmer*, 2 Conn. 341; *Beckwith v. Windsor Mfg. Co.*, 14 Conn. 594; *Stevens v. Staples*, 64 Minn. 3, 65 N. W. 959; *Carpenter v. Lamphere*, 70 Minn. 542, 73 N. W. 514; *Surv. Part. Massey McKesson Co. v. McDowell*, 20 N. C. 252; *Ketchum v. Barber et al.*, 4 Hill [N. Y.] 224; *Kent v. Phelps*, 2 Day [Conn.] 483; *Thurston v. Cornell*, 38 N. Y. 281; *Duval v. Farmers' Bank*, 7 Gill & J. [Md.] 44; 39 Cyc. 1056, 1057; 22 Ency. Pleading & Practice, 454).

There was no stipulation as to whether said sums were, in fact, commissions, nor as to the intent of the plaintiff in charging said sums, nor as to the amount or character of the services rendered, if any, or the reasonable value of such services; and in rendering judgment in favor of plaintiff the court found that said sums were paid and retained as commissions, and the judgment imported a finding that the charge for the services rendered was reasonable, and that said note and charge were not a cloak or a device to

cover usury. These being issues of fact not agreed upon by the parties, necessary to be determined by the court before judgment could be rendered upon the issues, it was necessary that a motion for a new trial be filed in order to procure a review of the finding of the court thereon.

[1] It is a well-established rule in this state, supported by a long line of decisions, that where a case is tried upon an agreed statement of facts, which eliminates all questions of fact, a motion for a new trial is unauthorized by statute, and the time for making and serving a case-made for this court runs from the date of the rendition of the judgment, unaffected by such motion or the order overruling the same. *Board of County Commissioners v. Porter et al.*, 19 Okl. 175, 92 Pac. 152; *Stannard v. Sampson et ux.*, 23 Okl. 13, 99 Pac. 796; *St. L. & S. F. Ry. Co. v. Nelson*, 40 Okl. 143, 136 Pac. 590; *C. & P. Ry. Co. v. Shawnee et al.*, 39 Okl. 728, 136 Pac. 591; *School Dist. No. 38 v. Mackey, Co. Treas.*, 44 Okl. 408, 144 Pac. 1032; *Dunlap v. Herring Lumber Co. et al.*, 44 Okl. 475, 145 Pac. 374; *Jones v. Fearnow*, 149 Pac. 1138. And the converse of this proposition would be true, that, where a statement of facts upon which a case is submitted does not eliminate all questions of fact, and where other evidence is introduced, if a review of the findings of fact by the court made therefrom is desired, a motion for new trial is necessary in order to present to this court the facts and evidence upon which such findings were made.

[2] An agreed statement of facts is but a substitute for evidence of those facts, and in this respect differs from an agreed case (*Towle et al. v. Sweeney et al.*, 2 Cal. App. 29, 83 Pac. 74), and the agreed statement of facts, in order to obviate the necessity of a motion for a new trial, must be an agreement upon the ultimate facts, and not merely an agreement upon facts which are evidential in their nature, and from which ultimate and material facts may be found.

The Supreme Court of the United States, in *Wilson v. Merchants Loan & Trust Co.*, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113, in passing upon the sufficiency of an agreed statement of facts within the meaning of Rev. St. U. S. §§ 649, 700 (U. S. Comp. St. 1913, §§ 1587, 1668), providing for a waiver of trial by jury, said:

"It has, however, been held that, where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts. *Wayne County Supervisors v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486. But, as such equivalent, there must, of course, be a finding or agreement upon all ultimate facts, and the statement must not merely present evidence from which such facts or any of them may be inferred."

And again, in *United States Trust Co. v. New Mexico*, 183 U. S. 535, 22 Sup. Ct. 172,

46 L. Ed. 315, in passing upon the same question the same court said:

"An agreed statement of facts may be the equivalent of a special verdict, or a finding of facts upon which a reviewing court may declare the applicable law if said agreed statement is of the ultimate facts, but, if it be merely a recital of testimony, or evidential fact, it brings nothing before an appellate court for consideration."

In the case at bar, as already shown, while counsel stipulate as to certain facts, they do not stipulate as to all of the ultimate facts in the case, but leave for determination by the court as a fact to be found, whether it was the intent of the plaintiff to charge and receive usurious interest in violation of the law, or whether said sums in controversy were, in fact, retained and charged as commissions, and also as to whether the plaintiff's deed of trust was a prior lien upon the property. This being true, the case was not tried upon an agreed statement or stipulation of all the ultimate facts in the case, but upon a stipulation as to certain facts and upon documentary evidence from which important and ultimate facts might be inferred, but in regard to which there was no agreement. From the facts agreed upon and the evidence introduced different inferences might have been drawn.

[4] Without determining the question as to whether the issues between plaintiff and defendants and between defendants and their codefendant, Walker, might be tried separately, we think it is apparent that the case was not, in fact, tried upon an agreed statement of facts within the meaning of the authorities, and therefore the case was improvidently dismissed. This being true, there remains the question whether this court, upon this state of facts, has authority to recall a mandate after same has been issued and lodged in the trial court.

Section 6, art. 2, of the Constitution provides:

"The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

The procedure for making and serving a case-made is prescribed in article 25, c. 60, Rev. Laws 1910. This section of the Bill of Rights, in connection with these statutory provisions, means that, when any litigant has complied with the provisions of the law regulating the manner of perfecting an appeal to this court, that the portals of this court shall not be closed against him, but, on the contrary, shall be open, and that he shall be entitled to have his case heard on its merits and justice administered therein. The rule announced in *Thomas v. Thomas* that the court has no authority after a mandate has regularly issued and been transmitted to the lower court to recall the same in the absence of fraud, accident, or mistake does not de-

prive the court of authority in the present case to make the order complained of. This case was wrongfully dismissed upon the assumption that the case had been tried upon an agreed statement of facts which disposed of all the issues of fact between the parties, and defendants have been denied their right to have their case heard in this court upon its merits.

In *St. Paul Fire & Marine Ins. Co. v. Peck*, 40 Okl. 396, 139 Pac. 117, the court had inadvertently misquoted a statute that was controlling, and upon the attention of the court being called to that fact the mandate was recalled, and the authority of the court so to do was determined. The opinion in that case reviews the authorities, and reaches the conclusion that, when by mistake or inadvertence a decision of this court is improvidently made, although the mandate is transmitted to the trial court, this court does not lose jurisdiction, and, when attention is called to such mistake, will assert jurisdiction and recall the mandate.

That this court has power to recall a mandate after same has been issued, transmitted, and filed in the lower court is demonstrated by the fact that in the following cases mandates have been issued, transmitted, and filed in the lower court, and thereafter the mandate was recalled, and jurisdiction reassumed, and the cause reconsidered on its merits: No. 1144, *Sampson et al. v. Staples*; No. 4263, *Steel et al. v. Jones et al.*; No. 2633, *Kelley et al. v. State*; No. 5209, *St. L. & S. F. Ry. Co. v. Brown*; No. 5667, *Wadsworth et al. v. Crump et al.*; No. 5707, *Coss et al. v. Sterritt*; No. 4634, *Paulsen et al. v. Western Electric Co. et al.*; No. 4272, *Rounds & Porter Lumber Co. v. Thompson*; No. 4633, *Cox et al. v. Dempster Mill & Mfg. Co.*; No. 5153, *Wagoner Tel. Co. v. Vermillion*; No. 5136, *Reynolds v. James*; No. 4657, *Scott et al. v. Potts et al.*; No. 7128, *Bd. Co. Comm. v. Clark et al.*

If it be contended that the mere filing of the mandate in the trial court is not sufficient to divest the jurisdiction of this court and lodge same in the trial court, then additional authority for this proposition is found in the following cases, in which the mandate had been issued, transmitted to the trial court, and duly recorded therein, where orders were made by this court recalling the mandate, jurisdiction reassumed, and the cases considered on their merits: No. 4346, *In re Estate of Hilly Hays*; No. 5663, *Ft. S. & W. R. Co. v. Black et al.*; No. 4397, *Miller et al. v. Okl. State Bank*; No. 4097, *Martindale et al. v. Shaha*; No. 6213, *Sharp v. City of Guthrie*.

Thus it is demonstrated that the action taken in this case is not without precedent, nor has a different rule been applied in this case from that which this court has consistently adopted and applied in other cases. In the cases cited some of the great lawyers

of the state, including former members of the territorial Supreme Court, were interested, and in one case at least a former member of this court appeared as counsel, and the authority of this court to make the orders therein was not questioned.

Such is also the practice in the Criminal Court of Appeals. In the following cases, mandate had issued, been transmitted to the lower court, and recorded which were afterwards recalled: A-1803, Sayers et al. v. State; No. A-2150, Grant v. State; No. A-1802, Loyes v. State.

In the cases following mandates had issued and been filed in the lower court, and were recalled and jurisdiction reassumed by the Criminal Court of Appeals: No. A-1766, Grant v. State; No. A-1311, Arnold v. State; No. A-1370, Edwards v. State; No. A-1061, McKenzie v. State; No. A-1430, McLeod v. State.

The Supreme Court of the United States has held that, where a case was dismissed by mistake, the case would be reinstated and disposed of on its merits. In *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531, that court said:

"Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in an opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases."

The decision in this case was cited and the doctrine therein approved in the following cases: *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013; *Illinois ex rel. Hunt v. Illinois Cent. Ry. Co.*, 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 446. See, also, *Alviso v. United States*, 6 Wall. 457, 18 L. Ed. 721.

In the following cases, after mandate had been issued and transmitted to the lower court, the Supreme Court of the United States recalled same: *Bank of Commerce v. State of Tenn.*, 163 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed. 211; *Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561; *United States v. Gomez*, 23 How. 326, 16 L. Ed. 552.

The Supreme Court of California, in the case of *Rowland v. Kreyenhagen*, 24 Cal. 52, said:

"Against an order or judgment improvidently granted, upon a false suggestion, or under a mistake as to the facts of the case, this court will afford relief after the adjournment of the term, and will, if necessary, recall a remittitur and stay proceedings in the court below. This is not done, however, upon the principle of re-assumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order."

And in the case of *Trumpler v. Trumpler*, 123 Cal. 248, 55 Pac. 1008, the same court said:

"Although this court loses jurisdiction after the remittitur has been issued and filed in the court below, yet, if any fraud or imposition has been practiced upon the court or the opposite

counsel by the party procuring the dismissal, or the order of dismissal has been improvidently granted upon a false suggestion, the appellate court will recall the remittitur and stay the proceedings in the court below. * * * This must be so, or intolerable injuries might result."

Many other California cases announce the same rule. Such is also the rule in New York. *Franklin Bank Note Co. v. Mackey*, 158 N. Y. 683, 51 N. E. 178; *Moffett v. El-mendorf*, 153 N. Y. 674, 48 N. E. 1105.

In *Town of Underhill v. Town of Jericho*, 66 Vt. 183, 28 Atl. 879, the Supreme Court of Vermont said:

"If its judgment order was not upon the case, as shown by the records of the trial court, * * * or if the judgment order issued erroneously through the misprision of its clerk, or if it issued by inadvertence, by reason of concealment, fraud, misrepresentation, misinformation, or other default, so that the jurisdiction of the court of error has not been exercised upon the real cause or in due course, and the remittitur does not represent the true judgment of the court of error properly * * * obtained, the cause, notwithstanding the erroneous remittitur received by the trial court, is still in the appellate court or court of error, and its jurisdiction thereon has not been exhausted."

In *Livesley v. Johnston et al.*, 47 Or. 183, 82 Pac. 854, the Supreme Court of Oregon, after referring to the rule in California just quoted, said:

"The preponderance of judicial authority concedes the power of a court of record at any time during the term at which a judgment is rendered to set it aside, when it was improvidently given in consequence of a false suggestion or under a mistake of facts."

In *Killian v. Ebbinghaus*, 111 U. S. 798, 4 Sup. Ct. 697, 28 L. Ed. 593, and in *Merriam v. Gordon*, 20 Neb. 405, 30 N. W. 410, mandates were recalled because of a mistake therein, and same was recalled and corrected. In *Lovett v. State*, 29 Fla. 384, 11 South. 176, 16 L. R. A. 313, which was a capital case, a purported transcript of the record was filed in the Supreme Court, judgment reversing the case rendered thereon, and mandate remitted and recorded in the lower court. Afterwards a correct transcript was filed, and the Supreme Court, speaking through Mr. Chief Justice Rayney, granted a rehearing and recalled the mandate, and reviewed the authorities upon the power of the court so to do, and cited with approval the case of *King v. Ruckman*, 22 N. J. Eq. 551, in which the following language was used:

"I have no doubt that this court has the power at any time to amend its judgment if it is erroneous by reason of the misentry of the clerk, or by reason of any other mistake, or that such judgment may be set aside and treated as a nullity if it has been procured by fraud, or is the result of misapprehension."

After quoting the language above, the opinion continues:

"The case before us is one in which a judgment of reversal has been rendered and is improvident through mistake and has been obtained upon a false suggestion. Our decision of it is the result of misapprehension and of imposition upon the court."

"The consideration for reversal or affirmance of a judgment or decree upon a misrepresentation of the record of the case or upon anything

else than the true record of that case is entirely outside of the functions or purposes of an appellate court. This case is, in our judgment, clearly within the rule which preserves our jurisdiction of it. We have been misled into reversing a judgment on a false record, into acting in a case when that case, as it really is and only can be acted upon by us, has not been before us. In law the writ of error issued in the cause is, in so far as our exercise of our powers is concerned, still before us, and will be until that cause, as it really is, shall be decided, or the writ dismissed on legal grounds."

The authorities upon the right to recall a mandate are collected in an extensive note to the case of *Ott v. Boring* (131 Wis. 472, 110 N. W. 824, 111 N. W. 833) 11 Ann. Cas. 865, note.

The opinion dismissing this case was filed June 1, 1915, and leave granted to file second petition for rehearing on July 2, 1915, and on that day order was made recalling the mandate. All of the various steps taken in this case were at and during the April term of the court.

The plaintiffs in error having taken all of the necessary steps to perfect their appeal, and petition in error having been filed in this court within due time, jurisdiction of this case attached, and the jurisdiction of this court cannot be defeated by an erroneous declaration that no such jurisdiction existed. Such a decision would be a denial of justice and deprive litigants of their property without due process of law.

The motion to set aside the order recalling the mandate will be overruled, and the case retained for a decision on its merits.

SHARP, Vice C. J., and TURNER, J., concur. THACKER, J., concurs in conclusion. KANE, C. J., dissents.

(55 Okl. 137)

LEGG et al. v. MIDLAND SAVINGS & LOAN CO. (No. 5297.)

(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 1, 1916.)

(Syllabus by the Court.)

1. BUILDING AND LOAN ASSOCIATIONS ⇨26
—POWERS—REPAYMENT OF LOANS—PREMIUMS.

A building and loan association incorporated within the state of Colorado under the laws of that state may loan its accumulations to members, upon such plan of repayment provided for in its by-laws, and may charge, contract for, and recover a premium upon such plan as may be provided for in the by-laws or note, or other evidence of indebtedness taken by such association, all of which notes shall be in form nonnegotiable. Section 6, c. 33, Laws of Colo. 1897.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. ⇨26.]

2. BUILDING AND LOAN ASSOCIATIONS ⇨28
—RIGHT TO LOAN ACCUMULATIONS—COMPETITIVE BUILDING.

A building and loan association organized within that state and under its laws may loan its accumulations, when the by-laws of the as-

sociation so provide, without the necessity of competitive bidding.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 36-38; Dec. Dig. ⇨28.]

3. BUILDING AND LOAN ASSOCIATIONS ⇨27
—CONTRACTS—RIGHT TO ENFORCE.

A contract between such building and loan association and one of its members, made in the territory of Oklahoma, to be performed in the state of Colorado, is governed by the law of the place of performance, and, if valid under the law of that state and not violative of the public policy of said territory, is enforceable in the courts of this state.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. ⇨27.]

Commissioners' Opinion, Division No. 3. Error from District Court, Pottawatomie County; Charles B. Wilson, Judge.

Action by the Midland Savings & Loan Company, a corporation, against J. F. Legg and others. Judgment for plaintiff, and defendants bring error. Modified and affirmed.

H. H. Smith, of Shawnee, for plaintiffs in error. Park Wyatt, of Tecumseh, and A. J. Bryant, of Denver, Colo., for defendant in error.

BLEAKMORE, C. This action was commenced on June, 17, 1911, in the district court of Pottawatomie county, by the Midland Savings & Loan Company against J. F. Legg, Minnie F. Legg, Robert Robertson, and T. J. Engle, to recover a sum alleged to be the balance due upon a certain bond and to foreclose a real estate mortgage securing the same. Robertson and Engle disclaimed any interest in the property.

The facts necessary to a determination of the questions presented for review are that: On December 1, 1905, J. F. Legg applied in writing for membership in the Midland Savings & Loan Company, a building and loan association incorporated and existing under the laws of the state of Colorado and having its principal place of business and home office in the city of Denver, and subscribed for 25 shares of its stock to be paid for in monthly installments; at the same time applying to said association for a loan of \$800, and agreeing, as a condition to the making of such loan, that he would be bound by the laws of the state of Colorado and the rules and regulations of the association. On the same day he and his wife, Minnie F. Legg, executed what is termed a first mortgage non-negotiable bond for the sum of \$800, payable to said association, together with a mortgage on certain real estate situate in the city of Tecumseh, Pottawatomie county, Okl., and an assignment of said shares of stock to secure the same, the bond providing, in substance, that J. F. Legg and Minnie F. Legg are indebted to the Midland Savings & Loan Company, a corporation under the laws of Colorado, in the sum of \$800, advanced upon

25 shares of capital stock owned by said Legg and assigned as collateral security, which is to be matured in monthly payments of \$10 each, and the makers agree to pay \$5 a month interest and \$3 a month as premium upon said loan, and such fines as may accrue upon delinquent monthly payments of stock, interest, and premium, according to the by-laws of the company governing the same; and in case of default suit may be brought and attorneys' fees included in the sum of \$80, and the withdrawal value of the shares of stock applied, the bond to be delivered and its conditions performed in the state of Colorado and all respects governed by the laws of that state.

The by-laws of the association provide, in substance, that all real estate loans shall bear interest and premium as may be provided for in the note, bond, or other evidence of indebtedness taken by the company, which shall be payable at the home office of the company; and that fines may be charged for delinquent payments, and all loans shall be construed as having been made in Denver, Colo., and with reference to the laws of said state; and that an expense charge of 3 per cent. of the par value of stock shall be deducted from the first payment or payments on the shares; and that no agent shall have authority, express or implied, to make contracts or agreements concerning loans, but the same must be made to the home office of the company; and that, in case any shares are deposited as collateral security for a loan, and the borrower desires to repay such loan, he shall be credited thereon with the withdrawal value of such shares of stock, less all charges for insurance, taxes, and other advances, and all due and delinquent loan payments and fines; and that such borrower shall not be required to pay a combined rate of interest and premium in excess of 1 per cent. per month upon the amount loaned; and that, in estimating the amount or rate of interest, there shall be included all interests, premium, and moneys paid to the company or to its agents as commission or on account of shares of stock pledged, less the guaranteed cash surrender value of such stock; and that an examination fee of the title of the property may be charged of \$5, and a membership fee not to exceed 1 per cent. of the amount of the loan.

Certain provisions of the statute of Colorado contained in chapter 33 of the Session Laws of 1897, pleaded and properly proved, were introduced in evidence, as follows:

"Section 1. Any association of not less than three persons hereafter incorporated under the laws of this state, which shall be organized within this state for the purpose of raising a fund by the collection of dues or stated payments from its members, to be loaned among its members, shall, in furtherance of such purpose, and after having complied with the requirements of this act, be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by

members for the right of precedence in taking loans, as the corporation may provide for in its constitution or by-laws. * * *

"Sec. 3. Every such association now or hereafter incorporated under the laws of this state complying with the provisions of this act, may issue and sell its shares of stock in one or more successive series, or upon the permanent or Dayton plans in the denominations and to the extent as limited in the articles of incorporation of such associations, either fully or partially paid up in periodical or other installments, or upon all, either, or any of these plans and with or without full participation in the earnings of such association, or partially in limited dividend bearing stocks as may be provided by the by-laws of such association, for the purpose of raising a fund to make advances to members upon first mortgage, or trust deed, liens, upon real estate and upon the shares of stock issued by such association, or upon both such securities. * * *

"Sec. 6. Every such corporation organized under the laws of the state of Colorado may loan its accumulations to members upon such plan of repayment as provided by its by-laws. They may charge, contract for and recover a premium upon such a plan as may be provided for in the by-laws, or note, or other evidence of indebtedness taken by such association, all of which notes shall be in form nonnegotiable.

"Sec. 7. No premiums, fines, or interest on such premium that may accrue to the said association, according to the provisions of this act, shall be deemed usurious; and the same may be collected as debts of like amount are now by law collected in this state; but no fees for nonpayment of dues shall exceed five per cent. per month for the first sixty days, and two per cent. per month thereafter."

Defendants made certain payments upon the indebtedness evidenced by the foregoing instruments, and defaulted in others. Recovery was sought and had for the alleged unpaid portion of the principal debt, interest at the rate of \$5 per month, premium \$3 per month, certain fines assessed upon delinquent payments, insurance premiums advanced, and attorneys' fees. At the close of the evidence the court sustained a demurrer to the evidence offered on behalf of defendants, and rendered judgment for plaintiff.

The only evidence offered on behalf of defendants as going to the merits of the case was that of J. F. Legg, certain portions of which were excluded. By such testimony it was attempted to establish the fact that the contract in question was made with an agent of the company in the state of Oklahoma. The portion of the evidence excluded is, in our opinion, immaterial.

The application for membership in the association, as well as the application for the loan, and the bond, mortgage, and assignment of stock, were all executed in the state of Oklahoma, and forwarded to the office of the association in Denver, Colo.

Defendants complain of the refusal of the trial court to suppress a deposition for the alleged reason that the same was taken without notice to them. The trial court heard evidence upon the question of the service of such notice, and admitted the deposition. There being evidence of the proper service of the requisite notice, the action of

the trial court in this regard will not be disturbed.

It is also insisted that there was error in the admission of the testimony of the witness whose deposition was taken, for the reason that the same was incompetent. It is not thought necessary to discuss this evidence at length, as, in the main, the essential facts testified to by the witness are established by the written instruments identified by the defendant Legg.

It is further contended that the session laws of the state of Colorado, *supra*, were improperly admitted in evidence because they were not shown to be in force at the time of the execution of the contracts in question. There appears to be no merit in this contention. The statute was proved to have been enacted and in force in 1897, and the general rule is that, when a statute is once shown to be in force, the continuance of its existence is a matter of presumption until the contrary is established.

[1-3] The principal questions presented by the assignments of error and urged here are that the contracts in question are governed and are to be construed by the laws of this state and not those of the state of Colorado, and that by virtue of the law of this state, as well as that of the state of Colorado, the loan in question not being let upon a competitive bid, the plaintiff is not entitled to collect a greater rate of interest than 7½ per cent. and is not entitled to recover any premium or fines, etc. It will be noted that the loan in question was not let upon competitive bids, but was made under section 6, c. 33, of the Session Laws of Colorado of 1897.

The questions presented by this assignment of error have been determined adversely to the contention of the defendant by this court, in *Midland Savings & Loan Company v. Henderson* (not yet officially reported) 150 Pac. 869, wherein it was held, in construing contracts almost identical with those involved herein, made in the Indian Territory and to be performed in Colorado, that the parties having in good faith contracted that the laws of Colorado should control, in the

absence of a statute forbidding nonresident building and loan companies from transacting business in that jurisdiction and making loans of the character in question, the parties must be held to the performance of their respective undertakings. In the syllabus it was held:

"A building and loan association incorporated within the state of Colorado under the laws of that state may loan its accumulations to members, upon such plan of repayment provided for in its by-laws, and may charge, contract for and recover a premium upon such plan as may be provided for in the by-laws or note or other evidence of indebtedness taken by such association, all of which notes shall be in form nonnegotiable."

"* * * Under section 6, p. 125, Laws Colo. 1897, building and loan associations organized within that state and under its laws may loan its accumulations, when the by-laws of the association so provide, without the necessity of competitive bidding."

"As a general rule, it is within the power of the contracting parties, by the express terms of their contract or undertaking, to establish the place according to the laws of which the validity and construction of the contract shall be determined."

The contracts in question in the instant case were made prior to statehood in the territory of Oklahoma, to be performed in the state of Colorado. It is not shown that they are violative of the established public policy of said territory; and the general principle, that contracts made in one place to be performed in another are governed by the law of the place of performance, should be applied.

There was no error committed by the trial court affecting the substantial rights of defendants, save a mistake in computing the amount due under the contracts. The judgment rendered was for \$727.67, and the further sum of \$80 attorneys' fees. The correct amount, including attorneys' fees, is \$700.23, with interest from the date of the judgment at the rate of 7½ per cent. per annum. The judgment should therefore be modified to this extent, and affirmed. *Midland S. & L. Co. v. Cox* (not yet officially reported) 148 Pac. 827.

PER CURIAM. Adopted in whole.

(33 Or. 228)

JOHNSON et al. v. PAULSON et al.

(Supreme Court of Oregon. March 7, 1916.)

1. APPEAL AND ERROR \S 125—DECISIONS REVIEWABLE—CONSENT DECREE.

In a suit to foreclose mechanics' liens, where defendants by their attorneys stated in open court that one of the claimants was entitled to recover such admission, while not technically a consent decree, was equivalent to a consent decree, which, under L. O. L. §§ 186-192, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 833; Dec. Dig. \S 125.]

2. APPEAL AND ERROR \S 414 — "ADVERSE PARTIES"—WHO ARE.

One respondent in whose favor a mechanic's lien was established is not an adverse party as to other respondents whose liens were established, though he would be an adverse party had his claim been denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2137, 2138; Dec. Dig. \S 414.]

For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

3. APPEAL AND ERROR \S 803—DISMISSAL OF APPEAL—EFFECT.

L. O. L. § 425, declares that, if a decree foreclosing mechanics' liens be in favor of different persons, execution shall issue upon the joint request of such persons. The right of several claimants to issue execution, their liens having been established, was stayed by an undertaking given under section 551 by the owner, who appealed. *Held*, that dismissal of the owner's appeal as to one of the lien claimants whose rights were admitted would not jeopardize the rights of the others; as he could not issue execution himself, and under the judgment would have to share pro rata with the other claimants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169-3173; Dec. Dig. \S 803.]

4. APPEAL AND ERROR \S 780 — DISMISSAL —PARTIES IN INTEREST.

In a suit to foreclose mechanics' liens, where the lien was admitted as to one of the claimants, an appeal from a judgment in favor of several, including him, may be dismissed as to such claimant, where he was not an adverse party as to the others, and dismissal would not jeopardize their rights; the errors assigned against judgment in favor of the others being such that they could be adjudicated without his presence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8121; Dec. Dig. \S 780.]

In Banc. Appeal from Circuit Court, Multnomah County; T. E. J. Duffy, Judge.

Proceedings by Martin Johnson and others and J. F. Shea against Josephine Paulson, W. J. Clemens, trustee, and others, for the foreclosure of mechanics' liens. From a judgment of foreclosure, the named defendants appeal. On motion of J. F. Shea to dismiss appeal as to him. Motion granted.

Josephine Paulson was the owner of lot 4 in block 17, Irvington, an addition to the city of Portland, upon which she caused a dwelling house to be constructed. A. S. Paulson was the contractor. Martin Johnson, Oscar Carlson, B. E. Remaley, Hansen & Holding, a partnership, Park McDonald,

J. B. Winstanley Company, a partnership, J. F. Shea, the Oregon Door Company, a corporation, each filed liens on the property on account of indebtedness incurred by the contractor in the construction of the building; and the contractor also filed a lien to secure the amount due him from the owner. The record indicates that seven separate suits were instituted for the foreclosure of as many liens, because on the motion of J. F. Shea it was "ordered that the said above-entitled suits, being suits Nos. E3098, E3093, E3092, E3095, E3096, E3097, and E3094, be and they are hereby consolidated under suit No. E3094, and that they be tried at the same time."

The several claims were tried and adjudicated in one proceeding. The disposition made of the several claims is recorded in a single journal entry, wherein it appears that a separate judgment was granted for each lien claimant, and each judgment was supplemented by an order directing that the property be sold, and that the proceeds of the sale be applied pro rata on the several judgments, except as to A. S. Paulson whose claim is subordinated to all the others. The defendants Josephine Paulson and W. J. Clemens, trustee, appealed from the whole judgment and decree. J. F. Shea now moves that the appeal be dismissed as to him.

Stapleton & Conley, of Portland, for appellants. Hall & Lepper, Lewis & Lewis, Schmitt & Schmitt, Angell & Fisher, and Asher & Johnstone, all of Portland, for respondents.

HARRIS, J. (after stating the facts as above). [1] During the trial the claim of Shea was admitted by appellants and their attorney stated in open court: "I think he is entitled to recover in this case." While not technically a decree by confession within the meaning of sections 186 to 192, inclusive, L. O. L., the admission is equivalent to a consent decree which is not appealable. *Fassman v. Baumgartner*, 3 Or. 469; *Twitchell v. Risley*, 56 Or. 226, 107 Pac. 459; *Plinsky v. Nolan*, 65 Or. 402, 133 Pac. 71; *Schmidt v. Oregon Mining Co.*, 28 Or. 9, 40 Pac. 406, 1014, 52 Am. St. Rep. 759; *State v. McDonald*, 63 Or. 467, 128 Pac. 835, Ann. Cas. 1915A, 201; *Boyer v. Burton*, 149 Pac. 83; 3 C. J. §§ 453, 546.

[2] Shea is in no way united in interest with any of the other respondents, and there is no good reason for compelling him to present his claim on an appeal which must inevitably be dismissed as to him. Moreover, Shea was not necessarily an adverse party within the rule established in *Watson v. Noonday Mining Co.*, 37 Or. 287, 55 Pac. 867, 58 Pac. 36, 60 Pac. 994, although he would be an adverse party if his claim had been disallowed by the trial court. *Barton v. Young*, 152 Pac. 876.

[3, 4] Nor does a dismissal of the appeal as to Shea jeopardize the rights of the other respondents. Section 425, L. O. L., declares that, if a decree of foreclosure is in favor of different persons, not united in interest, an execution shall issue upon the joint request of such persons or upon the order of the court or judge thereof on the motion of either of them. All the lien claimants cannot join in a request for an execution because the hands of some of the judgment creditors are stayed by an undertaking which complies with the requirements of section 551, L. O. L. Shea would at all events be required to share the proceeds with such other lien claimants as might prevail on the appeal because one of the provisions of the decree obtained by Shea is to the effect that he shall share pro rata with the other judgment creditors. The assignments of error point out objections to the judgments granted to Johnson, Carlson, Remaley, Hansen & Holding, J. B. Winstanley Company, and the Oregon Door Company, and those objections which arise out of separate parts of the final decree can be adjudicated without the presence of Shea. *Poppleton v. Nelson*, 10 Or. 437; *Everding & Farrell v. Toft*, 150 Pac. 757. See, also, *Williams v. Wilson*, 42 Or. 299, 308, 70 Pac. 1031, 95 Am. St. Rep. 745; *Lauriat v. Stratton* (C. C.) 11 Fed. 107, 6 Sawy. 339, 342.

The appeal is dismissed as to J. F. Shea.

EAKIN, J., absent.

(79 Or. 473)

MOLALLA ELECTRIC CO. v. WHEELER et ux.

(Supreme Court of Oregon. March 7, 1916.)

1. APPEAL AND ERROR — 1009 — REVIEW — EQUITY CASE.

While the judge in an equity case tries the facts, his conclusion thereon is not final, since the trial on appeal is de novo.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970, 3978-3981; Dec. Dig. —1009.]

2. APPEAL AND ERROR — 1009 — REVIEW — EQUITY CASE.

Where, in an equity suit, the trial judge personally examines the locus in quo in order properly to apply the testimony to the issues, his findings of fact and decree are entitled to careful consideration.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970, 3978-3981; Dec. Dig. —1009.]

3. EMINENT DOMAIN — 208 — AMOUNT OF DAMAGES—EVIDENCE.

Evidence in a suit to restrain an ejectment suit, and to determine the value of land taken by plaintiff in the injunction suit for the construction of a water power ditch under a parol agreement with defendant in such suit, as well as the damages to land not taken, held to sustain a finding of the trial judge, requiring pay-

ment to the defendants by the plaintiff of \$300 as damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 542; Dec. Dig. —203.]

4. TRIAL — 375—VIEW OF PROPERTY—EFFECT.

Where the land in suit is viewed by the court or jury, a judgment must be rendered, not on the view had, but on the evidence introduced as explained by the view.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. —375.]

5. APPEAL AND ERROR — 1009 — REVIEW—FINDINGS OF FACT.

The decree and findings of the judge in an equity suit are not of the same force on appeal as those of the judge without a jury in a law action, which will not be disturbed if there is any evidence to support them.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970, 3978-3981; Dec. Dig. —1009.]

Department 1. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Suit for injunction by the Molalla Electric Company against Irvine Wheeler and wife. Decree for defendants, and plaintiff appeals. Affirmed.

B. G. Skulason, of Portland (Clark, Skulason & Clark, of Portland, on the brief), for appellant. Philip L. Hammond, of Oregon City (Hammond & Hammond, of Oregon City, on the brief), for respondents.

MOORE, C. J. This is an appeal by the plaintiff, the Molalla Electric Company, a corporation, from a decree requiring it to pay the defendants Irvine Wheeler and Jennie Wheeler his wife, \$200 as the value of 1.39 acres of their land which was taken for a canal, and \$300 as damages to the remainder of their premises. It appears from a transcript of the testimony that the plaintiff's predecessors in interest, the Molalla Power Company and the Canby Canal Company, in the year 1909 began the construction of a ditch to divert water from the Molalla river and conduct it to a power house where it was to be used in generating electricity for illumination. In prosecuting the work it became necessary to cross a 12-acre rectangular tract of land owned by the defendants. In order to secure a right of way therefor, an agent of the plaintiff's predecessors agreed to pay the defendants \$100, to furnish them the free use of eight 16-candle power incandescent lamps six hours daily, to allow them to install in the ditch a 5 horse power wheel with which to divert 24 miners' inches of water to be used for irrigation from May to August each year, both months included, to grant them the right to excavate an incline to the canal to permit stock to obtain water, to authorize them to take from the canal sufficient water to operate a hydraulic ram to supply water for domestic purposes, and to erect and maintain for them three bridges across the canal on their land, which rights and privileges the defendants

were to use and enjoy for a term of 99 years. Relying upon these promises, and without receiving any part of the consideration, the defendants, by a parol license, permitted the canal to be dug across their premises from the southeast corner to the northwest corner, a distance of 1,030 feet, the earth taken from the ditch being left on the south bank, and the excavation and waste occupying a space of 40 feet in width at the narrowest part. One bridge was built across the canal near the east border of the defendants' land for their use, and this is the only consideration ever given for the easement.

The defendants commenced an action in ejectment to try the title to, and to recover the possession of, the strip of land, making the Molalla Power Company, the Canby Canal Company, and the Molalla Electric Company, defendants. The last-named company, having succeeded to all the rights of the other companies in and to the canal, filed an answer in that action, and thereupon, as plaintiff instituted this suit in the nature of a cross-bill in equity, to enjoin further prosecution of the law action, and to have determined the value of the land which was taken for the ditch, and the measure of the damages which resulted to the defendants' premises by reason of the construction of the canal. The cause being at issue was tried, a decree rendered, and a review thereof instituted as hereinbefore stated.

[1] It is contended by plaintiff's counsel that in allowing the defendants more than \$100, as the value of the land taken, an error was committed. The plaintiff's witnesses estimated the worth of the land appropriated at \$75 an acre, or \$104.25 for the 1.39 acres taken. In the opinion of the defendants' witnesses, however, the value of such land was appraised at \$350 to \$500 an acre. The trial judge viewed the premises, and, from such inspection and a consideration of the testimony given on this branch of the case, awarded to the defendants \$200 as the value of the land of which the plaintiff had taken possession. In the trial of a suit in equity the judge of the lower court, under the practice which obtains in Oregon, determines the facts in issue, but such conclusion is not final; for on appeal from a decree in such a cause, the case is tried anew upon the transcript and the evidence accompanying it. L. O. L. § 556.

[2] When in an equity suit the trial judge personally examines the locus in quo, in order properly to apply the testimony received to the issues involved, his findings of fact and the decree predicated thereon are entitled to careful consideration. In the case at bar, an examination of the testimony given by the plaintiff's witnesses does not, in our opinion, overcome the findings as to such value, corroborated as it was by the judge's view of the premises.

[3] It is maintained that the testimony received is insufficient to authorize an award of any damages for detriment to the remainder

of the premises, and that in giving the defendants \$300, as indemnity for such supposed injury, an error was committed. The plaintiff's witnesses testified that before the ditch was dug water stood on a part of the land referred to, but after the canal was constructed the premises were drained, whereby the defendants received a benefit, and for that reason their real property was not damaged. The defendants' witnesses admit that the premises contained a low spot about a rod square, which was covered with water in the winter and which small tract was rendered dry by digging the canal, but, notwithstanding such slight advantage, the ditch and the embankment constitute a detriment to the premises. No witness, however, states the measure of the injury, or details any circumstance from a consideration of which the quantum of damages to the remainder of the premises can possibly be determined. The testimony given by Robert Vorpahl fairly illustrates that of each of the defendants' witnesses on this subject. He was asked:

"You consider that this canal, knowing the land before it went through and knowing its condition now, is this a benefit to the land? A. No, sir. Q. Is it a detriment? A. Yes, sir. Q. How? A. It puts the land in bad shape to farm and it is a nuisance to get across the canal."

In *Burton v. Severance*, 22 Or. 91, 29 Pac. 200, it was ruled that a witness should state facts, and not draw conclusions from them or give opinions; and hence, in actions for damages, while a witness might state facts upon which the damages were predicated, he could not give his opinion concerning the amount of damage resulting from any given act or omission, because it was the exclusive province of the jury to assess damages under the rules of law declared by the court. According to the rule there recognized, as applied herein, it might have been proper for a witness, who was qualified to testify on the subject, to have stated upon oath that before the canal was dug the defendants' tract was worth \$300 an acre, but since the ditch was completed the premises were worth only \$200 an acre. From this testimony the trial court might have concluded that the amount of damage thereby sustained was \$100 an acre or \$1,200. Such supposed method of substantiating a material fact amounts to nothing more than a mere estimate, made by a witness as to the amount of damages sustained. Every lawyer who has had much experience in the practice of his profession knows that all witnesses do not agree upon estimates of value, except as to mediums of exchange, or concur upon the measure of damages sustained by the acts of omission or commission of a party. Such being the case, the writer, speaking for himself alone, never has thought, and does not now believe, the rule established in the case referred to is founded in reason or justified by experience in the trial of causes. The court or jury to whom the matter is submitted must

determine the facts in issue from a careful consideration of all the testimony received. Estimates of value and of damages can be received from competent witnesses, and since their appraisal of these elements will probably be quite variant, the writer can see no just reason why substantial justice will not be administered by permitting the court or jury to consider all such estimates and deduce the proper conclusion therefrom. But, however this may be, the method adopted in the case at bar to establish the amount of damages sustained is a very fair elucidation of the rule promulgated in *Burton v. Severance*, supra, when carried to an extreme. Based upon a consideration of the testimony of the defendants' witnesses to the effect that the construction of the canal had not been any benefit, but was a detriment to the land, the trial court, after viewing the premises, assessed the damages at \$300, in the absence of any evidence as to the measure of the injury, except such as was derived from an inspection of a plat of the real property which had been received in evidence and from a view of the premises. It is impossible, therefore, accurately to try the case anew upon the transcript and the evidence accompanying it, as required by statute. L. O. L. § 556.

[4] The locus in quo is permitted by the court to be viewed by a jury, pursuant to section 133, L. O. L., so that the testimony received may be properly applied to the situation of the premises, in order to determine the character thereof, and the verdict returned must be based upon a consideration of such testimony, and not upon the inspection which was thus made. *State v. Ah Lee*, 8 Or. 214; *Crane v. Oregon R. & N. Co.*, 66 Or. 317, 133 Pac. 810.

[5] In the trial of a suit in equity, the judge of the lower court practically acts as a juror in receiving the evidence, from a consideration of which findings of fact must be made. Such conclusions are not like the findings of fact in a law action, tried without the intervention of a jury, which latter deductions are tantamount to special verdicts and will not be disturbed on appeal if supported by any evidence. By viewing the locus in quo, the trial judge in an equity case is thereby better enabled to apply the testimony to the premises. The findings of fact, however, must be based upon such testimony, in order that the decree rendered shall not be reversed on appeal. The map referred to shows the canal extending diagonally across the defendants' land a distance of 1,030 feet, with a bridge spanning the ditch at the east end of the premises, while the space occupied by the earth left on the bank is much wider in places than the 40 feet allowed by the decree as the measure of the plaintiff's right, thereby requiring the defendants to remove much of the earth left near the margin of the canal if they desire to make successful use of their

land. The testimony shows that the water flowing in the canal is about 20 feet wide and 4 feet deep, while the banks are of the angle of ordinary repose, though caves have occurred along the slopes, and hence it is almost impossible to ford the artificial stream. In order to reach the opposite bank at the northwest part of the premises it will be necessary for the defendants, or any person cultivating the land at that place, to make a journey of 2,060 feet, thus producing great inconvenience and entailing much loss of time. It further appears from the evidence that the northeast part of the premises consists of a plateau having a bank of about 60 feet, below which the canal divides a narrow strip of very rich, alluvial bottom land which by reason of the ditch can be cultivated only one way. In view of these circumstances, it is believed that, notwithstanding the paucity of the evidence as to the measure of damages, the sum awarded therefor is not excessive, and, this being so, the decree should be affirmed, and it is so ordered.

BENSON, BURNETT, and McBRIDE, JJ.
concur.

(79 Or. 485)

LYONS v. CHAFFEE.

(Supreme Court of Oregon. March 7, 1916.)

1. VENDOR AND PURCHASER ~~§~~54—BOND FOR DEED—CONSTRUCTION AND OPERATION.

A bond for a deed transfers the equitable title to the obligee, leaving in the vendor the legal title as security for the purchase price and interest.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 85; Dec. Dig. ~~§~~54.]

2. VENDOR AND PURCHASER ~~§~~273 — REMEDIES OF VENDOR—STRICT FORECLOSURE.

In a suit for strict foreclosure of a vendee's equitable title under bond for deed on account of noncompliance with the contract, it is unnecessary for the vendor to tender a deed and demand the price as a condition precedent to the suit.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 767; Dec. Dig. ~~§~~273.]

3. VENDOR AND PURCHASER ~~§~~285 — REMEDIES OF VENDOR—STRICT FORECLOSURE.

Where a purchaser has broken the terms of a bond for deed by failure to pay installments of interest, the court, in a suit by the vendor for strict foreclosure, may require the payment of the whole price as a condition of avoiding the foreclosure.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 800-807; Dec. Dig. ~~§~~285.]

Department 1. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Suit by Electa Helen Lyons against Charles J. Chaffee. From a decree for defendant, plaintiff appeals. Affirmed.

This is a suit in the nature of a strict foreclosure of the rights of the defendant under bond for a deed which reads as follows:

"Know all men by these presents that we, Electa H. Lyons and Elmer E. Lyons, wife and husband, of Forest Grove, Oregon, are held and firmly bound unto C. J. Chaffee, of Hood River, Oregon, in the sum of \$3,500, to be paid to the said C. J. Chaffee, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated the 18th day of July, A. D. 1911. The conditions of this obligation are such that if the above-bounden obligor shall, on or before the 20th day of July, A. D. 1916, make, execute, and deliver unto the said C. J. Chaffee (provided that the said C. J. Chaffee shall on or before that day have paid to the said obligor the sum of \$2,500 gold coin of the United States of America, together with interest thereon at the rate of 7 per cent. per annum, payable semiannually, in like gold coin, at the Butler Bank, Hood River, Oregon) a good and sufficient deed of all the certain lot, piece, or parcel of land situated in the county of Hood River and state of Oregon and bounded and described as follows, to wit: Beginning at a point one rod south from the northwest corner of the southeast quarter of section sixteen in township two north, range ten east of the Willamette meridian; running thence south 25 rods; thence east 32 rods; thence north 25 rods; and thence west 32 rods to the place of beginning, containing five acres. Also a strip of land about one rod wide and 32 rods long along the north line of the above-described tract (being a strip of land lying between the above-described tract and the center section line running east and west), to be used for road purposes; and also a right of way along the north line of tract first above described for irrigation ditch, or flume, or pipe line—and shall thereby convey the title in fee simple of said premises free and clear of all incumbrances to the said C. J. Chaffee, then this obligation shall be void; otherwise to remain in full force and virtue. Electa H. Lyons. [Seal.] Elmer E. Lyons. [Seal.]"

The complaint alleged nonpayment of two installments of interest, and prayed that defendant's interest in the property be foreclosed. There was a general demurrer to the complaint, which was overruled, and the defendant given ten days in which to answer. It incidentally appears that an answer was filed and testimony taken, but the answer is not brought up; defendant depending here upon the sufficiency of his demurrer. There was a decree for plaintiff. The defendant, being dissatisfied, appeals.

S. W. Stark, of Portland, for appellant.
George R. Wilbur, of Hood River, for respondent.

McBRIDE, J. (after stating the facts as above). [1] The bond for a deed transferred the equitable title in the property to defendant, leaving in the vendor the legal title as security for payment of the purchase price and interest according to its terms. Knott v. Stephens, 5 Or. 235, 240; Burkhart v. Howard, 14 Or. 39, 12 Pac. 79; Security Savings Co. v. MacKenzie, 33 Or. 209, 52 Pac. 1046; Coles v. Meskimen, 48 Or. 54, 85 Pac. 67; Flanagan Estate v. Great Central Land Co., 45 Or. 335, 77 Pac. 485; Wollenberg v. Rose, 41 Or. 314, 68 Pac. 804; Miles v. Hemenway, 59 Or. 318, 111 Pac. 696, 117 Pac. 273.

[2] The instant case is not a suit to rescind

a contract, but to foreclose plaintiff's lien upon the property, or rather to foreclose defendant's equitable title on account of noncompliance with the contract. This distinction is noted in Security Savings Co. v. MacKenzie, supra, where it is held unnecessary for the vendor to tender a deed and demand the purchase price as a condition precedent to maintaining a suit of this character:

"It is claimed that the complaint should be dismissed, because there is neither allegation nor proof that plaintiffs * * * ever offered to perform their part of the contract. A sufficient answer to this contention is that the case at bar is neither a suit for the specific performance of the contract nor for the rescission or cancellation thereof, but one to enforce the right of the vendor to have the equitable interest of the vendee barred and foreclosed; and, while in such case there is a conflict in the authorities, it is believed to be the better rule that a failure to tender performance before suit is no defense."

[3] Plaintiff's lien upon the property, while not strictly a mortgage, is a lien in her favor in the nature of a mortgage upon defendant's interest in the property; and, defendant's contract being broken by a failure on his part to pay the installments of interest, by analogy to the statute for the foreclosure of mortgages and other liens upon real property (section 430, L. O. L.), we think it was competent for the court to require the payment of the whole purchase price as a condition of avoiding the effects of a foreclosure. Such seems to be the rule in suits for strict foreclosure to enforce vendor's liens to which this proceeding is analogous. Gray v. Hill, 105 Mich. 189, 63 N. W. 77; Dellinger v. Foltz, 93 Va. 729, 25 S. E. 998; Harrington v. Birdsell, 38 Neb. 176, 56 N. W. 961. Strict foreclosure is a matter resting in the sound discretion of the court, which may impose such equitable restrictions as it deems proper upon the right to redeem. We do not think that it was inequitable to require the defendant to discharge the whole debt and thereby obviate the probable necessity of plaintiff bringing a second suit when the subsequent payments become due.

The decree is affirmed.

MOORE, C. J., and BURNETT and BENSON, JJ., concur.

(12 Okl. Cr. 255)
JONES v. STATE. (No. A-2141.)

(Criminal Court of Appeals of Oklahoma. Feb. 7, 1916.)

(Syllabus by the Court.)

1. HOMICIDE \Leftrightarrow 307—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS—EVIDENCE.

In a prosecution for assault with intent to kill, it was not incumbent on the court to charge the law of assault with intent to do bodily harm, or assault and battery, when, under the evidence, the defendant was either entirely innocent of any offense whatever, or was guilty of an assault with intent to kill.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 638-641; Dec. Dig. \Leftrightarrow 307.]

2. CRIMINAL LAW §24 — PRESUMPTION — NATURAL CONSEQUENCES OF ACTS.

When the intent is the gist of the crime, the presumption that every sane man contemplates, and intends, the natural and probable consequences that necessarily result from his acts and conduct, though a very important circumstance in making the proof necessary, upon this point, is not conclusive, nor alone sufficient to convict, and should be supplemented by other evidence to avoid a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 26, 27; Dec. Dig. §24.]

3. CRIMINAL LAW §1159 — APPEAL — VERDICT—CONFLICTING EVIDENCE.

Where the evidence is conflicting, and that on the part of the state such that, if believed by the jury, a verdict of guilty should result, a conviction will not be set aside on the ground that it is not warranted by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. §1159.]

Appeal from District Court, Okmulgee County; Wade S. Standfield, Judge.

Joe Jones was convicted of assault with intent to kill, and appeals. Affirmed.

Eaton & Cowley, of Okmulgee, and Crump & Crump, of Muskogee, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, J: The plaintiff in error, Joe Jones, herein referred to as "defendant," was convicted at the district court of Okmulgee county during the June, 1913, term thereof, on a charge of assault with intent to kill, and his punishment fixed at imprisonment in the state penitentiary for one year and one day.

It appears that defendant and the assaulted party, L. J. Pounds, were farmers living in the neighborhood of the Salt Creek schoolhouse in Okmulgee county. The assaulted party was the constable of that township. On the 22d day of December, 1911, in the evening of that day, certain Christmas exercises were held at that schoolhouse for the benefit and amusement of the children of that neighborhood. The constable was requested to be present in order to preserve order, and he did attend. Defendant also attended, together with certain members of his family, among whom was his son, Ernest Jones. After the exercises had been going on for some time, Ernest Jones and the young man who was with him created a disturbance in the room, and the constable went to them and admonished them to be quiet. The disturbance subsided for a short time, but was afterwards renewed by the parties, and the constable went to them and started to put them out of the house. During his attempt to eject Ernest Jones from the room, Joe Jones, father of Ernest, assaulted Pounds.

The testimony on the part of the state tended to show that the constable had Ernest Jones with his arms around him and was at the rear of Ernest, pulling him out backwards; that he was making no effort to

strike or in any way mistreat him; that defendant, Joe Jones, was in another part of the room and started to the place where the constable and Ernest were, pulling a knife out of his pocket as he went, and making certain threats against the constable. He rushed up to the scene of the assault, as the state's witnesses testified. He reached around his son and stabbed the constable in the back with a knife, the blade of which was three inches or more in length, inflicting a wound that penetrated into the lung, causing hemorrhage from the lung, and confining the constable to his bed for some period of time.

As a witness in his own behalf, the defendant denied that he stabbed the constable at all, and his witnesses testify that they did not see him stab him, nor did they see a knife in his hands at the time. The defendant admits that he went to the scene of the difficulty, but says that his only purpose was to separate his son from the constable and to restore order.

The constable, Pounds, died in the February following, but there is no evidence to show whether his death was the result of the wound inflicted on this occasion. Prior to his death, however, a preliminary examination was held, and his testimony was reduced to writing. The physician who attended the deceased testified that the wound was inflicted in a vital spot on the deceased's body, and that it was a serious and probably fatal wound.

The evidence was uncontradicted on part of the defendant. The jury found by their verdict that the weapon used was a deadly weapon.

[1] The first assignment of error is based upon the proposition that the court erred in refusing to submit to the jury the question of an assault with a sharp and dangerous instrument with the intent to do bodily harm, and, also, simple assault and battery. Justifying this contention, counsel contends that the doctrine in *Clemons v. State*, 8 Okl. Cr. 452, 128 Pac. 739, is conclusive. In this counsel is in error, for the reason that the proof in the *Clemons* Case failed to show that the weapon used was a deadly weapon *per se*, and the jury's verdict was silent on that point. In the case at bar the jury specifically found that the weapon used was a deadly weapon. The doctrine of the *Clemons* Case is not applicable to the facts in this record. Where there is evidence that might tend to lessen the offense, or to reduce the crime to a degree lower than that charged in the indictment, or information, it is the duty of the trial court at all times to fully instruct the jury as to the law upon such lower degrees, or included offense. But where there is no evidence to support such lower degree, or included offense, it is not only unnecessary to instruct thereon, but the court has no right to ask the jury to con-

sider such questions. In the case at bar, if the evidence of the state is to be believed, this plaintiff in error was guilty of assault with intent to kill—and nothing less. Upon the other hand, if his testimony must be believed—that is, testimony offered by him in his defense—then he was guilty of no crime whatever. The jury found that he was guilty of assault with intent to kill; and we believe, correctly so. See, also, *Simms v. State*, 4 Tex. App. 144; *State v. Robb*, 90 Mo. 30, 2 S. W. 1; *State v. Doyle*, 107 Mo. 36, 17 S. W. 751; *State v. Barton*, 142 Mo. 450, 44 S. W. 239.

[2, 3] The next assignment of error is based upon the proposition that the court erred in giving the following instruction to the jury:

"The jury are instructed that on the question of intent the law presumes a person intends all the natural, probable, and usual consequences of his acts, and this presumption of law will always prevail unless, from a consideration of all the evidence bearing upon the point, the jury entertains a reasonable doubt as to whether such intent did exist."

This instruction is not a correct statement of the law applicable to the case at bar. When the intent is the gist of the crime, the presumption that every sane man contemplates and intends the natural and probable consequences that necessarily result from his acts and conduct, though a very important circumstance in making the proof necessary, upon this point, is not conclusive, nor alone sufficient, to convict, and should be supplemented by other evidence to avoid a reasonable doubt. It is therefore incumbent upon the state to prove, as a matter of fact, not only that the act itself was done, but also that the defendant at the time that he did the same had the specific intent in mind which is required to constitute the crime of assault with intent to kill. We do not feel warranted, however, in reversing this judgment on the ground that this instruction is erroneous, for the reason that the court gave other instructions on the question of intent, which clarified the matter to a great extent, and, in effect, took away from the jury the presumption that this instruction told them was the rule, which they could entertain as a matter of law.

The Legislature of this state has enacted a statute providing that a new trial shall not be granted by any appellate court of this state, in any cause, civil or criminal, on the ground of a misdirection of the jury, unless in the opinion of the court in which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional right. We cannot say, after a careful examination of this record, that plaintiff in error was deprived of any substantial right, or that a

miscarriage of justice resulted in this case. In fact, we are thoroughly of opinion that a miscarriage of justice would result if a new trial should be awarded and this plaintiff in error not convicted.

There are other minor irregularities complained of, but we are unable to find from a full and complete examination of the record that error substantially prejudicial was committed.

It is therefore the judgment of this court that the judgment of the trial court should be affirmed. And it is so ordered.

DOYLE, P. J., and FURMAN, J., concur.

(21 N. M. 330)

THAYER v. DENVER & R. G. R. CO.
(No. 1804.)

(Supreme Court of New Mexico. Jan. 31, 1916.
On Motion by Appelles to Require Clerk
to Issue Mandate, Feb. 11, 1916.)

(Syllabus by the Court.)

1. PLEADING \S 420 — AMENDMENT — OBJECTION—WAIVER.

An objection to the allowance of an amendment should be made when leave to amend is asked, and, in order to avail himself of error in granting the amendment, the party objecting should stand on the ruling, since he waives the objection by pleading to the amendment, by going to trial thereon, or by otherwise recognizing the amended pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1408-1412; Dec. Dig. \S 420.]

2. NEGLIGENCE \S 11—"WILLFUL INJURY"—"INJURY FROM NEGLIGENCE."

A "willful injury" is a positive act, while an "injury resulting from negligence" is a negative act, resulting from the absence of such care as it was the duty of the defendant to use.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. \S 11.]

For other definitions, see Words and Phrases, First and Second Series, Willful Injury.]

3. NEGLIGENCE \S 11—NATURE OF ACTION—WILLFULNESS.

Negligence, whether slight, ordinary or gross, is still negligence, and is negative in its nature implying the omission of duty, and excludes the idea of willfulness. When willfulness is an element in the conduct of the party charged, the case ceases to be one of negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. \S 11.]

For other definitions, see Words and Phrases, First and Second Series, Negligence.]

4. NEGLIGENCE \S 83—LAST CLEAR CHANCE—OPERATION OF DOCTRINE.

The doctrine of "last clear chance" has no connection or relation whatever to an intentional injury. In an action predicated upon the doctrine of "last clear chance" it must appear that plaintiff was negligent, but that such negligence was not the proximate cause of the accident, but that the proximate cause thereof was the negligence or want of due care on the part of the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. \S 83.]

5. NEGLIGENCE \S 117—"PLEA OF CONTRIBUTORY NEGLIGENCE."

The plea of contributory negligence is a plea in confession and avoidance, which admits

negligence on the part of the defendant, but seeks to avoid liability therefor by alleging that the plaintiff was guilty of negligence which contributed to his injury, and the plea is bad if it denies that defendant was negligent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. ¶117.]

For other definitions, see Words and Phrases, First and Second Series, Contributory Negligence.]

6. PLEADING ¶180—REPLY TO DEFENSE.

Neither willful injury nor "last clear chance" can be properly pleaded in a reply, by way of confessing and avoiding an answer which sets up contributory negligence as a defense to a complaint based on simple negligence, and, where the reply sets up facts showing a right of recovery under either willful injury or "last clear chance," it is a departure from the complaint and subject to be stricken upon motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. ¶180.]

7. PLEADING ¶180—CAUSE OF ACTION—REPLY.

A party must, under our system of pleading, recover upon the cause of action stated in his complaint, and he cannot recover upon a cause of action stated in his reply.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. ¶180.]

8. PLEADING ¶180—REPLY—"DEPARTURE."

A "departure" in the reply consists in leaving the case made in the complaint or petition in respect to some material matter which is inconsistent with, or which does not support it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. ¶180.]

For other definitions, see Words and Phrases, First and Second Series, Departure.]

9. PLEADING ¶180—REPLY—"DEPARTURE"—DETERMINATION.

One test laid down by the courts for determining the question as to whether a reply constitutes a "departure" from the complaint is determined by a negative answer to the inquiry whether evidence of the facts alleged in the reply is admissible under the allegations of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. ¶180.]

10. TRIAL ¶252—INSTRUCTIONS—SUBMISSION OF ISSUES—EVIDENCE.

An instruction not based on the evidence is erroneous, and should not be given, and, where there is no evidence in a case tending to establish liability of the defendant under the doctrine of "last clear chance," it is error to submit such issue to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ¶252.]

11. EVIDENCE ¶20—JUDICIAL NOTICE—OPERATION OF LOCOMOTIVE.

The manner and method of operating a locomotive engine, the space within which, going at a given rate of speed, it can be brought to a stop, and the proper way to check the speed and bring to a stop a runaway car are not matters of common or general knowledge, and cannot be judicially known by the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. ¶20.]

12. MASTER AND SERVANT ¶264—INJURY TO SERVANT—ASSUMPTION OF RISK—PLEADING AND PROOF.

Where a cause of action is based upon alleged negligence of the master in failing to use due care in seeing to it that the brake upon a

box car which the servant is instructed to run down the switch to a designated point, and there stop by applying the brake, is in proper repair, and the master has pleaded "assumption of risk," it is proper for the servant to prove his lack of experience in such work for the purpose of disproving such defense, as such evidence tends to show that he did not know and appreciate the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. ¶264.]

13. DAMAGES ¶168—PERSONAL INJURIES—PROOF OF DISABILITY.

The physical ability or inability of a person to do work or perform any act may be proved by the direct testimony of the party himself.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 480, 482-486; Dec. Dig. ¶168.]

14. DAMAGES ¶167—PERSONAL INJURIES—EVIDENCE—LIFE EXPECTANCY.

Where, in a personal injury action, there is substantial evidence tending to show that the injuries are permanent, evidence of life expectancy is properly submitted to the jury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 487-489; Dec. Dig. ¶167.]

15. EVIDENCE ¶381—DOCUMENTARY EVIDENCE—MORTALITY TABLES.

It is a generally recognized rule that mortality tables, as published in standard encyclopedias, are admissible in evidence without further proof of their authenticity. *Held*, that the table of mortality based on American experience, found at page 885, vol. 20, Am. & Eng. Ency. of Law, was properly submitted to the jury without further or other proof.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. ¶381.]

16. MASTER AND SERVANT ¶265—INJURY TO SERVANT—ASSUMPTION OF RISK—BURDEN OF PROOF.

Where an answer on its face shows that the injury received was in consequence of a risk not ordinarily incident to the employment which grew out of the master's negligence, the burden is upon the master to show that the servant knew and understood the increased danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. ¶265.]

17. MASTER AND SERVANT ¶101, 102—SAFE PLACE AND APPLIANCES—DUTY OF MASTER.

Under the common law the limit of the duty of the master to the servant in the matter of place of service, of machinery, and of appliances is to exercise ordinary care to furnish him with a reasonably safe place to work and reasonably safe appliances, and to use ordinary care to keep the place and appliances in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. ¶101, 102.]

18. MASTER AND SERVANT ¶111—EQUIPMENT OF CARS—DUTY OF RAILROAD COMPANY—FEDERAL SAFETY APPLIANCE ACT.

Where the federal Safety Appliance Act of Congress (Act April 14, 1910, c. 160, § 2, 36 Stat. 298 [U. S. Comp. St. § 8618]) controls, the duty upon the part of a railroad company to equip its cars with and maintain efficient hand brakes thereon is absolute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215-217, 255; Dec. Dig. ¶111.]

On Motion by Appellee to Require Clerk to Issue Mandate.

19. APPEAL AND ERROR —1189—ISSUANCE OF MANDATE—PAYMENT OF COSTS.

Rule 15 of this court (154 Pac. xxxviii), adopted July 15, 1915, construed. *Held*, that it is the duty of the clerk to issue a mandate, upon request of either party, where all the costs have been paid by either party, and that he has no right to withhold such mandate where its issuance is requested by an appellee against whom judgment for costs has been entered in this court, until such appellee pays and satisfies such judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4644; Dec. Dig. —1189.]

Parker, J., dissenting.

Appeal from District Court, Santa Fe County; E. C. Abbott, Judge.

Action by Fred Thayer against the Denver & Rio Grande Railroad Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions, and issuance of mandate ordered.

In September, 1912, the appellee, with others, was employed by the appellant company at Santa Fe, N. M., to work at Delta, Colo., icing refrigerator cars. On the evening of the 6th of September, 1912, the ice house was opened, and certain cars which had been standing up above the ice house switch were placed in position for icing. The first car iced was a fruit grower's express car, No. 22445. One Jenkins was the foreman in charge of the night gang. The appellee commenced working about 7 o'clock that evening, and was working inside the first car, attending to the placing of the ice in the proper receptacles. After the first car was iced, the foreman, Jenkins, called one of the men, Santiago Quintana, and told him to take a torch and go down the ice house switch (which has a grade of about one-half of 1 per cent.) and stand about 20 yards back from the switch for the purpose of signaling the place for the car to be stopped. After Quintana had started down the switch, the foreman told the plaintiff to go up on top of the car and ride it down the switch track, stopping it at the point where he saw the light. The plaintiff asked no instructions from the foreman, nor did the foreman give him any instructions other than those stated; that is, to go up on top of the car and ride it down to the switch, stopping it at the point where he saw the light. The appellee got on top of the car, "kicked out the clipper," and found that the brake was loose, and turned the wheel back and forth; appellee's testimony being to the effect that the brake was not set when he got on the car. Some of the men removed a wooden block from in front of the car, and with pinch bars started the car downgrade. The distance from the switch stand to the point where the first car was iced was 1,100 feet. After appellee mounted the car as testified to by him, he made no

effort to set the brake until he rode to within a distance of about 25 yards from where Quintana was standing with the light. Then he tried to put on the brake to stop at that point, but could not stop the car, as the brake would not catch. After he passed Quintana, he called to Quintana to get up and help him. Just at this moment he looked back and saw an engine approaching this car. He saw his safety could only be secured by holding onto the brake, which he did until the engine and car collided. From the effects of the shock he was thrown off on the left-hand side of the track, and sustained a broken leg, his face was cut and bruised, his teeth knocked loose, his jaw on one side affected, and his hearing injured. He was picked up by either the engineer or the brakeman, placed on the rear of the engine, and carried to the depot, from 1,200 to 1,500 feet down the track. After remaining there a while, he was taken to a hotel, and the next day taken to the railroad hospital at Salida, Colo., where he remained about ten days, and was then discharged, returning to his home in Santa Fe. He testified at the time of the trial that his leg had not recovered; that he still suffered pain at the point of the break; that his hearing was gradually growing worse; and that he was not able to chew on the side of his jaw that was injured.

And the appellee further testified that at the moment he first saw the engine the rear of the engine was advancing toward the car on which he was riding. The collision occurred just east of the switch stand upon the main line. The car upon which appellee was riding had come down off the ice house switch, running through the switch point onto the main line.

There is a conflict in the testimony of the engineer and brakeman and appellee as to the direction in which the engine was headed. Appellee testified that the engine was headed east, so that the rear of the engine tank collided with the car upon which he was riding. The engineer and brakeman testified that just prior to the accident they had come in from the east, and that their engine was headed west toward the ice house, and that just prior to the accident they had been setting out the train which they had just run in from the east. The engineer further testified that just prior to the accident he had set out a portion of the train upon another switch, and had pulled out of the switch up to the main line and beyond the switch stand on the ice house switch, and had reversed his engine, and was backing down the main line to couple onto his caboose, which he had left standing in front of the depot. He was sitting in the cab on the right-hand side of the engine, which would be next to the ice house switch. Just after he had reversed and started back he saw the car coming down the ice house

switch in the same direction in which he was going, and at the same moment he heard a man "yell," but saw no one. He instantly realized that he would not have time to again reverse his engine and pull out of the way of the car, because before he could stop his engine the car would have "side swiped," and probably have killed him. He instantly opened up the throttle and backed down the track ahead of the car, passing the switch stand point just in time to avoid being hit by the car. After getting in ahead of the refrigerator car, he slowed down and let the refrigerator car catch up with him and stopped both the car and his engine. The shock of the collision was sufficient to knock appellee off the top of the car when the car collided with the engine. The engine had an ordinary headlight, but did not throw any light upon the top of the approaching car so that the engineer could see any one upon the car. When he first saw the car the front end of the same was practically opposite where he was sitting in the cab.

Upon the trial a witness, Abel Benavides, testified that prior to the icing of the car he went up above the ice house and rode the car down and spotted it in front of the ice house, using the brake, and that when the car was spotted he set the brake. On the other hand, appellee testified that the brake was not set when he mounted the car and attempted to release it. After the accident this car was pushed up on the switch and blocked by the brakeman. Within less than an hour thereafter the car was picked up by an outgoing train and carried to Grand Junction, some 50 miles distant. This particular car reached Grand Junction within less than four hours after the accident, and was there inspected, but the testimony of the inspector shows that he did not try the hand brakes at all, that his inspection lasted about one and a half minutes to the car, but he testified that his inspection showed that the brake rigging on this car was in good shape.

The evidence shows that appellee remained on crutches until December 2, 1912, and that since said date he has worked at various jobs. Upon the trial of the case, over the objection of the defendant, the court submitted to the jury both the issue of primary negligence and the "last clear chance" rule. The jury returned a verdict in favor of appellee for \$5,000. Motion for a new trial having been overruled, judgment was entered accordingly, from which judgment defendant prayed this appeal.

Renehan & Wright, of Santa Fé, and E. N. Clark, of Denver, Colo., for appellant. Edward P. Davies and Catron & Catron, all of Santa Fé, for appellee.

ROBERTS, C. J. (after stating the facts as above). [1] The first question discussed by counsel for appellant is the action of the

trial court in permitting appellee to file an amended complaint. The amended complaint was filed by leave of court, over appellant's objection, at the conclusion of appellant's case in chief upon the first trial of this case. This appeal is from a judgment rendered upon a retrial of the cause, and appellant concedes that the amendment stands in the same light as though made prior to the trial. We are favored by a very able and thorough discussion of the question as to whether the original complaint stated a cause of action, it being appellant's contention that it did not, and, failing so to do, the court had no power to permit an amended complaint to be filed which did state a cause of action. This question, although very interesting and one upon which much disagreement is to be found in the adjudicated cases, is not before us for consideration, because of the fact that appellant elected not to stand upon his objections to the filing of the proposed amended complaint, but answered the same, and proceeded to trial thereupon. This being so, it waived the alleged error by pleading to the amendment.

In 31 Cyc. 751, it is stated:

"An objection to the allowance of an amendment should be made when leave to amend is asked, and in order to avail himself of error in granting the amendment the party objecting should stand on the ruling, since he waives the objection by pleading to the amendment, by going to trial thereon, or by otherwise recognizing the amended pleading."

The text is sustained by numerous cases. See, also, to the same effect, 1 Ency. Pl. & Pr. 573; *McAdow v. Kansas City Western Ry. Co.* (Mo. App.) 164 S. W. 188; *Rice v. Norfolk-Southern R. Co.*, 167 N. C. 1, 82 S. E. 1034; *American Home Circle v. Schneider*, 134 Ill. App. 600; *Kansas City Southern Ry. Co. v. Tonn*, 102 Ark. 20, 143 S. W. 577.

[2] 2. In the amended complaint, upon which the case was tried, appellee alleged facts showing that the brake apparatus with which the car was equipped, which car he was instructed to ride down the switch track and stop at the designated point, was defective, that by reason of such defects so alleged to exist he was unable to stop the car, and that it ran down upon the main track, where it collided with an engine. It will be noted that the defective brake was alleged to have been the proximate and sole cause of the accident by which plaintiff was injured. To this complaint appellant filed an answer in three counts. The first count was a general denial. The second count was as follows:

"Defendant denies that the injuries alleged to have been received by plaintiff, if any injuries were by him received, were due to or owing to or caused by any negligence or want of care or caution on the part of the defendant, but, on the contrary, defendant alleges that such alleged, or any, injuries were due to or caused by the negligence, want of care, and caution on the part of the plaintiff himself."

The third count pleaded assumption of risk. To this answer appellee filed a reply in which he first denied generally all the allegations of new matter pleaded in the answer, and then, by way of an alternative further reply, he set up the following facts:

"(a) That, were all the matters and facts of new matter pleaded in defendant's answer true, that still the defendant, through its employes and agents, knew and realized the dangerous position of the plaintiff, and, knowing and realizing such dangerous position of the plaintiff, failed to use due care to avoid the collision which resulted in the accident and injury to the plaintiff.

"(b) That it was the duty of the defendant and its agents and servants and employes to know of the dangerous position of the plaintiff, and, knowing the same, to have avoided it.

"(c) That the defendant, through its agents and employes, knowing of the danger of the plaintiff, not only did not avoid the collision, but deliberately caused the same."

Appellant objected to the filing of the reply upon two grounds: First, that it was not filed in apt time; and, second, that it was a departure from the complaint. The objections were by the trial court overruled, and the reply was filed.

It will be noted that the reply attempts to set up in the same count both "last clear chance," or "supervening negligence" and willful injury. This evidently was occasioned by reason of the pleader's failure to appreciate the distinction which exists between a willful injury and an injury due solely to inadvertence, or, in other words, an injury occasioned by the negligence of a party owing to another exercise of due care and caution. A willful injury is a positive act, while an injury resulting from negligence is a negative act, resulting from the absence of such care as it was the duty of the defendant to use. An examination of the cases dealing with the subject of negligence will disclose the fact that much confusion exists in regard to the question of the varying degrees, so termed, of negligence.

[3] 3. Many of the courts classify negligence into three degrees, viz., slight, ordinary, and gross, and in many instances use the terms "gross negligence" and "willful tort" interchangeably and as synonymous terms. In many states the Legislature has, by statute, adopted the three degrees, and has defined each degree. In the absence of statute, however, there is no warrant for any such classification. Actionable negligence has no degrees. The true rule was announced by the Supreme Court of Indiana in the case of *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 293, 48 Am. Rep. 719, where the court said:

"Negligence, whether slight, ordinary, or gross, is still negligence. * * * Negligence is negative in its nature, implying the omission of duty, and excludes the idea of willfulness. * * * When willfulness is an element in the conduct of the party charged, the case ceases to be one of negligence."

See, also, to the same effect, *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Milwau-*

kee & St. Paul Ry. Co. v. Arms, 91 U. S. 489, 23 L. Ed. 374; *Chicago, R. I. & P. Ry. Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 3 Ann. Cas. 42. In the case last cited the question is ably discussed, with copious quotations from the adjudicated cases and text-writers. The court quotes with approval the following from the *American & English Encyclopedia of Law*, vol. 21, p. 459:

"While not infrequent references are still found in judicial discussions of the subject to the classification of negligence into degrees, the tendency of modern authority and the weight of the best-considered cases are now opposed to this view, holding that in every case negligence, however described, is merely a failure to bestow the care and skill which the situation demands, and hence it is more accurate to call it simply negligence. Some decisions even go further, and declare that the classification of negligence into degrees is a matter of pure speculation and of no practical consequence, that it is useless and tends to confusion, and that, in fact, it is unsafe to base any legal decision on distinctions in the degree of negligence."

The distinction between negligence and willful tort was pointed out by this court in the case of *Wood v. Sloan*, 148 Pac. 507, L. R. A. 1915E, 766.

[4] 4. The doctrine of "last clear chance" has no connection or relation whatever to an intentional injury. If an injury is intentionally and purposely inflicted, the question of negligence does not enter into the inquiry or have any bearing whatever upon the injured party's right to recover damages. Contributory negligence on the part of the injured party likewise is relegated from the case; for in such cases it matters not how negligent or careless the injured party may have been, if the defendant willfully and intentionally inflicts injury upon him, he is liable and should respond in damages. On the other hand, where liability is predicated upon an injury inflicted upon one guilty of negligence by which he is placed in a perilous position, yet his perilous position is discovered by another, or by the exercise of due diligence the peril of the other should have been discovered, such party is bound to use reasonable care to avoid the injury. Where an action is predicated upon an omission of duty, in such a case it properly belongs to and is classified in the field of negligence. To such an action contributory negligence on the part of the plaintiff, which continues concurrently with the negligence of the defendant and contributes proximately to the injury, is a valid defense. In other words, in an action predicated upon the doctrine of "last clear chance," it must appear that plaintiff was negligent, but that such negligence was not the proximate cause of the accident, but that the proximate cause thereof was the negligence or want of due care on the part of the defendant.

In the present case the parties have treated the reply as proceeding only upon the theory of "last clear chance," and, such be-

ing the case, this court will proceed upon the same assumption.

[5] 5. This brings us to the inquiry as to whether the reply was a departure from the complaint. Appellee argues that the appellant, in his second defense, quoted supra, set up contributory negligence on the part of plaintiff, as a defense to his complaint, and that his reply amounted to nothing more than a confession and avoidance of that defense. In this he is in error: First, because the answer did not set up contributory negligence; and, second, "last clear chance" is not a defense to contributory negligence.

As to the first question it will be observed that the defendant denies that he was guilty of any negligence or want of care, and alleges that the injury was "due to or caused by the negligence, want of care and caution on the part of the plaintiff himself." This amounted to no more than a general denial of the plaintiff's complaint, and did not require a reply.

In 29 Cyc. 583, it is said:

"An answer amounting to no more than a denial of defendant's negligence and that it was wholly caused by the negligence of the plaintiff does not require a reply."

In volume 5, Am. & Eng. Ency. Pl. & Pr. p. 11, the rule is stated as follows:

"The plea of contributory negligence is a plea in confession and avoidance, which admits negligence on the part of the defendant, but seeks to avoid liability therefor by alleging that the plaintiff was guilty of negligence which contributed to his injury, and the plea is bad if it denies that defendant was negligent."

In the case of *Watkins v. Southern Pacific Co.* (D. C.) 38 Fed. 711, 4 L. R. A. 239, the court, in considering a similar answer, said:

"This defense confesses nothing, but avers that the defendant was not guilty of negligence, and that the injury sustained by the plaintiff was wholly owing to his own negligence. As I have said, it amounts to nothing more or less than another denial of the allegation in the complaint that the injury in question was not caused by the fault or negligence of the plaintiff [defendant]."

In the case of *Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940, the answer was in almost the same identical language as in the one now under consideration. The court said:

"It goes without saying, then, that an answer which denies any negligence on the part of the defendant, and alleges that the injury resulted wholly from plaintiff's negligence, does not plead contributory negligence; and the defendant, having failed to plead contributory negligence, cannot rely upon it, unless," etc.

In the case of *Wastl v. M. U. Ry. Co.*, 24 Mont. 159, 61 Pac. 9, the court said:

"Obviously, therefore, the negligent acts of plaintiff and defendant must concur and operate together, each contributing proximately to cause the injury complained of. If this condition does not exist, then there is no question of contributory negligence."

In the case of *Payne v. C. & A. Ry. Co.*, 129 Mo. 405, 31 S. W. 885, the court, after quoting Mr. Beach's definition of "contributory negligence," said:

"If the negligence of either plaintiff or defendants is the sole cause of the injury, there could be no contributory negligence in the case."

In further support of our position see the following cases: *Cogdell v. Wilmington & Weldon Ry. Co.*, 132 N. C. 852, 44 S. E. 618; *Benjamin v. Railroad*, 245 Mo. 598, 151 S. W. 91; *Cain v. Winterstein*, 144 Mo. App. 1, 128 S. W. 274; *Ramp v. Met. Street Ry. Co.*, 133 Mo. App. 700, 114 S. W. 59; *Felton v. Aubrey*, 74 Fed. 350, 20 C. O. A. 436; *H. & T. C. R. R. Co. v. Patterson*, 20 Tex. Civ. App. 255, 48 S. W. 747; *Scattergood v. Ingrain*, 86 Ohio St. 76, 98 N. E. 923.

[8] 6. But, as both parties evidently treated this count of the answer as setting up the defense of contributory negligence, we will so assume, and proceed to a consideration of the second point. Appellee, in his brief, quotes from the text of 29 Cyc. p. 583, and by inserting the bracketed words shown below assumes that "willful negligence" and "last clear chance" are synonymous terms. The text quoted is as follows:

"Willful negligence of defendant [last clear chance] which, notwithstanding the negligence of plaintiff's intestate [contributory negligence] resulted in injury, must be pleaded by the reply, to be available to overcome a defense of contributory negligence, and is not inferentially pleaded by a general denial of contributory negligence without such affirmative allegations."

The text quoted is supported only by one case, if that case can be said to so decide, viz., *Ford v. Chicago Ry. Co.*, 106 Iowa, 85, 75 N. W. 650. In that case the reply to the defense of contributory negligence was a general denial, and the trial court instructed on the theory of "last clear chance." The only question before the court was as to whether, under the pleadings, this instruction was proper, and the court correctly held that it was not, as no such issuance was made by the pleadings. The court was not called upon to decide whether this should have been pleaded in the complaint or the reply, and what was said upon this point may be considered as obiter. Just what is intended by the term "willful negligence," employed in the text quoted, is not clear, but whether it was intended to mean willful and intentional injury, or, as appellee assumes, "last clear chance," is wholly immaterial, as a brief consideration will show.

On the assumption that it means a willful tort purposely and intentionally inflicted, it must be remembered that a cause of action based upon negligence and one predicated upon a willful tort are quite different and distinct. In the former the element of intentional wrong does not enter, but it proceeds upon the theory that the injury was occasioned by reason of some inadvertence on the part of the defendant in a situation where due care and diligence were owing to the plaintiff. In such an action the proximate cause of the injury must necessarily be the inadvertence of the defendant; otherwise there could be no recovery. To an ac-

tion of this character a defendant may plead contributory negligence on the part of plaintiff which, concurring and co-operating with defendant's negligence, proximately contributed to the injury, and, if such fact be proved, it will defeat a recovery. In such a case, looking only to the ground upon which the plaintiff bottoms his right to recover, it must be apparent that the inquiry would be limited to the question as to whether the agency which the plaintiff alleges was responsible for his injury was solely responsible therefor, or did some act or omission on the part of the plaintiff which, under the circumstances, he should have refrained from doing, or should have done, enter into and directly and conjointly with defendant's act or omission produce or cause the resulting injury. If some other act of omission or commission on the part of the defendant caused the injury, how can it be logically said that such other act, if pleaded and proved, would avoid the concurring negligence of the plaintiff, and permit him to recover upon the complaint? If the facts set forth in his complaint are met and counterbalanced by the proof of contributory negligence, that must be an end to that act of negligence on the part of the defendant. If some subsequent negligent or willful act on the part of the defendant intervenes, and is the active, moving, and proximate cause of the injury, without which the same would not have occurred, it must be true that the right of recovery would rest solely upon such last negligent act or willful tort without further relation to the original negligence of either party, save as such prior negligence might be shown as a fact in the case, for the purpose of explaining how the plaintiff came to be in the situation he was at the time of the injury, where his right of recovery is based upon the theory of "last clear chance" or "willful tort."

In an action based upon an intentional and willful injury, as stated, it matters not how careless and negligent the plaintiff may have been, as such carelessness and negligence on his part would not justify the defendant in inflicting upon him an intentional injury. In such a case the wrong complained of is the injury purposely inflicted, to which the prior negligence of either party has no relation, except perhaps to explain the plaintiff's presence at the place of the infliction of the injury. In such a case the party would not base his right to recover upon any negligence or want of care on the part of defendant which might have been the remote cause of the injury, but upon the willful wrong of the defendant which was the proximate cause thereof.

If it be taken for granted that the Iowa court held that "willful injury" could be pleaded in a reply, in confession and avoidance of an answer alleging contributory negligence, direct authority to the contrary is afforded by the Supreme Court of Alabama.

In the case of *Louisville & Nashville Railroad Company v. Markee*, Adm'r, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21, the court said:

"It would also seem on principle that, if there is that variance between simple negligence and wanton or willful injury that proof of the former will not sustain a complaint charging the latter, a replication to a plea of contributory negligence averring willful and intentional injury would be a departure from a complaint charging simple negligence."

In the case of *Alabama Great Southern Railroad Co. v. Hall*, Adm'r, 105 Ala. 599, 17 South. 176, the complaint counted on simple negligence; the defendant pleaded contributory negligence. To this plea the plaintiff replied that the engineer was guilty of "gross, wanton, and reckless negligence in running the engine at too great a rate of speed." The court said:

"If by the replication it was intended to aver no other than simple negligence, as charged in the complaint, the replication did not answer the plea. On the other hand, if the replication averred wanton or willful wrong, the replication was a departure from the original cause of action, and upon objection should have been rejected."

See, also, *George v. Mobile & Ohio R. R. Co.*, 109 Ala. 245, 19 South. 784.

On the other hand, if we assume that the reply attempts only to set up the doctrine of "last clear chance," appellee's position is not improved. It is not true, as argued by appellee, that "last clear chance" is a defense to contributory negligence, and can only be properly pleaded in a reply to an answer setting up contributory negligence as a defense. Contributory negligence, as stated, is as valid and complete a defense to an action founded upon that doctrine as it is in any other branch of the law on negligence, where such contributory negligence of the plaintiff continued concurrently with the negligence or want of care on the part of the defendant, and, together with the negligence of the defendant, contributed to the proximate cause of the injury, and without which the accident would not have resulted. Where the negligence of the plaintiff continues up to the very moment of the injury and is contemporaneous and concurrent with the negligence of the defendant; and where the exercise of reasonable diligence before the injury would have warned the plaintiff of his danger and have enabled him to escape by his own efforts, there can be no recovery. Take, for example, the facts in the present case. Suppose the defendant could show that after the car upon which plaintiff was riding was upon the main track plaintiff saw the engine approaching, and he could by the exercise of due care, have stepped off the car without danger of injury to himself, and he neglected to do so, he would have no right to recover. Of course, if the plaintiff could show that he was unconscious of the threatened danger in time to have avoided the injury, and that the de-

defendant actually saw or knew of the danger to which the plaintiff was exposed, and also knew or should have known that the plaintiff was unconscious thereof, and the defendant failed to use due diligence to avoid the injury, the plaintiff would be entitled to recover. *Union Traction Co. v. Bowen*, 57 Ind. App. 661, 103 N. E. 1096.

Appellee mistakenly assumes that his right to recover is based upon the primary negligence of the defendant in putting him to work upon a car equipped with a defective brake; whereas, if the matters set up in the answer are true, and likewise the allegations of the reply are also true, then his cause of action must necessarily be predicated upon the negligence of the engineer in failing to use due care to avoid running his engine into the car upon which appellee was riding. In such case the negligence of the engineer was the sole, proximate cause of the accident, and the antecedent negligence of the defendant and the plaintiff was the remote cause of the remote events which co-operated to bring the plaintiff into the perilous position where he was injured by reason of the intervening negligence of the defendant. This is clearly evidenced by the cases collected in the case note to *Dyerson v. U. P. R. R. Co.*, 7 L. R. A. (N. S.) 132. See, also, subdivision VIII, note to case of *C. C. C. & St. L. Ry. Co. v. Means*, 5 Neg. Com. Cases, Ann. 101, and note to case of *Bogan v. C. C. R. R. Co.*, 55 L. R. A. 418.

[7] Therefore, if plaintiff recovers in this case, his right to so do, assuming that the allegations of his reply are true, and that he was guilty of contributory negligence in the first instance, as alleged in the answer, must rest upon proof of the facts alleged in his reply; in other words, he must recover upon his reply, and not upon his complaint. It is elementary that a party cannot sue for the breach of one duty and recover for the breach of another. See opinion by Judge Cooley in the case of *F. & P. M. Ry. Co. v. Stark*, 38 Mich. 714.

In this case if the plaintiff is to recover upon the doctrine of "last clear chance," it is apparent that he would be recovering upon his reply, and not upon his original complaint. This he cannot do. Of course, a party may plead any matter by way of reply which avoids the answer, but in such a case the party does not predicate his right to a recovery upon his reply, but simply obviates the effect of the answer interposed to his complaint, and leaves his right of recovery upon the original complaint unaffected by the answer. The reply to an answer setting up contributory negligence, as in this case, to the primary negligence of the defendant, which bases a right of recovery upon the doctrine of "last clear chance," does not avoid the effect of the answer in so far as such primary negligence is concerned, but sets up an independent right of recovery, which

relegates both the primary negligence of the defendant and the contributory negligence of the plaintiff to the background. In other words, the prior negligence of both parties is eliminated as a direct proximate cause of the injury, and the right to recover rests solely upon an altogether new and distinct act of negligence on the part of the defendant, upon which plaintiff must recover, if a recovery is to be had.

That a plaintiff is not entitled to affirmative relief upon a reply is well settled by the adjudicated cases. In the case of *Small v. Kennedy*, 127 Ind. 290, 33 N. E. 674, 19 L. R. A. 337, the court said:

"We have not been cited to any authority, nor do we know of any, holding that affirmative relief may be granted upon a reply. The rule is, as we understand it, that a set-off or counterclaim may be utilized, by way of reply, to defeat any affirmative matter set up by way of answer, but such set-off or counterclaim cannot, by way of reply, be made the subject of a substantive claim upon which a judgment may be based."

In the case of *Moss v. Fitch*, 212 Mo. 484, 111 S. W. 475, 126 Am. St. Rep. 568, the Supreme Court of Missouri quoted with approval the following excerpt from the case of *Crawford v. Spencer*, 36 Mo. App. 78:

"A party must, under our system of pleading, recover upon the cause of action stated in his petition, and he cannot recover upon a cause of action stated in his reply. The provision of the statute above quoted was not, we think, intended to change the office of a reply, which is that of a denial or a confession and avoidance of matter set up in the answer."

And also the following from the case of *Stepp v. Livingston*, 72 Mo. App. 179:

"If it were disclosed by the record that the plaintiff recovered on a cause of action stated in his reply, but not in his petition, it would be our duty to reverse the judgment."

In the same cause the court quoted, with approval, the following excerpt from 18 Ency. Pl. & Pr. 690:

"The plaintiff cannot introduce in his reply a cause of action different from that which he states in his complaint or petition; in other words, he cannot after answer is made abandon the cause of action set up in the complaint and make an entirely new cause of action in the reply."

In the case of *Hastings School District v. Caldwell, Hamilton & Co.*, 16 Neb. 68, 19 N. W. 634, the court quoted with approval the following excerpt from *Maxwell's Code Pleading & Practice*, 108:

"A plaintiff can recover only on the causes of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can be done only by amendment of the petition."

To the same effect see, also, the following: *Plummer, Perry & Co. v. Rohman*, 61 Neb. 61, 84 N. W. 600; *Jones v. Marshall*, 56 Iowa, 739, 10 N. W. 264; *Marder, Luse & Co. v. Wright*, 70 Iowa, 42, 29 N. W. 799; *Eskridge v. Ditmars & Co.*, 51 Ala. 245.

[8] 8. In *Bliss on Code Pleading* (3d Ed.) § 396, the author says:

"A departure in the reply [as at common law] will not be allowed. It consists in leaving the case as made in the complaint or petition in respect to some material matter, in introducing new matter which is inconsistent with, or which does not support it. It will not be permitted in any system which pays the least regard to the logic of pleading. If the plaintiff desires to change his position, he must do so upon leave by amending his original pleading."

Plaintiff is not aided by section 4119, Code 1915, which reads as follows:

"When the answer contains new matter, the plaintiff may, within 20 days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer, and the plaintiff may in all cases demur to the answer containing new matter, where upon its face it does not constitute a counterclaim or defense; and the plaintiff may demur to one or more of such defenses or counterclaims, and reply to the residue of the counterclaims."

Under this section the reply was clearly a departure; for the allegations of the reply are not consistent with the complaint, and do not constitute a defense to the plea of contributory negligence set up in the answer, and permit the plaintiff to recover upon his original complaint.

[9] 9. Another test laid down by the courts for determining the questions as to whether a reply constitutes a departure from the complaint often applied by the courts is determined by a negative answer to the inquiry whether evidence of the facts alleged in the reply is admissible under the allegations of the complaint. 6 Enc. Pl. & Pr. 462; *Mayes v. Stephens*, 38 Or. 512, 63 Pac. 760, 64 Pac. 319; *Swain v. Knapp*, 34 Minn. 232, 25 N. W. 397; *Smart v. Burquois*, 51 Wash. 274, 98 Pac. 666; *Wabash R. R. Co. v. Bymer*, 214 Ill. 579, 73 N. E. 879; 7 Standard Enc. Pro. 119.

In the case of *Smith v. Nichols*, 35 E. C. L. 88, Chief Justice Tindall said:

"The short answer to that objection is that that which is a departure in pleading is a variance in evidence; and, if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure."

And in the case of *Caldwell v. Gale*, 11 Mich. 77, the court said:

"What would not in a replication be a departure in pleading may be given in evidence * * * under the general issue."

A very interesting discussion of the question of departure in pleading will be found in the case of *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983. In the opinion, written by Mr. Justice White, reference will be found to practically all the standard text-books dealing with the subject. True, in that case the departure was "from law to law," while in the present case the departure is "from fact to fact"; still the same principle governs.

It could not be contended with any degree

of logic that the plaintiff in the present case, assuming that the reply had not been filed, could have offered proof of the fact that his injuries were occasioned by reason of the negligence of the engineer in charge of the engine upon the main track, under the allegations of his complaint; for it is well settled that a different cause of injury than the one alleged cannot be proven. 29 Cyc. 583. Now to permit proof of such facts and a recovery upon such proof is to permit the plaintiff to recover for an injury set up for the first time in his reply, which, as shown, is contrary to all rules of pleading. Appellee's remedy, in case he elected not to stand upon the primary negligence alleged in his original complaint, was to have moved the court for leave to amend his complaint, and upon such leave being granted he could have set up the facts in his complaint, which appear in his reply.

Appellee could, in the first instance, have set up in different counts in his complaint as many different causes of action as the facts in the case might warrant, provided they all arose out of the same transaction or transactions connected with the same subject of action. Code 1915, § 4105. Under this provision of the Code, he could have alleged primary negligence in one count, "last clear chance" in another, and willful injury in a third, provided all were connected with the same subject of action, which in this case would be the injuries received by the appellee.

Our conclusion that this reply is a departure "from fact to fact" must be correct; otherwise there would be no end to pleading, and a defendant would experience much difficulty in driving the plaintiff to an issue. Were this not true, it would be possible for a plaintiff to retreat from "fact to fact," hoping eventually to find some fact upon which he could plant his feet that the defendant could not deny. Suppose in the present case that the defendant could deny the matters set up in the reply by a formal pleading, or that it should set up contributory negligence of the plaintiff as a defense, and plaintiff then should file a further pleading, in answer to such denial, setting up some neglect of duty on the part of the man who flagged his car, or neglect of duty upon the part of the switchman; for example, that he could have prevented the injury by switching him onto a clear track. This supposed case shows the necessity for fixed rules in the matter of pleading.

Appellee, in a supplemental brief filed since the submission of the cause, argues, however, that the question of departure is not properly here for consideration, because: (1) It was raised, or attempted to be raised in the trial court by objection to the filing of the reply, instead of by demurrer or motion; (2) that the ruling of the court upon such objection is shown only by the bill of excep-

tions, whereas such ruling, not occurring upon the trial of the cause, should appear as a part of the record proper; and (3) the supplemental transcript showing the action of the court in this regard is not printed. There is perhaps some merit in these contentions, but, as we are required to reverse the cause because the court submitted the issue of "last clear chance" to the jury, over the objection of the appellant, when there was no evidence justifying or warranting the consideration of this issue, we will not enter upon a consideration of the questions suggested.

Passing now to a discussion of the alleged error by the court in submitting to the jury the question of the liability of the appellant under the doctrine of "last clear chance." At the conclusion of appellee's case in chief appellant moved the court to withdraw from the consideration of the jury the question of the alleged negligence of the engineer, because no evidence had been introduced by the appellee, tending in any manner to establish such fact. This motion was overruled. Again, at the conclusion of all the evidence, appellant renewed its motion. The trial court, over appellant's objection, by certain instructions submitted to the jury the question of the company's liability under the doctrine of "last clear chance," predicated upon the alleged negligence of the engineer in failing to use due care to avoid a collision between his engine and the car upon which appellee was carried down upon the main track.

[10] 10. It is well settled that an instruction not based on the evidence is erroneous and should not be given. See the many cases cited in *Century Digest*, "Trial," § 596.

In the case of *Emison v. Owyhee Ditch Co.*, 37 Or. 577, 62 Pac. 13, the rule was concisely stated by the Supreme Court of Oregon as follows:

"The rule is well settled that, when the court, in the absence of any evidence thereof, instructs the jury respecting a matter that is material to the cause, the charge is necessarily misleading and erroneous."

See, also, *Barce v. City of Shenandoah*, 106 Iowa, 426, 76 N. W. 747; *Schlesinger & Mayer v. Scheunemann*, 114 Ill. App. 459; *Thompson on Trials* (2d Ed.) § 2315.

The substance of appellee's testimony regarding the collision with the engine was as follows: Thayer was signaled by one Quintana to stop the car upon which he was riding. He attempted to apply the brakes, but they would not catch. Quintana was standing near the point of the switch, and signaled Thayer to stop the car when he was about 25 yards distant. Thayer testified that he looked up when near the point of the switch, and saw an engine approaching, and almost immediately the car and engine collided, and from the shock he was thrown to the ground.

Clearly the above evidence did not tend in any degree to establish negligence or want of due care on the part of the engineer. There

was no showing that the engineer could in any way have prevented the accident, or that he was remiss in his duty in any manner.

Passing now to a consideration of the evidence offered by the defendant on this phase of the case, as we must in order to determine the propriety of the instruction, the engineer, Rolla, testified, in substance, as follows:

"I had been switching cars, and had passed the point of the ice house switch going west, ran the engine some distance west to get clearance, and was signaled by the brakeman to return, was going forward toward the depot, and when the front of the engine had almost reached the point of the ice house switch I heard a man shout, looked to the left, and saw a box car directly opposite, about six feet away, the front of the car being approximately six feet in front of where I sat. I realized that the only way to avoid a collision was to run through the switch before the car reached it, so I opened the throttle and passed the switch about four feet ahead of the car. After I got in front of the car I slowed up and caught it and brought it to a stop. I could not get out of the way of the car, because there was a caboose standing on the track in front of the depot, and the track was downgrade, and I realized that I would collide with this caboose, and probably kill some one in it, and perhaps myself, in case I ran into it."

There was no evidence as to the speed of the car or the engine, except statements of certain witnesses to the effect that the car was "going pretty fast"; no attempt to show that the engineer could, with safety, have run further down the track before stopping the car, or that another and different result would have been accomplished had he done so. Appellee made no attempt whatever to show that the engineer failed to stop the car in the only feasible manner, or that he was in any way remiss in his duty. Certainly it is apparent, and cannot be disputed, that the engineer acted in a proper manner when he ran in ahead of the car; otherwise there would have been a collision at the point of the switch, and the box car would have turned over.

[11] 11. But appellee argues that the court could take judicial knowledge of the fact that the engineer could, with safety to himself have run further down the track toward the depot, and have stopped the car with less force, and this without any danger of collision with the caboose; hence this issue was properly submitted to the jury. We cannot agree with this contention, because the manner and method of operating a locomotive engine, the space within which, going at a given rate of speed, it can be brought to a stop, and the proper way to check the speed and bring to a stop a runaway car are not matters of common or general knowledge. These matters are known only by men experienced in railroad operations.

"Matters of which a court will take judicial notice must be a matter of common and general knowledge, not merely the knowledge of specialists or experts." *Jones on Evidence*, § 105a.

If the court could, as claimed by appellee, take judicial notice of the fact that the en-

gineer could, by running further down the track, and by operating his engine in some other manner, have avoided the shock which appellee claims threw him from the car, there would be but few matters, indeed, which a court could not judicially notice, and but slight necessity for introducing evidence in a case. If this were true, where an employé was injured in the operation of a factory, a mine, in the construction of a building, or in any other of the various vocations in which men engage, all that he would be required to establish would be the fact that he was injured in a given manner, and then the court would judicially know, without proof, just how such machinery or appliance should have been operated or constructed, and such judicial knowledge could not be controverted by proof. The mere statement of the proposition shows its utter fallacy.

In the case of *Union Pacific Ry. Co. v. Shannon*, 33 Kan. 446, 6 Pac. 564, the jury found, without evidence to support the same, that an engineer could have stopped a train going at a speed of 45 miles an hour in a space of from 350 to 375 feet. The court said:

"It is not within the general knowledge of persons in what space an engine or train can be stopped going at the speed of 45 miles an hour, and equipped with the appliances as the one operated by the company at the time of the accident. To determine how long it takes to stop an engine or train requires experience in the running of trains and in checking their speed, or opportunities on the part of a person giving opinion thereof to speak as an expert. *Railway Co. v. Stewart*, 30 Kan. 226 [2 Pac. 151]. This was not a subject upon which the jury could use their own judgment, and, if any one of the jury had any particular knowledge on the subject, he ought to have been sworn and examined as a witness."

In the case of *Kotila v. Houghton County St. Ry. Co.*, 134 Mich. 314, 96 N. W. 437, the court held that the jury could not assume, in the absence of evidence on the subject, that an electric car, going downgrade at a great rate of speed, could have been stopped in 150 feet with the ordinary appliances.

Prof. Wigmore (section 2570, Wigmore on Evidence), speaking of judicial notice by the jury's own knowledge, says:

"In general, the jury may in modern times act only upon evidence properly laid before them in the course of the trial. But, so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this information in making up their minds."

But the learned author further observes:

"But the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life."

From the foregoing it is evident that the court should not have submitted to the jury the question of the liability of the appellant, under the doctrine of "last clear chance," because there was no evidence introduced tend-

ing to establish any negligence or want of care on the part of the engineer.

[12] 12. Passing now to a consideration of the remaining questions presented, the next point to be noticed is the alleged error on the part of the trial court in permitting appellee to testify as to his former experience in similar work. This requires but slight consideration. Appellant in its answer alleged, as one ground of defense, that appellee assumed the risk of such employment. The cause of action set up in the complaint was that the brake upon the car was defective, and by reason of such defect the accident resulted.

Where a cause of action is based upon alleged negligence of the master in failing to use due care in seeing to it that the brake upon a box car which the servant is instructed to run down the switch to a designated point, and there stop by applying the brake, is in proper repair, and the master has pleaded "assumption of risk," it is proper for the servant to prove his lack of experience in such work for the purpose of disproving such defense, as such evidence tends to show that he did not know and appreciate the danger.

Labatt's Master and Servant, § 1186a, summarizes the rule as to the assumption of risk in the following language:

"The servant assumes all the ordinary risk of the service, and all of the extraordinary risk; that is, those due to the master's negligence of which he knows and the dangers of which he appreciates."

In the present case the servant was not employed by the appellant as a brakeman, but only as a common laborer for the purpose of icing cars. He was directed by the master to run the car down to the switch, and it certainly could not be contended with any degree of logic that he assumed the risk of the master's negligence in regard to the brake, unless it appeared that he was an experienced brakeman, and could know and ascertain by turning the brake that it was out of repair, or by other means which such an experienced man should have adopted. There was no error in permitting proof of appellee's inexperience.

[13] 13. The sixth point urged is alleged error in overruling appellant's objection to the following question propounded to appellant on direct examination:

"You testified, on your direct examination, as to certain physical labor which you performed before you were injured. Are you able at the present time, and in your present condition, to follow any of these occupations?"

The objection interposed was that the question called for the conclusion of the witness and invaded the province of the jury.

"The physical ability or inability of a person to do work or perform any act may be proved by the direct testimony of the party himself." 2 Ency. of Evidence, 846.

The fact sought to be elicited by the question was as to whether the witness was able to perform the acts of manual labor since

the injury which he had testified that he followed prior thereto. This was a fact to which he could testify.

In the case of *Kilne v. K. C., St. J. & C. B. R. Co.*, 50 Iowa, 656, a question of similar import was held proper, the court saying:

"It was a fact purely as to whether plaintiff could do the specified work in his present condition."

To the same effect see *People v. Tubbs*, 37 N. Y. 586.

The seventh point is trivial and need not be considered. Neither will the eighth point be considered. This involved alleged error in not striking out the testimony of the witness Dr. Rolls taken on the former trial of the cause, and read to the jury because of the absence of the witness at the time of the trial. As the witness will probably be present at the next trial, and as his testimony may tend to prove the issues then submitted to the jury, no comment will be made on this point.

Nor is there merit in the ninth point discussed, which related to the refusal of the court to permit appellant to cross-examine Miguel Abeytia, a witness for the appellee, as to the condition of the car; for, if it be conceded that the right existed, it appears from the transcript of the evidence that appellant did ask this witness later during the examination if he had examined the brake apparatus, and he said that he had not and knew nothing about it; so, if there was error, it was cured by the party later asking the witness the same question, which was answered.

[14] 14. The court, over appellant's objection, permitted appellee to read to the jury the table of mortality based on American experience, found at page 885, vol. 20, Am. & Eng. Ency. of Law. This appellant claims was error, for two reasons: First, that there was no proof that appellant's injuries were permanent; and, second, that no sufficient foundation for the introduction of such table was established.

As to whether the evidence established the fact that the injuries were permanent need not be considered, as such fact may be established upon the subsequent trial, if it was not so established in the former trial, as contended by appellant. The rule only need be stated, which, as set forth in volume 7, Ency. of Evidence, p. 426, is, as follows:

"In order to justify the admission of evidence of life expectancy, the evidence must establish the fact that the injury was permanent. And it is not sufficient that the evidence shows that the injury was serious. But the mere fact that the evidence as to the permanency of such disability is conflicting will not necessitate the exclusion of the evidence."

And, if there is substantial evidence tending to show that the injuries are permanent, such tables are properly received in evidence.

[15] 15. The second ground of the objec-

tion was based upon the theory that no sufficient foundation was laid for the introduction of the mortality table appearing in volume 20 Am. & Eng. Ency. of Law (2d Ed.) at page 885, for the reason that there was no proof of its authenticity or accuracy. In support of this contention appellant cites and relies upon the case of *Notto v. Atlantic City R. Co.*, 75 N. J. Law, 826, 69 Atl. 968, 17 L. R. A. (N. S.) 1138, 127 Am. St. Rep. 835. This case is directly in point and upholds appellant's theory, but we are unable to agree with the reasoning of the court. Indeed, no other case is cited so holding, and the note appended to this case in the L. R. A. report clearly evidences the fact that the courts of the country, without exception, hold otherwise. The author of the note referred to says:

"It is a generally recognized rule that mortality tables, as published in standard encyclopedias, are admissible in evidence without further proof of their authenticity."

In the case of *Shover, Adm'r, v. Myrick*, 4 Ind. App. 7, 30 N. E. 207, the court, after reviewing many authorities on the subject, says:

"From what has been said we think it fairly deducible that proof of the probable longevity of a person of a given age and conditions, as well as the present value, annuities, and estates depending upon future contingencies, may be effected in any or all of the following ways:

"(1) The court may take judicial knowledge of the United States Mortality Tables, and perhaps other standard tables of the kind and character heretofore spoken of.

"(2) Standard tables showing mortality rates and expectancies of human lives at certain ages and under certain conditions, and probable longevity, as well as the present worth of annuities, etc., may be used as evidence, under proper instructions as to their use, in the trial of causes involving such controversies as those hereinbefore alluded to.

"(3) Expert witnesses may testify as to results and conclusions arrived at by them with reference to these subjects, and such witnesses may refer to the tables and data upon which their knowledge is based, in whole or in part, as a means of refreshing their memories."

We agree fully with this conclusion; hence it follows that no error was committed in admitting the mortality table in question.

Points 11 and 12 relate to the sufficiency of the evidence, and will not be further considered, as the case must be retried. Point 13 relates to the refusal of the court to strike the amended reply from the files at the conclusion of plaintiff's case. This question has been fully discussed, and requires no further consideration.

Instruction No. 3 given to the jury by the court of its own motion was as follows:

"The jury is instructed that in this class of civil cases any fact that is asserted by one side and denied by the other can only be established in law by a preponderance of the evidence, and the burden of proof is therefore on the plaintiff to establish all of the material facts alleged in his complaint by a preponderance of the evidence, and likewise the burden of proof rests upon the defendant to prove by a preponderance of the evidence the allegations of contributory neg-

ligence and assumption of risk set forth in defendant's amended answer."

In regard to this instruction appellant in its brief says:

"The question to be here specifically considered is that part which instructs the jury that the burden of establishing the defense of 'assumption of risk' is upon the defendant. Such is not the law. The plaintiff is presumed to assume all of the ordinary risks incident to his employment. Primarily assumption of risk, so far as it relates to ordinary risks incident to the employment, is a question of law, and not of fact. Where the risk is not ordinarily incident to the employment, the burden of proof is upon the defendant. When the servant shows that the injury received was in consequence of a risk not ordinarily incident to the employment, growing out of the master's negligence, the burden is then upon the master to show the servant knew and understood the increased danger." *King v. Ford R. L. Co.*, 93 Mich. 172, 53 N. W. 10; *Swoboda v. Ward*, 40 Mich. 423.

"A servant is presumed to know and assume the obvious risks ordinarily and usually incident to the employment which he undertakes." 8 Ency. Ev. 520.

It requires evidence to rebut this proposition. 8 Ency. Ev. 522.

[16] We fully concur in the above statement of the law on this subject, but do not think that it established the fact that the instruction in question was erroneous. Plaintiff's complaint was founded upon the alleged negligence of the master in failing to see to it that the brake was in proper repair. The portion of the answer, upon which the foregoing instruction was predicated, reads as follows:

"(1) Defendant alleges that, if the brakes on the car mentioned in plaintiff's complaint were defective, as alleged, then such defects were open and obvious and apparent to plaintiff, and that plaintiff saw and comprehended any and all danger incident thereto, if any danger there was with respect to said brakes, or by the exercise of due care and caution upon his part could have seen and comprehended any and all danger, if any danger there was incident to any or all of such conditions."

The answer on its face shows that the injury received was in consequence of a risk not ordinarily incident to the employment, which grew out of the master's negligence; hence the burden was upon the master to show that the servant knew and understood the increased danger. As an abstract statement of the law, it not appearing that defendant was a common carrier by railroad engaged in interstate commerce, the instruction might be subject to criticism, but, as applied to the pleadings in this case, it was proper.

The thirteenth instruction given by the court of its own motion was as follows:

"You are further instructed that it is the duty in law for the defendant to furnish safe and suitable brakes, brake appliances, and brake apparatus upon its cars and any cars operated by it, and keep the same in suitable condition for use upon said cars."

[17] 17. By this instruction the jury was told that it was the absolute duty of the railroad company to furnish safe and suitable brakes, brake appliances, and brake appa-

tus and keep the same in proper condition for use upon its cars, thus making the railroad company an insurer to that extent. This is not the rule at common law, and we have no statute in this state which makes it the absolute duty of a railroad company to so equip its cars. Tested by the common law or by our local statutes, the instruction was clearly erroneous. *C. O. & G. Co. v. Holloway*, 114 Fed. 458, 52 C. C. A. 260; *C., B. & Q. R. Co. v. Merckes*, 36 Ill. App. 195; *P. D. & E. Co. v. Hardwick*, 48 Ill. App. 562; *Colorado Central R. R. Co. v. Ogden*, 3 Colo. 499; *Carelton M. & M. Co. v. Ryan*, 29 Colo. 401, 68 Pac. 279; *C., B. & Q. R. R. v. Oyster*, 58 Neb. 1, 78 N. W. 359; *Hughley v. City of Wabasha*, 69 Minn. 245, 248, 249, 72 N. W. 78; *Bellville Pump & Skein Works v. Bender*, 69 Ill. App. 189, 192; *Gormully & Jeffery Mfg. Co. v. Olsen*, 72 Ill. App. 33; *C. & E. I. R. Co. v. Garner*, 78 Ill. App. 281, 285; *N. Y., T. & M. R. Co. v. Green*, 90 Tex. 257, 266, 38 S. W. 31; *Wells v. Coe*, 9 Colo. 159, 160, 11 Pac. 50; *Sampson M. & M. Co. v. Schaad*, 15 Colo. 197, 199, 25 Pac. 89; *Moffat v. Tenney*, 17 Colo. 189, 30 Pac. 348; *B. & C. R. R. Co. v. Læhe*, 17 Colo. 280, 283, 29 Pac. 175; *Orman v. Mannix*, 17 Colo. 564, 576, 30 Pac. 1037, 17 L. R. A. 602, 31 Am. St. Rep. 340; *U. P. R. Co. v. O'Brien*, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766; *Deane v. Light & P. Co.*, 5 Colo. App. 521, 524, 39 Pac. 346; *D. & R. G. R. Co. v. McComas*, 7 Colo. App. 121, 124, 42 Pac. 676; *Maydole v. D. & R. G. R. R. Co.*, 15 Colo. App. 449, 452, 62 Pac. 964; *Floyd v. C. F. & I. Co.*, 18 Colo. App. 153, 156, 70 Pac. 452; *McKean v. C. F. & I. Co.*, 18 Colo. App. 285, 289, 71 Pac. 425; *Roche v. D. & R. G. R. R. Co.*, 19 Colo. App. 204, 208, 73 Pac. 880.

[18] 18. If, however, the evidence disclosed that the railroad was a common carrier engaged in interstate commerce, the instruction correctly stated the law; for by section 2 of the act of Congress of April 14, 1910, amendatory to the federal Safety Appliance Act of 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. §§ 8605-8612]), all cars subject to the provisions of that act are required to be equipped with "efficient hand brakes," and this duty is absolute. Where the Safety Appliance Act applies, it imposes an absolute liability upon the carrier. *Great Northern Ry. Co. v. Otos*, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. —, where cases decided by the Supreme Court of the United States so holding will be found cited.

Whether the evidence in this case establishes the facts necessary to warrant the application of this statute need not be determined, in view of the fact that we are required to reverse the case on other grounds. On a subsequent trial any error in this regard can be avoided by the trial court by adhering to the law as above announced.

It is perhaps proper to say that the fed-

eral Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]) has no application to this case under the pleadings and evidence; hence requires no consideration.

For the reasons stated, the judgment will be reversed, and the cause remanded, with directions to the trial court to grant appellant a new trial; and it is so ordered.

HANNA and PARKER, JJ., concur.

On Motion by Appellee to Require Clerk to Issue Mandate.

ROBERTS, C. J. [19] Appellee recovered a judgment in the district court of Santa Fé county against the appellant for \$5,000 damages, costs of suit, etc. Upon appeal the cause was reversed and ordered remanded for a new trial upon the merits. Appellant had expended something over \$200 for transcript of record, printing the same, and costs advanced to the clerk of this court. Under section 4282, Code 1915, appellant having prevailed in this court, judgment was entered against appellee for the costs of this appeal. There was a small balance due the clerk for costs not covered by the amount advanced by the appellant, which the appellee paid, thereupon he requested the clerk to issue a mandate. This the clerk refused to do until appellee should pay into his hands an amount of money sufficient to satisfy the judgment which appellant had obtained against him in this court for costs. The refusal of the clerk was based upon the assumption that rule 15 (154 Pac. xxxviii) of this court, adopted July 15, 1915, required the unsuccessful party in this court to satisfy any judgment that might be here rendered against him for costs before he could ask for a mandate. The rule in question reads as follows:

"Upon denial of a petition for rehearing, or if within twenty days after a decision no petition for rehearing is filed, a mandate shall issue to the court below, as the cause may require, for execution, upon the payment by either party of the costs incurred in this court."

Section 4289, Code 1915, provides a remedy for the collection of a judgment for costs by execution. Was it the intention of the court, when the above rule was adopted, to provide a party who may have recovered a judgment against his adversary in this court for costs, with an additional and arbitrary remedy for the collection of his judgment? We think not, nor is the language of the rule susceptible of any such interpretation. It reads, "Upon payment by either party of the costs incurred in this court" the mandate shall issue, thus clearly evidencing that the only object in view was the protection of the clerk in the matter of costs, which under the law he is required to collect and turn over to the state treasurer. Whether a successful party can collect his judgment does not con-

cern the court. It gives to him, upon application, all the remedies which the law affords. The above rule was never designed to supply him with an arbitrary remedy, or to prevent an unsuccessful party in this court from securing a mandate so that he could have the cause remanded to the district court and there secure a trial on the merits. To hold otherwise would, where the unsuccessful party here was without means, effectually cut him off from all right to litigate his rights, however meritorious might be his cause of action.

If no further costs are due the clerk, he will issue the mandate; and it is so ordered.

HANNA, J., concurs. PARKER, J., dissents.

(21 N. M. 327)

McMILLIN v. BOATRIGHT, Mayor, et al.
(No. 1707.)

(Supreme Court of New Mexico. Jan. 21, 1916.)

(Syllabus by the Court.)

PLEADING \Leftrightarrow 194—ANSWER—DEMURRER.

Where all the allegations of the complaint are denied, either specifically or generally by the answer, it is error to sustain a demurrer to the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 444-446, 449-452; Dec. Dig. \Leftrightarrow 194.]

Appeal from District Court, Bernalillo County; H. W. Reynolds, Judge.

Action by Thomas McMillin against D. H. Boatright, Mayor, etc., and others. From judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Marron & Wood, of Albuquerque, for appellants. James L. Nicholas, of Socorro, and E. A. Mann, of Albuquerque, for appellee.

PARKER, J. This case was before us on a motion to dismiss the appeal, which motion was denied. *McMillin v. Boatright*, 149 Pac. 305.

The amended complaint alleges that the appellee was the duly appointed and qualified city marshal of the city of Albuquerque; that no person had been appointed and qualified as his successor, nor had he been removed by the appointing power; that the defendants, without right or authority, were attempting to dispossess plaintiff of said office, and to forcibly and wrongfully take possession of the books, papers, office furniture, office room, and paraphernalia, and to wrongfully usurp said office, and threatened so to do, and that unless restrained, they would, as appellee believed, proceed to wrongfully and unlawfully dispossess appellee thereof, and seize the office room, furniture, books, papers, and paraphernalia of said office, to the appellee's irreparable injury. Appellee prayed for a temporary injunction, which was granted, and which was made permanent on final hearing.

A demurrer to the complaint was interposed by the defendants, and overruled, and thereupon they answered. They admitted in the answer that the appellee was in the actual possession of said office, and was therefore the de facto city marshal; but they denied that they or either of them had used or threatened to use any force, or forcible methods whatever against the appellee, or to place the defendant George Thomas in possession of the office of city marshal of said city. They further alleged that the term of office of appellee had expired, and that thereafter, on the 20th day of April, 1914, the appellant Boatright nominated the appellant Thomas for the office of city marshal of the city of Albuquerque; that said nomination was acted upon by the city council, four of the aldermen voting in favor thereof, and four against the confirmation thereof, whereupon the said Boatright, as mayor of said city, cast his vote to decide the tie vote in favor of the confirmation, and thereupon declared the nomination of said appellant Thomas duly confirmed; that the said appellant Thomas thereafter duly qualified as such city marshal, and was entitled to the possession of the office, and to all the rights, duties, and emoluments thereof, and was so entitled at the time of the commencement of the action; that a commission had been duly issued by said authorities of the city of Albuquerque, constituting, appointing, and commissioning the said appellant Thomas as said city marshal.

A demurrer to the answer was interposed by the appellee upon the following grounds: (1) That said answer does not state facts sufficient to constitute a defense to plaintiff's complaint, in this: (a) That it admits that plaintiff is the de facto city marshal of Albuquerque, and does not set up a prima facie right to said office; (b) nor does said answer allege that defendant Thomas' right to said office has ever been determined by any court; (c) said answer does not show that said Thomas has executed a bond, and that the same has been approved by the city council as is required by law as a prerequisite to his taking the office. This demurrer was sustained, and the appellants electing not to plead further, but to stand upon their said answer, the court rendered judgment permanently enjoining the appellants from "using or attempting to use force or stealth, or any forcible or stealthy method in taking possession of, or attempting or endeavoring to take possession of, the office of city marshal of the city of Albuquerque, and from forcibly interfering with the appellee in the conduct of said office." The defendants below thereupon brought this appeal.

As appears from a report of the case in 149 Pac. 305, after the case was brought into this court, the appellant Thomas, who was the appointee to the office of city marshal,

filed a motion to dismiss his appeal, leaving the appellant Boatright, who was the mayor of the city of Albuquerque, as the sole appellant in the case. The errors assigned are 8 in number, but the only ones which are noticed in the brief are those which relate to the action of the court in sustaining the demurrer to the appellant's answer to the amended complaint, and to the court's action in making the injunction permanent. The court, in its final judgment, enjoined the defendants from taking or attempting to take possession of the office by force or stealth, and from forcibly interfering with the appellee in the conduct of his office. This broadened the scope of the injunction, the temporary writ having gone against the use of force only in ousting appellee.

Appellants argue really but one proposition, and that is that the answer constituted a defense to the complaint, and consequently, it was error to sustain the demurrer to it, and it was error to enjoin them as was done.

1. It is submitted by counsel for appellants that the answer denied that the appellants had used, or intended to use, other than lawful means to get possession of the office. The complaint alleged force and other unlawful means. The answer specifically denied force, either actual or intended. It further contains a general denial of all allegations of the complaint not elsewhere therein admitted. This made the answer a complete denial of the allegations of fact contained in the complaint, and it was error to sustain the demurrer. The district court evidently must have overlooked this general denial in the answer, and must have considered only the specific denial of an intent to use force to take possession of the office.

It was error to sustain the demurrer to the answer under these circumstances, and the judgment of the lower court will be reversed, and the cause remanded, with instructions to overrule the demurrer to the answer; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

(21 N. M. 313)

MURRY v. BELMORE et al. (No. 1801.)

(Supreme Court of New Mexico. Jan. 12, 1916.)

(Syllabus by the Court.)

1. ATTACHMENT \S 365 — WRONGFUL LEVY — LIABILITY OF ATTACHING PLAINTIFF.

Where an officer levies a writ of attachment on the property of a stranger, attachment plaintiff is liable to the claimant of the ownership and right of possession thereof, not only when he directs the wrongful levy, but also when he subsequently adopts or ratifies the officer's acts, independently of any bond and jointly with the attaching officer.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. \S 1328-1338; Dec. Dig. \S 365.]

2. APPEAL AND ERROR — 169 — PRESENTATION BELOW — NECESSITY.

A question, not jurisdictional, cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. ¶ 169.]

3. TRIAL — 339 — VERDICT — CORRECTION.

After a verdict has been received and entered upon the minutes, and the jury has been dismissed, they have not the power to reassemble and alter their verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 791-794; Dec. Dig. ¶ 339.]

4. TRIAL — 345 — VERDICT — CORRECTIONS — WAIVER OF OBJECTIONS — ACQUIESCENCE.

Where, from the record, it appears that attorney for appellant purposely and designedly permitted the court to reassemble the jury and correct the verdict, without objecting to such action, and thereafter sought to take advantage of the same, the appellate court will not consider such alleged error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 816-820; Dec. Dig. ¶ 345.]

Appeal from District Court, Quay County; T. D. Leib, Judge.

Action by G. L. Murry, guardian of Whitney B. Reid and others, against D. A. Belmore, Jr., and another. From judgment for plaintiff, defendant named appeals. Affirmed.

Catron & Catron, of Santa Fé, and H. L. Boon, of Tucumcari, for appellant. Harry H. McElroy, of Tucumcari, for appellees.

ROBERTS, C. J. This action was instituted in the court below by G. L. Murry, as guardian of the minor heirs of Nellie B. Reid, deceased, against the appellant, Belmore, and one J. W. Dickey, not a party to this appeal, to recover damages for the wrongful removal of certain fixtures and improvements from a tract of land which said heirs inherited from their mother. The real estate in question had been purchased by Mrs. Reid from one Hamm, about one year prior to the alleged trespass. Hamm was indebted to the appellant, Belmore, who instituted suit against him, and caused an attachment to be levied upon the dwelling house, barn, fences, and certain other improvements upon the land in question, which were later sold by virtue of such attachment proceedings. At the sale appellant purchased all the attached property, excepting the windmill and fixtures connected therewith, which were purchased by his codefendant, Dickey. Belmore was notified by Murry (whether before or after the sale under the attachment proceedings does not definitely appear) prior to the removal of any of the said property that the real estate belonged to said minor heirs; that Mrs. Reid had purchased the same prior to the institution of the attachment proceedings, and had a deed therefor, which had been long since of record. Notwithstanding the notice so given, Belmore sold a part of the property so purchased by him to others and authorized the

purchasers to remove the same from the premises, and removed other property himself. Dickey removed the windmill. Upon the trial of the case, appellant did not dispute the fact that title to the property was vested in the appellee's wards at the time the attachment proceedings were instituted, and only attempted to litigate the value of the property and the amount thereof that he had removed. The jury returned a verdict against both defendants, in favor of plaintiff, in the sum of \$375, we may assume, although the original verdict is not made a part of the record. The court received the verdict and discharged the jury. On the morning of the next day, the court called the jury into the box and stated that he had been advised by practically all the members of the jury that they did not intend to return a verdict against Dickey for any amount, but only intended to award a recovery against Belmore. The court thereupon asked each juror if such was his intention. Upon being advised in the affirmative, he stated that the verdict would be corrected by limiting the recovery against Belmore alone, which was done, and judgment entered accordingly.

While appellant has assigned many alleged errors, only two of the assignments are discussed, and those only will be considered.

[1] The first error relied upon is that the court erred in refusing to set aside the verdict of the jury for the reason that the verdict was excessive and not warranted by the evidence. Under this assignment appellant urges two propositions: First, that Belmore removed only a part of the property and caused only part of the damage, to wit, \$40.50; and, second, that the Reid heirs owned only a three-fourths interest in the property removed from the premises, and are therefore entitled only to that proportionate part of the damages.

As to the first proposition, it is only necessary to say that appellant set in motion the agency which resulted in the damages accruing to appellee. He instituted the attachment proceedings and accepted the benefits from the sale of the property. The guardian had the election "to pursue jointly or severally against all who aided in, or who advised or procured, or accepted benefits resulting from, the trespass." *Vandiver v. Polak*, 107 Ala. 547, 19 South. 180, 54 Am. St. Rep. 118. Here Belmore procured the attachment and caused the property to be sold and derived all the benefits from the sale, and was thereby rendered liable to respond in damages for the conversion of all the property sold, whether purchased by himself or others, and this regardless of the fact that appellee might, had he so elected, have proceeded against all others who participated in the wrongful transaction. Possibly the foregoing statement, to the effect that Belmore procured the property to be

sold, may be going further than the evidence warrants; but whether he directed the constable to sell this particular property or not is wholly immaterial, because there is ample evidence of ratification by him of the acts of the constable in selling the property. It is not clear from the evidence whether Murry notified Belmore of his claim, on behalf of the children, to the property prior to the sale or after the sale; but it does appear that he was so notified before any of the property had been removed, and his answer to the notice was that he had been out a lot of money and was going to take the property. This action on his part, coupled with his receipt and appropriation of the money derived from the sale to his own use, furnished ample evidence of ratification on his part. In 4 Cyc. 764, it is said:

"Where an officer levies a writ of attachment on the property of a stranger, attachment plaintiff is liable to the claimant of the ownership and right of possession thereof not only when he directs the wrongful levy, but also when he subsequently adopts or ratifies the officer's acts, independently of any bond and jointly with the attaching officer."

In the case of *Perrin v. Claffin*, 11 Mo. 13 the court said:

"The doctrine of the common law is that the person who agrees to a trespass after it is done, where the trespass is done to his benefit or for his use, is a trespasser ab initio. His subsequent agreement is equivalent to a previous command."

There was ample evidence of ratification by Belmore of the acts of the constable, and, this being true, he was liable for the value of all the property sold under the attachment levy, whether purchased by him or others. Such being true, the only remaining question under this branch of the case is whether the evidence warranted the recovery of the amount awarded. There was evidence, which, if true, warranted a recovery of more than \$500. Consequently there is no merit in this contention.

[2] It is sufficient answer to the second proposition urged to say that no such question was presented in the trial court. The record is silent as to any interest owned, or claimed, in or to the property by the father of the children named, or in fact that the father was still living, or survived his wife. It is well settled that a question, not jurisdictional, cannot be raised for the first time on appeal. *Elliott on Appellate Procedure*, § 470; *State v. Padilla*, 18 N. M. 573, 139 Pac. 143.

[3] The next assignment of error relied upon is that:

"The court erred in calling back to the jury box the jurymen who tried this case, and having then and there attempted to impeach and correct their verdict, on the day after said verdict had been returned and they had been discharged."

There was no evidence adduced upon the trial to connect the defendant Dickey with the alleged trespass, save the fact that he attended the sale of the attached property and purchased the windmill, valued at slight-

ly over \$10. He had nothing whatever to do with the sale or removal of the remainder of the property, and no connection whatever with Belmore. This being true, a joint verdict against Dickey and Belmore for the full value of all the property removed from the lands was not warranted by the evidence, and the court, upon proper application, would have set aside the verdict as to Dickey, as it had power to do. The verdict as to Belmore, however, was sustained by the facts proven. It is evident that the court realized that the verdict against Dickey was unwarranted by the evidence, and that it attempted to correct the same. It had no power to make this correction in the manner attempted. After a verdict has been received and entered upon the minutes, and the jury has been dismissed, they have not the power to reassemble and alter their verdict. *Warner v. N. Y. Central R. R. Co.*, 52 N. Y. 437, 11 Am. Rep. 724; *Walters v. Junkins*, 16 Serg. & R. (Pa.) 414, 16 Am. Dec. 585; *Sargent v. State*, 11 Ohio, 472; *Salinas v. Stillman*, 25 Tex. 12.

[4] While the court erred in reassembling the jury and changing the verdict, yet appellant is precluded from taking advantage of the same, because of the conduct of his counsel. Mr. Hitson, one of the attorneys representing both defendants, was present in the courtroom when the judge called the jury into the box and began to interrogate them as to their intention in returning the verdict. When Mr. Hitson discovered what the court was about to do, he arose and left the courtroom. After the verdict had been corrected and the jury dismissed, he returned and objected to any change being made in the judgment. From the bill of exceptions it is apparent that he purposely refrained from calling the attention of the court to its want of power to change the verdict, and purposely and intentionally permitted such change to be made so that he would be in a position to force a new trial for the defendant Belmore, because, after the verdict was changed, the judgment would be at variance with the same, unless it was also altered. Attorneys are officers of the court, and it is their duty to assist the court in arriving at a correct conclusion in matters of law and fact. They have no right to sit idly by and see error committed, affecting the interests of their client, without making an honest effort to avoid the error. Mr. Hitson should, when he apprehended the purposes of the court, have called the attention of the court to its lack of power, and, had he done so doubtless the court would have found some legal method of correcting the injustice done Dickey, by the verdict returned. Certainly it would have had the power, upon proper application, to have set aside the verdict as to Dickey, and could have permitted it to stand as to Belmore. Instead of attempting to assist the court to arrive at a correct conclusion, and avoid error, the bill of excep-

tions shows that Hitson arose and left the courtroom and absented himself until assured that the court had taken such an action as he felt would compel the granting of a new trial as to Belmore. When satisfied that this result had been accomplished, he returned to the courtroom and attempted to make such a record as he felt would accomplish this result. Under such circumstances, and in view of the fact that the record shows that the verdict as to Belmore is amply sustained by the evidence, we will not notice this alleged error, and the judgment will be affirmed, and it is so ordered.

HANNA and PARKER, JJ., concur.

(21 N. M. 320)

STALICK v. WILSON. (No. 1809.)

(Supreme Court of New Mexico. Jan. 15, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 223—PRESENTATION BELOW—DEFAULT JUDGMENT—EVIDENCE.

Where a cause is at issue and is regularly set for trial, and the defendant has due notice of such fact and fails to appear, he is precluded from raising any question relating to such judgment, not jurisdictional, or the evidence to sustain the same, on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338-1342, 1344, 1346-1350; Dec. Dig. \Leftrightarrow 223.]

2. JUDGMENT \Leftrightarrow 526—CONSTRUCTION—AMENDED COMPLAINT.

Where a complaint is filed in a cause, which later is superseded by an amended complaint, and a judgment is rendered which recites that the "court doth find that the allegations of the complaint are sustained by the evidence," such language will be construed as referring to the amended complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 969; Dec. Dig. \Leftrightarrow 526.]

3. PLEADING \Leftrightarrow 426—MOTION TO STRIKE—WAIVER—PRESUMPTION.

Where a defendant moves to strike out a bill of particulars, filed by the plaintiff, which he fails to call to the attention of the trial court, and six months thereafter files an answer which puts the cause at issue, and interposes no objection to the setting of the cause for trial, it will be presumed that he intended to waive his motion to strike the bill of particulars.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1425-1427; Dec. Dig. \Leftrightarrow 426.]

4. JUDGMENT \Leftrightarrow 151—DEFAULT JUDGMENT—MOTION TO VACATE—REQUISITES.

Where a party seeks relief from a judgment entered at the conclusion of a trial had in his absence, of which he had due and timely notice, he must not only set up facts, in his motion to vacate such judgment, which show that he has a meritorious defense, but he must also give a sufficient reason for his failure to appear and defend the action at the time set for the trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 296-298, 727, 730; Dec. Dig. \Leftrightarrow 151.]

5. APPEAL AND ERROR \Leftrightarrow 221—PRESENTATION BELOW—ASSESSMENT OF DAMAGES—DISSOLUTION OF RESTRAINING ORDER.

Where, upon a final hearing upon an application for a restraining order, the petitioner is present and interposes no objection to the suf-

ficiency of the evidence as to the damages claimed by the defendant, caused by the granting of the temporary order, and does not object to the court assessing damages upon the dissolution of the order, he cannot have the action of the court reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1353-1356, 1359, 1361-1363, 1365-1367; Dec. Dig. \Leftrightarrow 221.]

Appeal from District Court, Bernalillo County; H. W. Reynolds, Judge.

Action by John Stalick against Francis C. Wilson, receiver of the Callup Electric Light Company. From judgment for plaintiff, defendant appeals. Affirmed.

A. T. Hannett, of Gallup, and H. B. Jamison, of Albuquerque, for appellant. El. A. Martin, of Gallup, for appellee.

ROBERTS, C. J. Appellee sued appellant in the court below for \$165 and interest thereon from July 4, 1908. To the original complaint, appellant interposed a demurrer, whereupon appellee filed an amended complaint which appellant concedes stated a cause of action. Upon demand a bill of particulars was filed by appellee. Thereafter, appellant filed a motion to strike the bill of particulars from the files, and, without standing upon said motion and procuring a ruling thereon, appellant filed an answer denying the material allegations of the amended complaint, and the cause was regularly and properly set for trial on the 26th day of November, 1914, of which fact appellant's attorney had ample notice. On said day appellant and his said attorney failed to appear. Appellee introduced his evidence, and judgment was rendered in his favor for the full amount claimed by him, together with interest thereon from the 4th day of July, 1908.

The record shows that prior to the trial both parties appeared in open court and waived trial by jury. The cause was tried in open court, and judgment was entered immediately upon the conclusion of the trial. On the next day appellant filed a motion to set aside the judgment on two grounds: First, that there was a motion undisposed of; and, second, that said cause was improperly placed upon the trial docket before the same was at issue. This motion was overruled by the court. Later a second motion was filed to set aside the judgment, which appellant characterized as a "default judgment," on the ground that he had a meritorious defense to the same, but the facts constituting the defense were not alleged, neither were any facts stated which excused his failure to appear at the trial.

From the record it appears that an execution has been issued upon the judgment, placed in the hands of the sheriff, and that he was proceeding to levy upon the property of the appellant. Thereupon appellant filed a petition, entitled in the same cause setting up the fact that the sheriff was about to levy upon and sell the property of the appellant

to satisfy the said judgment and asking that he be restrained from levying said execution until the motion to set aside the judgment was disposed of.

The court issued a temporary restraining order, without requiring appellant to execute a bond to indemnify appellee, and thereafter, upon a final hearing, dissolved said order, overruled the motion to set aside the judgment, and entered judgment for appellee against appellant for \$114, in addition to the costs already taxed in the cause. The sum of \$114 was made up of two items, viz.: \$39 actual traveling expenses of plaintiff and his attorney in attending the hearing upon the injunction proceedings, and \$75 for attorney's fees, which the court found to be a reasonable fee for plaintiff's attorney in attending the final hearing upon said order. From this judgment appellant prosecutes this appeal.

[1, 2] It is very questionable whether the original judgment is before the court for review, as it might reasonably be held that the appeal was only from the last order entered, refusing to set aside the judgment, quashing and setting aside the injunctive order and entering judgment against appellant for \$114. Nevertheless, if we assume that the first judgment entered is properly here for consideration, no question relating to the judgment not jurisdictional will be considered, as appellant did not attend at the trial and preserved no exceptions to any ruling of the court. The amended complaint stated a cause of action. It is true the judgment recited that the court "doth find that the allegations of the complaint are sustained by the evidence," but the amended complaint superseded the original complaint, and the natural construction would be that the judgment referred to the amended complaint.

"A judgment should be so construed as to give effect to every word and part of it, including such effects and consequences as follow by necessary legal implication from its terms, although not expressed; and where there are two possible interpretations, that will be adopted which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered, which brings it within the authority and jurisdiction of the court, and which renders it the more reasonable, effective, and conclusive." 23 Cyc. 1101.

[3] The next question is presented by the first motion filed to set aside the judgment. The grounds upon which this motion was predicated have already been stated. The court properly overruled the motion, for appellant, by filing an answer to the amended complaint, might be held to have waived its motion to strike the bill of particulars which it had theretofore filed. Its answer put the cause at issue, and it interposed no objection to the cause proceeding to trial on the ground that this motion had not been disposed of, nor does it appear that the motion was ever called to the attention of the court, although it was filed more than six months

before the answer was filed. The court properly overruled the motion.

[4] The second motion filed set forth no reason whatever excusing the failure of appellant and his attorney to appear at the time set for the trial of the cause. It simply recited that appellant had a meritorious defense. This was not sufficient.

"A defendant seeking to be relieved against a judgment taken against him through his 'mistake, inadvertence, surprise, or excusable neglect,' or 'unavoidable casualty or misfortune,' or other statutory grounds, must show a good excuse for failure to defend himself at the proper time; it is not enough that he has a meritorious defense to the action; he must give a sufficient reason for the omission to plead it in due season." 23 Cyc. 930.

[5] This brings us to a consideration of the action of the court in awarding appellee \$114, costs and attorney's fees in defending the injunction proceedings, which both parties assume were properly instituted in the same cause; hence we will so treat the application. It is here claimed that there was no proof sustaining the allowance, and that the court was without power to make the allowance in this case, citing the case of McCoy et al. v. Torrance County Savings Bank, 19 N. M. 422, 144 Pac. 283. Neither question, however, is properly here for consideration. Appellant interposed no objection to the action of the court in proceeding to determine and assess damages in the cause, nor did it object on the ground that appellee did not testify to the items making up the estimate of damages. The record shows that Mr. Martin, one of the attorneys for the appellee, handed to the court an itemized statement of the expenses incurred by appellee; that appellee, Stalick, was present, and "who was tendered as a witness by the plaintiff as to the correctness of said items, as to the matter of said expenses, and Mr. Hannett said that he did not care to cross-examine him." The record then shows that the court announced that he would render judgment for the amount above stated, and then proceeds: "Mr. Hannett thereupon excepted to the judgment and announced that he would appeal and file a supersedeas bond." Appellant should have stated specifically the ground of his objection, so that the trial court could have obviated the error, if any existed.

"When an objection is made, the trial court and opposing counsel are entitled to know the ground on which it is based, so that the court may make its ruling understandingly, and so that the objection may be obviated if possible; and therefore, as a general rule, objections, whether made by motion or otherwise, and whether to the pleadings, to the evidence, to the instructions or failure to instruct, to the argument of counsel, to the verdict, findings or judgment, or to other matters, must, in order to preserve questions for review, be specific and point out the ground or grounds relied upon, and a mere general objection is not sufficient." 3 C. J. 746.

Under the rule above stated, which is approved by practically all of the courts, it is

apparent that appellant is not entitled to have these questions reviewed.

The judgment will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

(51 Mont. 551)

LEPLEY v. CITY OF FT. BENTON et al.
(No. 3671.)

(Supreme Court of Montana. Jan. 15, 1916.)

1. MUNICIPAL CORPORATIONS Ⓔ864 — INDEBTEDNESS—AMOUNT.

Const. art. 13, § 6, declares that no city, township, or school district shall become indebted in an amount exceeding 3 per cent. of the value of its taxable property, but that municipalities may, on vote of the taxpayers, incur increased indebtedness when necessary to construct a sewer system or procure a water supply. Rev. Codes, § 3259, subd. 64, which enacts the constitutional provision in statutory form, authorizes the incurring of indebtedness not exceeding 10 per cent. above the 3 per cent. limit for the construction of a sewer or water system. A municipality, which was not then indebted up to the 3 per cent. limit, being desirous of constructing a sewer system, was authorized by a vote of the electors to incur an indebtedness beyond the 3 per cent. limit. Held, that the Constitution and statutes only authorize a city to incur indebtedness beyond the 3 per cent. limit when such indebtedness is necessary for the construction of a sewer or waterworks system; therefore, as the city was not, at the time of the election, indebted up to the 3 per cent. limit, only the amount of indebtedness for the construction of the sewer system which exceeded the 3 per cent. limit was authorized, and the city could not, before issuing bonds for such system, incur other indebtedness up to the 3 per cent. limit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828-1835; Dec. Dig. Ⓔ864.]

2. MUNICIPAL CORPORATIONS Ⓔ864 — INDEBTEDNESS—ELECTIONS.

In such case, where the permission granted at the election was for the council to incur indebtedness for a sewer system, which, with existing indebtedness, would exceed the 3 per cent. limit, the city could not, before issuing sewer bonds, incur indebtedness up to the 3 per cent. limit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1828-1835; Dec. Dig. Ⓔ864.]

3. APPEAL AND ERROR Ⓔ855—DETERMINATION—QUESTIONS PRESENTED FOR REVIEW.

Where a question decisive of the case is presented by the record, the Supreme Court will determine it, though it did not appear to have been considered by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8406; Dec. Dig. Ⓔ855.]

Appeal from District Court, Chouteau County; J. W. Tattan, Judge.

Action by Charles Lepley against the City of Ft. Benton and others. From an order vacating a temporary injunction, plaintiff appeals. Reversed.

Stranahan & Stranahan, of Ft. Benton, for appellant. Pray & Callaway, of Great Falls, for respondents.

BRANTLY, C. J. This action was brought by plaintiff, a resident of the defendant city and the owner of property therein subject to taxation, to restrain the city authorities from issuing and selling bonds of the city to the amount of \$17,000 to procure funds to establish a municipal lighting plant. The proposed bond issue was authorized by a vote of the electors of the city held on July 10, 1914. They were sold on January 6, 1915, but when this action was commenced had not been delivered to the purchaser. It is alleged that the indebtedness incurred by the bonds, together with that already incurred and outstanding, will exceed the 3 per cent. limit prescribed by the Constitution, and therefore that the bonds are void. The following statement of the financial condition of the city is made the basis for this claim: That the assessed valuation of the property within the city for the year 1913 was \$810,000, and for 1914 \$950,000; that the city is at present indebted to the amount of \$44,500, which is made up of these items: Bonds for water supply, etc., "\$4,500 and upwards"; floating indebtedness represented by outstanding warrants issued in payment of current expenses of the city government, "\$3,000 and upwards"; bonds sold for the purpose of establishing a sewer system, including a contract by the city for the construction of the system, \$33,000; and the city's proportion of \$33,894.09, the cost of grading, paving, lighting, etc., in improvement district No. 1 of the city, the contract for which has already been let, the estimated proportion being "\$3,000 and upwards." Upon the filing of the complaint on February 27, 1915, the court ordered a temporary injunction to issue. On March 23d the defendants filed their answer, denying the material averments in the complaint, and moved for a dissolution of the order. After a hearing, the court made an order sustaining the motion. The plaintiff appealed.

As we gather them from the record, the events giving rise to the controversy may be stated as follows: On December 9, 1913, the council of the defendant city passed an ordinance, submitting to the taxpayers the question whether the city should contract an indebtedness to the amount of \$33,000 by an issue and sale of its bonds to procure funds for the construction of a sewer system. It was recited in the ordinance that the indebtedness thus to be incurred, including existing indebtedness, would exceed the constitutional limit of 3 per cent. of the assessed valuation of the property in the city. In pursuance of the ordinance the election was held on January 30, 1914, and by a majority vote the issuance of the bonds was authorized. On June 1, 1914, the council passed a second ordinance, submitting to the qualified electors the question whether the city should contract an indebtedness to the amount of

\$17,000 by an issue and sale of its bonds to procure funds to construct a municipal lighting plant. This ordinance recited that the proposed indebtedness, together with that already outstanding, would not exceed the constitutional limit of 3 per cent. The election held on July 10, 1914, resulted in a favorable vote. On August 1st a contract was let by the council for the construction of the sewer system. The resolution, letting this contract, recited that it was let upon the condition that a sale of the bonds could be effected. The formal contract was executed on August 8th. A sale of the bonds not having been effected, on September 8th the contract was so amended by consent of the contractor as to extend the time within which the work of construction should be completed. On January 6, 1915, the council effected a sale of all the bonds authorized at both elections, the lighting plant bonds first, and the sewer bonds a few minutes later. The course pursued by the council indicates that at the time the first issue of bonds was proposed, it held the view that the power of the city to incur any further indebtedness within the 3 per cent. limit would be fully exhausted by that issue. The proposition to make the second issue was therefore an afterthought, the council having doubtless concluded that it could class the whole of the issue first authorized within the 10 per cent. limit, and thus leave a margin within the 3 per cent. limit for the issue of those subsequently authorized. Otherwise the order adopted for the sale of the bonds cannot be explained. Indeed, it is claimed by counsel for defendants that the sale of the issue authorized at the June election, first in order, classed the amount represented by them within the 3 per cent. limit, with the result that the issue authorized by the election in January would automatically fall exclusively under the 10 per cent. limit. At the hearing of the motion it seems to have been assumed by counsel on both sides that this would ordinarily have been the result in such case. Counsel for the plaintiff insist, however, that such could not have been the result here, because the pursued by the counsel in letting the sewer construction contract on August 11, 1914, by which it became bound to the amount of \$33,000, fixed the status of the bonds authorized to this amount as within the 3 per cent. limit so far as there was any further margin within that limit, and hence exhausted the power of the city to incur any further indebtedness. This contract was admittedly made contingent upon the sale of the bonds; but it follows that when the sale was effected, the city became indebted to the full amount of the bonds and liable to the contractor for the same amount, contingent only on his performance of the contract. Therefore the status of this indebtedness, as to its classification within one limit or the other, thus became fixed by relation to the date

at which the debt was authorized, without regard to what was subsequently done.

[1] The decisive question in the case therefore is: Could the council, under the provisions of the Constitution and statute applicable, arbitrarily class the debt authorized at the election of January 30, 1914, as falling exclusively within the 10 per cent. limit, leaving an unabsorbed margin within the 3 per cent. limit for other indebtedness?

Section 6, art. 18, of the Constitution, declares:

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of, such city, town, township or school district shall be void; provided, however, that the Legislative Assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenue derived therefrom to the payment of the debt."

Subdivision 64 of section 3259 of the Revised Codes was enacted in part to effectuate this provision, and, so far as applicable here, is simply an enactment of the provision of the Constitution in statutory form. The provision was examined and construed in *Butler v. Andrus*, 35 Mont. 575, 90 Pac. 785. After stating the purpose of the limitation imposed by the provision, this court said:

"The constitutional limitation in question is clear and unambiguous, and means just what it says, to wit, that no indebtedness may be contracted in any manner or amount, for any purpose, in excess of the prescribed limit. *State ex rel. Helena Waterworks Co. v. City of Helena*, 24 Mont. 521, 63 Pac. 99 [55 L. R. A. 336, 81 Am. St. Rep. 453]. The proviso under which the Legislature may authorize an extension of the limit is also clear in purpose, to wit, to allow an extension of this limit when such extension (increase) is necessary to construct a sewerage system or procure a water supply. It cannot be granted or be made available for any other purpose nor under any other circumstances than those which create the necessity for it. The Legislature, in granting the privilege, used the expression, 'and an additional indebtedness shall be incurred when necessary to construct,' etc. This language seems susceptible of but one construction. There may be no extension, if there is no debt already contracted, for the word 'additional' qualifies the character of the debt to be contracted, and refers also to a pre-existing amount of indebtedness to which it may be added. The word 'necessary' defines the condition of affairs which requires the additional indebtedness. The condition must be such as to create the necessity. If a municipality is not indebted in any amount at all, or if it has the necessary funds in its treasury, no additional indebtedness can be incurred; nor can it be said that any necessity has arisen demanding it. Otherwise, we are compelled to the conclusion that, whenever a city government has determined to construct a sewerage system or procure a water supply, this fact of itself cre-

ates the necessity by which the privileged extension is made available, without regard to the city's financial resources and its existing indebtedness, and without regard, also, to the necessities of the people for a sewerage system or a water supply. This is the interpretation of the statute for which defendants contend; but, in view of the purpose of the limitation declared in the Constitution, and the terms employed in the statute, we think the only conclusion permissible is that the privilege of the extension becomes available only when the financial condition of the city requires a resort to it in order to serve the comfort or preserve the health of the people."

Upon further consideration of its purpose and the terms in which it is couched, we think the construction there given it the only one of which it is reasonably susceptible, and answers the question propounded above in the negative.

The authority sought by the council and granted by the taxpayers at the election held in January, 1914, was to increase the existing indebtedness of the city by an encroachment upon the 10 per cent. limit so far as was then necessary for the construction of a sewer system. This was granted. There was then a substantial margin within the 3 per cent. limit. It was not necessary to go wholly within the extended limit. Indeed, it was not permissible, under the decision in *Butler v. Andrus*, supra, to do this, for the taxpayers could go no further than to authorize an increase of, or addition to, the indebtedness of the city as then existing. The result of the exercise of the authority conferred was to increase an indebtedness to the full capacity of the city for all purposes, except for an additional water supply, or the extension of its sewer system when it might become necessary. This must be the result; otherwise a city may resort to the extended limit at any time, however ample its financial resources may be within the 3 per cent. limit. To be sure the defendant city cannot now install a lighting plant, even though it might have done so had it undertaken this improvement first and left the sewer system to be provided for later. This may be a hardship, but it is the plain mandate of the Constitution that cities and towns may not go beyond the prescribed limit of indebtedness in any manner or for any purpose, except as therein provided, and that they cannot transcend this limit except when necessary.

[2] Let it be conceded, however, that it is competent for the taxpayers to authorize the council to contract an indebtedness exclusively within the extended limit for either water supply or a sewer system; they did not do so in this case, for the ordinance indicates that the purpose of the council in consulting them was to get their consent to contract an indebtedness which, including all existing indebtedness, would exceed the 3

per cent. limit. The permission asked and given, therefore, was to exceed this limit, not to contract an indebtedness exclusively without it. For the presumption must obtain that the taxpayers assented to the request as made. Under these circumstances the council could not even by a resolution classify the debt, much less could it do so by resorting to the device of selling the light bonds a few minutes in advance of the sale of the others. The result is that the council had no authority to sell the lighting plant bonds at all.

It is true that in the case of *Arnold v. City of Miles City*, 46 Mont. 478, 128 Pac. 915, it was held that, when the indebtedness of a city incurred under the 3 per cent. limit has been reduced by payment until it has fallen below the limit, or because of an increase in the value of the taxable property of its inhabitants, a margin is created within this limit, the city may contract an indebtedness for general purposes to the extent of the margin, as for the construction of a bridge. But the situation presented in that case was that the indebtedness within the 10 per cent. limit had been contracted under circumstances which of necessity classed it exclusively within that limit, and hence that a subsequent change in the financial condition of the city did not change its character so as to bring it partly within the 3 per cent. limit. Whether the rule announced in that case is logically correct or not, we do not think it should be extended to cases which do not fall clearly within its purview. In our opinion this case is not such a one.

[3] At the hearing in the trial court the inquiry was directed exclusively to an effort to ascertain whether the existing indebtedness of the city was not already too large to permit the issue and sale of the bonds in question; it being apparently assumed that the amount of the sewer bonds would fall exclusively within the extended limit. It is not clear whether the question determined above was considered or determined by the trial court. Even so, since it arises upon the record and counsel have submitted it, we have deemed it proper to decide it. Our conclusion being decisive of the case, it is not necessary to examine the several assignments based upon the rulings of the court in admitting and excluding evidence, or to determine whether, viewing the evidence as a whole, the court abused its discretion in sustaining defendants' motion.

The order is reversed, at the cost of the defendants.

Reversed.

SANNER and HOLLOWAY, JJ., concur.

(51 Mont. 539)

Ex parte LEWIS. (No. 3760.)

(Supreme Court of Montana. Jan. 7, 1916.)

1. CRIMINAL LAW — 884 — TRIAL — VERDICT — VALIDITY.

A verdict of guilty, fixing the punishment at not less nor more than two years' confinement in the penitentiary, although not in compliance with Laws 1915, c. 14, providing for indeterminate sentences, was valid as a conviction of the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2107, 2526; Dec. Dig. — 884.]

2. CRIMINAL LAW — 893 — CONVICTION — WHEN ACCOMPLISHED.

Conviction of one tried for crime is accomplished by the verdict, and not upon entry of the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2527; Dec. Dig. — 893.]

3. CRIMINAL LAW — 1188 — APPEAL AND ERROR — IMPROPER JUDGMENT — EFFECT.

On appeal from a sentence improperly pronounced under a proper conviction the sentence may be annulled and the cause remanded for proper sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3222-3224; Dec. Dig. — 1188.]

4. HABEAS CORPUS — 109 — IMPROPER SENTENCE — DETERMINATION.

Where the defendant is convicted under a proper verdict, but an improper sentence is imposed in violation of the indeterminate sentence act, the fact that he applies for habeas corpus does not entitle him to absolute release, and, while he is entitled to be released from the penitentiary, he must be recommitted for proper sentence under the verdict of conviction.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. — 109.]

Holloway, J., dissenting.

Application for writ of habeas corpus by Floyd Lewis. Release ordered, and applicant ordered recommitted for proper sentence and judgment.

H. C. Crippen, of Billings, for appellant. J. B. Poindexter, Atty. Gen., and C. S. Wagner, Asst. Atty. Gen., for respondent.

SANNER, J. [1] Habeas corpus. The petitioner, Floyd Lewis, is now confined in the state prison under a judgment of conviction for the crime of statutory rape; said judgment having been pronounced by the district court of Yellowstone county, conformable to a verdict which declared his guilt and assumed to fix his punishment "at not less than two years nor more than two years." He seeks his release and an absolute discharge, upon the ground that the verdict and judgment are void because they do not comply with the requirements of the indeterminate sentence act (Laws 1915, p. 21). The express provisions of this act are that in convictions for certain offenses, including statutory rape, the verdict, if the jury fix the punishment, and the judgment in any event, must, "instead of fixing the punishment at a definite term," prescribe a minimum not less than

the minimum fixed by the statute for the offense involved, and a maximum not greater than the maximum so established. Sufficient reasons are stated by Mr. Chief Justice Brantly in Collins' Case, 51 Mont. —, 152 Pac. 40, for the conclusion that the verdict and judgment are not in compliance with the act, and the effect of such circumstance is the question before us. As regards the verdict, no difficulty is presented; it amounts to nothing more nor less than a conviction of the offense charged in the information (Rev. Codes, § 9322; Ex parte Brown, 68 Cal. 176, 8 Pac. 329), with an abortive attempt to fix the punishment. The effect of such a condition is settled by statute; for upon the return of such a verdict it becomes the duty of the presiding judge to assess and declare a proper punishment just as though the jury had attempted no expression upon the subject. Rev. Codes, § 9330.

[2] That the conviction or acquittal of a person tried for crime is accomplished, not by the judgment, but by the verdict, is a proposition both ancient and elementary. *Shepherd v. People*, 25 N. Y. 401, 419 et seq.; *United States v. Gilbert*, 2 Sumner, C. C. 19, 40, Fed. Cas. No. 15,204; *Brennan v. People*, 15 Ill. 511, 517; *Mount v. State*, 14 Ohio, 295, 45 Am. Dec. 542; *Ex parte Brown*, supra.

[3] We have, therefore, the case of a person duly convicted so far as this record shows, but unduly sentenced; and there cannot be the slightest doubt that upon an appeal the improper sentence would be annulled, and the cause remanded, with directions to impose sentence and enter judgment in conformity with the law. Rev. Codes, § 9417; *State v. Tyree*, 70 Kan. 203, 78 Pac. 525, 8 Ann. Cas. 1020; 8 R. C. L. § 237, 239.

[4] Must the result be otherwise and the person convicted be altogether released merely because he has chosen the writ of habeas corpus as the method for bringing the same matter to our attention? To so hold would, it seems to us, put form before substance as the thing of ultimate concern. Such is not the practice of this court in other cases nor the command of the law in this case. One of the chief purposes of all legal administration is the prevention of crime, by the due punishment of persons judicially ascertained to have been guilty of crime; and no person whose guilt has been judicially determined is entitled to immunity merely because the trial court having jurisdiction of him and his cause has made a mistake in a correctible matter. We say "correctible matter" advisedly, because the imposition of sentence is such a matter. 8 R. C. L. § 239; note to 3 Ann. Cas. p. 1024 et seq. While habeas corpus relieves from illegal custody, it is no part of its function to absolve any one from the penalty of his guilt (12 Cyc. 276); and when in such proceedings it is made to

appear that the petitioner is guilty of a criminal offense, or ought not to be discharged (Rev. Codes, § 9646), or that, though illegally held, another is entitled to his custody (Rev. Codes, § 9650), he is not to be absolutely discharged, but must be recommitted as may be just and legal. Specific application of these provisions or of principles embodied in them have been made in many cases analogous to the one at bar. Among such cases are the following: *Ex parte Branigan*, 19 Cal. 133; *Ex parte Gilmore*, 71 Cal. 624, 12 Pac. 800; *People v. Kelly*, 97 N. Y. 212; *Coleman v. Nelms*, 119 Ga. 307, 46 S. E. 451; *Miller v. Snyder*, 6 Ind. 1; *Russell v. Tatum*, 104 Ga. 332, 30 S. E. 812; *Ex parte Tayloe*, 5 Cow. (N. Y.) 39; *In re Sullivan*, 5 R. I. 27; *In re Gut Lun* (D. C.) 84 Fed. 323.

Petitioner calls our attention to *State v. District Court et al.*, 35 Mont. 51, 88 Pac. 564, which, upon first impression, seems to support his claim to an absolute discharge; but an examination of this decision with the record disclosing just what was before this court will show that such impression is illusory. The proceeding was on supervisory control brought by the state to review an order of the district court of Deer Lodge county on habeas corpus, and the facts as made to appear to the district court were that the applicant, Fairgraives, had been convicted of a misdemeanor in the district court of Silver Bow county, Hon. Michael Donlan, Judge, presiding, but committed to the state prison for the offense as a felony. It is worthy of note that the order which was reviewed and upheld by this court discharged Fairgraives from the custody of the prison contractors and committed him to the custody of the sheriff of Silver Bow county, to be dealt with by Judge Donlan as might be meet and proper. It is fair to say, however, that the only question really presented in this court was the propriety of the discharge from the custody of the prison contractors, neither side challenging the recommitment to the sheriff. Manifestly, if this decision be at all pertinent to the present inquiry, it is a precedent for the order which we propose to enter.

A situation more truly analogous to that now before us was presented by *In re McDonald et al.*, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B, 988, concluding which we said:

"The trial and commitment of petitioner Gilis were void, and his detention thereunder cannot be upheld. But he is not entitled to his release. The record discloses an abortive attempt to try and punish him for an alleged violation of the laws of the state. He must therefore be remanded to the custody of respondents to be dealt with according to law."

So here it is our opinion that the petitioner is entitled to be discharged from the custody of the warden of the state prison because, though tried and convicted, no proper sen-

tence has been pronounced upon him. But he is not entitled to go free; he must be committed to the custody of the sheriff of Yellowstone county, to be by him brought before the district court of that county for sentence and judgment in accordance with the law.

It is so ordered.

BRANTLY, C. J., concurs.

HOLLOWAY, J. I dissent. The judgment entered against this petitioner in the district court is void, and the commitment under which the warden assumes to imprison him is a nullity. This court has no original jurisdiction in criminal cases, and I challenge its authority to issue a commitment under which the sheriff of Yellowstone county can hold this petitioner in confinement until such time as a judgment may be rendered and entered against him in the district court. At least until that judgment is rendered, whether it be done within one month or six months, this petitioner will be deprived of his liberty without due process of law, the constitutional guaranty notwithstanding.

The decision of the majority converts the writ of habeas corpus into a writ of review, and the cause is treated and disposed of as though the case of the *State v. Lewis* was before this court on appeal. In this state the writ of habeas corpus is the writ as it was known to the law at the time our Constitution was adopted in 1889, and in an application of the character of the one now before us the inquiry upon the return is limited to a determination of the question: Is the imprisonment or restraint legal? Section 9642, Rev. Codes. Sections 9643 and 9650A Revised Codes, specify particularly when the applicant may be remanded to custody, but the circumstances of the present case do not approach the conditions enumerated therein.

That this applicant is illegally imprisoned cannot be gainsaid, and section 9653, Revised Codes, provides that under such circumstances he must be discharged. It may be that the law ought to be different, but until changed by the proper lawmaking body this court ought to carry into effect the plain provisions of the Codes, whatever the results may be.

(51 Mont. 55)

MARCELLUS v. WRIGHT et al. (No. 3582)

(Supreme Court of Montana. Jan. 17, 1916.)

1. PLEADING — 208 — DEMURRER — SPECIFICATION.

As Rev. Codes, § 6535, requires a demurrer on the ground that plaintiff has not the legal capacity to sue, enumerated in section 6534, subd. 2, to point out specifically the particular defect relied upon, a demurrer not pointing out such defect is insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513-519; Dec. Dig. — 208.]

2. PLEADING —193, 367—COMPLAINT—SEPARATE STATEMENT OF CAUSES OF ACTION—DEMURRER—MOTION TO MAKE MORE DEFINITE AND CERTAIN.

As Rev. Codes, § 6534, enumerating the grounds of demurrer, does not make a failure to separately state causes of action ground for demurrer, that objection to a complaint must be made by motion to make more definite and certain instead of demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 425, 428-435, 437-443, 1173-1193; Dec. Dig. —193, 367.]

3. DESCENT AND DISTRIBUTION —58 —RIGHTS OF WIFE.

Under Rev. Codes, § 4820, subd. 4, a wife may be the sole heir of her husband where he leaves neither issue, father, mother, brother, nor sister.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 146, 160; Dec. Dig. —58.]

4. PLEADING —192—COMPLAINT—DEMURRER.

As a widow may, in specified circumstances, be the sole heir of her husband, a complaint by a widow which did not show the existence of other heirs is not demurrable as showing the want of other parties, as under Rev. Codes, § 6538, such objection must appear on the face of the complaint, or it can be raised only by answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427; Dec. Dig. —192.]

5. PLEADING —34—COMPLAINT—CONSTRUCTION.

As whatever is necessarily implied by, or is reasonably to be inferred from, an allegation, is taken as directly averred, a complaint by a widow sufficiently shows the death of her husband where facts were alleged from which the inference of his death was fairly deducible.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. —34.]

6. TRUSTS —100—RESULTING TRUSTS.

Where a husband and wife mortgaged property and on the mortgage falling due a bank agreed to lend money to the wife and to buy in the property for her benefit, thereafter to convey it to her, a resulting trust arose under Rev. Codes, § 4538, declaring that when a transfer of real property is made to one person and the consideration is paid by or for another, a trust is presumed to arise, where the bank purchased the property according to the agreement but refused to retransfer.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 151; Dec. Dig. —100.]

7. MORTGAGES —624—REDEMPTION—EFFECT.

A payment of mortgage indebtedness by a party to the mortgage, who was also a debtor, operates as a redemption restoring title to the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1878-1888; Dec. Dig. —624.]

8. MORTGAGES —624—FORECLOSURE—REDEMPTION.

Rev. Codes, § 6837, as amended by Laws 1913, c. 107, declares that the judgment debtor or his successor in interest may redeem, while section 6839, as amended, declares that if the debtor redeems, the effect of the sale is terminated and he is restored to his estate. *Held*, that a wife of the mortgagor was not, by virtue of her relationship, a redemptioner, the expression "judgment debtor" referring to the one whose lands were sold to satisfy the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1878-1888; Dec. Dig. —624.]

9. HUSBAND AND WIFE —86—CONTRACTS—AGREEMENT.

Rev. Codes, §§ 3690-3737, having freed a wife of her common-law liabilities, a wife may purchase her husband's real estate sold on mortgage foreclosure, either directly or through the medium of a trustee, and hence on such purchase she acquires title, good as against her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 342-345; Dec. Dig. —86.]

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by Mary A. Marcellus against Frank M. Wright and others. From a judgment sustaining a demurrer and dismissing the complaint, plaintiff appeals. Reversed and remanded.

Ralph J. Anderson and Alfred Blaisdell, both of Lewistown, for appellant. Belden & De Kalb, of Lewistown, for respondents.

HOLLOWAY, J. To the complaint in this action defendants interposed a joint demurrer, specifying the following grounds:

"(1) That the plaintiff has not the legal capacity to sue. (2) That there is another action pending between the same parties for the same cause. (3) That there is a defect of parties plaintiff, in that it is shown in paragraph VII that the heirs of Emit Marcellus, deceased, have an interest in the controversy. (4) That causes of action have been improperly united in that an action for an alleged tort is united with an action which sounds in contract and said causes of action are not separately stated and numbered."

The demurrer was sustained, and plaintiff, electing to stand on her pleading, suffered a judgment of dismissal to be entered against her, and appealed.

[1] The first ground of demurrer is that enumerated in subdivision 2 of section 6534, Revised Codes. Section 6535 provides:

"An objection taken under subdivision 1, 3 or 6 of section 6534 of this Code, may be stated in the language of the subdivision; an objection taken under either of the other subdivisions, must point out specifically the particular defect relied upon."

Since the demurrer does not attempt to point out wherein plaintiff lacks legal capacity to sue, and such lack of capacity does not appear from the face of the complaint, so far as we are able to determine, this ground of demurrer could not have been the basis for the trial court's ruling. *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

There is not in the entire complaint the faintest suggestion that there is another action pending between the same parties for the same cause, and the second ground of demurrer is frivolous in the extreme.

[2] The objection that causes of action are not separately stated and numbered cannot be raised by demurrer. Section 6534 above enumerates the grounds of demurrer, and this is not one of them. The proper remedy for such a defect is a motion to make the complaint more definite and certain. *Galvin*

v. O'Gorman, 40 Mont. 391, 106 Pac. 887. It is not contended in this court that the complaint states different causes of action which might not be united if separately stated and numbered, and the fourth ground of demurrer could not have furnished the basis for the trial court's ruling.

[3-6] Nowhere in the complaint is it made to appear that Emit Marcellus has any heir other than this plaintiff, and that the wife may be the sole heir of her husband is determined by subdivision 4 of section 4820, Revised Codes. In order to be available as a ground of demurrer, the defect in parties must appear from the face of the complaint; otherwise the objection can be raised only by answer. Rev. Codes, § 6538. The complaint does not disclose any defect of parties, but it is agreed that the trial court and counsel proceeded upon the theory that, under the third ground of demurrer, defendants might urge the objection that plaintiff does not disclose her interest in, or title to, the land sufficiently to enable her to maintain this suit. A special demurrer does not raise the question, but upon respondents' own theory there is not any merit in their position. The sufficiency of the allegation respecting the death of Emit Marcellus is attacked in argument, but was not in the demurrer. If the allegation were deemed a material one it would suffice to say that facts are alleged from which the inference of his death is fairly deducible; and it is the rule in this state that:

"Whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as directly averred." *Willoburn Ranch Co. v. Yegen*, 49 Mont. 101, 140 Pac. 231.

[8] The complaint alleges that in 1899 Emit Marcellus and this plaintiff, his wife, conveyed certain lands to Louis Landt as security for a loan; that in 1902, and for several years prior thereto, plaintiff had been accustomed to consult defendant Wright, the cashier of the Bank of Fergus County, upon matters of business as her confidential agent and adviser; that she reposed the utmost confidence in his honesty, integrity, and good faith; that about August, 1902, she consulted him with reference to securing money to discharge the Landt obligation and was advised by Wright, acting for the bank, to permit Landt to foreclose his mortgage and sell the property, and that he (Wright), acting for the bank, would bid in the property for plaintiff and treat the money so advanced as a loan to plaintiff and hold the title to the land as security for the loan; that relying upon the advice so given and the agreement so made, Landt was permitted to foreclose and at the sale defendant Wright, acting for the bank, purchased the lands for \$3,845.40, which amount was deemed to be a loan to the plaintiff; that upon the expiration of the period of redemption a sheriff's deed was executed and delivered to Wright, who thereupon by deed conveyed the lands to the bank; that

thereafter, in 1905, the bank, in violation of the trust, conveyed some 600 acres of these lands to the defendant Benjamin McDonald, who took the same with knowledge of the trust. There are other allegations, but they are not material here.

We are not called upon to determine whether the complaint states a cause of action in favor of the plaintiff and against every defendant, as that question is not presented; but that plaintiff discloses in her complaint that she has such an interest in the land as will authorize her to maintain a suit in equity to protect it, is, we think, beyond question. If the allegations be true, the purchase of the lands at foreclosure sale, though nominally made by Wright, acting for the bank, was in fact made for plaintiff and with her money; that is, money loaned to her by the bank. A resulting trust was thus created in favor of the plaintiff (Rev. Codes, § 4538; *Lynch v. Herrig*, 32 Mont. 287, 80 Pac. 240; *Eisenberg v. Goldsmith*, 42 Mont. 563, 113 Pac. 1127), if she was in such position that she might have made the purchase directly and in her own name.

[7-9] It is urged in the brief of counsel for respondents that because plaintiff was one of the original Landt debtors and a party to the mortgage, payment by her would have the effect of a redemption rather than a purchase, and that a redemption would restore the title to Emit Marcellus, or to his heirs in case of his death prior thereto, and would not vest it in the plaintiff. This conclusion is clearly correct, but in our opinion the premise is not. When Emit Marcellus died, his interest in the property passed to his heirs. Rev. Codes, § 4819. If his death occurred prior to the date of the sale under foreclosure, then the question whether plaintiff, as his widow, by redeeming the property could maintain this action, would arise; but, as we construe the complaint, plaintiff's right of action is made to depend upon her purchase at the foreclosure sale in 1902, before any presumption of her husband's death arose. Adjudicated cases may be found which award to the mortgagor's wife the right to redeem, but in this state the subject is controlled by statute. Section 6837, Revised Codes, as amended by chapter 107, Laws of 1913, enumerates the persons who may exercise the right of redemption. Subdivision 1 limits the right to the judgment debtor; but "debtor," as the term is there employed, refers exclusively to the debtor whose land was subjected to forced sale. This is made plain by other provisions of the same statute, one of which, found in section 6839 as amended, reads as follows:

"If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate."

The other subdivision of the section restricts the right to redemptioners, and a wife, by virtue of her relationship to the mortgagor, is not a "redemptioner," as that term is therein defined. As wife of the mortgagor,

plaintiff did not redeem and could not. There is not any question, however, that under our very liberal statute emancipating married women (Rev. Codes, §§ 3690-3737) a wife may purchase her husband's real estate at execution or foreclosure sale and hold it as her separate property, if the transaction is bona fide and payment is made with her own money. She is authorized to purchase his lands from him directly (section 3694), and she could accomplish the same end through the medium of a trustee or an officer of the law (17 Cyc. 1253; 27 Cyc. 1700; Schouler on Husband and Wife, § 402; Blum v. Harrison, 50 Ala. 16; Houston v. Nord, 39 Minn. 490, 40 N. W. 563; Hill v. Bugg, 52 Miss. 397; Page v. Dixon, 59 Mo. 43; Bracken v. Milner, 99 Mo. App. 187, 73 S. W. 225).

In our opinion this complaint states facts sufficient to disclose that plaintiff became the purchaser of these lands at the foreclosure sale. Thus she discloses a sufficient interest in the land to maintain any appropriate action to protect her title.

The judgment is reversed, and the cause is remanded, with directions to overrule the special demurrer.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(51 Mont. 509)

HAMILTON v. HAMILTON et ux.
(No. 3573.)

(Supreme Court of Montana. Jan. 3, 1916.
On Motion for Rehearing, Feb. 1, 1916.)

1. APPEAL AND ERROR §193 — WAIVER OF OBJECTIONS—FAILURE TO DEMUR.

In an action to set aside and cancel sheriff's sales and deeds thereunder, or to permit plaintiff to redeem from such sales, the objection that allegations in the complaint that the sales were void and allegations that plaintiff was ready and willing to pay the amounts necessary to redeem were so inconsistent that the allegations of invalidity were conclusive against the right to redeem was merely an objection to the complaint for ambiguity or uncertainty, and could not be availed of on appeal, where the point was not made by special demurrer in the court below; as the right to object was conclusively deemed to have been waived under Rev. Codes, § 6539, providing, relative to grounds of demurrer, that if no objection is taken either by demurrer or answer, the defendant must be deemed to have waived it, accepting only the objection to the court's jurisdiction, and the objection that the complaint does not state a cause of action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. §193.]

2. MORTGAGES §591 — FORECLOSURE — REDEMPTION—STATUTORY PROVISIONS.

Rev. Codes, § 6836, provides that upon a sale of real property the purchaser is substituted to and acquires the rights of the judgment debtor, and that, when the estate is less than a leasehold of two years, the sale is absolute, but that in all other cases the property is subject to redemption as provided in that chapter. That section is contained in a chapter which apparently relates exclusively to sales under ex-

ecution, and no provision as to redemption is found in the chapter relating to mortgage foreclosure sales. Such section, however, was adopted from a California statute which prior to its adoption had been construed by the California Supreme Court as including foreclosure sales, and, though such construction was never expressly adopted by the Montana Supreme Court, it was impliedly recognized and adopted. Section 7537 provides that a judgment creditor having a judgment rendered against a testator or intestate in his lifetime may redeem any real estate of the decedent from any sale "under foreclosure or execution" in like manner and with like effect as if the judgment debtor were still living. Held that, both the court and the Legislature having accepted and adopted the construction given the statute in California, and it long having been acted upon as a rule of property, such construction will not be repudiated, and such section applies to foreclosure sales.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1693-1708; Dec. Dig. §591.]

3. STATUTES §226—CONSTRUCTION — ADOPTION OF STATUTE FROM ANOTHER STATE.

When a statute is adopted from another state the language of which has been construed by the court of last resort of that state, the construction is also adopted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. §226.]

4. APPEAL AND ERROR §173—CHANGE OF THEORY ON APPEAL.

In a suit to redeem from foreclosure sales, where defendant alleged and took the position that plaintiff's right to redeem had been cut off by a sale of the right of redemption under execution, and that he had become the owner of such right by purchase at the execution sales, a contention that no right of redemption from the foreclosure sales ever existed could not be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. §173.]

5. EXECUTION §38—PROPERTY SUBJECT TO EXECUTION—RIGHT OF REDEMPTION FROM PRIOR SALE—"SUCCESSOR IN INTEREST."

Rev. Codes, § 6821, provides that all property, both real and personal, or any interest therein of the judgment debtor, is liable to execution. Section 6836 provides that an execution purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor to the property, that, when the estate is less than a leasehold for two years, the sale is absolute, but that in other cases the property is subject to redemption. Section 6837 provides that property sold subject to redemption may be redeemed by the judgment debtor or his successor in interest or by creditors. Section 6839 provides that in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property. Held, that the right to redeem is a personal privilege, and not a property right, and is not itself subject to sale under execution, the use of the term "successor in interest" not indicating that such right may be taken by involuntary sale, as "successor in interest" includes a judgment creditor who may have become the debtor's successor by purchase at an execution sale, from which there has been no redemption or possibly a grantee to whom the judgment debtor has transferred his statutory right.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 51, 98-102; Dec. Dig. §38.]

For other definitions, see Words and Phrases, First and Second Series, Successor in Interest.]

6. EXECUTION ⚡291—REDEMPTION—RIGHT TO REDEEM.

If a judgment debtor's right to redeem from foreclosure and execution sales is subject to execution, it is because it is an interest in the property, and the sale thereof is also subject to redemption.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 829, 831-834; Dec. Dig. ⚡291.]

7. EXECUTION ⚡295—SALE—TIME FOR REDEMPTION.

If a judgment debtor is prevented from redeeming from a sheriff's sale by the act of the purchaser directly or indirectly, whether he be the judgment creditor or not, equity will intervene to protect his right and extend the time of the period of redemption.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 846-850; Dec. Dig. ⚡295.]

8. MORTGAGES ⚡599—FORECLOSURE—REDEMPTION—TIME FOR REDEMPTION.

A foreclosure sale took place on April 28, 1909, but the certificate issued to the purchaser and the duplicate filed with the county clerk by mistake recited that the sale took place on June 16th. The judgment debtor, in making ready to redeem, asked the sheriff as to the date of the sale, but the sheriff had forgotten the date. The debtor examined the records in the sheriff's office, the certificate of sale in the county clerk's office, and the return of sale in the office of the clerk of the district court, all of which showed that the sale was made on June 16th, and was advised by his attorneys that such date was correct. After April 28, 1910, his attention was called to the mistake, but an offer by him to redeem at that time or any time earlier than June 14, 1910, when tender was made, would have been rejected. *Held*, that his actual knowledge of the date of the sale after the year for redemption had expired could not affect his right to redeem subsequently and within one year from June 16th.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1733-1741; Dec. Dig. ⚡599.]

9. MORTGAGES ⚡599—FORECLOSURE—REDEMPTION—TIME FOR REDEMPTION.

The judgment debtor was entitled to redeem; as, under Rev. Codes, § 6840, authorizing payment of the amount necessary to redeem to be made to the sheriff, the sheriff, for the purposes of redemption, was the purchaser's agent, and it was his duty to know when the time for redemption expired, and his false representation thereof innocently made was, in legal effect, a misrepresentation by the purchaser or creditor, and the purchaser or creditor could not profit by it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1733-1741; Dec. Dig. ⚡599.]

10. MORTGAGES ⚡605—REDEMPTION—TENDER—PERSON TO WHOM MADE.

Tender of payment of the necessary amount to the sheriff on June 14, 1910, was as effectual as if it had been made to the purchaser, since, as the sheriff's mistake extended the time of redemption until June 16th, it also extended his authority to accept payment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1738-1794; Dec. Dig. ⚡605.]

11. EXECUTION ⚡296—REDEMPTION—AMOUNT REQUIRED TO REDEEM—"REDEMPTIONER."

Rev. Codes, § 6837, subd. 1, authorizes the judgment debtor or his successor in interest to redeem property sold subject to redemption, and subdivision 2 authorizes creditors having liens subsequent to that on which the property is sold to redeem, and provides that the persons men-

tioned in that subdivision are termed "redemptioners." Section 6838 provides that the judgment debtor or redemptioner may redeem within one year on paying the amount of the purchase, etc., and, if the purchaser be also a creditor, having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien, with interest. Section 6839 provides for successive redemptions by redemptioners, and provides for the execution of a deed if redemption is not made within one year, or if no other redemption has been made within 60 days after a redemption, and that in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property, that, if he redeem, he must make the same payments as are required to effect a redemption by a redemptioner, and that, if he redeem, the effect of the sale is terminated, and he is restored to his estate. *Held*, that the provision that the debtor must make the same payments as are required to effect a redemption by a redemptioner is not intended to annul the distinction between the judgment debtor and redemptioners, or to require the judgment debtor to pay prior liens held by the purchaser, as a condition of redemption, but merely means that, if he redeems from a redemption, he must make the payments which have been made by the redemptioner.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 851-856; Dec. Dig. ⚡296.]

For other definitions, see Words and Phrases, First and Second Series, Redemptioner.]

12. EXECUTION ⚡297—MORTGAGES ⚡605—REDEMPTION—TENDER—KEEPING TENDER GOOD.

Rev. Codes, § 4944, provides that an obligation for the payment of money is extinguished by a due offer of payment if the amount is immediately deposited in the name of the creditor with some bank within the state of good repute, and notice thereof is given to the creditor. Section 4948 provides that an offer of payment or other performance duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof. *Held* that, where a debtor made a proper tender of the amount necessary to redeem from execution and foreclosure sales, his failure to deposit the amounts tendered or retain them in his possession in readiness to be paid over to the purchaser upon demand, and to bring them into court when he instituted the action, did not defeat his right to redeem; it being sufficient that he brought them into court when directed to do so.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 857-864; Dec. Dig. ⚡297; Mortgages, Cent. Dig. §§ 1788-1794; Dec. Dig. ⚡605.]

13. EXECUTION ⚡295—MORTGAGES ⚡614—REDEMPTION—ACTIONS TO REDEEM—LACHES.

A mere delay of 14 months before bringing a suit to redeem from execution and foreclosure sales did not alone require the imputation of laches.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 846-850; Dec. Dig. ⚡295; Mortgages, Cent. Dig. §§ 1822-1824; Dec. Dig. ⚡614.]

On Motion for Rehearing.**14. MORTGAGES ⚡599—STATUTES ⚡225—REDEMPTION—STATUTORY PROVISIONS.**

Though Rev. Codes, § 6838, was enacted in 1867, while section 6839 was first enacted in 1877, as both have been incorporated in the same act, they are to be considered as enacted

at the same time and to be interdependent and construed accordingly.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1733-1741; Dec. Dig. ~~599~~; Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. ~~225~~.]

Appeal from District Court, Fergus County; J. B. Leslie, Judge.

Action by Robert E. Hamilton against Robert S. Hamilton and wife. From a decree in favor of plaintiff and an order denying a new trial, defendants appeal. Affirmed.

J. C. Huntoon and Edw. C. Russell, both of Lewistown, and Walsh, Nolan & Scallon, of Helena, for appellants. Wm. Wallace, Jr., of Helena, I. B. Kirkland, of Lewistown, and J. G. Brown and T. B. Weir, both of Helena, for respondent.

BRANTLY, C. J. This action was brought by the plaintiff against the defendants, his father and mother, to procure a decree directing the cancellation of four sheriff's deeds covering lands sold on foreclosure and execution sales belonging to the plaintiff, or permitting the plaintiff to exercise the right of redemption. The events out of which the controversy arose may be stated as follows: On May 29, 1907, the plaintiff was the owner of several pieces of real estate which, for convenience, may be referred to as the McDonald, Diehl & Mohler, Sloan, and Knudson ranches, besides two quartz lode mining claims designated as the Arizona and Standpat, all situated in Fergus county. For some years the father (hereafter referred to as the defendant, because Mary A. Hamilton is only a formal party) had held three mortgages executed to him by the plaintiff, separately covering the first three ranches named, and also two unsecured promissory notes of the plaintiff. On May 29, 1907, the defendant brought an action in the district court of Fergus county on these notes (the cause being numbered 1602), and on November 19, 1907, recovered judgment thereon in the sum of \$4,661.35. On June 7, 1907, the defendant brought an action to foreclose the mortgage on the McDonald ranch (cause 1606). On May 10, 1909, this action resulted in a decree directing the sale of the property to satisfy an indebtedness found to be \$1,163.45, with interest and accrued costs. On June 16th the property was sold by the sheriff under the decree; the defendant becoming the purchaser for \$1,213.97, the full amount due, with interest and costs of sale. A certificate was issued to the defendant on that date, and a duplicate thereof was filed with the county clerk. On July 25, 1908, the defendant brought an action (cause 1774) to foreclose the mortgage on the Diehl & Mohler ranch. On February 15, 1909, this action resulted in a decree directing a sale of it to satisfy an indebtedness of \$1,406.03, with interest and accruing costs. On June 2d the property was sold by the sheriff under the

decree, the defendant becoming the purchaser for the sum of \$1,481.82, the full amount due, with interest and costs of sale. A certificate was issued to the defendant on that date, and a duplicate thereof filed with the clerk and recorder on August 6th. On July 25, 1908, the defendant brought an action (cause 1775) to foreclose the mortgage on the Sloan ranch. On February 16, 1909, this action resulted in a decree directing a sale of the property to satisfy an indebtedness of \$5,837.43, with interest and accruing costs. On April 28th the property was sold by the sheriff; the defendant becoming the purchaser for the sum of \$6,017.24, the full amount due, with interest and accruing costs. A certificate was issued to him on June 16, 1909, and a duplicate thereof filed with the clerk of the county on August 6th. By mistake of the sheriff this certificate recited that the sale had taken place on June 16th instead of April 28th. On June 22, 1909, the defendant caused execution to issue upon the judgment recovered in cause No. 1602, directing the sheriff to satisfy the same by sale of the property of plaintiff. Under this execution, on July 21st, the sheriff, having advertised for sale, but without a levy of the execution, again sold the property covered by the three mortgages, for the sum of \$235; the defendant becoming the purchaser. A certificate of sale was issued to him on August 6th, and thereafter, on September 7th, a duplicate thereof was filed with the county clerk. The purpose of this latter proceeding was to sell the plaintiff's "equity of redemption," or, in other words, to cut off his statutory right of redemption from the foreclosure sales. The published notice of sale described the subject of it as "all the right, title, and interest" of plaintiff in the lands designated by legal subdivisions, as in the notices of the foreclosure sales. It did not mention the right of redemption. On July 22, 1909, in cause 1608, the defendant recovered judgment upon another claim which he held against the plaintiff for the sum of \$946.67, which was duly docketed, and at the time this action was tried was unsatisfied. On September 7, 1909, under an alias execution issued on the judgment in cause 1602, the sheriff sold the Knudson ranch and the Arizona and Standpat claims; the defendant becoming the purchaser. The price paid for the former was \$1,500, and for the latter \$500. Certificate of this sale was issued on September 7th and filed with the county clerk on September 14th. On October 11, 1909, under a later alias execution issued on the judgment in cause 1602, "all the right, title, and interest of defendant" in the Knudson ranch and the two mining claims was sold by the sheriff and purchased by the defendant for \$250. By this sale the defendant sought to cut off plaintiff's right to redeem this property. The balance remaining due after these various sales upon

the judgment in cause 1602 was \$3,086.22, with accrued interest. On May 7, 1910, the sheriff executed to the defendant a deed to the Sloan ranch. As soon as the year following each of the other sales expired the defendant obtained sheriff's deeds. He thereupon, by appropriate actions prosecuted to judgment, secured possession of all the lands in question. The plaintiff was not personally present at any of the sales, but remained away under the advice of his attorneys that it would be better to permit the sales to take place and to regain the title by redemption.

The complaint contains five causes of action. The first relates to the McDonald ranch. Reciting in detail the proceedings referred to above resulting in the sale under the decree of foreclosure and the right of redemption, under the execution in cause 1602, it alleges, in substance, that on June 14, 1910, the plaintiff tendered to the sheriff in cash, for the purpose of redeeming the premises, the full amount necessary to effect redemption, which included the amounts paid at both sales, with interest, costs, taxes, and all legal charges, but that the sheriff refused to accept the money and to permit him to redeem; that plaintiff "then was, and ever since has been, and now is, ready and willing and hereby offers to keep said tender good, and to pay the whole of said redemption money into this court for the benefit of whomsoever shall be entitled thereto whenever this court shall order or permit plaintiff so to do"; that on September 2, 1910, the sheriff executed and delivered to the defendant a deed purporting to convey the premises to him, who thereupon caused the same to be recorded by the county clerk, and that thereafter the plaintiff was ousted from possession at the suit of the defendant, as stated above; that "plaintiff avers upon his information and belief that said deed is voidable and should be voided, for the reason that the said premises were sold at said sheriff's sale en masse instead of in separate lots, and for the further reason that plaintiff has made a good and sufficient tender of the sum necessary to redeem said property from said sales within the time for redemption therefrom, and has done all things necessary and within his power to accomplish a redemption of said property, and would have redeemed the same but for the wrongful refusal of said sheriff to accept the redemption money when tendered as aforesaid." The second and fourth causes of action are substantially repetitions of the first, with the exception of the difference in the dates of the events which occurred during the course of the proceedings and the amounts tendered to effect redemption. The tender for the redemption of the Diehl & Mohler ranch, to which the second cause of action relates, is alleged to have been made on June 2, 1910, and the sheriff's deed on September 2d. The tender for the redemption of the Knudson ranch and the mining claims, to which the fourth cause

of action relates, is alleged to have been made on June 14, 1910, and the sheriff's deed on September 2, 1910. The third cause of action, which relates to the Sloan ranch is, with the exception of the following, substantially the same as the foregoing. It is alleged that on June 16, 1909, the sheriff made his return of sale under the decree and filed it in the office of the clerk of the district court on August 6th; that he stated therein that he had sold the property to the defendant on June 16, 1909; that in the certificate delivered to the defendant and the duplicate filed with the county clerk he also stated that the sale had been made on June 16th; that early in the month of April, 1910, "and while the said records and certificates in this court and in the recorder's office showed the date of said sale to have been June 16, 1909, this plaintiff, having no knowledge of the actual date of said sale, caused an investigation of said records to be made for the purpose of advising himself of the date thereof, and of the expiration of the time within which he would be entitled to redeem therefrom, and caused inquiry to be made of the sheriff also with regard thereto; and that he was advised by said sheriff and informed by those who had made said investigation of such records that the sale had taken place on June 16, 1909." Then follow allegations to the effect that the plaintiff had no knowledge prior to June 10, 1910, that it was claimed that the sale had been made at an earlier date or of the fact that it had taken place at an earlier date, and that, if he had had such knowledge or the means of obtaining the same, and had not been misled by the statement of the sheriff and the return of sale and the certificate accepted by the defendant, he could and would have made redemption of said property from the sale prior to April 28, 1910. It is alleged:

"The delay of this plaintiff in making said redemption and tender as to said decretal sale on June 14, 1910, was due to his being misled by said certificate of sale and return of sale and the information of the sheriff and the record, and that he acted in reliance thereon and in the honest belief induced thereby that his right to redeem from said decretal sale did not expire until June 16, 1910."

It is further alleged:

"That on June 1, 1910, said sheriff, acting under the direction of defendant Robert S. Hamilton, moved this court for permission to withdraw his return upon said order of sale filed in said foreclosure suit on August 6, 1909, and to amend the date declared therein as the date of said sale by changing the '16th day of June' to the '28th day of April,' and for leave to refile said return, as so amended, as of date August 6, 1909, which motion was supported by the affidavit of this defendant Robert S. Hamilton and said sheriff, alleging that a mistake had been made in said return of sale and in said certificate of said sale in the date of said sale; and on August 10th, 1910, this court permitted the withdrawal of said return and the change of date thereof, and the refile of the same, all of which was accordingly then had and done."

The tender to effect redemption is alleged to have been made on June 14, 1910. The

fifth cause of action is a combination of all the others. It was abandoned at the trial, and therefore does not require notice here.

The relief demanded is the following: That each of the sheriff's deeds and all proceedings had under each of the sales be canceled; that, if said sales be not canceled, the plaintiff be permitted to redeem, and that upon such redemption the defendants be required to convey each and all of said premises to the plaintiff; that he recover his costs, and that he have such other relief as in the premises may be just and equitable. The questions of fact presented by the pleadings and agitated at the trial are these: (1) Were the proper tenders made by the plaintiff to effect redemption? (2) Was the plaintiff misled as to the date of sale of the Sloan ranch, so that his tender made on June 14th was in time? (3) Had he up to the date of the trial held himself in readiness to pay the amounts tendered? The court found these issues in favor of the plaintiff, and rendered a decree adjudging him entitled to redeem all the lands upon depositing in the hands of the clerk within 30 days from the date thereof the sum of \$12,651.29; that upon such deposit the sheriff's deeds and also the judgments under which the defendant obtained possession be canceled; and that plaintiff recover his costs to be paid to him out of the sum deposited by him with the clerk. The plaintiff made the required deposit. The cause is here on appeals by the defendants from the decree and an order denying them a new trial.

[1] 1. It is argued that the plaintiff is not entitled to redeem because he has waived the benefit of any tenders made and the right to redeem by attacking the validity of the sales on the ground of irregularity and insisting upon their invalidity as the primary ground of relief. It is said that the two allegations in the complaint, the one asserting that the sales were void because they were made en masse, and therefore not pursuant to the requirements of the statute (Rev. Codes, § 6830), and the other that the plaintiff was and still is ready and willing to pay the amounts necessary to effect redemption from them, are so far inconsistent that the making of the former is conclusive against the right to redeem. This contention is, in effect, an attack upon the complaint on the ground of ambiguity or uncertainty, and may not be availed of in this court, for the reason that the point was not made by special demurrer in the court below. Whether the court should have sustained a demurrer upon this ground, had it been interposed, we are not required to decide. Our office is to determine whether the plaintiff made a case by his evidence upon which he is entitled to relief within the allegations of his complaint considered from any point of view. This is the rule when seasonable attack has been made in the trial court by general demurrer only. *Donovan v. McDewitt*, 36 Mont. 61, 92

Pac. 49; *Hicks v. Rupp*, 49 Mont. 40, 140 Pac. 97; *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976. It is the rule applicable to a complaint which is merely ambiguous or uncertain in the allegation of the facts upon which the demand for relief is predicated, because the right to object to it by special demurrer on either or both of these grounds is conclusively deemed to have been waived after issue is joined. Rev. Codes, § 6539.

[2, 3] 2. It is contended that the statute relating to redemptions does not include sales made under foreclosure decrees. This contention cannot be maintained. Section 6836 of the Revised Codes declares:

"Upon a sale of real property, the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years unexpired term, the sale is absolute. In all other cases the property is subject to redemption, as provided in this chapter."

The chapter in which this provision is found (chapter 1, tit. 9, pt. 2) apparently relates exclusively to sales under levies by execution upon judgments as such, and not to mortgage foreclosure sales. The provisions relating to the latter are found in chapter 1, tit. 10, pt. 2. In the latter there is found no provision on the subject of redemption. If nothing other than these provisions were to be considered, we should be inclined to the opinion that a sale under a decree of foreclosure would ipso facto finally cut off the rights of the judgment debtor. Section 6836 was first enacted by the territorial Legislature in 1867, and has been a law in this jurisdiction ever since. Laws 1867, p. 181 (Prac. Act) § 229; Laws of Montana 1871-72, p. 87 (Civ. Prac. Act) § 279; Laws 1877, p. 128 (Code Civ. Proc.) § 329; Rev. Stat. 1879, div. 1, tit. 9, c. 1 (Code Civ. Proc.) § 329; Comp. Stat. 1887, div. 1, § 340; Code Civ. Proc. 1895, § 1233. It was adopted from the Practice Act of California, the source of many of the provisions of our Code of Civil Procedure (Cal. Civ. Prac. Act [St. 1851, p. 88] § 229), with the addition of the clause defining the rights acquired by the purchaser at execution sale. This clause, however, did not in any way affect the right of redemption granted. Section 231 of the California act fixed the time within which the redemption might be effected at six months. The same limitation was provided by our own statute until it was changed to one year by the act approved March 12, 1895. Rev. Codes, § 6838. Prior to its enactment by the territorial Legislature, the provision had been construed by the Supreme Court of California as broad enough to include within its design sales made under decrees of foreclosure. In *Kent v. Laffan*, 2 Cal. 596, decided in 1852, after quoting the provision, Mr. Justice Heydenfeldt, speaking for the court, said:

"I think the language of this act is sufficiently comprehensive to include within its design sales of real estate under decrees of foreclosure of mortgages. A contrary doctrine might be held by ingenious and technical construction of that portion of the act which regulates executions upon judgments. But in all such cases I consider it safest to look to the obvious policy of the law, and to maintain such policy against a mere hesitation caused by the inapt language of the act. This is also the application of the common-law principle which declares that remedial statutes shall be beneficially construed."

It may be noted that, when the decision was made, the California act also contained special provisions for foreclosures, none of which granted the right of redemption. This case was recognized and followed as authority in *Guy v. Middleton*, 5 Cal. 392 (1855); *Harlan v. Smith*, 6 Cal. 173 (1856); *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655 (1858); and *Stout v. Macy*, 22 Cal. 650 (1863). While in *McMillan v. Richards* Mr. Justice Field intimated a doubt as to the correctness of the decision in *Kent v. Laffan*, he said:

"It has been repeatedly recognized as law by this court. * * * and has been acted upon by parties for years; rights of property have been acquired under it which we are not at liberty at this day to disturb."

There is no decision by this court expressly adopting the construction given the provision by the California court; yet it was many years ago recognized by this court as settled law. *State ex rel. Cruse Savings Bank v. Gilliam*, 18 Mont. 94, 44 Pac. 394, 45 Pac. 661, 33 L. R. A. 556. In that case the question at issue was whether the act approved March 12, 1895, extending the period of redemption from six months to one year impaired the obligation of a mortgage contract made prior to its enactment. In the original opinion it was held that it did not. On rehearing the decision was reversed because of the decision of the Supreme Court of the United States in *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93, overruling the decision of the Supreme Court of Kansas in the same case. 55 Kan. 466, 42 Pac. 725, 31 L. R. A. 74, 49 Am. St. Rep. 257. The decision was upon a question not before the court, unless upon the assumption that the statute (section 6836, *supra*) includes sales on mortgage foreclosures. This decision may therefore be deemed as a distinct recognition and adoption of the law as declared in *Kent v. Laffan*. Again, in section 7537 of the Revised Codes is found this provision:

"A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living."

This provision has been upon our statute books for more than 30 years. Both this court and the Legislature having thus accepted and adopted the construction given the statute in *Kent v. Laffan*, and it having long been acted upon as a rule of property

in this state, we think it would be entirely wrong for this court to repudiate it at this late day, thus disturbing titles acquired under it. Especially applicable to these circumstances is the rule which we have frequently recognized, that, when a statute is adopted from another state, the language of which has been construed by the court of last resort of the state from which it comes, we adopt the construction also. *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *Sharman v. Huot*, 20 Mont. 553, 52 Pac. 558, 63 Am. St. Rep. 645; *Stadler v. Bank*, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582; *Butte & Boston Co. v. Montana O. P. Co.*, 25 Mont. 41, 63 Pac. 825; *McQueeney v. Toomey*, 36 Mont. 281, 92 Pac. 561, 122 Am. St. Rep. 358, 13 Ann. Cas. 318.

[4] The case of *Thomas v. Thomas*, 44 Mont. 102, 119 Pac. 283, Ann. Cas. 1913B, 616, cited by counsel, does not suggest anything contrary to the case of *Kent v. Laffan*, but merely holds that the sheriff derives his power to make a sale on foreclosure from the decree, and not from the order of sale, and that such an order need not possess the formalities of the writ of execution provided for in section 6817 of the Revised Codes. Neither is the case of *Parker v. Dacres*, 130 U. S. 50, 9 Sup. Ct. 433, 32 L. Ed. 848, in point. It does hold that the legal right of redemption is statutory. It also holds that the mode of exercising it pointed out by the statute must be pursued. There is nothing in either of these holdings applicable to the case in hand. Furthermore, in their answer the defendants aver that plaintiff owned the right to redeem the lands covered by the mortgages from the date of each of the sales until July 21, 1909, when the several rights were sold under execution in cause 1602, and that defendant then became the purchaser and owner. This allegation defines the position assumed by defendant throughout the trial in the district court, viz., that he had cut off plaintiff's right to redeem, and hence that, though it had existed either by virtue of the statute or under the terms of the decree, he had himself become the owner of it by purchase at the execution sales. That the right exists was therefore an admitted fact in the case. The contention made in this court for the first time that the right never existed is, to say the least, too late to avail the defendant. It is also entirely inconsistent with the next contention made by counsel, viz., that plaintiff's right to redeem was subject to sale under execution, and that, it having been levied upon and sold, plaintiff was left without the right.

[5, 6] 3. Section 6837 of the Revised Codes declares:

"Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest: 1. The judgment debtor,

or his successor in interest, in the whole or any part of the property. 2. A creditor having a lien by a judgment, mortgage or attachment, on the property sold, or on some share or part thereof, subsequent to that on which the property is sold. If a corporation be such creditor, any stockholder thereof may redeem, in case the officers of such corporation refuse so to do. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

Sections 6838 and 6839 prescribe within what time and how the judgment debtor or redemptioner may effect redemption, what are the rights of successive redemptioners, and what payments must be made by each. In the latter section is found this provision:

"In all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property."

It authorizes the execution of a deed by the sheriff only at the expiration of the year. It was held in *McQueeney v. Toomey*, supra, that the right of redemption puts the debtor in a position analogous to that of one who has a right to repurchase the property on certain fixed and definite terms. This conclusion was deemed necessary in view of section 6836, which declares what the purchaser at the sale acquires. If he acquires "the right, title, interest and claim of the judgment debtor," no interest is left which is the subject of levy and sale. Clearly, then, the purpose of the Legislature in enacting section 6837 was to declare it to be the public policy of this state that, when an unfortunate debtor has lost his land, either under mortgage foreclosure or execution sale, he shall have the opportunity to regain it by complying with the conditions imposed; and not only so, but that those who have acquired liens inferior to that to satisfy which the sale was made shall resort to the process of redemption, and not to levy and sale, in order to protect themselves from loss. The right is therefore a personal privilege, and not a property right, and hence does not come within the category of any of the interests enumerated in section 6821 as subject to execution. The language quoted from section 6839, "In all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property," as clearly manifests this purpose as if the statement had been, "The right of the debtor to redeem shall not be subject to levy under execution;" otherwise the provision would be without meaning or purpose. The result would be that the right, not only of the judgment debtor, but also of every redemptioner, could be taken away by an assiduous creditor, and thus the whole policy of the law would be defeated. *Merry v. Bostwick*, 13 Ill. 398, 54 Am. Dec. 434; *Powers v. Andrews*, 84 Ala. 289, 4 South. 263; *Shaw v. Lindsey*, 60 Ala. 344. It is said by Mr. Freeman in his work on Execution (2d Ed.) § 182, that since the judgment debtor had, pending the period of redemption, the possession of the property and a beneficial,

as well as a legal, estate therein, no reason can be assigned why this estate may not be subject to levy and sale under execution against him. This may be true in those states in which, as in Iowa (*Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460), the levy and sale vests in the purchaser only an inchoate estate which may ripen into a legal estate upon the execution of the sheriff's deed. It cannot be so under our statute, for it contains no provision giving the debtor the right of possession during the period of redemption; section 6843 seeming to imply that the judgment creditor is entitled to demand and receive the value of the use and occupation during that period. This view is in conflict with the conclusion announced in *McMillan v. Richards*, supra, on the same point; but it may not be overlooked that section 231 of the California Practice Act, in force at the time the decision was made, as has already been noted, did not define the character of title acquired by the purchaser at an execution or foreclosure sale, as does section 6836, supra. The California section has been amended in the particular referred to, and is now identical with ours. Cal. Code Civ. Proc. § 700. We have not been referred to any decision construing it. Doubtless the court would not give it a construction in harmony with our view. But, be this as it may, if the debtor's interest is subject to execution, it is because it is an interest in the real estate. If it be such, the conclusion cannot be avoided that the sale of it must also be subject to redemption (*Russell v. Fabyan*, 34 N. H. 219); otherwise, again, the provision quoted from section 6839 is without purpose or meaning. The use of the expression "successors in interest," in section 6837, does not furnish the basis for an inference to the effect that the right of the debtor may be taken by involuntary sale. It can mean nothing more than that one who has succeeded to the title to the property, or has been substituted to the rights of the debtor or redemptioner, has the same rights as has he. When, for illustration, property is subject to a mortgage, or judgment, or attachment lien, it is still the property of the debtor. A judgment creditor may become his successor by purchase at execution sale from which there has been no redemption, as was the case in *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, 648, but this is fundamentally a different case from that of an attempted sale under execution of the statutory right of redemption. The distinction between this right and what was known as the equity of redemption at the common law is fundamental. The one is the right a judgment debtor has to regain property which he has lost by sale under process. The other is the right the mortgagor has, prior to foreclosure, to discharge the indebtedness, and thus clear his property from the incumbrance of the mortgage, the former comes into existence only after the

foreclosure sale and is of purely statutory origin. 27 Cyc. 1800; 11 Am. & Eng. Ency. of Law (2d Ed.) 213. The other is founded upon the mortgage contract. The term "successor" is also broad enough to include a grantee to whom the judgment debtor has transferred his statutory right. *McQueeney v. Toomey*, supra; *Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 843, 54 Am. St. Rep. 369. The question whether this is so does not arise here. Our conclusion therefore is that the attempted sales of the right of redemption were nugatory, and that by virtue of them defendant did not cut off plaintiff's right.

4. The next question presented is whether the evidence is sufficient to support the findings. It is so voluminous that it will be impossible to quote and examine it in detail. There can be no question but that it amply justifies the court's conclusion that on June 14, 1910, the plaintiff tendered to the sheriff at the Fergus County Bank in Lewistown amounts respectively sufficient to effect redemption of the McDonald, Sloan, and Knudson ranches and the mining claims, including the amount bid at the alleged sale of the right to redeem, made of the former on July 22, and of the latter on September 7, 1909, with statutory interest at 12 per cent. per annum on the principal sums (Rev. Codes, § 6838), together with the taxes, assessments, and charges paid by the defendant, with interest on them at 8 per cent. per annum. At that time the plaintiff, accompanied by his wife and his attorney, Mr. Marshall, was at the bank, and, Mr. Marshall having previously ascertained and cast up the separate amounts required, the plaintiff tendered them separately in gold coin to Mr. Tullock, the undersheriff, who had come in at the request of Mr. Waite, the president of the bank. Uncertain whether the exact amounts ascertained by Mr. Marshall's calculations would be sufficient, he tendered a considerable sum in excess in each case. Mr. Tullock, though expressing himself as satisfied that the amounts were sufficient, refused to accept them, because he had been instructed by the sheriff and Mr. Huntoon, the attorney of the defendants, who had exclusive charge of the sales, and also of the matter of redemption, not to accept them; Mr. Huntoon's theory evidently being that the right of redemption in each case had been taken away by the sales under the judgment in cause 1602. Thereupon the total of the three amounts was tendered and refused. There were present at the time Mr. Waite, the president, Mr. Osweller, the assistant cashier, and Mr. Nave, an acquaintance of plaintiff who had aided in procuring the money. Mr. Marshall, Mr. Waite, and Mr. Osweller testified as to what took place. Upon the refusal of Mr. Tullock to accept the money, Mr. Belden, an attorney of the plaintiff, came in and with the same money made like tenders, as mortgagee of the plaintiff. These tenders were also refused. There

is some conflict in the evidence as to whether tenders were made in separate amounts to redeem from each sale, or whether only a single tender of the gross amount was made by Mr. Belden. It is sufficient to say on this point that the evidence preponderates in favor of the court's finding that the tenders were made by the plaintiff as stated by Mr. Marshall and as the court found.

[7] Admittedly no tender was made at any other time to redeem the Sloan ranch, the sale of which had taken place on April 28, 1909. It does not follow, however, that this fact conclusively precluded the court from inquiring into the circumstances and determining whether the plaintiff was excusable for neglecting to make the tender in this behalf before the expiration of the year after that sale. It is well settled that, if the judgment debtor is prevented by the act of the purchaser, whether judgment creditor or not, directly or indirectly, from complying with the statute, equity will intervene to protect his right and extend the time of the period of redemption. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839; *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721; *Benson v. Bunting*, 127 Cal. 536, 59 Pac. 991, 78 Am. St. Rep. 81. Indeed, we do not understand that counsel for the defendant contend to the contrary. They apparently accept this as the law, because their contention is that the court was in error in finding that the plaintiff was misled by the sheriff and the record made by him after the sale proceedings, and thus prevented the plaintiff from effecting redemption within the statutory period.

[8-10] The evidence introduced on this point tends to show that early in April the plaintiff, in order to make ready to redeem, made inquiry of the sheriff as to the date of sale. The sheriff being unable to give him the information on the subject because he had apparently forgotten the date, he then went to the sheriff's office. Such record as he found there showed the date as June 16th. He then examined the certificate of sale in the county clerk's office and the return of sale in the office of the clerk of the district court. Not content with this, he had an investigation made by his attorneys, and was advised by them that June 16th was the correct date. All these records showing that the sale had been made on June 16th, he reached the conclusion that this date was correct. The notice of the sale was published in the Fergus County Democrat, to which the plaintiff was a subscriber. It described the Sloan ranch by legal subdivisions only. Notice of the sale of the Diehl & Mohler ranch was being published at the same time and in the same way. The Sloan, McDonald, and Diehl & Mohler ranches were being advertised by the same description for sale on July 21st. This was the notice of the sale of the right of redemption. But there was no intimation in

the notices that this was the subject of the sale. The plaintiff, having been advised by his attorneys not to attend the sales, did not do so, nor did he read the notices. If we bear this in mind, it does not appear strange that he should have been led by the record to believe that he had until June 16th to effect redemption. Indeed, the defendant himself, who had procured the sales and had attended all of them, and seems to have been determined to preclude redemption by any means in his power, did not discover the mistake until he came to apply for his deed on May 5th; and, while it is true that a few days after April 28th the defendant applied to the court for, and subsequently obtained, an order permitting the sheriff to correct his return and certificate, and that the attention of the plaintiff was then called to the error, the time for redemption had then expired. An offer by him to redeem at that time or any time earlier than he did after the end of the year would have been peremptorily rejected. The fact that actual knowledge was then brought to him could not affect his right. And if, as he testified, and the court found, he neglected to offer to redeem earlier than he did because he had no actual knowledge of the correct date until after the expiration of the year, and could not acquire it from the official record, he ought not to be denied relief. For, though the sheriff was not, in a strict sense of that term, the agent of the plaintiff, the defendant may not be permitted to profit by his error; on the contrary, to the extent to which the plaintiff suffered wrong by the error of the sheriff, the defendant is responsible. For the purposes of redemption the statute makes the sheriff the agent of the purchaser at the sale. Rev. Codes, § 6840. It is his duty to know when the time for redemption expires. Therefore a false representation made by him upon the subject is, in legal effect, a misrepresentation made by the purchaser or creditor, and, though it be innocently made, the latter cannot profit by it. 2 Herman on Estoppel and Res Judicata, § 770; 17 Cyc. 330; French v. Edwards, 13 Wall. 506, 20 L. Ed. 702. And just here it may be remarked that a tender of payment to the sheriff on June 14th was just as effectual as if it had been made to the defendant; for, if the mistake of the sheriff extended the time of redemption until June 16th, it also extended the authority of the sheriff to accept payment.

As to the tender made on June 2d to redeem the Diehl & Mohler ranch, the evidence is not entirely satisfactory, but, in our opinion, it is sufficient to sustain the conclusion that it was made on that date as alleged. In brief, it appears that, having previously ascertained through his attorneys from the return of the sheriff that that date was the last day of the redemption period, the plaintiff obtained from one Shoemaker a sufficient amount in gold to effect the redemption,

and entrusted it to Messrs. Marshall and Belden, his attorneys, for that purpose. The attorneys proceeded to the sheriff's office. Mr. Marshall testified that they, in the presence of the plaintiff and in his behalf, tendered the amount bid at the foreclosure sale, and also the sale of the right of redemption, together with interest, taxes, and charges as required by the statute, and, in order to cover any error which they might have made in casting up the gross amount, \$130 besides, and that the undersheriff refused to receive it because he had been instructed by the sheriff and Mr. Huntoon not to do so. This was the only direct evidence on the subject. The truth of it is rendered questionable by the statement of the plaintiff that he was not present, by that of Mr. Belden that he made the tender as plaintiff's mortgagee, and also by that of Mr. Tullock, the undersheriff, that the only tender he had any recollection of was that made by Mr. Belden. That Mr. Belden did make such a tender must be accepted as true, because the documentary evidence introduced in connection with his testimony shows that he held a mortgage on the property executed to him and recorded on that day which was brought to the attention of the sheriff by a certificate of the county clerk and an affidavit by Mr. Belden as required by the statute. Rev. Codes, § 6841. On the other hand, it cannot be doubted that the money tendered belonged to the plaintiff, and that the attorneys were present then to effect a redemption in his behalf. The other testimony tends to show that the mortgage was executed to Mr. Belden merely as a device to enable him to make a tender as mortgagee. It is altogether improbable that, such being the case, he made the tender exclusively as mortgagee with money which belonged to his client. We think the evidence justifies the conclusion that a tender was made as testified to by Mr. Marshall on behalf of the plaintiff, and that the subsequent tender by Mr. Belden was a precautionary measure merely, as evidently was the tender by Mr. Belden in the same capacity at the bank on June 14th; for in each case, when his tender had been refused, he returned the money to the plaintiff.

[11] 5. Counsel argue that the tenders were ineffective because they did not include the balance of the judgment in cause 1602 and that recovered in cause 1608. They rely upon the provision found in section 6839:

"If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner."

This provision we must construe in connection with its context in the section in which it is found and with section 6838, bearing in mind the distinction in the meaning of the terms "debtor" and "redemptioner" as defined in section 6837, supra. Section 6838 declares:

"The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within one year after the sale, on paying the purchaser the amount of his purchase, with one per cent. per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest."

Considering for the moment this provision alone, the distinction between the obligation cast upon the judgment debtor and the redemptioner is apparent. The first may redeem by paying to the purchaser the amount of his purchase, with interest, etc. The latter must, in addition, pay any prior lien held by the purchaser. As pointed out in *Sharp v. Miller*, 47 Cal. 82, the reason for the distinction is that, if the redemptioner were permitted to redeem without paying the prior lien of the purchaser, the result would be that the lien would be defeated; for the title would pass to the redemptioner free from it. If the judgment debtor redeems, the lien of the purchaser will be preserved because the judgment debtor is restored to his estate, and the lien will at once attach. The same distinction is observed by the Supreme Court of Minnesota in *Warren v. Fish*, 7 Minn. 432 (Gil. 347), in which an identical provision was considered.

The question, then, arises whether the provision quoted above from section 6839 imposes upon the judgment debtor an additional obligation. It must be borne in mind that the two sections were enacted at the same time and as the provisions by which the privilege granted by section 6837 was to be made available. As section 6838 declares the obligation to be discharged by the judgment debtor and the first redemptioner, so section 6839 is primarily concerned with the rights and obligations of successive redemptioners. It declares particularly when and how and within what time each redemptioner may acquire the right of his predecessor, what payments he must make, and what notice he must give to the sheriff to protect his rights. It further declares when the purchaser or the redemptioner may obtain a deed with the proviso that the judgment debtor shall have the entire year in which to redeem. Then follows the provision quoted above, which counsel insist adds to the obligation imposed upon the judgment debtor by section 6838, the further obligation to discharge all prior liens held by the purchaser. Evidently this was not the purpose of the Legislature in inserting this provision. It cannot be supposed that, after it had defined and distinguished the respective obligations of the judgment debtor and the redemptioner, it deliberately concluded to annul the distinction and put both in the same category. Looking at the preceding provisions of the section, it seems clear that the intention was to declare that,

if the judgment debtor redeem from a redemptioner, he must make the payments which have been made by the redemptioner. That this is so is suggested by the clause immediately preceding, "but in all cases the judgment debtor shall have the entire period of one year from the date of sale to redeem the property," and also the one immediately following, "if the debtor redeem, the effect of the sale is terminated and he is restored to his estate." The first of these serves to put beyond question the right of the debtor to redeem from a redemptioner at any time within the period of one year, and the latter to relieve the debtor from the obligation to observe any of the requirements as to notice which must be observed by the redemptioner, both in this section and in section 6841. This construction harmonizes the two provisions by reconciling their apparent inconsistency, and gives certain meaning to every provision of both.

We have not been referred to any case which has expressly construed such a provision; but the Supreme Court of California in *Campbell v. Oaks*, 68 Cal. 222, 9 Pac. 77, has by implication given the provision the same purport we have given it above. In that case the purchaser at the sale was a member of a copartnership which held a judgment lien prior to that of the judgment creditor at whose instance the sale was made. The purchase had been effected on behalf of the firm and with firm money; the purchaser holding the title in trust for the firm. Within the period of redemption the judgment debtor tendered to the sheriff the amount of the purchase, with interest, etc., in order to effect redemption, and demanded a certificate, which was refused. Action was brought by the debtor to compel the issuance of the certificate. The trial court denied relief, but the Supreme Court, reversing the judgment, said:

"We cannot see how the firm obtaining a judgment against the same defendant in the superior court could have been prejudiced by a redemption from the sale under the second judgment, as the lien of the first judgment was in no manner affected thereby. It was simply an attempted redemption by the judgment debtor whereby the sale under the second judgment would have been wiped out."

The court evidently regarded the firm as a purchaser having a prior lien. Hence, since sections 702 and 703 of the Code of Civil Procedure of California are substantially identical with sections 6838 and 6839, supra, the decision is directly in point; for the conclusion stated cannot be justified upon any theory other than that the provision relied on by counsel does not relate to the obligation due from the debtor to the purchaser, but to that due from him to the redemptioner.

We have assumed in this discussion that both the defendant's judgments were prior liens upon all the plaintiff's property. In fact, the unpaid balance of the judgment in

cause 1602 was not a prior lien, within the meaning of the statute, on the Knudson ranch and the mining claims, because it was the judgment under which these properties were purchased. It is also doubtful whether the judgment in cause 1608 was a lien upon any of the property sold under the foreclosures, because the judgment was not docketed until July 22, 1909, after the last foreclosure sale had been made. It is not necessary to consider these matters. The defendant can have no just cause of complaint. By the redemption which we shall hold the plaintiff effected, he will get the amounts due him in full, and at the same time will have ample security for the amounts due on these judgments; for both will become liens upon all the property as soon as the redemption is effected, to be enforced by him at his pleasure.

[12] 6. The evidence discloses that the plaintiff did not deposit the amounts tendered or retain them in his possession in readiness to be paid over to the defendant upon demand, down to the date of the trial, and bring them into court when he instituted this action. He did not therefore lose his right, however. Section 4948 of the Revised Codes declares:

"An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation and has the same effect upon all its incidents as a performance thereof."

Whatever may be the view entertained by the courts elsewhere, this section establishes the rule in this jurisdiction. It is clear and explicit, and its terms cannot be misunderstood. It is true the offer does not discharge the debt due, for nothing short of payment or deposit in conformity with section 4944 will have this effect; but it does have the same effect upon all the incidents of the obligation as actual payment. If the debt is secured by a lien upon property, or by sureties, the tender operates as a release of the lien or the sureties, as the case may be, and leaves the creditor to his personal claim against his debtor. 38 Cyc. 163; *Thomas v. Seattle Brewing Co.*, 48 Wash. 560, 94 Pac. 116, 15 L. R. A. (N. S.) 1164, 125 Am. St. Rep. 945, 15 Ann. Cas. 494; *Ferreira v. Tubbs*, 125 Cal. 687, 58 Pac. 308; *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857, 9 L. R. A. 55, 19 Am. St. Rep. 247; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145. After the tender has been made and refused, it is not necessary in order to keep it good that the money be brought into court. *Ashley v. Rocky Mt. Bell Tel. Co.*, 25 Mont. 286, 64 Pac. 765; *Thomas v. Seattle Brewing Co.*, supra; *Ferreira v. Tubbs*, supra; *Moore v. Norman*, supra; *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Christenson v. Nelson*, 38 Or. 473, 63 Pac. 648; *Weeks v. Baker*, 152 Mass. 20, 24 N. E. 905; *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 663. It was sufficient that the plaintiff, having established his unconditional tenders, brought the amounts into court

when directed to do so. As heretofore stated, his ability and willingness to pay at any time is demonstrated by the fact that he tendered the amounts due unconditionally, and subsequently, at the termination of the trial, deposited the money with the clerk.

[13] 7. The contention that the plaintiff forfeited his right to relief by reason of his delay in bringing the action is without merit. The evidence discloses nothing further than that he permitted the lapse of 14 months before filing his complaint. This court, following the rule recognized by the courts generally, has repeatedly held that mere delay short of the period of limitation prescribed as a bar to the particular action does not require the imputation of laches. *Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968; *Parchen v. Chessman*, 49 Mont. 326, 142 Pac. 631, 146 Pac. 469.

Several other contentions made by counsel are not of sufficient merit to require special notice.

The judgment and order are affirmed.

Affirmed.

SANNER and HOLLOWAY, JJ., concur.

On Motion for Rehearing.

BRANTLY, C. J. [14] In their petition for a rehearing in this case counsel insist that the court, in the consideration of sections 6838 and 6839 of the Revised Codes, fell into error in making this statement found in paragraph 5 of its opinion:

"It must be borne in mind that the two sections were enacted at the same time and as the provisions by which the privilege granted by section 6837 was to be made available."

From an exact historical point of view the criticism of counsel is justified. Section 6838 was first enacted by the territorial Legislature in 1867 as section 231 of the Civil Practice Act (Laws 1867, p. 181), whereas section 6839 was first enacted in 1877 as section 332 of the new Code of Civil Procedure (Laws 1877, p. 129). Sections 6837, 6838, and 6839 were all included in this Code, and in the opinion of the court, taken together with the preceding and following sections, were intended to cover the whole subject of redemption from sales under execution and foreclosure, and to make definite and certain, not only the privilege conferred by section 6837, but also the mode by which it could be exercised. Hence we concluded that, whatever may have been the provisions on the subject theretofore, sections 6838 and 6839, having been incorporated in the same act, are to be considered as enacted at the same time to be interdependent and to be construed accordingly. From this point of view the criticism of counsel is without merit.

It is further insisted that the court erroneously decided, in paragraph 4 of its opinion, that the judgment debtor is not entitled to possession after sale and during the period of redemption. The court did not so decide.

It merely noted, in passing, the fact that there is no express provision in the statute declaring this right, whereas section 6843 seems "to imply that the judgment creditor (who has become the purchaser) is entitled to demand and receive the value of the use and occupation during that period." The question of the debtor's right did not arise, and therefore there was no intention to decide it. However, lest the language referred to may mislead, we now say that the question is expressly reserved until a case is presented rendering its decision necessary.

The other contentions of counsel were all made in oral argument and in their briefs. Upon due consideration they were overruled. After further consideration, we do not think a rehearing upon them would induce us to change our conclusion.

The rehearing is denied.

SANNER and HOLLOWAY, JJ., concur.

(60 Colo. 539)

WEBER v. HEAD CAMP, PACIFIC JURISDICTION, WOODMEN OF THE WORLD. (No. 8233.)

(Supreme Court of Colorado. Dec. 6, 1915.
Rehearing Denied Feb. 7, 1916.)

1. INSURANCE — 788 — FRATERNAL BENEFIT INSURANCE — DEFENSES — SUICIDE — INVALIDITY.

Under Sess. Laws 1903, p. 257, providing that the suicide of a policy holder of any life insurance company doing business in the state shall not be a defense against the payment of a life insurance policy, in force at the time a policy was written, the provision thereof that if the member within one year committed suicide no benefit should be payable, and that if thereafter he committed suicide the insurer would pay only 50 per cent. of the amount otherwise due, was void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1956; Dec. Dig. —788.]

2. ACCORD AND SATISFACTION — 7 — APPLICATION — LIQUIDATED CLAIM.

Where the amount due the beneficiary under a benefit certificate was the fixed sum of \$2,000, and a void provision of the policy provided that in case of suicide only \$1,000 should be paid, and on suicide of insured the company stated to the beneficiary that only \$1,000 would be paid, and on such representation she accepted such sum, there was no dispute as to the sum due and the rule of accord and satisfaction had no application to the rights of the parties.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 46-58, 66, 94, 95; Dec. Dig. —7.]

3. INSURANCE — 798 — PAYMENT OF CLAIM — ACCOUNT.

Where the beneficiary in a benefit certificate was entitled on the death of the member to \$2,000, and, on the insurer's representation that by reason of the member's suicide she could only recover \$1,000, accepted such amount and executed a release, and where the insurer then knew that the suicide clause was void, under the statute, and that there was no room for an honest dispute as to its liability for the full

amount, the payment of \$1,000 would be considered as a payment on account.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1981, 1985; Dec. Dig. —798.]

4. INSURANCE — 798 — PAYMENT OF PART OF CLAIM — RELEASE — CONSIDERATION.

In such case, the insurer having paid nothing more than its conceded liability, the beneficiary's receipt or release, as to the remainder of the amount payable and recoverable was without consideration, and would not defeat an action to recover the unpaid remainder.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1981, 1985; Dec. Dig. —798.]

5. RELEASE — 17 — CONSIDERATION — FRAUD.

A grossly inadequate consideration for the release of valuable rights may of itself be an evidence of fraud.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. —17.]

Error to District Court, El Paso County; J. W. Sheafor, Judge.

Action by Anna Weber against Head Camp, Pacific Jurisdiction, Woodmen of the World. Judgment for defendant, and plaintiff brings error. Reversed, and cause remanded, with directions to enter judgment in favor of plaintiff.

Purcell & Burns, Eugene D. Preston, and C. B. Horn, all of Colorado Springs, for plaintiff in error. George P. Steele, of Denver, for defendant in error.

GARRIGUES, J. Action to recover judgment on a life insurance policy. January 23, 1907, John H. Weber, a member of the defendant organization, took out a benefit certificate or life insurance policy therein for \$2,000, in which plaintiff was named as beneficiary. The policy contained the following clause:

"If the member holding this certificate shall die within one year from the date of the receipt thereof, first, from suicide, whether sane or insane, no benefit whatever shall be paid to his beneficiary or to his beneficiaries and each of them; and further, if a member shall commit suicide, when in good standing at any later date, the amount to be paid to his beneficiary and each of them shall be but fifty per cent. of the amount of what would be due should the member die from some ordinary cause; and that said fifty per cent. shall be received by his beneficiary, or beneficiaries, and each of them in full settlement of all claims."

June 24, 1910, Weber committed suicide. Proof of death having been duly presented to the company, it paid Mrs. Weber \$1,000, which she accepted, executing and delivering a receipt and release in the following language:

"Pacific Jurisdiction, Woodmen of the World.

"Affidavit and Receipt of Adult Beneficiary.

"State of Colorado, County of Mesa—ss: "

"Anna Weber, being first duly sworn, on oath deposes and says: My name is Anna Weber. My age is 40 years. My post office address is Colbran, Mesa county, Colorado. My residence is Colbran, Mesa county, Colorado. I sustain the relationship of widow to John H. Weber, deceased, late member of Gate City Camp, No. 18, Woodmen of the World, a subordinate camp under the control of the Head Camp, Pacific Ju-

risdiction, Woodmen of the World, a corporation (not for pecuniary profit) organized under the laws of the state of Colorado. As such widow of said decedent, I am a beneficiary, under certificate No. 200989, of said John H. Weber, deceased, and as such beneficiary entitled to receive from said the Head Camp, Pacific Jurisdiction, Woodmen of the World, \$1,000.00 dollars, in full settlement of all claims on my behalf, as beneficiary, against said corporation. I have on this 30th day of August, A. D. 1910, received benefit fund warrant No. 13,653, issued by the said Head Camp, Pacific Jurisdiction, Woodmen of the World, in the sum of \$1,000.00 in full settlement of all claims in my behalf as beneficiary, based on said benefit certificate. I understand that this affidavit, together with said benefit fund warrant, when the same is paid, is, pursuant to the constitution and by-laws of said corporation, a voucher in full of all claims on my behalf, based on said benefit certificate.

"Anna Weber."

Thereafter she commenced this action to recover \$1,000 more, which she now claims is the balance due on the policy. The company answered, setting up three defenses: First, denying any liability; second, setting up specifically the suicide clause of the policy; third, a plea of accord and satisfaction based upon the receipt and release. Plaintiff demurred to the second defense, which was overruled, and replied to the third, admitting the execution of the receipt and release, but alleging that it was procured by fraud, duress, undue influence, and imposition upon her, and was executed and delivered by her under a mistake as to her legal rights. Trial was to a jury, and at the conclusion of plaintiff's case, on motion, the court instructed the jury to return a verdict for defendant. The case is here on error.

1. The principal question presented here for determination is predicated on the action of the court in directing a verdict for defendant. Plaintiff contends, although she executed and delivered the release and receipt, that her action in this regard was induced by the representations of defendant company that it would only pay her \$1,000, as that was all that was due her under the terms of the policy, and that she signed and delivered the paper under a mistake as to her legal rights. The company takes the position that there was an honest dispute over the amount for which it could be held liable under the terms of the policy, which was finally resolved by a compromise under which it agreed to pay, and plaintiff consented to accept, \$1,000 in full settlement of all claims she had against the company; that this constituted an accord and satisfaction, evidenced by the release executed under oath which now estops plaintiff from asserting any further claim against the company. Concerning the alleged misrepresentations on the part of the company, Mrs. Weber testified substantially as follows:

Saw the clerk of the camp and told him I expected \$2,000 from the Woodmen of the World. He said I would only get \$1,000 because my husband had committed suicide, and that I would get the \$1,000 or nothing. Relying upon the representations made by him I signed the in-

strument; did not know at that time that I could get more than \$1,000, and if I had known I was entitled to \$2,000 under the law, I would not have signed the receipt. Nothing in the conduct of the officers of the company caused me to sign the receipt; that is, they did not urge me to sign it. My attention was called to the provision in regard to death by suicide and I signed the receipt. Nobody explained it to me and I did not read the receipt, although I could have done so.

[1] 2. In deciding the issue presented it is necessary to consider the effect of the suicide clause contained in the policy. At the time of its issuance, our statute provided:

"The suicide of a policy holder of any life insurance company doing business in this state shall not be a defense against the payment of a life insurance policy." *Seas. Laws 1903, p. 257.*

The only reason assigned by the company for its refusal to pay the face of the policy was based on the suicide clause. It urged no other defense and gave no other reason for such refusal. At the time this contract was written, the suicide clause therein inserted was void. It could not be urged as a defense in this state—in the event the insured died by his own hand—against an action to enforce payment, and the policy therefore must be considered as though the clause was absent. The statute eliminates from consideration any defense upon this ground, which otherwise might have been asserted, and, although the constitutionality of the act has been attacked, our Court of Appeals has decided, and we have held it constitutional and binding, that insurance companies doing business in this state are subject to its provisions. *Woodmen v. Sloss, 49 Colo. 177, 112 Pac. 49, 31 L. R. A. (N. S.) 531; Modern Brotherhood v. Lock, 22 Colo. App. 409, 125 Pac. 556.*

[2] The amount due upon this policy is \$2,000, a fixed, definite, specified, liquidated sum, and the rule of accord and satisfaction has no application to the case.

[3, 4] 3. The only question remaining is whether plaintiff is estopped from recovering, by the execution and delivery of the release, or are the circumstances under which it was executed such as to permit her now to repudiate it and recover the balance. Plaintiff evidently had not been advised and did not know her legal rights in connection with the policy. She says had she known she was legally entitled to \$2,000, she would not have accepted \$1,000. Apparently when her attention was called to the suicide clause by the representative of the company and she was told it would only pay her \$1,000 in satisfaction of her claim, relying upon such representations and believing that was all she was entitled to receive, she executed the release. The company knew at the time the statements were made that the suicide clause was void under the statutes of this state, and there was no room for an honest dispute at that time as to its liability for the full amount of the policy. The payment of \$1,000 must be considered only as a payment on account.

Having paid nothing more than its conceded liability, the receipt or release as to the remaining \$1,000 was without consideration. *Supreme Council American Legion of Honor v. Storey* (Tex. Civ. App.) 75 S. W. 905; *Insurance Co. v. Villeneuve*, 25 Tex. Civ. App. 360, 60 S. W. 1014; *Brooks v. White*, 2 Metc. (Mass.) 285, 37 Am. Dec. 95; *Bailey v. Day*, 26 Me. 90; *Hayes v. Mass. Co.*, 125 Ill. 638, 18 N. E. 322, 1 L. R. A. 303.

[8] It is an ancient doctrine of the common law that an agreement to release or discharge a liquidated, enforceable debt on payment of less than the amount due is not supported by a consideration, and will not defeat an action to recover the unpaid remainder. *Rauen v. Prudential Co.*, 129 Iowa, 725, 106 N. W. 198. It is unbelievable that plaintiff would surrender a \$1,000 interest in a policy against which no valid defense existed, except under some clear misapprehension. A grossly inadequate consideration for the release of valuable rights has been held in itself to be an evidence of fraud. *Rauen v. Prudential Co.*, supra, 129 Iowa, 739, 106 N. W. 203; *Berry v. Insurance Co.*, 132 N. Y. 54, 30 N. E. 254, 28 Am. St. Rep. 548. Here there was no consideration whatever.

The questions involved are purely legal. No issue of fact can arise to be determined by a jury, and we consider a retrial in the lower court unnecessary. The judgment is reversed, and the cause remanded, with directions to the lower court to enter judgment in favor of the plaintiff and against the defendant company for the sum of \$1,000, together with interest thereon at the rate of 8 per cent. per annum from August 30, 1910, and costs.

Reversed.

GABBERT, C. J., and SCOTT, J., concur.

(60 Colo. 551)

GRAYBILL v. CORLETT. (No. 8422.)

(Supreme Court of Colorado. Feb. 7, 1916.)

1. WATERS AND WATER COURSES — 157 — IRREVOCABLE LICENSES — IRRIGATION DITCH.

Where for over 16 years plaintiff and his predecessors maintained a ditch over the land owned by defendant and his predecessors to carry water for irrigation purposes, and the ditch was maintained and improved without objection by defendant and his predecessors, the license became irrevocable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 185; Dec. Dig. — 157.]

2. WATERS AND WATER COURSES — 156 — CONVEYANCE SUBJECT TO LICENSE — BONA FIDE PURCHASER — NOTICE.

Where defendant knew of the maintenance of an irrigation ditch over lands which he purchased, but erroneously deemed that the license was revocable, he took the land subject to the burden of the ditch.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 158, 174-183; Dec. Dig. — 156.]

3. ELECTION OF REMEDIES — 11 — IGNORANCE.

Where plaintiff, deeming that his license to maintain an irrigation ditch over the lands of defendant was revocable, instituted an action to condemn a right of way for a ditch, but dismissed the same on discovering his mistake, there was no election of remedies, precluding the assertion of a right to maintain the original ditch, for an election between two remedies necessarily implies knowledge that there are two, and it is not binding in equity, when made under a mistake of law or fact.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 14; Dec. Dig. — 11.]

Error to District Court, Rio Grande County; A. Watson McHendrie, Judge.

Action by Clayton C. Graybill against Charles M. Corlett. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

John T. Jacobs, of Greeley, and H. M. Howard, of Monte Vista, for plaintiff in error. George M. Corlett, of Monte Vista, for defendant in error.

TELLER, J. The plaintiff in error is the owner of a tract of land which was for a number of years irrigated through a lateral across the land of defendant in error. In 1906 defendant in error destroyed the lateral, and this suit was begun by plaintiff in error to have his title to said ditch quieted and defendant enjoined from interfering with its use. The trial court entered judgment for the defendant.

It appears that the lateral in question was constructed by one Farrar in 1886, under a parol license from one Warren, the owner of the land upon which it is now located, for the irrigation of lands not involved in this action. In 1890 one Kramer, plaintiff's grantor, obtained from Warren, who was the agent of his wife, the owner of the servient estate, permission to run water through the ditch for irrigating the land now owned by plaintiff. In 1892 Kramer conveyed to the plaintiff, and the latter obtained water through the ditch for the land thus conveyed until 1906. He testified that he put in a new headgate for this lateral, and several times cleaned and repaired the ditch; no one at any time objected to his use of it. The defendant was, for 10 years prior to 1905, the agent of Mrs. Warren, and had charge of her said land. In 1905 he purchased this land, and early in 1906 he informed the plaintiff that he could no longer use the ditch. Soon afterwards defendant plowed up the ditch, and it has never since been used.

There is no conflict of evidence on points material to the case—it appearing that plaintiff's grantor had a parol license to use the ditch; that it was used for the irrigation of plaintiff's land for 16 years, and until it was destroyed by the defendant; that plaintiff cleaned and repaired it from time to time; and that defendant took title to the Warren land with full knowledge of these facts.

From defendant's testimony it appears that he acted upon the belief that plaintiff had no right to have the ditch remain on the land, because there had been no conveyance of a right of way. The court entered a judgment for defendant, without any findings of facts or law, and we are therefore without information as to the grounds of his decision.

[1] It is too well settled to require discussion that under the circumstances above stated a licensee holds under an irrevocable license, and his right is as valid as if acquired by grant. *De Graffenried v. Savage*, 9 Colo. App. 131, 47 Pac. 902; *Tynon v. DeSpain*, 22 Colo. 240, 43 Pac. 1039.

[2] Defendant took the land subject to the burden of this ditch. 22 Colo. 250, 43 Pac. 1042.

[3] Some time prior to the beginning of this suit the plaintiff began a proceeding to condemn a right of way for a ditch over the defendant's land, having been advised by his then counsel that he had no right to maintain the old ditch. This proceeding was dismissed before any action had been taken under it. It is urgently contended that the plaintiff, in beginning that proceeding, made an election of remedies, and that such election is irrevocable.

If it be true that a proceeding to condemn land is a remedy, within the rule as to the election of inconsistent remedies, upon which point we express no opinion, it does not follow that the rule should be applied in this case. An election between two remedies necessarily implies knowledge that there are two remedies, and it is everywhere held that, in order to constitute a binding election, the party electing must have had such knowledge as is essential to an intelligent choice of procedure. 15 Cyc. 261. *Williams v. County Com'rs*, 48 Colo. 541, 111 Pac. 71. Here the plaintiff, when he began the proceedings in condemnation, supposed that he had no other recourse; his attorney having so advised him. It cannot, therefore, be said that he chose one of two remedies.

"An election made by a party under a mistake of facts, or a misconception as to his rights, is not binding in equity." *Kerr on Fraud and Mistake*, 453.

And this is true, whether the mistake be of law or of fact, there having been no change in conditions from which injury to the other party would result from the adoption of the new remedy. *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739. A suit begun under a mistake as to the remedy, and dismissed by plaintiff, is no bar to the adoption of another remedy. *Gibbs v. Jones*, 46 Ill. 319. The plaintiff, then, having mistaken his remedy when he began proceedings to condemn a right of way, was not barred from prosecuting the present action. He had an interest in the ditch, which the

defendant plowed up and destroyed, and was entitled to have his title therein quieted.

The judgment is reversed, and the cause remanded, with directions for such further proceedings as are in harmony with this opinion.

GABBERT, C. J., and HILL, J., concur.

(60 Colo. 500)

HEADLEY et al. v. DENVER & R. G. R. CO.
(No. 8241.)

(Supreme Court of Colorado. Dec. 6, 1915.
Rehearing Denied Feb. 7, 1916.)

1. RAILROADS \Leftrightarrow 307—INJURY AT CROSSING—
NEGLIGENCE.

Where the automatic bell, which a railroad was required by ordinance to keep at a crossing, was out of order and failed to ring to give warning of the approach of a train, which was traveling at an excessive rate of speed under the ordinance, the road was guilty of negligence sufficient to sustain a verdict for death of one killed at the crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 972-977, 979, 980; Dec. Dig. \Leftrightarrow 307.]

2. RAILROADS \Leftrightarrow 335—INJURY AT CROSSING—
CONTRIBUTORY NEGLIGENCE.

That the automatic bell at its crossing, which a railroad was required by ordinance to maintain to give warning of the approach of trains, failed to ring, and that the train which struck decedent was traveling at an excessive rate of speed under ordinance, did not relieve decedent from taking ordinary precaution for his own safety, and his contributory negligence in going on the tracks without looking and listening for an approaching train barred recovery for his death, since, where a railroad violates its duty of due care, but the conduct of one who suffers injury thereby is negligent, contributing in some measure to bring about the injury sustained, recovery therefor is barred, unless the railroad, as by the invitation of a flagman, positively misleads the injured party.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1023, 1084, 1086-1088; Dec. Dig. \Leftrightarrow 335.]

3. RAILROADS \Leftrightarrow 327—INJURY AT CROSSING—
CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK
AND LISTEN.

Decedent, killed at a railroad crossing when he attempted to cross the tracks on his bicycle immediately after the passage of one train, was under duty to look and listen for any other approaching train before attempting to cross the tracks, two switch and two main line.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1043-1056; Dec. Dig. \Leftrightarrow 327.]

4. RAILROADS \Leftrightarrow 350—INJURY AT CROSSING—
CONTRIBUTORY NEGLIGENCE—QUESTION OF
LAW OR FACT.

The question whether one killed at a railroad crossing was guilty of contributory negligence, though usually for the jury, as when the facts are such that reasonable men of fair intelligence may draw different conclusions therefrom, is nevertheless for the court when it is clear that only one reasonable inference can be drawn from the facts, and the course which prudence dictated to decedent be definitely discerned.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. \Leftrightarrow 350.]

**5. RAILROADS ⚡328—INJURY AT CROSSING—
CONTRIBUTORY NEGLIGENCE.**

Where decedent, attempting to cross four railroad tracks, two switch and two main, knew that a train was approaching on one of the main tracks, which was temporarily hidden from his view by another train, and would continue hidden until he reached the space between the main tracks, he was under duty, before going upon the track on which the train was approaching, to look, as soon as his view was unobscured, to see if he could cross in safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1067-1070; Dec. Dig. ⚡328.]

**6. RAILROADS ⚡327—INJURY AT CROSSING—
CONTRIBUTORY NEGLIGENCE.**

Where one attempting to cross railroad tracks, two switch and two main line, reached the middle space between the main line tracks, before going on the second of them he was under duty to look and listen for an approaching train, since the duty of one using a railroad crossing to look and listen is continuous until the crossing is completed, unless the railroad produces a condition of apparent safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. ⚡327.]

**7. RAILROADS ⚡330—INJURY AT CROSSING—
CONTRIBUTORY NEGLIGENCE.**

An ordinance requiring that railroads operate electric warning bells at crossings, which should "begin to ring when the head end of any train moving toward the crossing" was at a distance of not less than 500 feet from the crossing, could not be so narrowly construed that decedent, attempting to cross railroad tracks after the passage of a train during which the warning bell had not rung, could be held not chargeable with notice that the bell was out of order; the spirit of the ordinance being otherwise than to require ringing only when the train was 500 feet away.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. ⚡330.]

**8. RAILROADS ⚡330—INJURY AT CROSSING—
CONTRIBUTORY NEGLIGENCE.**

While one approaching a railroad crossing has the right to assume that the road will give the usual and required signals of the approach of trains, and, when he can neither see nor hear any signs thereof, to assume that the crossing may be made safely, he is not thereby relieved from the duty to use his senses vigilantly to avoid danger, being excusable only when the company has created a condition of apparent safety.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071-1074; Dec. Dig. ⚡330.]

Hill and Teller, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; Charles Cavender, Judge.

Action by William F. Headley and others against the Denver & Rio Grande Railroad Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

William R. Eaton, of Denver, for plaintiffs in error. E. N. Clark and R. G. Lucas, both of Denver, for defendant in error.

WHITE, J. The plaintiffs in error brought this action for damages resulting from the death of their son, who, it is alleged, was killed by reason of the negligence of the defendant in the operation of one of its railroad trains. The defense pleaded was the

contributory negligence of the deceased. At the close of the plaintiffs' case the court instructed the jury to find for the defendant, and the correctness of this ruling is the sole question here involved. The facts briefly stated are as follows:

Ellsworth avenue is a public highway 60 feet in width, extending east and west through the southern portion of the city of Denver. Across this avenue at a point between South Inca street on the east and South Jason street on the west, the defendant operates four railroad tracks extending in a southeasterly and northwesterly direction. The track farthest east is used for switching purposes only, which is also true of the one farthest west. The other two are main lines, of which the one farthest east is used for north-bound trains, and the other for south-bound trains. The switch to the west is known as the "coal track," and leads into the "Post coalyard" adjoining Ellsworth avenue on the south and about 20 feet west of the south-bound main line. The Post coalyard is inclosed by a board fence 5½ feet in height, with a 3-inch space between the boards. The distance from this fence to the south-bound main track is 16½ feet and to the north-bound main track 25½ feet. The ground is level and the tracks straight, with an unobstructed view in each direction for at least three-fourths of a mile. Where the track enters the coalyard on Ellsworth avenue is a gate 16 feet in width, which was open at the time of the occurrence in question. Four freight cars were standing upon the coal track just inside the coalyard. There was an automatic signal bell at the crossing, which, under the terms of an ordinance of the city, was required to "begin to ring when the head end of any train traveling toward the crossing where such signal bell is located is at a distance of not less than 500 feet from such crossing." This bell was at the time, and had been for over a week, out of order, and made no sound whatever. The ordinance also limited the maximum speed of trains at this point to 20 miles per hour.

The deceased was a strong, intelligent young man, 19 years of age, had been reared in the vicinity of the crossing, and was perfectly familiar with surrounding conditions, having passed over the crossing daily for years. At about 8 o'clock on the morning of December 20th he was fatally injured at this crossing by coming in contact with the engine of a local passenger train of defendant, known as "Uncle Sam," which was at the time 10 minutes late and traveling northward on the north-bound line at a speed of from 35 to 40 miles per hour. When the train was within approximately 250 feet of the crossing the engine bell was ringing, and as the train approached the crossing and up to the time of the collision the whistle there-

on was sounding. Deceased, on the morning of the fatal injury, was on his way to work, riding a bicycle, which was his custom. At a point about 250 feet west of the crossing where the collision occurred, he passed a friend afoot, with whom he frequently lingered and talked, but did not do so at this time, only saying, in substance, that he would hurry along. He was next seen about 15 feet west of the coalyard track, and hence about 35 feet from the south-bound main line and approximately 45 feet from the point of collision. He was then riding at a speed of about 4 or 5 miles per hour. At that moment an 8 or 10 car passenger train, with two engines, known as train No. 1, traveling south at the rate of 25 or 30 miles an hour, on the south-bound main line track, came upon the crossing, and immediately after it had passed over the "Uncle Sam" train came upon the crossing. The trains were making considerable noise, and some smoke and steam which had escaped from train No. 1 was blowing to the southwest in the direction of, and over, the Post coal-yard, but in no sense interfered with seeing by the different witnesses—except one who was standing on the west side of the south-bound main line just east of the Post coal-yard board fence—the things which took place on the crossing.

As "Uncle Sam" train approached, a witness was walking on the track in the same direction the train was moving, and when about 200 feet south of the crossing stepped off to the east for that train to pass. At this time the bell of the engine pulling the "Uncle Sam" train was ringing, and train No. 1 was passing on the south-bound track. This witness, as the engine of "Uncle Sam" train passed, looked ahead and across the pilot thereof and saw the wheel of a bicycle on the crossing, coming on the space between the south-bound main line and the north-bound main line, which at that point are 8½ feet apart. Another witness—the one standing on the west side of the south-bound main line just east of the Post coal yard board fence, approximately 230 feet south of the crossing, and whose vision was somewhat obscured by the smoke, etc.—looked north to the crossing when the rear end of train No. 1 rendered it possible, and saw the deceased on his bicycle turning to keep from hitting the "Uncle Sam" train, and saw him fall. Another witness who was standing in the Post coal office looking through a glass door in the direction of the crossing, a distance of approximately 45 feet, saw the collision. This witness testified that the whistle of the "Uncle Sam" engine was blowing and that "Uncle Sam" hit the crossing just an instant later than No. 1 cleared the crossing"; that the latter had cleared the crossing between 20 and 40 feet; that when witness first saw the deceased he was sitting upright on his bicycle, riding toward the east, with his

hands on the handle bars, and it appeared to witness that the front wheel of the bicycle struck the side of the pilot, and the pilot beam at the rear of the pilot hit him. Another witness testified that he was at the scales in the coalyard (which was about 50 feet from the point where the collision occurred and in plain view thereof); that he heard "Uncle Sam" coming in and saw deceased rolling alongside the engine, and subsequently saw the track of the bicycle wheel where it had turned; that No. 1 was then, after witness had run to the body of deceased, from 125 to 150 feet south of the crossing. It is alleged in the complaint and admitted in the answer that "immediately" after train No. 1 passed over the crossing the "Uncle Sam" train entered thereon and passed over the same.

The alleged acts of negligence set forth in the complaint are: The failure to sound the signal bell at the crossing as required by ordinance; propelling the train that caused the death of deceased at a greater rate of speed than permitted by ordinance; failure to cause the whistle or bell upon the locomotive of such train to be sounded or rung, or to give any other signal or warning of the approach of such train, at any point within sight or hearing of the crossing.

[1-3] That the automatic bell was out of order and failed to ring and that "Uncle Sam" train was traveling at an excessive rate of speed were established by the evidence and also conceded by the defendant, and constituted negligence of the defendant sufficient to sustain a verdict. The proof of these, however, in no wise relieved the deceased from taking ordinary precaution for his own safety; and the undisputed evidence shows that he failed in this regard, and that such failure contributed to his death. He was, under the circumstances of this case, bound to look and listen before attempting to cross the railroad tracks in question. We have frequently held that exceeding the lawful speed limit, or the failure of a defendant railroad company to ring the bell or blow the whistle at the crossing, though required by law, will not render the company liable, unless that be the proximate cause of the injury, and there be no such negligence by the plaintiff as will prevent recovery, and have often announced that one about to cross steam railroad tracks at a street intersection must exercise a proper degree of care to avoid injury. *Nichols v. C., B. & Q. R. R. Co.*, 44 Colo. 501, 519, 520, 98 Pac. 806; *C. R. I. & P. Ry. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 288. Indeed, it is elementary that, if in a given case it appears that the defendant owed the plaintiff a duty to use due care, that he violated that duty, and that the plaintiff by reason thereof suffered an injury, the plaintiff, nevertheless, cannot maintain his cause of action, if his own conduct was not that of a reasonably prudent and careful

man, and such conduct contributed in some measure to bring about the injury sustained. Colo. Cent. R. R. Co. v. Holmes, 5 Colo. 197; C., R. I. & P. Ry. Co. v. Crisman, supra; Westerkamp v. C., B. & Q. R. R. Co., 41 Colo. 290, 297, 92 Pac. 687; Liutz v. Denver City Tram. Co., 43 Colo. 58, 95 Pac. 600.

[4] As the standard of duty in such cases is dependent upon the particular facts and circumstances of each, the question whether contributory negligence has been proven in a given case is usually one for the jury. Nevertheless such question, in a particular case, may become one of law and thus come within the province of the court, so that a particular verdict may and should be directed. Where the facts are such that reasonable men of fair intelligence may draw different conclusions, the question of contributory negligence must be submitted to the jury, for the finding is then of fact. But if it is clear that only one reasonable inference can be drawn from the facts, and the course which prudence dictates be definitely discerned, the finding thereon is of law, not of fact, and it devolves upon the court to settle the matter. Colo. Cent. R. R. Co. v. Holmes, supra; Colo. Cent. R. R. Co. v. Martin, 7 Colo. 592, 4 Pac. 1118; Lord v. Pueblo S. & R. Co., 12 Colo. 390, 21 Pac. 148; Jackson v. Crilly, 16 Colo. 103, 26 Pac. 331; D. & R. G. R. R. Co. v. Ryan, 17 Colo. 98, 103, 28 Pac. 79; C., B. & Q. R. R. Co. v. McGraw, 22 Colo. 363, 366, 45 Pac. 383; D. & R. G. R. R. Co. v. Spencer, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; C. & S. Ry. Co. v. Sonne, 34 Colo. 206, 211, 83 Pac. 383; Nichols v. C., B. & Q. R. R. Co., supra. The case at bar comes within the latter rule, and it was not error to so advise the jury, and direct a verdict accordingly. Under all the facts, the duty resting upon deceased was clearly discernible and fixed by law. D. & R. G. R. R. Co. v. Ryan, supra; C., R. I. & P. Ry. Co. v. Crisman, supra; C. & S. Ry. Co. v. Thomas, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700; C. & S. Ry. Co. v. Sonne, supra; Westerkamp v. C., B. & Q. R. R. Co., supra.

In *Denver & Rio Grande R. R. Co. v. Ryan*, supra, after considering the duties and responsibilities imposed by law upon railroad companies, we declared that the law was no less exacting in its requirements of individuals, and expressly approved an instruction therein given which charged the jury that:

"As a matter of law it is negligence and carelessness for a person to go, stand, or be upon the track of a railroad without keeping watch both ways for trains."

In support of the rule we therein cited, *inter alia*, *Railroad v. Houston*, 95 U. S. 697, 702, 24 L. Ed. 542. Certain language used in that case, and the law stated, are so applicable here, that we shall quote therefrom. The case involved the death of a woman who was killed on a crossing of two parallel tracks of the railroad company. When the engineer first saw her, she was on the track

about four feet ahead of the engine. No one witnessed the accident. No one saw her from the time she left her house nearby until she was injured, which was about 6:30 p. m. Standing cars on the other track might have obstructed her view. The court held that the physical facts showed that she could not have looked after passing the standing cars, and that she was guilty of contributory negligence as a matter of law. The language of the court is as follows:

"* * * The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred, had it instructed the jury, as requested, to render a verdict for the defendant."

[5] Should we assume, as suggested in conference, that deceased may have stopped, listened, and looked to the southward before train No. 1 cut off his view, and may have seen the north-bound train approaching, and concluded that he had time in which to cross over before such train, moving at the speed allowed by ordinance, reached the crossing, there is, nevertheless, no sensible explanation of his subsequent acts. He neither looked nor listened, or, if so, acted other than recklessly after reaching the space between the south and north bound main lines. While it may be true that he was not, as a matter of law, in duty bound to stop upon reaching such space, he was, nevertheless, required to look and listen, or act with reasonable prudence, before entering upon and attempting to cross the north-bound main track. *D. & R. G. R. R. Co. v. Ryan*, supra; *Hinken v. I. C. Ry. Co.*, 97 Iowa, 603, 66 N. W. 882; *Weyl et al. v. C., M. & St. P. Ry. Co.*, 40 Minn. 350, 42 N. W. 24.

[6] Moreover, the duty resting upon deceased to look and listen before advancing upon this track was a legal obligation, which he was bound to discharge, unless excused therefrom by some peculiar facts of the case. In other words, it is the imperative duty of

one attempting to cross several tracks not to cease his watchfulness upon crossing the first or second in safety, but to continue to exercise his senses, and be observant of the obvious conditions until the crossing has been accomplished, unless the railroad company, through its acts, has produced a condition of apparent safety wherein reasonable men might have different views as to the necessity of looking and listening. Diligence, in order to be effective, must cover the whole field of danger, and where it is inherent in a continuing state of things the duty to exercise the care which the law imposes is a continuing obligation. Deceased knew that there were two main tracks, and, if the suggested supposition be true, he also knew that a train was approaching the crossing on the north-bound track and was temporarily hidden from his view, and would so continue until he had reached the space between the main lines. Whatever might have been the speed of the north-bound train when deceased's view thereof, if he saw that train at all, was cut off by the south-bound train, the course which prudence dictated is clearly discernible.

While there is some argument on the part of the defendant railroad company that the crossing was obscured by dust, smoke, and steam immediately after train No. 1 passed, and that deceased was negligent, as a matter of law, in proceeding until that had cleared, we deem it unnecessary to consider the matter. We have read the entire record and agree with plaintiffs that there was no smoke or dust or steam on the crossing that in any wise interfered with the vision of deceased. Without notice of an approaching train on the north-bound track, it was his duty, as a matter of law, upon reaching the space between the two main lines to look and listen—that is, "to keep watch" for an approaching train upon the track he was about to cross—unless surrounding conditions excused him therefrom; and with actual knowledge of an approaching train thereon he was bound to ascertain if it was likely to reach the crossing before he could safely pass over the same. One must assume as within probabilities that a train may sometimes run at greater than the legal rate, and when he is in a position to ascertain the fact for himself is bound to do so, unless there is something in the conditions existing that excuses him in that respect. The north-bound train went upon the crossing immediately after it was cleared by the south-bound train, and deceased was observed in the space between the main lines when the north-bound train was within a very few feet of the place where the collision occurred. He was then in no danger whatever, and in no situation of peril to interfere with the exercise of calm judgment. Nevertheless he pushed forward to cross the track, making no effort to

ascertain the proximity of danger or to avoid injury until the instant of the impact, when he was seen to swerve his bicycle as it struck the side of the pilot.

It is self-evident that, unless excused by the silent signal bell, deceased was grossly negligent, for he neither looked nor listened with the care common prudence required, or, what is more probable, did not look or listen at all. In *Illinois (C. & N. W. Ry. Co. v. Hansen, 166 Ill. 263, 46 N. E. 1071)* and in some other jurisdictions it appears that the duty to look and listen is not enforced as a rule of law; but this court, in common with the overwhelming weight of authority, affirms the rule, and holds that, if the duty is omitted, the trial court should instruct that a verdict be returned accordingly, except in cases of a peculiar nature, where there are facts excusing the performance of the duty. *Elliott on Railroads (2d Ed.) vol. 3, § 1166; Westerkamp v. C., B. & Q. R. R. Co., supra; C. & S. Ry. Co. v. Sonne, supra.* And the facts excusing the performance of this duty must be of such character as to show, not only negligence of the railroad company, but also that its acts were such as to mislead the person injured when crossing its tracks. *Elliott on Railroads (2d Ed.) vol. 3, § 1165.* Thus in *D. & R. G. R. R. Co. v. Gustafson, 21 Colo. 393, 41 Pac. 505*, the negligence of the railroad company was supplemented by the express invitation and direction of the flagman to the traveler to proceed.

So in *Nicholas v. C., B. & Q. R. R. Co., supra*, the facts established not only the negligence of the defendant, but also that, by its affirmative acts, the plaintiff was misled. The defendant was in the act of moving one of its trains from its main line, which led over the crossing where the injury occurred, to a siding, and had an engine, hidden from view, following this train. The distance from the siding to the crossing was several hundred feet, and a train moving at the speed allowed by law would not reach the crossing before the plaintiff attempted to pass over. Under these circumstances, plaintiff approached the crossing. He saw the train taking the siding which led away from the crossing, and thereupon walked along and near the track a very few feet and attempted to cross it, when he was struck and injured by the engine which had been hidden from view in the rear of the train which he observed; the engine having traveled the distance at an excessive and unlawful rate of speed without giving the required signals. *Colorado & Southern Ry. Co. v. Chiles, 50 Colo. 191, 114 Pac. 661*, is of like character, and all the elements essential to bring it within the exception to the general rule are present, to wit, the negligence of the defendant and its acts which misled the party injured. And while Phil-

lips v. Denver Tramway Company, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29, did not involve the crossing of a steam railroad, but a street railway, and a somewhat different rule applies, still the facts established negligence of the defendant, and also its acts which misled the plaintiff. The facts having the tendency to mislead were the propelling of its car, which plaintiff was following, across the street intersection at the time that the car which caused the injury was crossing the same intersection, thus producing an apparent condition of safety, but in which there was an invisible or hidden danger.

In the case at bar the negligence of defendant was in no wise supplemented by any act on its part which would mislead the deceased. In other words, it did nothing to induce the deceased to attempt to cross the track, nor did it create any condition of apparent safety wherein there was a hidden or concealed danger. Its acts in the premises constituted negligence, but in no sense excused the deceased from the use of some care on his part to avoid injury. The rule here applicable is well stated in *Cadwallader v. L. N. A. & C. Ry. Co.*, 128 Ind. 518, 520, 27 N. E. 161, 162, where it is said:

"Assuming in this case that the appellant had the right to presume that no train was approaching, by reason of the failure of the flagman to give notice, yet this did not excuse her from the use of her senses of sight and hearing, in order to ascertain the fact for herself. With the use of these senses she was as well able to ascertain whether a train was approaching as the flagman at the crossing, and a failure to use them was negligence. It has often been held by this court that negligence on the part of the railroad company does not excuse the injured party from the exercise of care on his part. *Bellefontaine Ry. Co. v. Hunter*, 33 Ind. 335 [5 Am. Rep. 201]; *St. Louis, etc., Ry. Co. v. Mathias*, supra [50 Ind. 65]; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 81 [2 N. E. 138]; *Indiana, etc., Ry. Co. v. Greene*, supra [106 Ind. 279, 6 N. E. 603, 55 Am. Rep. 736]; *Indiana, etc., Ry. Co. v. Hammock*, supra [113 Ind. 1, 14 N. E. 737]; *Ohio, etc., Ry. Co. v. Hill*, supra [117 Ind. 56, 18 N. E. 461]; *Woodard v. New York, etc., R. R. Co.*, 106 N. Y. 369 [13 N. E. 424]. The failure of the flagman at the crossing to notify the appellant of the fact that a train was approaching was, at most, negligence, and did not excuse her from the use of some care on her part to avoid injury. It is not found that the flagman did anything to induce the appellant to attempt to cross the track. The most that is claimed is that he did not notify her that a train was approaching. Had the flagman done anything to induce the appellant to attempt a crossing at the time she was hurt, or anything to throw her off her guard, then the question of her negligence would have been a question for the jury."

And in *Elliott on Railroads* (2d Ed.) vol. 3, § 1165, the rule is stated as follows:

"In all cases where the right of recovery is based upon negligence the rule supported by authority is that, in order to recover, the plaintiff must himself exercise care, and is not absolved from this duty no matter how clear the negligence of the defendant. Where, however, the acts and conduct of the defendant are such as may be justly regarded as willful, the general

rule does not apply, nor, we may say in passing, does it fully apply where the defendant is negligent and the negligence is such as to mislead the plaintiff. But the plaintiff cannot be heard to say that he has been misled unless he has used such care under the circumstances to ascertain the nature of the danger and guard against it, as a man of ordinary prudence would have exercised under similar conditions. It cannot be inferred from the mere fact that a defendant was guilty of negligence that the plaintiff was misled. The fact that there was negligence on the part of the defendant must be supplemented by evidence that there were such acts as would mislead a man of ordinary prudence or the plaintiff cannot successfully assert that he was misled by the defendant. As a railroad track is a warning of danger, one who attempts to cross it must act with care proportionate to the danger, and not suffer his attention to be diverted from the danger before him, and he must keep his faculties in active exercise."

The same rule is stated and applied in *White v. Chicago & N. W. Ry. Co.*, 102 Wis. 489, 78 N. W. 585, 587, in which the facts were as follows: The gates maintained at a railroad crossing were open, and plaintiff while walking across the tracks was struck by a train running at an unlawful rate of speed, which he might have seen and heard, if he had looked and listened before attempting to cross, and, notwithstanding that he testified that he did look and listen, the court, nevertheless, held, as a matter of law, that he was guilty of contributory negligence. In considering the effect of the open gate as an invitation to cross in safety, the court (102 Wis. on pages 493, 494, 78 N. W. 587) said:

"In a written opinion denying the defendant's motion for a new trial, the trial judge laid much stress on the case of *Rohde v. C. & N. W. R. Co.*, 86 Wis. 309 [56 N. W. 872], wherein it was said: 'The open gate was an assurance to the public that there was no danger, and an invitation to cross in safety.' This was said in a case where the gates were not lowered, and plaintiff, relying thereon, drove his team in such proximity to the track that they became frightened by a passing train and ran away. But suppose, while in a place of safety, plaintiff in that case had seen, or could have seen by the use of ordinary care, that the train was approaching, would any one claim that he might nevertheless continue his way and drive into danger? The paramount duty of the traveler is to use ordinary care, and this obligation is none the less absolute, even though the other party is guilty of negligence. It is only when the traveler is lulled into security in reliance upon the negligent act, and is drawn into danger that he could not avoid by the exercise of ordinary care, that the obligation to respond in damages exists. The current of authorities in support of this rule is well-nigh universal. An extensive discussion and citation of authorities may be found in *Elliott, R. R.* §§ 1165, 1166. Thus, in *Moore v. K. & W. R. Co.*, 89 Iowa, 223 [56 N. W. 430], it is stated: 'A traveler upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If, by neglect of his duty, he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the usual rate.' It was fur-

ther said, in substance, that although deceased had the right to act on the presumption that the usual warning signals for crossings would be given, yet he must use ordinary care to avoid danger; and, having had an opportunity to see the train and avoid the danger, no recovery could be had."

[7, 8] While there are cases which hold that a silent signal bell or an open gate may operate to excuse a traveler from looking and listening for an approaching train, and the question should be submitted to a jury under proper instructions, the weight of authority and best-reasoned cases are to the contrary. It is a matter of common knowledge that electric bells, or even gates, are liable to be out of order, and common prudence would not permit one to rely solely thereon. Besides, in this case deceased must have known that the electric signal bell was not in order, from the fact that it was not ringing while the south-bound train was passing, and deceased was within less than 45 feet of the crossing when that train came upon and passed over it. It is said, however, that as the ordinance does not expressly require the signal bell to continue to ring until the rear of the train has cleared the crossing, but only to "begin to ring when the head end of any train moving toward the crossing" is at a distance of not less than 500 feet from such crossing, we cannot say that deceased should have known that the bell was not in working order. The ordinance cannot be so construed; its spirit is otherwise. If the construction suggested could be placed thereon, it would also follow that the ordinance had been complied with when the signal bell had commenced to ring at the distance of 500 feet from the crossing as the train approached, and immediately ceased ringing long prior to the head end of the train reaching such crossing. This would be unreasonable, if not absurd, and equally so would be the construction suggested. While one who approaches a steam railroad crossing has the right to assume that the company will give the usual and required signals of approach, and, when he can neither hear nor see any signs of a moving train, to also assume that the crossing may be made safely, he is not thereby relieved from the duty to use his senses vigilantly to avoid danger. *Elliott on Railroads* (2d Ed.) vol. 3, § 1158. He can be excused in this respect only when the company has, by its acts, created a condition of apparent safety. In this case that which the railroad company did and that which it failed to do in the premises was nothing more than mere negligence. We are satisfied from a most careful consideration of this record that the facts are such that if the case were submitted to a jury, and a verdict returned in favor of plaintiffs, we could not permit it to stand under the well-recognized rules of law.

The former opinion of this court is there-

fore withdrawn, and the judgment of the trial court affirmed.

TELLER, J. (dissenting). I cannot agree that the court below was justified in directing a verdict for defendant. As I read the cases determined by this court in which that question was involved, they are directly in conflict with the majority opinion. In the case of *Denver & Rio Grand Railroad Co. v. Gustafson*, 21 Colo. 393, 41 Pac. 505, it appeared that plaintiff stopped some distance from a railroad crossing while a freight train was passing on one of the tracks, and that after it passed a flagman stationed there signaled plaintiff to go ahead. Plaintiff testified that thereafter he neither looked nor listened for approaching trains, but relied solely upon the flagman. This court held that under those circumstances a non-suit was improper, and said:

"We cannot say, as a matter of law, that the defendant in such a case may rely solely upon the flagman; neither can we say, as a question of law, that his failure to look or listen was not contributory negligence. It is a question of fact, to be determined by the jury, whether or not a plaintiff may rely solely upon the flagman, or whether he is excused from the exercise of any additional precaution on his part in these circumstances."

This court there cited with approval an Iowa case, which held that it was for the jury to determine whether the plaintiff was justified in relying upon the flagman's signal to cross over.

* In *Phillips v. Denver Co.*, 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29, it is said that:

"This court has never held that a plaintiff was guilty of contributory negligence, as a matter of law, when some fact or element was present that tended to lull the plaintiff into a sense of safety, and caused him to perform or fail to perform the act or acts upon which the contributory negligence was sought to be predicated. On the contrary, this court has held that in such a case the question was one for the jury."

Again, speaking of acts of a railroad company which create an appearance of safety, this court said:

"Such a condition does not relieve the traveler from the exercise of all care, but it is a factor to consider in determining whether or not he exercised that degree of care which, under the circumstances, he should have exercised." *Nichols v. C., B. & Q. R. R. Co.*, 44 Colo. 501, 98 Pac. 808.

In *Williams v. Sleepy Hollow M. Co.*, 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170, 11 Ann. Cas. 111, we said:

"It is only in the clearest cases that the court should usurp the functions of the jury in determining questions of negligence or contributory negligence."

In the majority opinion this court arrived at a conclusion that the deceased must have

known that the signal bell was out of order and not ringing. To do this the court indulges in inferences from the evidence, thereby usurping the functions of the jury. As to whether or not deceased must have known the condition of the bell, because of certain facts proved, is a question upon which intelligent persons may reach different conclusions. If the matter had been left to the jury, and they had found that he was ignorant of the condition of the bell, as well they might, they might then have found that he was not guilty of negligence, under the ruling laid down in the Phillips Case, *supra*, because they might reasonably have found that the silence of the bell tended to lull deceased into a sense of safety. Under the Gustafson Case it was clearly a question for the jury whether or not deceased was or might have been justified in relying upon the silence of the bell.

The prolonged discussion of the evidence in the majority opinion is sufficient of itself to show that there were matters in evidence from which the jury might have found for either party upon the question of contributory negligence. The deceased cannot be held conclusively at fault "unless there is no sensible explanation to the contrary reasonably possible." *Staal v. Railroad Co.*, 57 Mich. 239, 23 N. W. 795. Several things might have been regarded by the jury as sensible explanations.

In *Nichols v. C., B. & Q. R. R. Co.*, *supra*, this court called attention to the fact that the plaintiff might have crossed the track in safety, had the train been going at the rate allowed by ordinance. So here the jury might have found that the deceased was not negligent in crossing the track, when, after seeing the approaching train, there was time for him to do so, had not the train been running at double the speed allowed by the ordinance. In a Michigan case the plaintiff's evidence tended to show that, after he was aware of the approach of the train, he had time in which to cross the tracks, had the train been running at its authorized speed, and that because it was running at double the proper speed he was struck while on the track. A refusal to direct a verdict for defendant was sustained. *Railroad Co. v. Van Steinburg*, 17 Mich. 120.

The silence of the bell, while not justifying the deceased in a reckless disregard of his safety, was a matter to be considered by the jury, as is directly held in *Tobias v. M. O. Ry. Co.*, 103 Mich. 330, 61 N. W. 514. I think the rule laid down in the majority opinion is a radical departure from the well-established law of this state, and contrary to the weight of authority in other jurisdictions.

I am authorized to state that Mr. Justice HILL concurs in these views.

(60 Colo. 519)

AFFOLTER et al. v. ROUGH & READY IRRIGATING DITCH CO.

(No. 8074.)

(Supreme Court of Colorado. Feb. 7, 1916.)

1. WATERS AND WATER COURSES ⇐152—IRRIGATING WATERS—ACTION TO ESTABLISH RIGHTS—PARTIES.

In an action by a junior appropriator of irrigating waters for an adjudication of priority, alleging abandonment by defendants of their prior rights, the owners of all junior priorities in the water district were not, in the absence of statute, necessary parties plaintiff, or parties defendant, if they refused to join as plaintiffs.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. ⇐152.]

2. WATERS AND WATER COURSES ⇐152—IRRIGATING WATERS — ACTION TO ESTABLISH RIGHTS—LACHES.

Where senior appropriators of irrigating waters, holding under decree, abandoned and failed to use the waters for 29 years thereafter, the failure for such period of a junior appropriator to bring an action to judicially decree the abandonment was not laches, barring such a suit, which need not be brought until some one again claims the abandoned water right under the decree.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. ⇐152.]

3. WATERS AND WATER COURSES ⇐152—IRRIGATING WATERS—ACTION TO ESTABLISH RIGHTS—NECESSITY FOR FINDING.

In an action by a junior appropriator of irrigating waters for a decree that senior appropriators had abandoned their rights under a former decree, where it was only certain that such senior appropriators were originally awarded greatly more than 16.70 cubic feet a second, while the referee's conclusion of law was that, whatever amount they had been awarded, they had abandoned all in excess of 16.70 cubic feet a second, it was unnecessary for the referee to determine the exact amount of water which the original decree gave the senior appropriators.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. ⇐152.]

4. JUDGMENT ⇐518—IRRIGATING WATERS—ACTION TO ESTABLISH RIGHTS—FORMER DECREE—CONCLUSIVE EFFECT.

In an action by a junior appropriator of irrigating waters against senior appropriators thereof to decree an abandonment of their rights therein, adjudged to them by a former decree, a readjudication of the matter could not be had, or the validity of the former decree questioned.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 961, 962; Dec. Dig. ⇐518.]

5. WATERS AND WATER COURSES ⇐152—IRRIGATING WATERS — ACTION TO ESTABLISH RIGHTS—EVIDENCE.

In an action by a junior appropriator of irrigating waters against senior appropriators to decree an abandonment of rights adjudicated the seniors by a former decree, evidence that the water was at times run in sections, and that some of the senior appropriators had at times used larger amounts than their pro rata of the whole, during which periods others used none, was insufficient to overcome the evidence of intent to abandon, made by showing that for a long period of years there was a nonuser of any

water in excess of the carrying capacity of the ditch, which was less than the decreed amount.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.]

White and Teller, JJ., dissenting.

En Banc. Error to District Court, Boulder County; Harry P. Gamble, Judge.

Action by the Rough & Ready Irrigating Ditch Company against Anna Affolter and others. From a decree for plaintiff, defendants bring error. Affirmed.

Edward Affolter, of Louisville, and William V. Hodges and Mason A. Lewis, both of Denver, for plaintiffs in error. F. P. Secor, Jacob S. Schey, and Gray Secor, all of Longmont, and Lyle A. Bowman, of Lovell, Wyo., for defendant in error.

HILL, J. The defendant in error (a corporation), the owner of an irrigation canal taking its water from the St. Vrain creek in water district No. 5, division No. 1, with a junior appropriation to that of the South Flat ditch, which takes its supply from the same stream, in the same district, brought this action against the plaintiffs in error, as owners of the South Flat ditch, alleging facts which, if true, constitute an abandonment by the owners of the South Flat ditch of a part of its decreed priority. It prayed judgment accordingly. Upon issues joined, the case was referred to a referee, who took evidence and made findings, which were thereafter approved by the court and decree entered accordingly, which is to the effect that all of the appropriations, rights, and priorities for the use of water acquired under or by means of the South Flat ditch, except 16.70 cubic feet of water per second of time, had been abandoned, etc.

[1] A special demurrer for defect of parties plaintiff was overruled. This question was thereafter repeatedly raised in different ways. The complaint alleges the statutory proceeding for adjudication of priorities in water district No. 5, which discloses numerous ditches with junior priorities to that of defendants in this district, taking water from the St. Vrain creek. It alleges that in time of scarcity there is not sufficient water in this stream to supply the reasonable needs of the plaintiff (the defendant in error here) after first supplying ditches having decrees and rights to the use of water in the district senior to the rights of plaintiff. It is claimed that all the owners of junior priorities in this district should have been made parties plaintiff, or upon refusal then defendants to the action. We cannot agree with this contention. It is true that an abandonment of water by an earlier appropriator will quite often, at certain times, be a benefit to many subsequent appropriators on the same stream in the district. It is likewise true that at times it will or may prove a benefit to subsequent appropriators in other districts in the same water division; but, in the ab-

sence of a statute requiring it, this does not compel the plaintiff to make all such others either parties plaintiff or defendant. It might be impossible to ascertain all of such ditches, or all of the particular ones in the district, or in other districts which would be affected. This is particularly true in a case where an abandonment is sought on one stream which is a tributary of another, etc., and especially where the extent to which and time when certain of them might be interested, is remote or uncertain. Numerous suits of this character have heretofore been before this court, brought by one or more plaintiffs where numerous other ditches might be benefited; but we do not recall a single instance where the court has required all subsequent appropriators in the district, or in other districts in the same water division, to be made parties. So far as any citations are furnished, this question has never heretofore been raised in this court.

Without legislation upon the subject, we are of opinion that the plaintiff, as a junior appropriator from the St. Vrain creek, had the right to bring this action, when the effect of such judgment would be of special benefit to it. Whether the result of such an action, if unsuccessful, would be res judicata as to other appropriators not made parties, is unnecessary to determine. If such is not the case, and the hardship or injustice will follow as claimed, the remedy lies with the Legislature, and not with the courts. A similar condition existed as to parties concerning the change of point of diversion prior to the enactment of remedial legislation upon the subject in 1899. In *Lower Latham D. Co. v. Bijou I. Co.*, 41 Colo. 212, at page 217, 93 Pac. 483, at page 484, in commenting upon this question, this court said:

"But before this statute was passed the owner of a right to use water from any of the streams of this state for irrigation might bring an equitable action against one respondent alone, and have determined as against him the right to change the point of diversion. * * * One of the objects of the remedial statute under which this proceeding is being conducted was to put a stop to a multiplicity of actions and not to allow such changes to be made until all persons who might be affected thereby are notified and given an opportunity to be heard."

This case also recognizes the defect in the statutes in not requiring notice to ditches outside of the district from which the water was to be changed which might be affected, but held that this did not create a defect of parties. We see no material difference in principle between the two classes of litigation concerning parties, and until there is legislation concerning this class, we cannot agree that all subsequent appropriators on the stream, or even in the district, are necessary parties.

[2] The defendants interposed a plea of laches in bringing the action. To sustain it they claim, that the plaintiff alleges an abandonment by intention in 1882, for which

reason it operated, if at all, instantly; that this action was not brought until 1911, 29 years thereafter, for which reason upon account of laches in bringing it, etc., it should have been dismissed. We cannot agree with this contention. The complaint alleges facts which, if true, are sufficient to show an absolute abandonment, one of which is a non-use of the waters from the year 1882, a period of 29 years, with the intention to abandon. Evidence of nonuse for a long period of time is competent as bearing on the intention of the parties. We do not understand that this is of that class of cases which requires that an action be brought immediately after such an abandonment takes place, or that a subsequent appropriator need bring it until some one again seeks to make claim to it under the decree. Until this is done, the subsequent appropriator is in possession to the extent at least that he uses and enjoys its benefits, alleged in this case to have been for 29 years. After abandonment, when it actually takes place, he has no reason for believing that any one will ever make claim to it again by virtue of the decree under which it was awarded, and until this is done he cannot be said to be guilty of laches in failing to bring an action to have it declared abandoned.

[3] The original decree did not fix the amount awarded to each ditch in statutory inches, but in "customary inches." In his report the referee "finds from the testimony that the term 'customary inches,' used in the said decree, is an uncertain and indefinite term, and cannot be reduced to cubic feet per second of time." It is claimed this finding discloses that the referee in fact attempted a readjudication for this ditch, for the reason that he denies the intelligibility of the most important factor of the 1882 decree, viz., the measure of volume used therein. The question is asked how could he ever find or report an abandonment when he had no knowledge of the amount which was awarded. In some respects this presents a novel feature. The pleadings also present the unusual feature of the defendants claiming less than the plaintiff alleges was originally awarded them. The plaintiff alleges that this "1670 customary inches" decreed to defendants' ditch was, by the state engineer, in 1887, computed to be 71.43 cubic feet of water per second of time. The defendants' answer that their decree of "16.70 customary inches" amounts to approximately 41 cubic feet of water per second of time; hence they claim a much less amount under their decree than the plaintiff alleges was originally awarded them as construed by the state engineer. Such being the state of the pleadings, when the evidence is considered, we find good reasons for the findings of the referee that the words "customary inches" as used in this decree is an uncertain and indefinite term, etc., and his inability

to determine the exact amount which was awarded to the defendants' ditch. We do not think this of itself discloses that the referee attempted to readjudicate their rights under the decree. That they were originally awarded a much greater amount than 16.70 cubic feet per second is admitted, and the conclusion of law of the referee is that, whatever amount that was, they had abandoned all of it in excess of 16.70 cubic feet per second, for which reason we think it was unnecessary for the referee to determine what the exact amount of the original decree was.

[4] It is claimed that there is an irreconcilable conflict between the finding of facts and conclusion of law by the referee, and that he erred in admitting testimony showing the acreage, the nature of the soil, and the amount of water required for its proper irrigation, viz., the needs of the defendants in this respect, and that the result of his work discloses that he attempted a readjudication of these matters, and based his report upon the needs of the parties at the time, regardless of their rights under the decree. We agree that a readjudication cannot be had, or the validity of the former decree questioned, in this kind of a proceeding; but we do not understand that the referee attempted anything of the kind. In addition to his conclusion of law, we think his utterances during the trial disclose to the contrary. While there may be an apparent conflict between the referee's finding of facts as set forth in his report and his conclusion of law, we think the latter is abundantly justified by the testimony. It is as follows:

"That by reason of the failure and neglect of defendants, since the date of the decree to the South Flat ditch, to take and divert from the St. Vrain creek by means of the South Flat ditch any water whatsoever in excess of sixteen and seventy one-hundredths (16.70) cubic feet per second of time, and for the further reason that the said defendants have not, since the date of the decree granting to said ditch the right to take from the St. Vrain creek sixteen hundred seventy (1670) customary inches of water, taken, diverted, or beneficially used any water whatsoever in excess of sixteen and seventy one-hundredths (16.70) cubic feet per second of time, they have abandoned the right given them by said decree to take or divert from said St. Vrain creek by means of their said South Flat ditch all waters in excess of that amount."

We have given the testimony careful consideration in connection with the physical conditions shown to be in existence during the 29 years preceding the bringing of this action, and we fail to perceive how the court could have consistently adopted any other legal conclusion more favorable to the defendants than the one recommended by the referee, and, were all the testimony complained of eliminated, we think the result should not have been more favorable to them than it was, and that the full measure of proof exacted to warrant the conclusion of law adopted by the court was fully supplied.

Parsons v. Ft. Morgan Co., 56 Colo. 148, 136 Pac. 1024; San Luis Valley Irr. Dist. v. Alamosa, 55 Colo. 386, 135 Pac. 769; Green Valley Co. v. Frantz, 54 Colo. 226, 129 Pac. 1006; Alamosa Creek Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112; Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. 391; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 Pac. 989; Sleber v. Frink, 7 Colo. 148, 2 Pac. 901.

[5] As proof that the evidence is insufficient to support the decree, counsel, among other things, refer to testimony tending to show that the amount of water represented by the different interest of each co-owner in this ditch has, within the past 20-odd years, been used by practically each owner upon his lands thereunder. They maintain that this is evidence of a beneficial use of the entire amount represented by the original decree, for which reason none of it can be declared abandoned. If there is testimony sufficient to show such use, it is not shown that each of the joint owners did or could have used the entire amount represented by his alleged interest in the original decree at the same time. This was a physical impossibility, for the reason that it was beyond the capacity of the ditch to carry. Counsel do not seriously dispute this, but arrive at their conclusion by deductions in showing that at times the water has been run in what is recognized in farmers' parlance as "in sections"; that is, some of the owners at times use larger amounts than their pro rata of the whole, during which period others use none, then when the first users finish others take it all, and so on until it has been thus passed around. In our opinion this discloses nothing more than a mutual exchange by different consumers, and does not tend to overcome the evidence of intent to abandon made by showing that for a long period of years there was a nonuse of any in excess of the then carrying capacity of the ditch.

It is questionable (although unnecessary to determine) whether the introduction of the testimony alleged to be incompetent was not the cause of the defendants being held not to have abandoned more of the waters originally decreed them than would have been the case had the testimony been limited to the physical conditions of the ditch, the acreage thereunder and the amount taken and applied to a beneficial use during the 29 years preceding the bringing of the action, and the other testimony to which no complaint is made; but, eliminating this, the conclusion reached makes the question of the admissibility of this testimony unnecessary to determine.

The judgment is affirmed. The former opinion is withdrawn, this one filed in lieu thereof, and the petition for rehearing denied.

Affirmed.

TELLER, J. (dissenting). I am of the opinion that defendants' application to have others, who are interested in the suit, made parties, should have been granted. The fact that these parties are very numerous does not change the legal situation. Our Code provides that in case the parties are numerous, and it is impracticable to bring them all before the court, one or more may be directed, by order of the court, to sue or defend for the benefit of all.

Every suit which seeks to have any part of a decreed water right declared abandoned is of interest to every water user in the district having a junior right. All such users are directly interested that the quantity of water held to have been abandoned shall be as large as possible. Every cubic foot of water found to have been abandoned, in effect, adds a cubic foot to the quantity from which all junior rights are supplied. Others have as much interest in the issue of the case as have the plaintiff companies; yet they are left free to litigate this same question, each in his turn. Any one who thinks that a more favorable result might be obtained by a new suit is at liberty to bring suit. This is the very evil which the equitable rule, affirmed by our Code, was intended to prevent. If it be considered that the court has discretion in the matter of bringing in new parties, then the court in this instance abused its discretion in not making the order requested.

But more important than this defect in parties is the fact that the referee received in evidence and manifestly made his findings upon testimony which was clearly incompetent. The record contains a mass of evidence upon the duty of water, to which objection was duly made, and the remarks of the referee clearly indicate that he thought he was authorized to find that all right to water in excess of the quantity necessary to irrigate the land under this ditch had been abandoned. He finds that all except 16.70 cubic feet per second had been abandoned. How did he arrive at this particular quantity as not having been abandoned, especially in view of the fact that he could not determine what quantity of water was meant by the terms of the original decree? He finds that the total area to be irrigated was 835 acres, and the decree leaves to this land exactly one cubic foot of water to each tract of 50 acres. This fact, taken in connection with the evidence as to the duty of water and the needs of this land, makes it practically conclusive that it was upon that evidence that the finding was based. There is no other evidence upon which it appears that it could have been based.

Further, the finding admits that in times of high water the plaintiffs in error had used more than 16.70 cubic feet of water. That being so, they cannot be held to have abandoned all but 16.70 cubic feet. They were

using water under a decree giving them the right to a quantity admittedly largely in excess of that allowed by the referee, and it must be assumed that they were receiving it under the decree, at least to the extent of the amount fixed therein. In the case of *Drach v. Isola*, 48 Colo. 134, 109 Pac. 748, relied upon to support the finding, the water used in flood times was in excess of the amount decreed, and could not, therefore, it was held, establish a use under the decree.

The findings ignore the undisputed testimony of defendant in error's own witnesses that the ditch had a capacity to carry, and had, within the time in which nonuse was relied upon to show abandonment, carried far more water than the decree allows. From a careful reading of the record I am forced to the conclusion that the cause was tried and determined on the theory that plaintiffs in error should be held to have abandoned their rights to so much of the water decreed to them as is not actually needed for their lands. This amounts to a readjudication of the right, and is an amendment of the original decree. However desirable it may be that parties be prevented from using water in excess of their needs, the question of excessive use cannot be tried in a suit for abandonment. For the reasons above stated I cannot agree with the majority opinion.

I am authorized to state that Mr. Justice WHITE concurs in so much of this opinion as relates to the evidence and findings, and upon the question of parties he expresses no opinion.

(60 Colo. 463)

BOARD OF CONTROL OF STATE HOME v. MULERTZ. (No. 8357.)

(Supreme Court of Colorado. Jan. 3, 1916.)

1. CONVICTS \S 6—JUVENILE COURT—PROCEEDINGS FOR COMMITMENT OF DEPENDENT CHILD—SERVICE—PROCESS ON CONVICT—JURISDICTION.

Where the adoptive mother of a dependent child was serving a term in penitentiary at the time proceedings were instituted in the juvenile court to commit the child to the State Home for dependent children under the provisions thereof of Rev. St. 1908, §§ 568-585, and the mother was served with process, the court had jurisdiction, since the confinement of a convict does not render him immune to the civil process of the courts.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. §§ 5-10; Dec. Dig. \S 6.]

2. INFANTS \S 19—JUVENILE COURT—FINAL ORDER—REOPENING CASE—JURISDICTION.

The juvenile court of Denver entered an order committing a dependent child to the State Home for dependent children in proceedings duly instituted for that purpose under the provisions thereof of Rev. St. 1908, §§ 568-585, process having been served on the child's adoptive mother while confined in the penitentiary. Two and one-half years after the term had expired, at which such order was entered, the mother petitioned the court to set aside the order and open the case for rehearing. The court granted the petition. *Held*, that such action was void, since in the absence of timely proceedings

to modify, set aside, or correct such order, the jurisdiction of such court as a court of record, under its creative act (Rev. St. 1908, § 1591), over such proceeding had terminated both at common law and under Code Civ. Proc. § 81, providing for proceedings subsequent to judgment.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 19; Dec. Dig. \S 19.]

3. INFANTS \S 19—JUVENILE COURT—NUNC PRO TUNC ORDER—VALIDITY.

Where such mother filed a petition for an order changing the guardianship of the child from the State Home to her and for an order nunc pro tunc permitting her to file such petition as of the term following that in which the order of commitment had been entered, an order for such entry was void, since the office of a nunc pro tunc order is confined to making a record of what was previously done by the court and omitted from entry, and does not extend to supplying something that should or might have been done, but was not.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 19; Dec. Dig. \S 19.]

4. INFANTS \S 19—JUVENILE COURT—REVIEWING COMMITMENT—NUNC PRO TUNC ORDER—JURISDICTION.

The further order of the court that such mother's first petition for a rehearing of the case be entered nunc pro tunc as of a date within the supposed jurisdiction of the court, was error, since the court was without jurisdiction to entertain such petition which did not attempt to raise an issue as to the custody of the child on a new state of facts, but simply sought to review the original order of commitment, over which the court no longer had jurisdiction.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 19; Dec. Dig. \S 19.]

5. INFANTS \S 19—DEPENDENT CHILDREN'S HOME—CUSTODY OF BOARD—JUVENILE COURT—POWER.

After the commitment of a dependent child to the State Home, the committing court has no power to change the custody of such child from such home, since under Rev. St. 1908, §§ 572-575, defining the purpose of the home and investing its board with the custody and disposition of dependent children, and section 579, providing for commitment and abrogating the parent's rights thereupon, such board has exclusive custody of children committed to the home, in the absence of legal error in the commitment or neglect or unfaithfulness on the part of the board.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 19; Dec. Dig. \S 19.]

6. INFANTS \S 19—JUVENILE COURT—CHANGE OF CUSTODY—ABUSE OF DISCRETION.

The act of the juvenile court of Denver in ordering a child to be taken from the State Home for dependent children and placed in the Denver Detention Home School, designed for the temporary detention of delinquent children provided by the city of Denver under the requirement of Rev. St. 1908, § 591, was an abuse of discretion.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 19; Dec. Dig. \S 19.]

Error to Juvenile Court, City and County of Denver; Ben B. Lindsey, Judge.

Application by Catherine Mulertz for the custody of a child then in the custody of the Board of Control of the State Home. From an order changing the custody of the child from the Home to the Denver Detention Home School, the Board of Control brings

error. Cause remanded, with directions to vacate the order.

Dines, Dines & Holme, Barnett & Campbell, and Kenneth B. Townsend, all of Denver, for plaintiff in error. John Horne Chiles, of Denver, for defendant in error. Ben B. Lindsey, of Denver, amicus curiæ.

WHITE, J. In a proceeding regularly pending, and at issue, in the juvenile court of the city and county of Denver, Catherine Mulertz was, on the 7th day of September, 1909, found and declared to be a dependent child, and was sent to "The State Home" for dependent and neglected children, the decree reciting that:

Her "future custody shall be subject to the statute of the state establishing said State Home and providing for the disposition of children in its care." Subdivision 5, c. 24, R. S. 1908.

The term of the court at which this order was entered expired January 11, 1910. Section 1592, R. S. 1908. At and prior to the time of the entry of the aforesaid order, the child was the adopted daughter of another Catherine Mulertz, also known as Fitch, and who had been duly served with notice of the proceedings, but did not appear therein. The petition showed, in addition to the facts of dependency, that Mrs. Mulertz had been convicted of a felony, and was in the penitentiary. July 17, 1912, Mrs. Mulertz filed in the case a petition in which she alleged that she was absent from the city and county of Denver, and "was under duress" on the date of the hearing at which the child was adjudged a dependent, and was "unable to appear" and resist the prayer of the petition therein, and prayed that the order and decree of commitment be set aside and further hearing be had on the original petition. November 18, 1912, the motion was sustained and a rehearing on the original petition ordered. Thereafter, and on January 9, 1913, Mrs. Mulertz presented a motion and petition in the case and prayed for an order, nunc pro tunc, that she be permitted to file the same as of the April term, 1910, of the court. This petition asked that an order be entered in the case changing the guardianship of the child from the State Home for dependent children to herself. She also presented an affidavit in support of the petition in which she alleged that when the proceedings in dependency were had, she was confined in the state penitentiary undergoing a sentence for the commission of a felony; that upon her release from the penitentiary, in March, 1910, she appeared in the juvenile court and verbally asked that the order committing said child to the State Home be set aside, and that the custody of the child be restored to her; that she was thereupon advised by the court to petition the board of control of the State Home to surrender the child to her, which she thereafter did, and the matter was, at some time not designated,

finally heard and denied; that thereupon she again verbally requested the juvenile court to restore the custody of the child to her; that because she believed from the attitude and expression of the individual members of the board of control of the State Home that the child would be returned to her by final action of the board, she had not presented a written petition to the court to be restored to the guardianship of such child; that she was not guilty of the offense for the commission of which she had been convicted, and that the child was not dependent, but alleged no fact as to why the custody of the child should be changed. September 15, 1913, the court entered an order granting Mrs. Mulertz leave to file her petition for a rehearing "as of a date within six months of her release from the penitentiary," and that "the petition for rehearing is granted as prayed," and ordered that said case be continued for trial on the issue "as to the rights of the said respondent, Catherine Mulertz, to the custody of said child." On the 19th day of November, 1913, a jury was selected, and before the introduction of any evidence the board of control of the State Home refused to participate in the trial, whereupon the court ordered the district attorney, in behalf of the state, to contest the issues with Mrs. Mulertz. After many days the jury, on November 28, 1913, returned a verdict that the child, Catherine Mulertz, was a dependent child, and recommended, however, that it be placed in the custody of Mrs. Mulertz. A motion for a new trial was thereupon filed and subsequently denied. April 15, 1914, the court again entered an order declaring the child, Catherine Mulertz, to be "a dependent child," and that it be taken from the State Home for dependent children and placed in "the home of Mr. and Mrs. J. P. Wright at the 'Detention Home School' until a suitable family home can be obtained for the child, or until the further order of this court." The board of control of the State Home declined to surrender the custody of the child, and brought the controversy here by writ of error and applied for a supersedeas, which was allowed, and the child has since remained in the State Home.

[1] If it be a fact that Mrs. Mulertz was a convict in the state penitentiary when service of process was had upon her, or if she was thereafter, by reason of such imprisonment, prevented from personally appearing at the hearing at which the child was adjudged a dependent, the service of process and the trial were, nevertheless, regular. Her situation did not relieve her of the necessity of heeding the process of the courts or from responding to the necessities of public justice. Chitty's Crim. Law, vol. 1, pp. 725, 726; Ramsden v. McDonald, 1 Wilson's Rep. 217; Cannon v. Windsor, 1 Houst. (Del.) 143; Platner v. Sherwood, 6 John. Ch. (N. Y.) 118, 127, 130.

The rule in this regard is stated in 9 Cyc. p. 875, as follows:

"In the absence of any statutory provision on the subject, process may be served personally on a convict confined in prison. * * *"

With no legislative pronouncement to that effect in this state, the situation of Mrs. Mulertz neither rendered her immune to the civil process of the courts, nor conferred upon her privileges to which honest citizens are not entitled. The judgment establishing the dependency of the child was not procured by fraud or by irregular or improper conduct of the successful party, and the court had jurisdiction of the subject-matter and of the persons whose rights were determined.

[2] The court pronouncing the judgment is a court of record—section 1591, R. S. 1908—and its power over the judgment, after the expiration of the term at which it was rendered, is governed either by the common law or the Code of Civil Procedure. By the common law its jurisdiction in the premises was ended upon the expiration of the term at which the judgment was entered, unless during that term a motion or some pleading was interposed to set aside, modify, or correct it, or an order entered continuing the case for such purpose. And if the Code applies the court's power in the premises ended, with like exceptions, upon the expiration of six months, or, in exceptional cases, one year, after the end of the term at which the judgment was entered. Section 81, Code of Civil Procedure, R. S. 1908; *People v. District Court*, 33 Colo. 405, 80 Pac. 1065; *Elder v. Richmond G. & S. M. Co.*, 58 Fed. 536, 7 C. C. A. 354.

As both the common law and Code provisions are definite and unequivocal, it is clear that the action of the court in setting aside its judgment rendered at a term of court which expired two and a half years before, was not only erroneous, but also of no force and effect whatever, unless jurisdiction of the case was retained by virtue of the attempted nunc pro tunc order of January 9, 1913.

[3] An order may be entered, nunc pro tunc, to make a record of what was previously done by the court and omitted from entry; but where the court has never made an order which it might or ought to have made, it cannot be entered nunc pro tunc. The court's power in this regard is not to supply something that might or should have been done, but to supply an omission in the record of action really had and omitted through inadvertence or mistake. There was not, during the term of court at which the judgment was entered or subsequent thereto, within the time allowed by statute or by the common law, any motion filed in the case or order made therein that would constitute the basis for the alleged nunc pro tunc entry. The motion requesting the entry, or rather the affidavit in support thereof, shows that while Mrs. Mulertz appeared in the juvenile

court some time in March, 1910, and orally requested that she be restored to the guardianship of the child, and the order committing the child to the State Home be set aside, she neither filed a motion in that regard nor was granted permission to do so, nor did the court make any order in the premises, but advised her to proceed before the board of control of the State Home if she desired to have the custody of the child restored to her; and that she did so proceed, and upon final hearing her application in that regard was denied by such board.

[4] Moreover, Mrs. Mulertz never asked leave to file the petition for rehearing, nunc pro tunc, but only asked that an order be entered, nunc pro tunc, giving her leave to file a petition for the restoration to her of the custody and control of the child. The court, however, not only awarded her the relief she requested, but also directed that the petition for rehearing, which was then in no wise before the court, be entered as of a date within the supposed jurisdiction of the court, and that its prayer be granted. This was clearly erroneous. As far as the case at bar is concerned, the juvenile court had performed all its duty in the particular case when the original judgment was entered, and no action having been taken by the party considering herself aggrieved thereby, within the time allowed by law to change or modify that judgment, the controversy was at an end. *McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406. In the motions, petitions, and affidavits in support thereof presented and heard subsequent to the decree of dependency and commitment of the child, there were no facts alleged or attempt to show that the condition of petitioner was so changed that a guardian was no longer necessary for the child, or that the State Home was in any sense an improper guardian, and the power of the court to change the guardianship, and its jurisdiction over infants generally, is therefore not involved. In fact the action attempted was simply to review or reverse the original judgment upon the same state of facts which existed at the time such judgment was rendered, and not to procure a new judgment or order in regard to the child, based upon a different state of facts. Therefore, when the petition for rehearing was filed, the court was without jurisdiction to entertain it. Courts are only instruments of government, and the powers intrusted to them must be exercised according to the rules and ordinances made and adopted for practical purposes. Under the facts of this case the duty of the juvenile court was to dismiss the petition for a rehearing, and to deny the request for an order, nunc pro tunc, permitting Mrs. Mulertz to file in the case a petition to restore to her the guardianship of the child. The former should have been dismissed, because the original decree had passed beyond the court's control; and the

latter should have been denied, because that which is embodied in the motion to be entered nunc pro tunc had not previously been done by the court, as well as upon the further ground that the control and custody of the child, after the entry of the order of commitment, was in the board of control of the State Home. Sections 572, 573, 574, 575, and 579, R. S. 1908.

[5] "The State Home" for dependent and neglected children is an agency of the state and, upon commitment of the child to its care, became its guardian, and the board of control thereof was invested with the power and discretion to restore the child to its parent, or to otherwise terminate the guardianship, or to continue the same as provided by law; and when no error of law, neglect, or unfaithfulness on the part of the members of the board of control is alleged or shown, their action must be accepted as disposing of the matter. The principle controlling in this regard is declared and applied in *Re Wares*, 161 Mass. 70, 36 N. E. 586. Moreover, when the action of the board of control of the State Home is questioned in such matters, it must be through some appropriate proceeding instituted for the purpose, and not by reopening a cause which has passed beyond the jurisdiction of the court that tried and determined the issues. We cannot give our assent to the contention of the trial judge, who appears as *amicus curiæ* herein, and that of counsel for defendant in error, that "the matter of procedure cuts but little, if any, figure." The relation of remedies to rights is fundamental, and cannot be disregarded at will. Whosoever exercises power in a government of the people, for the people, and by the people, whether the power be executive, legislative, or judicial, must do so in substantial compliance with the rules prescribed, or his action in the premises is unlawful.

[6] But, apart from this, it is certain beyond peradventure of doubt that the trial court abused its discretion in taking this child from the State Home and placing it temporarily in the custody of those in charge of the "Detention Home School," which is a "room" or "house" provided by the city and county of Denver in compliance with the command of the Legislature, and designed for the temporary detention and control of delinquent children. Sections 591 and 598, R. S. 1908. It is not conceivable that the best interests of the child would be subserved by removing it from the institution created and designed by the Legislature as a home for neglected and dependent children, and from the influences exerted by the men and women constituting the board of control thereof, against whose characters nothing derogatory is charged, and placing it in charge of those in control of an institution designed primarily for the temporary deten-

tion of delinquent children. We must assume, in the absence of a showing to the contrary in an appropriate suit instituted for that purpose, that the board of control of the State Home, has and will, in relation to this child, properly discharge its duties and discretion under the statute. In any event, the action of the court, of which complaint is here made, was without authority, and the cause is therefore remanded, and the trial court directed to vacate its orders entered in the case subsequent to the original judgment of dependency and commitment.

Reversed and remanded, with directions.

GABBERT, C. J., and BAILEY, J., concur.

(60 Colo. 562)

JONES v. CERES INV. CO. (No. 8377.)

(Supreme Court of Colorado. Jan. 8, 1916.
Rehearing Denied Feb. 7, 1916.)

1. PLEADING \S 187, 343—MOTION FOR JUDGMENT.

Rev. Code, \S 53, declares that the sufficiency of the pleadings shall be determined as prescribed in the act and not otherwise; and section 55 provides that the complaint shall contain a statement of the facts constituting the cause of action and a demand for the relief claimed. In an action for damages for breach of a contract to convey land, setting forth the alleged cause of action, to which a demurrer was overruled, the answer, denying many allegations of the complaint, alleged that, when he made the contracts, plaintiff knew that defendant owned the land, that the contracts were those of a certain named person, that defendant's name was not mentioned therein, and that such person was not its agent, which allegations were denied by the replication, except the allegation that plaintiff, when he made the contract with such person, knew that the lots belonged to defendant, and that its name was not referred to in the contract. *Held*, that the granting of defendant's motion for judgment on the pleadings was improper, as a motion therefor cannot take the place of a general demurrer, and, unless the pleadings show affirmatively that plaintiff is without right, should not be entertained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 400, 1048-1051; Dec. Dig. \S 187, 343.]

2. PLEADING \S 343—REPLICATION—DEMURRER.

In such case the sufficiency of the replication should have been tested by demurrer, so that, if bad, plaintiff would have an opportunity to amend, which was denied, by sustaining the motion for judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. $\S\S$ 1048-1051; Dec. Dig. \S 343.]

3. VENDOR AND PURCHASER \S 341 — PURCHASER'S ACTION FOR DAMAGES — PLEADINGS.

Allegations in a purchaser's action that the contract had not been made with defendant company, yet that defendant knew that plaintiff had made the contract with a certain person as its agent, and had relied upon his acts as those of the defendant, and had made payments accordingly, which defendant had received and applied to its own use, stated a cause of action to recover the amount paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. $\S\S$ 1008-1017; Dec. Dig. \S 341.]

4. JUDGMENT \Leftrightarrow 252—CONFORMITY TO PRAYER FOR RELIEF.

Under Rev. Code, § 186, providing that the relief granted to a plaintiff, if there is no answer, shall not exceed that which he has demanded in his complaint, but that in other cases the court may grant him any relief consistent with the case made by the complaint and embraced within the issue, a party is entitled to such relief as his evidence, together with the facts averred in his pleadings, justify, regardless of the relief demanded in his prayer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. \Leftrightarrow 252.]

5. FRAUDS, STATUTE OF \Leftrightarrow 138 — SALE OF LAND—RETENTION OF MONEY RECEIVED.

A party who has repudiated his verbal contract for the sale of land cannot invoke the statute of frauds to enable him to retain what he has received of the purchaser under it, in part performance thereof.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 327-333; Dec. Dig. \Leftrightarrow 138.]

Error to District Court, City and County of Denver; James H. Teller, Judge.

Action by James C. Jones against the Ceres Investment Company. Judgment for defendant on the pleadings, and plaintiff brings error. Reversed.

Tolles & Cobbe, of Denver, for plaintiff in error. Hindry, Friedman & Brewster, of Denver, for defendant in error.

HILL, J. The plaintiff in error, who was plaintiff below, contends that the court erred in granting the defendant's motion for judgment on the pleadings. The complaint alleges that one Dillow was the agent of the defendant company and as such had a large amount of its real estate for sale; that in September, 1908, the plaintiff made to Dillow, as the agent of the defendant, an offer of \$1,416 for certain lots, describing them; that by the terms of said offer the plaintiff agreed to pay for them in installments of \$55 per month and interest, and also agreed to pay the subsequent taxes, water taxes, and insurance; that defendant accepted the offer, and agreed to deed to plaintiff, or any person to be named by him, the "above-described lots," upon payment of said sum and interest at the rate of 8 per cent. per annum; that defendant, instead of making a contract direct with plaintiff, made a written contract with Dillow for said lots, containing the above conditions, and Dillow made a contract with plaintiff, as the agent of defendant company, containing the same conditions; that it was further verbally agreed and understood at the time of entering into the written contract that plaintiff might, at any time, pay the entire amount due under said contract, or any portion thereof, and receive a deed or deeds for the property paid for in full; that there has been paid upon this contract to the defendant the sum of \$1,128.12, which payments were made on and prior to August 22, 1910; that a portion of the above-described prop-

erty was conveyed to plaintiff, or as he directed, giving dates and description; that no other property contained in the above-described contract was ever conveyed to plaintiff or as he directed. This is followed by the alleged execution of three other similar contracts made in the same manner for other lots, describing them, stating amounts paid and to be paid. It is alleged that all the payments were made upon the contract executed in October, 1904, before 1910, and that 3 lots only, out of about 25 covered by this contract, were conveyed to the plaintiff, etc. The portion of the complaint concerning contracts bearing dates November 20 and 27, respectively, 1910, contains the same allegations as the first as to certain payments, etc., except in different amounts, but does not allege the conveyance of any of the lots to plaintiff. The complaint alleges that, aside from taxes, water taxes, and insurance, a total of about \$2,500 was paid by the plaintiff upon the four contracts, that some of it was paid by the plaintiff direct to the company and some to Dillow as its agent, and that all of it was received by the defendant company. It then alleges that during the month of July, 1910, the plaintiff made demand, not only once, but several times, upon the defendant company to make and deliver to him deeds for all the property that he had purchased of it, as shown by the four contracts heretofore described, made with it through Dillow, and by said defendant company adopted as its contract, with the exception of those theretofore conveyed, etc. It alleges that the defendant company, acting through its president, Waldo, expressed its willingness to make the deeds before requested, and several times set the time when he would have them ready for delivery, but failed and neglected so to do; that on or about the 21st of July, 1910, the plaintiff called at the office of the defendant company and found Waldo in charge; that Waldo then stated that he would have the deeds executed and ready for delivery upon the following day, viz. the 22d of July, 1910, and requested plaintiff to call upon said day, pay the amount due, and receive the deeds for said property; that on the afternoon of the 22d of July, 1910, in pursuance of this request, plaintiff called at the office of the defendant company and found that the deeds had not been executed; that Waldo, the president of the defendant company, was not there, but had left the state the night before, and was just starting on a trip around the world, and would not be back for a year; that plaintiff was ready, willing, and able, at the time, and at all times after demand made by him as hereinbefore mentioned, to pay the balance due the defendant company for the real estate owned by it and sold to plaintiff by and through its agent, Dillow, and so stated at the time; that the said deeds

were to be made by Waldo, the president of the company. The plaintiff then alleges that on the 5th of August, 1909, he made a sale of all the real estate then owned by him (purchased from defendant company) to one Banty for the sum of \$9,800; that \$1,800 of said amount was paid in cash, and \$50 was to be paid every month; that said payments were made up to and including the month of July, 1910; that Banty also had the option of paying off, at any time, the entire amount due plaintiff and obtaining deeds for said property; that on or about July 1, 1910, Banty notified plaintiff that she desired to pay the balance due upon said contract, amounting to about \$7,000, and obtain deeds for said property; that, pursuant to said demand made upon plaintiff, he made the several demands hereinbefore mentioned on the defendant, so that he might be able to carry out the contract upon his part with Banty; that the amount paid by Banty upon said contract, principal, interest, and taxes, at the time amounted to about \$3,000; that Banty desired to build a number of houses upon said property; that, when Banty became aware that plaintiff could not furnish deeds promptly for the property, she declined to proceed further, employed counsel, threatened suit, and demanded the return of her money and a cancellation of the contract; that plaintiff was compelled to and did return to Banty the money paid by her upon said real estate and canceled the contract; that the defendant company, by and through its president, Waldo, knew that plaintiff was the purchaser of the aforesaid property; that he had made a sale of this property to Banty about the time of said sale; that plaintiff had made an advantageous sale thereof, and desired to carry the same out; that by reason of the failure of the defendant company to furnish him a deed or deeds, when required or within a reasonable time, he has been damaged in the sum of \$6,000. The prayer is for judgment for this amount.

In its answer the defendant denies that plaintiff made the offers to Dillow; admits that, instead of making a contract with it, he made written contracts with Dillow for the property described; and denies each and every other material statement and thing set forth therein, not specifically admitted or denied. For a second defense it alleges that at the time the contracts were entered into by the plaintiff, as described in the complaint, plaintiff knew the defendant was the owner of the property described in said action; that said contracts were written contracts; that this defendant was not named or referred to therein; that said contracts were in words and figures as follows: Copies are then set forth of the four contracts between Dillow and the plaintiff, the same as to dates and description of the lands as those in the complaint. The answer then al-

leges that said above contracts were and are the individual contracts of Dillow; that Dillow did not sign said contracts for or on behalf of the defendant; that Dillow was not, at said time, the agent of or for the defendant, or authorized by it to enter into said contracts on its behalf. For a third defense it is alleged that the Dillow contracts with plaintiff are contracts for the sale of land; that neither was signed by defendant, nor by any agent of defendant, nor by any agent of the defendant lawfully authorized in writing; and that neither defendant nor any person by it lawfully authorized in writing did ever make or sign any contract in writing for the sale of this land as required by sections 2662 and 2663, R. S. 1908; that said contracts are therefore wholly void, etc.

[1, 2] By replication the plaintiff denied the allegations in the answer, starting with the one alleging that the contracts were and are the individual contracts of Dillow. The defendant's motion for judgment on the pleadings was then sustained. We cannot subscribe to the correctness of this ruling. In *Wallace v. Collier*, 147 Pac. 660, we had occasion to go into this question, and quoted from the other recent opinions of this court, with the conclusion, as therein stated, that this motion cannot take the place of a general demurrer, and that, unless the pleadings show affirmatively that the plaintiff is without right, it should not be entertained. Section 53 of our Revised Code states that the mode of pleading in civil actions and the rulings by which the sufficiency of the pleadings shall be determined shall be as described in this act and not otherwise. Section 55 says:

"The complaint shall contain: * * * A statement of the facts constituting the cause of action, in ordinary and concise language, without unnecessary repetition. * * * A demand for the relief which plaintiff claims, and if the recovery of money or damages be demanded, the amount thereof shall be stated."

The plaintiff set forth his alleged cause of action. A demurrer thereto was overruled. In its answer the defendant denied many allegations of the complaint. For a further defense it alleges the plaintiff knew it was the owner of the property at the time the contract was made by him with Dillow for their purchase and sets up the contracts. It then alleges that these contracts were Dillow's, that its name was not mentioned nor referred to therein, and that he was not their agent. Two of these latter allegations, in legal effect, are but denials of those in the plaintiff's complaint, viz. that the contract was the company's, and not Dillow's, and that he was its agent, etc. *Hoosac M. & M. Co. v. Donat*, 10 Colo. 529, 16 Pac. 157.

The only allegations in this further defense that were not a denial, and which the plaintiff did not deny in his replication, are that when he made the contract, as alleged, with the company, through Dillow, its agent,

and in the agent's name, he knew the lots belonged to the company, and that its name was not referred to in this contract. The sufficiency of the replication should have been tested by demurrer; if bad, this would have given the plaintiff the right to amend, which was denied him by sustaining the motion for judgment on the pleadings; but, regardless of this, as they then stood, they do not disclose that the plaintiff was without right.

[3-5] According to the allegations of the complaint, the defendant knew that the plaintiff made these contracts with Dillow, as alleged, viz. as its agent and for it, and relied upon them as the acts of the company, and made payments accordingly; that it took his money from time to time to apply thereon, and applied it to its own use, knowing that he was thus paying it, relying upon the contracts as being those of the company. Section 186 of the Revised Code reads:

"The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

In *Becker v. Pugh*, 9 Colo. 589, 13 Pac. 906, it is held that under the Code a party is entitled to such relief as his evidence, together with the facts averred in the body of his pleadings, justify, regardless of the relief demanded in his prayer; hence, if we assume for the pleadings all the defendant claims, he would yet have a cause of action for his money. In *Gifford v. Willard*, 55 Vt. 36, at page 38, it is well said:

"The defendant, having repudiated his verbal contract for the sale of his farm to the plaintiff, cannot invoke the aid of the statute of frauds to enable him to retain what he received of the plaintiff under it, and in part performance thereof."

To the same effect are *Segars v. Segars*, 71 Me. 530; *Gifford v. Willard*, 55 Vt. 36; *Jellison v. Jordan*, 68 Me. 373; *White v. Wieland*, 109 Mass. 291. The principles announced in these cases are specially applicable here. According to the allegations of the complaint, the defendant had received the purchase price for a large number of these lots, also a part of the purchase price for the others paid by the plaintiff, knowing that when the payments were made the plaintiff relied upon these contracts as being the contracts of the defendant, and looked to it for their fulfillment, making the payments with this object in view. Under such circumstances, the plaintiff, having pleaded the facts, if true, was entitled to recover from the defendant the amount paid. The same principles are applicable to the defendant's plea of the statute of frauds. It is elementary that it cannot invoke the aid of the statute in order to allow it to perpetrate a fraud, which would be the effect if it were

allowed to retain both the lots and the moneys paid therefor.

We will not, at this time, go into the question of part performance, or whether proper to be shown to sustain an action for damages, or concerning the question of ratification, or whether the statute of frauds would defeat a recovery other than for the moneys paid, for the reasons that the contract between the defendant and Dillow is not before us; it might or might not throw light upon these questions. There is also a dispute as to the meaning of the complaint concerning part performance, such as possession, etc., and whether part performance or ratification has been pleaded.

The parties will be permitted to amend their pleadings as they may be advised, by which at least some of these questions can be eliminated and others made more clear. The judgment is reversed.

Reversed.

GABBERT, C. J., and SCOTT, J., concur.

In re CLARK.

(79 Or. 15)

(Supreme Court of Oregon. Feb. 1, 1916.)
MANDAMUS \Leftrightarrow 61 — EXERCISE OF JUDICIAL DISCRETION — DISMISSAL OF INDICTMENT — "MAX."

L. O. L. § 1704, providing that the court "may" on its own motion, or on application of the district attorney, and in furtherance of justice, order that an action after indictment be dismissed, the reasons being stated, vests a judicial discretion in the court; and hence the court cannot, by mandamus, be compelled to sign an order of dismissal on application of the district attorney.

[Ed. Note.—For other cases, see *Mandamus* Cent. Dig. §§ 122-126; Dec. Dig. \Leftrightarrow 61.

For other definitions, see *Words and Phrases*, First and Second Series, May.]

In banc. Original proceedings in mandamus by Albin L. Clark to require John P. Kavanaugh, Judge of the Circuit Court of the State of Oregon, County of Multnomah, Department No. 1, to sign an order dismissing an indictment. Demurrer to answer overruled, and writ dismissed.

Wilson T. Hume, of Portland, for petitioner. Geo. M. Brown, Atty. Gen. (Walter H. Evans, Dist. Atty., of Portland, on the brief, for respondent.

BENSON, J. On April 29, 1915, the petitioner was indicted for the crime of wilfully and fraudulently altering and destroying white ballots cast at an election. Thereafter he entered a plea of not guilty, and on May 17, 1915, a trial was had in which the jury was discharged for inability to agree upon a verdict. Another trial was begun on May 25th, of the same year, which resulted in a conviction, and thereafter the verdict was set aside for the reason that in the interval the official stenographer, who reported the

trial, died, and it was therefore impossible to secure a record thereof. About December 10, 1915, the district attorney moved to dismiss the indictment under section 1704, L. O. L., and tendered a written order reciting the reasons for the signature of Judge Kavanaugh, to whom the motion was presented, and it was by him denied. The record discloses that a like motion had previously been presented to and denied by two other circuit judges of Multnomah county. Thereupon the petitioner applied to this court for a peremptory writ of mandamus requiring Judge Kavanaugh to sign the order of dismissal. In response to the petition an alternative writ was issued by this court, and an answer thereto was duly filed, to which the petitioner demurs. Section 1704, L. O. L., upon which this proceeding is based, reads as follows:

"The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action, after indictment, to be dismissed; but in that case, the reasons of the dismissal must be set forth in the order, which must be entered in the journal."

The petitioner contends that the word "may" in the above section means "must," and that the lower court has no discretion in the premises, but must sign the order of dismissal when requested by the district attorney. The law above quoted was section 323 of Dady's Code, and was a part of chapter 31 thereof, as enacted in 1864. In this chapter there are seven sections, enacted at the same time, all being in relation to the "dismissal of actions after indictment for want of prosecution or otherwise." In the other sections of the chapter which provide for the dismissal, the word "must" is used. It seems clear that the Legislature had the intention of differentiating them when in this section it used the word "may." In fact, the language of the section, itself, taken alone, can lead to but one conclusion, and that is that the court is expected to use judicial discretion in furtherance of justice.

"Mandamus will not lie to control the exercise of the discretion of any court when the act complained of is either judicial or quasi judicial, and while mandamus may be invoked to compel the exercise of discretion, it cannot compel such discretion to be exercised in any particular way." 26 Cyc. 158; *Croasman v. Kincaid*, 31 Or. 445, 49 Pac. 764; *Irwin v. Kincaid*, 31 Or. 478, 49 Pac. 765.

It follows that the demurrer to the answer must be overruled, and the writ dismissed; and it is so ordered.

(79 Or. 143)

JACOBS v. JACOBS.

(Supreme Court of Oregon. Feb. 1, 1916.)

1. PROCESS §166 — DIVORCE — SERVICE ON DISTRICT ATTORNEY—WAIVER.

In an action for divorce, where no service of summons and complaint had been made on the district attorney, the findings of fact and conclu-

sions of law reciting the district attorney's appearance for the state showed the district attorney's waiver of the provision of L. O. L. § 1020, as amended by Laws 1911, p. 127, requiring the state to be made a party to such suits and the summons to be served on the district attorney.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 250-255; Dec. Dig. §166.]

2. DIVORCE §243, 308 — JUDGMENT FOR MAINTENANCE—JURISDICTION—SUMMONS.

L. O. L. § 53, provides that in actions not for the recovery of money only the notice in the summons shall state that if defendant fails to answer the complaint the plaintiff will apply to the court for the relief demanded therein. The summons in a suit for divorce stated that if defendant failed to appear and answer plaintiff would apply for the relief prayed for therein, viz., a decree of divorce, and such other and further relief as was prayed for in the complaint. *Held*, that the recitals in the summons were sufficient to give the court jurisdiction to enter a money judgment for the maintenance and education of the minor children and for permanent alimony for plaintiff.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 684-686, 801, 802; Dec. Dig. §243, 308.]

Department 2. Appeal from Circuit Court, Linn County; Percy R. Kelly, Judge.

Suit for divorce by Mary Jacobs against John Jacobs. Decree for plaintiff, and defendant appeals. Affirmed.

M. V. Weatherford, of Albany (Weatherford & Weatherford, of Albany, on the brief), for appellant. Wm. S. Risley, J. J. Whitney, and W. R. Bilyeu, all of Albany, for respondent.

BENSON, J. [1] There are but two assignments of error which involve questions of law. The first of these is that the district attorney was never served with copies of the summons or complaint, and that therefore the court was without jurisdiction to hear and determine the case. It was conceded, upon the argument, that no service had been made upon the district attorney; but, in the findings of fact and conclusions of law signed by the judge of the trial court, the following recitals appear:

"The above-entitled cause having been tried before the above-entitled court on the 9th, 10th, and 11th days of November, 1914, at which trial the plaintiff appeared by Messrs. J. J. Whitney, W. S. Risley, and W. R. Bilyeu, her attorneys herein, as well as in her own proper person, and defendant appeared by Messrs. J. K. Weatherford and M. V. Weatherford, his attorneys herein, as well as in his own proper person, and the state of Oregon appeared by Hon. G. S. Hill, district attorney, and upon the evidence having been given in behalf of both parties plaintiff and defendant, oral argument being waived, and it being agreed that briefs should thereafter be submitted to the court, which said briefs have been submitted, and the court being fully advised hereby makes and renders the following findings of fact and conclusions of law."

In the absence of any record to the contrary, this recital of the appearance of the district attorney is conclusive, and under the provisions of section 1020, L. O. L., as amend-

ed in the Laws of 1911, p. 127, constitutes a waiver of the service upon him of the summons and complaint.

[2] The next assignment of error contends that the court had no jurisdiction to enter a money judgment for maintenance and education of the minor children or for permanent alimony for the plaintiff, because neither of these are mentioned or referred to in the summons. The summons, so far as it refers to the relief asked, is as follows:

"If you fail to appear and answer said complaint as hereby required, the plaintiff will apply to the above-entitled court for the relief prayed for therein, to wit, a decree of divorce, and such other and further relief as is prayed for in her complaint on file therein."

As a suit for divorce is not for the recovery of money only, all that is necessary to recite in the summons is "that if the defendant fail to answer the complaint the plaintiff will apply to the court for the relief demanded therein." Section 53, L. O. L. It follows that there is no merit in this assignment.

The other questions raised upon the argument and in the briefs have to do with the evidence and the findings deduced therefrom. The transcript of the testimony is quite voluminous and much of it unfit for publication, and no good purpose would be served by reproducing any of it here. It is sufficient to say that a careful examination of all the evidence convinces us that the trial court was correct in its findings and conclusions, and that the decree is a proper one. It is therefore affirmed.

MOORE, C. J., and BEAN and HARRIS, JJ., concur.

(79 Or. 146)

KAY v. CITY OF PORTLAND.

(Supreme Court of Oregon. Feb. 1, 1916.)

1. APPEAL AND ERROR §671—BILL OF EXCEPTIONS—NECESSITY.

Where there is no bill of exceptions in the case, the only matters before the Supreme Court are the pleadings and findings of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2887-2872; Dec. Dig. § 671.]

2. MUNICIPAL CORPORATIONS §185—POLICE—REMOVAL OF PATROLMAN—STATUTE.

Portland City Charter, § 313, provides for an examination of new candidates for public service positions, and permits the civil service commission to fix probationary service, and, for the protection of persons already in service for six years immediately preceding the taking effect of the charter, provided that, if such a person should within 30 days after the charter had gone into effect make satisfactory proof of such service, he should be certified as eligible to appointment, and forthwith appointed to his position, while section 317 provides that a person appointed cannot be discharged without hearing if he demands it seasonably. *Held*, that a police officer who voluntarily resigned, severing his official relations with the city for three years, after he was examined and reappointed to the force for a probationary period only, could not avail himself of the temporary rule of section 313, providing for appointment

without examination of persons in service for six years, which by its terms became inoperative 30 days after the taking effect of the charter and the appointment of the civil service commission, to render his discharge without hearing improper under section 317.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 492-509; Dec. Dig. § 185.]

3. EVIDENCE §47—JUDICIAL NOTICE.

Where rules of the civil service commission of a city were not pleaded below or brought before the Supreme Court by bill of exceptions, such court cannot consider them, as, like ordinances of cities, they are not subjects of judicial notice.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 69; Dec. Dig. § 47.]

Department 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Thomas Kay against the City of Portland. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff brought this action to recover \$1,300 alleged to be due him for services as patrolman on the police force of the city of Portland. The complaint alleged, in substance, that about nine years before the — day of —, 1914, plaintiff was employed as a patrolman, and served as such for about six years, during which time he was promoted to the office of sergeant of police, and that about three years before the filing of the complaint herein he voluntarily resigned; that in April, 1912, he made application in the classified civil service of the defendant, in accordance with the ordinances, rules, and regulations adopted and enforced in said city, to be reinstated to any vacancy in the police department of the defendant, and was thereafter duly and regularly recommended, reinstated, and permanently appointed to the office of police sergeant of detectives in the said police department, all under the rules and regulations of the classified civil service; and that by said reinstatement he became a public officer of said defendant, and was and is entitled to all the rights, privileges, and emoluments of such office. Plaintiff avers that, as such police sergeant of detectives, he was employed by defendant and paid as a salary \$125 a month; that he was paid said salary each month from the 1st day of May, 1912, until the 1st day of September, 1912, at which time he was reduced in rank, without fault on his part, his consent, or a trial, from the position of sergeant of detectives to patrolman at a decreased salary of \$100 a month; that he was employed by defendant and occupied said office of patrolman from the 1st day of September, 1912, until the 8th day of October, 1912, when, while plaintiff was such employé of defendant, without any fault on his part, the defendant city, acting through its chief of police, dismissed the plaintiff from his said office, contrary to law and without any cause or hearing, and refused to permit him to perform any work or duties connected with his said

office as patrolman or otherwise, and wrongfully and without cause excluded plaintiff from his said office and prevented him from performing the duties thereof; that on the 11th day of October, 1912, while plaintiff was so employed, the executive board of defendant removed and discharged the plaintiff from his said office of patrolman, wholly without cause or fault on his part, and without notice to him, and without an opportunity for him to be heard; that no written statement of the cause of his removal and discharge was prepared and served upon him, although he duly demanded a copy of the same, nor was any written notice of the cause of plaintiff's removal and discharge in general terms, or otherwise, ever served at any time upon plaintiff or copy thereof filed with the civil service commission of said city, or elsewhere; that plaintiff was given no notice to appear and answer any charges whatever; that he was not permitted to serve longer as a patrolman, or otherwise, but was prevented therefrom by the executive board of the defendant; that the action of said executive board in making plaintiff's dismissal and discharge is and was against his wishes, and without his consent, and wholly without his cause and fault. It is further alleged that plaintiff made application to the civil service commission to investigate the reasons for his discharge, which request was refused. Then follow allegations of plaintiff's readiness and willingness to perform his duties and other matters not material on this appeal. The city answered admitting that plaintiff had been employed as a patrolman as alleged, and that he had resigned that position about three years before the commencement of the action, making a qualified denial of all the other allegations of the complaint, and by way of a further and separate answer alleging: That on May 8, 1903, plaintiff was appointed to the position of police officer in accordance with the civil service provisions of defendant's charter. That on March 26, 1909, he voluntarily resigned from such position. That on March 2, 1912, he made application to be again appointed to a position in the classified civil service, and was reinstated on the eligible list on said day in accordance with defendant's charter. That thereafter, a vacancy occurring, the civil service commission certified the names of three eligible candidates, including that of plaintiff, and on May 1, 1912, the executive board appointed plaintiff to such vacant position on probation. That the charter of defendant provides: "The appointing authority shall appoint to each vacant position on probation for a period to be fixed by the rules one of the candidates so certified. Within such period the appointing authority may discharge such probationer, and, in like manner, appoint another of such candidates, and so continue until all said candidates have been so appointed." That pursuant to such authorization

the civil service commission adopted a rule providing that the period of probation should be six months from and after the date of appointment. That thereafter, on the 11th day of October, 1912, plaintiff was discharged by the executive board. Plaintiff filed a reply admitting that he had served as alleged up to March, 1909, and that at said date he voluntarily resigned, and that on March 2, 1912, he applied for appointment under civil service rules and was reinstated. The reply admitted the appointment on the 1st day of May, 1912, and that he was dismissed, but denied knowledge or information sufficient to form a belief as to whether the civil service rules of defendant prescribed a six months' period of probation, and all other affirmative allegations of the answer. Upon a trial had without a jury the circuit court made the following findings and conclusions:

"Defendant is a municipal corporation organized and existing under and by virtue of an act of the Legislative Assembly entitled, 'An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the secretary of state January 23, 1903, and acts amendatory thereof. On the 1st day of May, 1912, the executive board of the defendant appointed plaintiff to a position in the police department, in accordance with the civil service provisions of defendant's charter and the rules enacted in pursuance thereof by civil service board. Prior to plaintiff's appointment, to wit, on the 11th day of October, 1905, the civil service board of defendant adopted a certain rule known as the civil service rule 7, being as follows: 'Period of probation. Each appointment shall be made on probation for a period of six months from date of appointment.' On the 11th day of October, 1912, and within the six months' period fixed by said rule 7 of the civil service board, plaintiff was discharged by executive board from the service of defendant. During all the time that plaintiff was a duly appointed, qualified, and acting officer in the police department of the defendant he was paid and he received all of the emoluments incident to such office. Since the date of his discharge plaintiff has not at any time been a duly appointed, qualified, and acting officer of the defendant. Based upon such findings of fact the court makes the following conclusions of law. Plaintiff was validly and lawfully discharged from the service of defendant. Plaintiff is not entitled to recover from defendant, and his complaint should be dismissed without prejudice against him. Defendant is entitled to a judgment against plaintiff for costs and disbursements incurred in the defense of this action."

There was a judgment for defendant, and plaintiff appeals.

Claude McColloch, of Portland (Oswald West, of Portland, on the brief), for appellant. Henry A. Davie, of Portland (W. P. La Roche, City Atty., of Portland, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1, 2] There is no bill of exceptions in this case, and the only matters before us are the pleadings and findings of the court. *Lewis v. Clark*, 66 Or. 461, 134 Pac. 1194. This narrows the case down to a single is-

sue: Was the plaintiff a probationer within the meaning of sections 313 and 317 of the charter? If he were not, his discharge without a hearing was, under the circumstances shown in the complaint, unjustified. The sections referred to, so far as they affect the present proceeding, are as follows:

"Whenever there shall be a vacancy in any position in the classified civil service, the appointing authority shall immediately notify the commission thereof. The commission shall thereupon certify to such appointing authority the names and addresses of the three eligible candidates standing highest upon the register for the class or grade to which such position belongs, but, if there be less than three, the commission shall so certify all such candidates upon the register. When vacancies exist in two or more positions of the same class in the same department at the same time, the commission may certify a less number than three candidates for each position, but those certified must be the eligible candidates standing highest upon the register. The appointing authority may require the candidate so certified to come before him, and shall be entitled to inspect their examination papers. The appointing authority shall appoint to each vacant position, on probation for a period to be fixed by the rules, one of the candidates so certified. Within such period, the appointing authority may discharge such probationer, and, in like manner, appoint another of such candidates, and so continue until all said candidates have been so appointed; but the appointing authority must make permanent appointment from said list of candidates unless, upon reasons assigned in writing by the appointing authority, the commission consents to and does certify a new list of candidates. If any probationer is not discharged within the period of probation, his appointment shall be deemed permanent. Any person who has been employed in any one department of the public service of the city for the six years immediately preceding the taking effect of this charter shall, upon making satisfactory proof of such employment to the commission, within thirty days after its appointment, provided the position which he occupies at the time this charter goes into effect is included in the classified civil service, be certified by the commission to the appointing authority for that position as entitled to appointment, and such appointing authority shall forthwith appoint said person to such position. The appointing authority shall immediately notify the commission of any appointment or discharge. * * * No employé in the classified civil service who shall have been permanently appointed under the provisions of this article shall be removed or discharged except for cause, a written statement of which, in general terms, shall be served upon him and a duplicate filed with the commission. Such removal or discharge may be made without any trial or hearing. Any employé so removed may within ten days from his removal file with the commission a written demand for investigation. If such demand shall allege, or if it shall otherwise appear to the commission that the discharge or removal was for political or religious reasons, or was not in good faith, for the purpose of improving the public service the matter shall forthwith be investigated by or before the commission, or by or before some officer or board appointed by the commission to conduct such investigation. The investigation shall be confined to the determination of the question of whether such removal or discharge was or was not for political or religious reasons, or was or was not made in good faith for the purpose of improving

the public service. The burden of proof shall be upon the discharged employé. On such grounds the commission may find that the employé so removed is entitled to reinstatement upon such conditions or terms as may be imposed, by the commission, or may affirm his removal. The findings of the commission, or such officer or board, when approved by the commission, shall be certified to the appointing officer and shall be forthwith enforced by such officer."

Section 313 provides first for an examination of new candidates for positions in the various departments of the public service, and permits the commission to make a rule fixing the time for service upon probation, which in this instance is shown to be six months. For the protection of persons who had already been in the service for a period of six years immediately preceding the taking effect of the charter it was provided, in substance, that if such person should within 30 days after the charter had gone into effect make satisfactory proof of such service, he should be certified by the commission to the appointing authority as eligible to appointment and should be forthwith appointed to the position. It was evidently intended that this should be a permanent appointment, from which, under the provisions of section 317, the person appointed could not be discharged without a hearing if he demanded it seasonably. That portion of section 313 providing for appointment without examination of persons who had previously served for six years was by its terms temporary in its duration and applied only to those officers or employés who should see fit to avail themselves of it within 30 days next succeeding the appointment of the commission. That period having long ago elapsed, it is inapplicable. It would seem to follow logically that plaintiff, having voluntarily resigned and severed his official relations with the city for a period of three years, cannot avail himself of this temporary rule, which by its own terms became inoperative 30 days after the appointment of the civil service commission, but must come in as a new applicant and a probationer.

[3] Reference is made in the brief to certain rules of the civil service commission, but, as they are not set out or pleaded in the complaint, and are not brought here by a bill of exceptions, we cannot consider them. Even ordinances of cities must be pleaded, as they are not subjects of judicial notice, much less the rules of a subordinate branch of the city government. This view of the case renders a consideration of the other matters urged in the briefs of the respective counsel unnecessary.

The judgment is affirmed.

MOORE, C. J., and BURNETT and HARRIS, JJ., concur. BENSON, J., not sitting.

79 Or. 498)

DOOLITTLE v. PACIFIC COAST SAFE & VAULT WORKS.*

(Supreme Court of Oregon. Feb. 1, 1916.)

1. MASTER AND SERVANT ⇐6—DURATION OF EMPLOYMENT—INDEFINITE HIRING.

As a general rule, an indefinite hiring is presumed to be a hiring at will in the absence of evidence of custom or of facts and circumstances showing a contrary intention of the parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 6; Dec. Dig. ⇐6.]

2. MASTER AND SERVANT ⇐8—DURATION OF EMPLOYMENT—RATE AND MODE OF PAYMENT.

While it is generally held that a hiring at so much per day, week, month, or year raises no presumption that the hiring was for such a period, yet the rate and mode of payment are often determinative of the period of service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8-10, 17; Dec. Dig. ⇐8.]

3. MASTER AND SERVANT ⇐8—DURATION OF EMPLOYMENT—EVIDENCE.

It is competent for either party to a contract of hiring to show the mutual understanding of the parties in reference to the duration of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8-10, 17; Dec. Dig. ⇐8.]

4. MASTER AND SERVANT ⇐8—DURATION OF EMPLOYMENT—INDEFINITE HIRING.

Unless the understanding of the parties to a contract of hiring was mutual that the services were to extend for a fixed and definite period, it is an indefinite hiring, and is determinable at the will of either party.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8-10, 17; Dec. Dig. ⇐8.]

5. MASTER AND SERVANT ⇐8—DURATION OF EMPLOYMENT—INDEFINITE HIRING.

When from a contract of hiring it is evident that it was the understanding of the parties that the time was to extend for a certain period, their understanding, fairly inferable from the contract, will control.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8-10, 17; Dec. Dig. ⇐8.]

6. MASTER AND SERVANT ⇐6—DURATION OF EMPLOYMENT—EVIDENCE.

To show the real understanding and intention of the parties to a contract of hiring respecting its duration, all the facts and circumstances surrounding the parties and the transaction may be shown, as that the employé was to the knowledge of the employer seeking a permanent position.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 6; Dec. Dig. ⇐6.]

7. APPEAL AND ERROR ⇐1010 — REVIEW — QUESTIONS OF FACT.

Under L. O. L. § 159, providing that the order of proceedings on a trial by the court shall be the same as in trials by jury, and that the finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reasons as far as applicable, the findings of the court upon the facts in an action at law tried without a jury import the same conclusiveness as a verdict, and will not be disturbed on appeal when there is any evidence to sustain them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ⇐1010.]

8. MASTER AND SERVANT ⇐6—DURATION OF EMPLOYMENT—EVIDENCE.

Plaintiff, whose family consisted of a wife and six children, resided in Berkeley, Cal., where he had an apparently permanent position as superintendent of construction for a safe company. Defendant's manager, who had been associated with him in business and was acquainted with his capabilities, asked him to come to Portland as superintendent of defendant's safe and vault works, and asked him to give the proposal his most earnest consideration, stating that he knew it was an important step for a man with a home and family, and that the place would be worth \$175 a month for the first year, \$200 the second year, and that beyond that would be entirely dependent upon results. Later defendant submitted a formal proposal, stating that it was in accordance with the manager's personal letter, and the proposal was accepted. *Held*, that a finding that the employment was for at least two years was warranted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 6; Dec. Dig. ⇐6.]

9. CORPORATIONS ⇐432—OFFICERS AND EMPLOYEES—AUTHORITY—EVIDENCE.

A corporation's manager had sole charge of its plant and of the hiring of plaintiff as superintendent of the plant. All persons interested in the matter acquiesced in the hiring for 16 months. It did not appear that the by-laws controlled the manager's authority in this respect or made any provision relating to the employment of services. *Held*, that a finding that the manager had authority to make the contract with plaintiff was supported by evidence and would not be disturbed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. ⇐432.]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by R. N. Doolittle against the Pacific Coast Safe & Vault Works. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for damages for breach of a contract. The court tried the cause without a jury, making findings of fact in favor of the plaintiff. From a judgment rendered thereon for \$1,000, defendant appeals.

Plaintiff alleges the corporate character of defendant, and, in effect, that prior to September 1, 1911, the corporation entered into a contract with him by the terms of which he was employed to act as general superintendent of its plant at Portland, Or., for a period of two years, beginning September 1, 1911, and ending September 1, 1913, at an agreed compensation of \$175 per month for the first year and \$200 per month for the second year; that pursuant to the contract he entered into the service of defendant at the time set, and continued therein until January 1, 1913, when, without reason or excuse, and in violation of the contract, defendant discharged him against his will.

Defendant admits the hiring and the services, but denies that plaintiff was employed for two years. Upon the trial it developed that the contract was negotiated by means of correspondence between the parties by letters and telegrams continuing over more

than a month's time. In July, 1911, the plaintiff resided in Berkeley, Cal., and was employed as superintendent of construction for a safe company in San Francisco. His family consisted of a wife and six children, one a boy of 19 who worked with him. On the 11th of that month the manager of the defendant company, who was acquainted with plaintiff's capabilities, wrote to him submitting a proposal for him to come to Portland and enter into the services of defendant as superintendent of its safe and vault works, describing the business, in which the investment was approaching \$200,000, and the future prospects and possibilities, and stating:

"Personally, I know you can fill the bill. * * * Now, I would wish you to give this your most earnest consideration, as I know it is a most important step for a man with a home and a family. * * *"

Towards the close of the letter the following statement appeared:

"The place would be worth to you \$175.00 per month for the first year, \$200.00 the second year, and beyond that would be entirely dependent upon the results."

Plaintiff answered that he looked with favor upon the proposition. On July 22d the company, by its manager, Mr. H. Austin Biddle, wrote:

"We * * * now beg to submit you formal proposal for your services in accordance with the writer's personal letter to you of the 11th inst., and with the understanding that same must go into effect not later than Sept. 1, 1911."

Plaintiff accepted the proposition by letter, and, pursuant to the arrangement came to Portland and took up the duties of superintendent of the defendant company's plant on September 1, 1911. His services were satisfactory. The results improved. He continued in the employment for 18 months, when, as a result of a change in the management of the plant, he was discharged. Defendant contended that the contract of employment was for an indefinite term, and that the trial court should have found as a matter of law that the writing evidenced such a contract. The company also claimed that it had the right to discharge plaintiff at any time at its pleasure.

It appears from the evidence that at the beginning of the second year of Doolittle's services, at his suggestion, the manager without any question increased his compensation to \$200 per month in accordance with the agreement contained in the writings.

C. A. Hart, of Portland (Carey & Kerr, of Portland, on the brief), for appellant. M. H. Clark, of Portland (Clark, Skulason & Clark, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1-6] As a general rule in the United States, an indefinite hiring is presumed to be a hiring at will, in the absence of evidence of custom, or of facts and circumstances showing a contrary intention on the part of the par-

ties. While it is generally held that the fact that a hiring at so much per day, week, month, or year raises no presumption that the hiring was for such a period, but only at the rate fixed for whatever time the party may serve, yet the rate and mode of payment are often determinative of the period of service, and in some cases it has been held that they do raise a presumption as to the period of service. 26 Cyc. 974. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter of employment; but, unless their understanding was mutual that the services were to extend for a fixed and definite period, it is an indefinite hiring, and is determinable at the will of either party; but, when from the contract itself it is evident that it was the understanding of the parties that the time was to extend for a certain period, their understanding, fairly inferable from the contract, will control. Wood's Master & Servant, § 136; Barlow v. Taylor Mining Co., 29 Or. 132, 44 Pac. 492; Christensen v. Borax Co., 26 Or. 302, 38 Pac. 127; McKinney v. Statesman Publishing Co., 34 Or. 509, 56 Pac. 651. In order to show what the real understanding and intention of the parties was, all the facts and circumstances surrounding the parties and the transaction may be shown, as that the plaintiff was to the knowledge of the defendant seeking permanent position, and any facts and circumstances that tend to establish the mutual understanding. Franklin v. Harris, 24 Mich. 115; Flak v. Henarie, 13 Or. 156, 9 Pac. 322; Flegel v. Dowling, 54 Or. 40, 10 Pac. 178, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159; 26 Cyc. 969; Nash v. Kreling (Cal.) 56 Pac. 260.

[7] In an action at law tried by the court without the intervention of a jury the findings of the court upon the facts import the same conclusiveness as the verdict of a jury. Section 159, L. O. L. When there is any evidence to sustain the findings, they will not be disturbed on appeal. In Kelly v. Carthage Wheel Co., 62 Ohio St. 598, 57 N. E. 984, the contract was evidenced by correspondence; the plaintiff making an offer which was accepted by the defendant. In his letter the plaintiff says:

"I will want you to guarantee me \$3,000 per year, a proportion of this amount to be paid me each day, and a settlement to be made at the end of each year, and, if I should make more than the above guaranty, the difference be paid me at the end of each year, when settlement is made."

Upon acceptance of this offer the plaintiff entered the employ of the defendant on May 1, 1892, and continued therein until September 31, 1893, when he was discharged. Having been paid what he had earned up to the time of his discharge, he brought suit to recover damages in the sum of \$1,500 for the six months following. He secured a verdict for the full amount, which was sustained on

appeal. 62 Ohio St. at page 610, 57 N. E. at page 986, the court says:

"And in the interpretation of contracts of this kind, as well as of all others, none of their provisions should be ignored or overlooked that serve to indicate the intention of the parties."

In *Du Pont v. Waddell*, 178 Fed. 407, 101 C. C. A. 335, we find the following language:

"It is true, as said by counsel and sustained by authority, that, nothing more appearing, the language used by the parties would be controlling in fixing the duration of the relation of employer and employé. We must, however, look to surrounding circumstances, the relations then existing, the character of the employment, and if, after doing so, the meaning of the language used and the intention of the parties is doubtful, or capable of more than one construction, the question should be submitted to the jury."

In *Chamberlain v. Detroit Stove Works*, 103 Mich. 124, 61 N. W. 532, quoted from in the *Du Pont Case*, we find the following:

"What the relation was and how long it was to continue depended upon the original hiring, the subsequent relation, the nature of the services performed, and the mutual understanding of the parties. As to duration, we think it was competent for the jury to determine from the evidence that the hiring was annual, and not subject to revocation or change by the board of directors or the president."

[8] In the present case the trial court, acting in the capacity of a jury, could properly take into consideration the nature of the employment, and the circumstances, as disclosed by the correspondence, which tended to show that at the time he was employed by the defendant he had a large family and was residing in California. He had a position which was apparently permanent. The manager of the defendant company had been associated with him in the business there, and was satisfied that he would make good. Both parties appear to have been negotiating with a view to making arrangements which were contemplated to continue for a considerable length of time. The statement that, "The place would be worth to you \$175.00 per month for the first year, \$200.00 the second year," under all the circumstances, would at least warrant a jury in concluding that the employment was for two years; in other words, the contract fixed a definite time.

[9] Defendant takes the position that the manager of the corporation was not authorized to enter into this contract with the plaintiff. The evidence tended to show that Mr. Biddle had the sole charge of the plant and of the hiring of plaintiff, and that all persons interested in the matter acquiesced in the arrangement for 16 months. It is said in *Herman on Estoppel*, § 800:

"No man can adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit."

It is not shown that the by-laws of the corporation controlled the authority of the manager in this respect or made any pro-

vision relating to the employment of services. In 2 *Thompson on Corporations*, § 1580, we find the rule:

"The power of the general manager, acting within the strict scope or the apparent scope of the corporate business about which and over which his employment extends, is practically unlimited as to the details of the business. In the internal management of the corporate business he has been held to have the right to exercise authority in the following instances: To employ clerks, servants, and laborers and fix their compensation; * * * to employ a superintendent of a mine; and to employ a foreman in a paper mill. * * *"

The evidence tended to show that the manager had authority to make the contract in question, and the court, acting as a jury, having so found, the findings should not be disturbed.

Finding no error in the record, the judgment of the lower court is affirmed.

MOORE, C. J., and McBRIDE and HARRIS, JJ., concur.

(79 Or. 333)

CARLSON et al. v. O'CONNOR.

(Supreme Court of Oregon. Feb. 1, 1916.)

1. SPECIFIC PERFORMANCE §25 — RIGHT TO RELIEF.

To entitle plaintiff to the specific performance of a contract to sell land, it is necessary for him to clearly prove a valid contract between himself and defendant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56-58, 60; Dec. Dig. §25.]

2. FRAUDS, STATUTE OF §158—SUFFICIENCY OF EVIDENCE—AUTHORITY OF AGENTS.

Evidence in a suit for the specific performance of a contract for the sale of land, alleged to have been made by defendant's agent, held insufficient to show any instrument in writing, subscribed by the party to be charged, or by his lawful agent under written authority, as required by L. O. L. § 804.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 373-376; Dec. Dig. §158.]

Department No. 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit by Peter G. Carlson and another against M. H. O'Connor for the specific performance of a contract to sell land. Decree for defendant, and plaintiffs appeal. Affirmed.

J. E. Bronaugh, of Portland (Bronaugh & Bronaugh, of Portland, on the brief), for appellants. P. H. D'Arcy, of Salem, and C. W. Fulton, of Portland (Ridgway & Johnson, of Portland, on the brief), for respondent.

BEAN, J. It appears from the record that a tract of 106 acres of land on the outskirts of Portland was advertised to be sold at public sale by the administrator of the estate of A. G. Ryan, deceased. On March 16, 1914, the plaintiffs attended the sale and bid for the property. The highest bid, \$16,000, was

made by one Patt in behalf of defendant, M. H. O'Connor. Upon looking into the value of the property, plaintiffs decided that they would pay more for it, and deposited the required amount to bring about a resale, which took place May 28, 1914. The plaintiffs were present and bid, but the highest offer of \$24,000 was made by H. Blatt, who was representing O'Connor. When the sale was over the plaintiffs regretted they had not offered more for the property, and finally decided to deposit a sufficient amount to bring about a second resale, according to the statute, and \$2,600 was placed with the attorney for the administrator of the estate for that purpose. During this time Mrs. M. P. Long, who resided in New York, and had a general power of attorneys from all the heirs of A. G. Ryan, deceased, was present in Portland and was represented in the matters of the estate proceedings by attorneys other than the one for the administrator. O'Connor employed Blatt to bid for him at the sale, as the former had a mortgage on the property, and agreed to pay him \$100 for his services. On the day following the second sale, Blatt assigned all his title and interest in the property by virtue of his bid to O'Connor, and authorized the administrator to execute a deed to the latter.

A few days after the plaintiffs had deposited the amount of money necessary to bring about a second resale, Blatt came to one of them and told him that if they would take \$1,000 and withdraw their request for a resale he would give it, or if they would give him \$1,000 he would transfer his bid to them. Plaintiffs told Blatt that if it could be done legally they would give him the \$1,000 for his bid, and withdraw their request for a resale, because in that way they would get the property for \$25,000. Plaintiffs then went to Mrs. Long and her attorneys, and explained Blatt's offer, asking if there was any objection to their accepting it. One of her attorneys told plaintiff Kallstrom that it was a dangerous thing to do. In settling this estate Mrs. Long had been detained from her home for a long time, and pressing matters required her presence there. The plaintiffs had prevented the first sale for \$18,000 from being confirmed, and had thus saved the estate \$8,000, and Mrs. Long and her attorneys were of the opinion that if the plaintiffs did not want to carry on the resale they could withdraw from it. Accordingly Mrs. Long and her counsel consented that the money deposited by plaintiffs be returned to them. After he had notified the probate judge of the proposition made by the plaintiffs, the attorney for the administrator returned the deposit. After consultation with their attorneys, plaintiffs entered into a contract on June 15, 1914, with H. Blatt and his wife, by which they agreed to pay him \$1,000, provided he would secure

them a good title to said land at \$24,000, and paid him \$100 of such sum.

At that time plaintiffs were unaware that Blatt had purchased at the sale for O'Connor, or that he had already made an assignment to him of his bid. The heirs represented by Mrs. Long consented that the sale should be confirmed in Blatt, which was done about June 18, 1914, whereupon the administrator executed a deed of the property to O'Connor, according to the assignment made by Blatt to him. When plaintiffs demanded of Blatt that he deed the property to them as agreed, he told them that he had been cheated out of it, and wanted to give them back the \$100 paid him, which plaintiffs refused to accept. Plaintiffs tendered O'Connor performance of their part of the contract entered into with Blatt, and demanded that he specifically carry out its terms. Upon his refusal so to do this suit was instituted. The trial court held that each side was trying to take advantage of the other, and that both were trying to take advantage of the estate, and that, the plaintiffs not having come into court with clean hands, the parties should be left in statu quo.

[1, 2] Blatt's conduct in the transaction cannot be explained from any rational standpoint. Neither the circumstances in connection with the transaction nor the weight of the evidence indicate that O'Connor authorized Blatt to make any sale of the land. On the contrary, they refute this. Defendant seemed acquainted with its value. Blatt appears to be utterly irresponsible. Plaintiffs knew that Blatt had not yet obtained title to the land, but took no precaution to ascertain as to his reliability. Whether Blatt intended to obtain the \$1,000 from plaintiffs for his own benefit is unnecessary to determine. It appears that he did not inform O'Connor of the deal with the plaintiffs until defendant requested him to execute a deed of the real property to him which was prepared. Blatt then produced from his pocket a copy of the contract he had executed to the plaintiffs, whereupon O'Connor exclaimed: "What in — did you do that for? Who told you to do that?"

In explaining Blatt asserts:

"Why, I done that to get my \$100."

He said that nobody in particular told him to do so. In order for the plaintiffs to be granted the relief asked, it is necessary for them to clearly prove a valid, binding contract between themselves and defendant. *Kine v. Turner*, 27 Or. 356, 41 Pac. 664. From a careful examination and consideration of all the evidence we find that they have failed to do this. Section 804, L. O. L., provides:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a convey-

ance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

It is contended on behalf of the plaintiffs that defendant authorized Blatt to make the contract with plaintiffs and that defendant is estopped from denying Blatt's authority. The only basis for this claim must have its foundation upon the testimony and statements of Blatt which are wholly unreliable.

The decree of the lower court was right, and is therefore affirmed.

MOORE, C. J., and McBRIDE, J., concur.
HARRIS, J., concurs in the result.

(79 Or. 355)

LOMBARD v. KIES.

(Supreme Court of Oregon. Feb. 1, 1916.)

1. VENDOR AND PURCHASER ⇐3—OPTION TO PURCHASE REAL ESTATE—CONSTRUCTION.

Plaintiff's option to purchase real estate for which he paid \$1,000, provided that upon defendant's procuring good title by deed or foreclosure of a purchase contract plaintiff should make the additional payment on the premises of \$4,000 and should pay the balance of the purchase price in certain installments, including the assumption of a prior mortgage. Upon payment of the \$4,000, a supplemental agreement was entered into whereby plaintiff might anticipate the contract by paying for any part of the tract which he should specify in writing, at stipulated prices per acre for the different kinds of land, for which defendant was to give plaintiff a good and sufficient deed. Held, that the agreement was a unilateral option under which plaintiff, upon complying with its terms, was entitled to a deed to such portion of the land as he might select, free from such prior mortgage.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. ⇐3.]

2. VENDOR AND PURCHASER ⇐112—OPTION TO PURCHASE LAND—PARTIAL EXERCISE—SUPPLEMENTAL AGREEMENT—BREACH—RESCISSIION.

Where plaintiff orally demanded a portion of the tract under the terms of the supplemental agreement, but did not specify the land in writing, he could not have rescission of the entire contract on the ground that defendant refused to convey free from the prior lien, since, having himself failed to comply with the terms of the agreement, he cannot complain of defendant's default.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200; Dec. Dig. ⇐112.]

2. VENDOR AND PURCHASER ⇐112—OPTION TO PURCHASE LAND—GOOD TITLE—NEW HIGHWAY—INCUMBRANCE—PURCHASE.

Where the parcel plaintiff desired to purchase under such supplemental agreement was a 40-acre tract containing a dwelling which plaintiff desired for a summer residence, the location of a new highway through the tract within 50 feet of the dwelling after the option contract had been made and partially carried out by plaintiff's \$4,000 payment entitled plaintiff to a rescission of the contract, since the establishment of the highway unknown to the parties, which rendered the premises unsuitable for the

purposes intended by plaintiff, was an incumbrance breaching defendant's agreement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200; Dec. Dig. ⇐112.]

In Banc. Appeal from Circuit Court, Washington County; J. A. Eakin, Judge.

Action by B. M. Lombard against M. B. Kies, receiver of the Commercial Bank of Vancouver, Wash., to rescind a contract of purchase of land. From a decree for plaintiff, defendant appeals. Modified.

On June 28, 1912, M. B. Kies, as receiver of the Commercial Bank of Vancouver, gave to F. C. Malpas an option to purchase a tract of 476 acres of farm land, the option (omitting the description of the land) reading as follows:

"Know all men by these presents that M. B. Kies, as receiver of the commercial Bank of Vancouver, hereinafter called party of the first part, for and in consideration of the sum of one thousand dollars (\$1,000) to him in hand paid, does hereby bargain, give, and grant to F. C. Malpas, hereinafter called party of the second part, for the period hereinafter provided, the sole, exclusive, and irrevocable right and privilege of purchasing that certain described tract or parcel of land, situate in the county of Washington, state of Oregon, to wit, * * * upon the terms and at the price hereinafter provided. It is understood between the parties hereto that the party of the first part has instituted a proceeding in foreclosure against Paul H. Reimers and Grace Reimers, his wife, and B. M. Lombard and Caroline S. Lombard, his wife, for the foreclosure of a certain contract of purchase covering the above-described premises, made and entered into between the party of the first part and said Paul H. Reimers and Grace Reimers, his wife, on March 16, 1911, which foreclosure suit is pending in the circuit court of Oregon for Washington county. The party of the first part agrees to carry on and prosecute said proceeding to a successful final determination and to procure title to all of said described premises in himself free from the claims of any and all of said defendants. In case the party of the first part shall procure a deed to said premises he shall immediately notify party of the second part thereof in writing, and the party of the second part shall, within 15 days after such notification, make an additional payment upon said premises in the sum of \$4,000, and shall pay the balance of the purchase price of said premises as follows: One-third thereof one year from the date of acquiring deed; one-third thereof one year later; one-third thereof one year thereafter: Provided, however, that the payment falling due in the year in which it becomes necessary to pay Balfour, Guthrie & Co.'s mortgage shall not be then made, but shall be made one year after the date of the last payment as above provided: Provided said mortgage is paid by the party of the second part when due. In case deed is not procured, but the party of the first part procures title in said foreclosure proceedings by strict foreclosure, he shall give notice in writing to the party of the second part of the fact of procuring title, and the said payment of \$4,000 shall be made within fifteen days thereafter, and subsequent payments shall be made thereafter as above provided. The total purchase price shall be the amount which shall be decreed in said foreclosure proceeding to be due the plaintiff against the defendants, Paul H. Reimers and Grace Reimers, including costs, disbursements, and interest and attorney's fees, and the further

amount of \$16,320.00, with interest thereon at the rate of 6 per cent. per annum from and after May 1, 1912, and the assumption by the party of the second part of the certain mortgage for \$7,000 in favor of Balfour, Guthrie & Co., now a first lien upon said premises. It is further understood that the payment of \$1,000 herein acknowledged shall apply as part of said purchase price in case all of the purchase price shall be paid by the party of the second part. In the event that the party of the first part shall be unable to carry out this agreement or shall for any reason fail to carry out the same, the party of the second part shall, at his option, be entitled on demand to the return of said sum of \$1,000 to be paid to him by the party of the first part, but the party of the first part shall not be bound to complete the terms of this contract in case said property is redeemed within the time limited by law. It is understood and agreed that the option herein granted shall exist in favor of the party of the second part until the expiration of 15 days after written notice by party of the first part to party of the second part of the deed or obtaining of title by decree of strict foreclosure, as above provided. It is further understood and agreed that the agreements herein contained shall bind the heirs, assigns, personal representatives, and successors of both of the parties hereto."

On December 4, 1912, M. A. Zollinger, having taken an assignment of the option from Malpas, paid \$4,000 thereon, and took from Kies a receipt and supplemental contract reading thus:

"Portland, Oregon, December 4, 1912. The undersigned, M. B. Kies, receiver of the Commercial Bank of Vancouver, Washington, hereby acknowledges receipt from M. A. Zollinger of the sum of four thousand dollars (\$4,000) paid to said receiver in accordance with the terms of the certain option and written agreement dated June 28, 1912, between the undersigned and F. C. Malpas, covering a certain tract of land in the counties of Washington and Yamhill, in the state of Oregon, known as the 'Aldrich place,' which option and agreement has been assigned to the said M. A. Zollinger by the said F. C. Malpas, said payment being made in the manner following: \$3,668.35 thereof in cash, and \$333.65 thereof by receipt of B. M. Lombard for costs, expenses, disbursements, and attorney fees advanced by the said B. M. Lombard on behalf of said M. B. Kies, receiver, in the foreclosure suit of said M. B. Kies, receiver, v. Paul H. Reimers et al.; and whereas, by the terms of said option it is agreed that the said receiver shall prosecute said suit to a successful final determination and to procure title to all of said premises in himself free from the claims of any and all of the defendants therein, and the right of the defendants to appeal from the decree rendered in said suit has not expired: It is further agreed and understood between said receiver and said M. A. Zollinger that in case an appeal shall be perfected in said suit, the said receiver shall and will, upon the request of the said M. A. Zollinger or his assigns, return to the said M. A. Zollinger the amount paid upon said premises, to wit, the sum of five thousand (\$5,000.00) dollars, excepting said sum of \$333.65. In consideration of the premises and of the payment at this time of the amounts above specified, and in consideration of payment of one dollar to said receiver by said M. A. Zollinger, receipt of which sum is hereby acknowledged, said receiver further agrees that said M. A. Zollinger, his heirs and assigns, shall have the right and privilege of paying upon the said contract dated June 28, 1912, any sum or sums he may desire at any time or times before the maturity thereof, and upon such payment being made he shall be enti-

tled to a good and sufficient deed of this receiver conveying such portion of the premises as he shall in writing specify upon payment, as follows: For uncleared land upon said premises \$50.00 per acre; for cleared land \$80.00 per acre, except for the governmental subdivision of forty (40) acres upon which the dwelling house stands, which shall be conveyed, as aforesaid, upon the payment of \$120.00 per acre. And whereas, the said option provides that the total price of said premises shall be the amount decreed in certain foreclosure proceedings, plus an additional amount therein specified, and the amount decreed to be due plaintiff, M. B. Kies, as receiver in said foreclosure proceedings, by oversight and omission failed to include the sum of \$325.00, with interest thereon at the rate of 6 per cent. per annum from and after May 15, 1912, it is understood that said last-named sum shall, for the purpose of said option, be added to the amount of the decree actually rendered in favor of the plaintiff in said foreclosure proceedings, and the consideration or purchase price of said premises shall be increased in said sum."

Subsequently Zollinger assigned the contracts to plaintiff, who, being desirous of making full payment for the 40-acre tract upon which the house stood, in accordance with the terms of the supplemental contract above set out, made a proposition to defendant, though not in writing, to pay therefor as provided in the event that he could have the tract released from the lien of the Balfour, Guthrie & Co. mortgage. The parties were not able to secure a release from the mortgagors without the payment of the entire mortgage debt, and, as the defendant was unable or unwilling to do this, the deed to the 40-acre tract was never executed.

On April 5, 1912, after the necessary preliminaries had been observed the county court of Washington county made and entered an order establishing a county road which, according to the survey, would run practically through the dooryard and within 50 feet of the dwelling house on the 40-acre tract above mentioned. Neither plaintiff nor defendant had any actual knowledge of the establishment of such highway until a few days before the commencement of this suit, at which time they together visited the premises, and found the county's employees busily engaged in grading the road through the property. Shortly thereafter plaintiff began this suit to rescind the contract and recover the payments made thereon, alleging two breaches thereof: (1) The refusal of defendant to convey the 40-acre tract free from the incumbrance of the Balfour, Guthrie & Co. mortgage; and (2) the establishing of the public road so near the dwelling house as to render the premises unfit for the purpose for which he was purchasing it, that is, for a suburban home for his family, and that therefore the defendant will be permanently prevented from giving him a good conveyance free from incumbrance. Defendant, answering, denies the alleged breaches of the contract, and by affirmative answer seeks a strict foreclosure of

the same. From a decree in favor of plaintiff, defendant appeals.

Kollock & Zollinger, of Portland, for appellant. Flegel, Reynolds & Flegel and H. L. Parcel, all of Vancouver, Wash., for respondent.

BENSON, J. (after stating the facts as above). The entire problem in this case is based upon the question as to whether or not there have been such breaches of the contract as to entitle plaintiff to rescind.

[1, 2] It is obvious from an examination of the writing that the agreement is nothing more or less than a unilateral option to buy in which the vendee may or may not at his own pleasure make the payments specified therein. *Scott v. Merrill's Estate*, 74 Or. 568, 146 Pac. 99, and cases there cited. He did not assume the Balfour, Guthrie & Co. mortgage; for the time had not arrived when he would be called to elect as to its assumption. Reading the supplemental contract in the light of this conclusion, it follows that if the plaintiff complied with the terms thereof in seeking a deed to the 40-acre tract, he was entitled to a good and sufficient deed free from the incumbrance of the mortgage. However, it is conceded that plaintiff never specified in writing the land that he desired to have conveyed, and therefore, having failed to comply with the terms of the contract himself, he is in no position to complain of a default upon the part of his adversary.

[3] Plaintiff's second contention presents greater difficulty. There is much diversity of opinion in the authorities as to whether or not a public highway is such an incumbrance as to constitute a breach of the covenants in a conveyance. Many of those which agree upon the main point differ widely as to the reasons which lead to the common conclusion. These authorities are quite fully collated in *Sandum v. Johnson*, 122 Minn. 368, 142 N. W. 878, 48 L. R. A. (N. S.) 619, Ann. Cas. 1914D, 1007, and in that opinion the result is stated in this language:

"While the decisions are conflicting, the clear weight of both argument and authority is that the existence of a known rural highway does not constitute a breach of the usual covenants in a deed conveying agricultural land."

This court has held that the existence of an open, notorious, and visible incumbrance upon land contracted to be conveyed, such as a railroad in operation, is not an incumbrance which renders the owner's title unmarketable and assigns as the reason for so holding that it is presumed that in fixing the purchase price the existence of the incumbrance was taken into consideration. *Barnum v. Lockhart*, 75 Or. 528, 146 Pac. 975; *Wetherby v. Griswold*, 75 Or. 468, 147 Pac. 388. The inevitable logic of this deduction is that, if the establishment of the highway is unknown to the contracting parties, the

question of its effect upon the agreement depends upon the facts of the individual case, especially in a suit to rescind; for, if the prospective highway renders the premises unsuitable for the purposes intended by the vendee, the discovery thereof presents a condition which was not in the contemplation of the parties, and the vendee ought not to be compelled to purchase something different from that for which he bargained. In the case at bar the land was about 25 miles from Portland where plaintiff resided. He was purchasing the land for the special purpose of making the 40-acre tract a summer home for his family. The possibility of having a dusty country road within 50 feet of his dwelling house, rendering habitation therein disagreeable and the passing of automobiles and other vehicles so near his home bringing added dangers into the lives of his children, presents a condition not contemplated at the time of entering into the option agreement and entitled him, we think, to a decree of rescission. A decree will therefore be entered here annulling the contract, and a judgment in favor of plaintiff as prayed for in his complaint, except that the taxes paid by him should be offset by his occupation of the premises from December 4, 1913, and that the moneys expended by him in putting in a crop should be eliminated, since, so far as the record discloses, he harvested and derived all the benefits from such crop. It appears from the record that pending litigation the property was leased for the crop season of 1914, at a rental of \$350, of which \$175 was deposited in court with the lease, by agreement of the parties, to abide the decision of the court. This money and the lease are to be withdrawn by the defendant, who will be given four months from the entry of the mandate herein in the lower court in which to pay the sums so adjudged to be paid, and plaintiff decreed to have a lien upon the premises for such payment.

EAKIN, J., took no part in the consideration of this case.

(80 Or. 18)

SARGENT, Superintendent of Banks, v.
AMERICAN BANK & TRUST CO.
OF PORTLAND et al.

(Supreme Court of Oregon. Feb. 1, 1916.)

1. BANKS AND BANKING ~~§ 49~~—LEGAL CAPACITY TO SUE—LIABILITY OF STOCKHOLDERS—CONVERSION.

Under L. O. L. § 4586, as amended by Laws 1911, p. 244, providing that the superintendent of banks may liquidate the affairs and administer the assets of a bank of which he has taken charge, and do whatever is necessary to preserve its assets and business, and enforce the individual liability of stockholders, the superintendent of banks representing primarily the creditors and depositors of the bank had legal capacity to sue defendant for the value of stock transferred to him in consideration of a conveyance of realty to which his title was

practically worthless, and for the value of other stock alleged to have been wrongfully converted by him to his own use.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. ¶49.]

2. BANKS AND BANKING ¶49—ACTION BY SUPERINTENDENT OF BANKS — DEFENSE — FRAUDULENT AND UNAUTHORIZED ACTS OF BANK.

In a suit by the superintendent of banks against a stockholder of an insolvent bank for the value of stock converted by him to his own use, and also stock transferred to him in consideration of a worthless title to realty, fraudulent and unauthorized acts of the bank are not available as a defense.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. ¶49.]

3. BANKS AND BANKING ¶39—STOCK—PURCHASE BY BANK—VALIDITY.

Under L. O. L. § 4569, forbidding a bank to buy its own stock except under circumstances not existing when the stock in question was surrendered, an attempted surrender of bank stock by a subscriber who had given worthless assets of another bank in exchange therefor, was void, and did not vest the bank with ownership of the stock surrendered or give it a right to re-issue same.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 44-48; Dec. Dig. ¶39.]

4. BANKS AND BANKING ¶47—INSOLVENCY — SUBSCRIBER—LIABILITY.

In a suit by the superintendent of banks to recover from a stockholder of an insolvent bank the value of stock for which he had given a practically worthless title to realty, the fact, if it were a fact, that the stock was some which had been unlawfully bought in by the bank and reissued to defendant, did not render him any the less a subscriber liable for whatever he had not paid on the stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 62, 64-68, 841; Dec. Dig. ¶47.]

5. BANKS AND BANKING ¶49—INSOLVENCY — ACTION BY SUPERINTENDENT OF BANKS — DEFENSE.

In a suit by the superintendent of banks for the value of stock for which defendant had given practically worthless property, it was no defense that defendant had caused part of the stock to be issued to a third person.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. ¶49.]

6. BANKS AND BANKING ¶49—INSOLVENCY — SUIT BY SUPERINTENDENT OF BANKS — DEFENSE.

Where in a suit by the superintendent of banks for the value of stock for which defendant had given a practically worthless title to realty, it appeared that the transaction was a fraud on the bank, its stockholders and creditors, and that for several months after it took place, defendant acted as president of the bank, and held it out to the public as being solvent, he could not be heard to say by way of defense that the bank stock was as worthless as his title to the realty.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. ¶49.]

7. BANKS AND BANKING ¶39 — SALE OF BANK STOCK—DUTY OF SUBSCRIBER.

A subscriber to the stock of a bank must exercise the utmost good faith to see that what

he gives in exchange is equal to the par value of the stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 44-48; Dec. Dig. ¶39.]

8. BANKS AND BANKING ¶39 — SALE OF STOCK—PAYMENT IN REALTY.

Under L. O. L. § 4571, prohibiting banks from purchasing realty except such as is necessary for the location of its business, including other premises in the same building to rent for income not exceeding in cost 50 per cent. of its paid-in capital, surplus, and undivided profits, and such as shall be conveyed to it in satisfaction of debts previously contracted, or as shall be purchased by it for its protection at judicial sales, an attempted payment for bank stock in realty, not within the exceptions of the statute, was unauthorized and amounted to no payment at all, except to the extent that the proceeds of the attempted payment went to swell the bank's assets.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 44-48; Dec. Dig. ¶39.]

9. BANKS AND BANKING ¶49—INSOLVENCY — SUIT FOR VALUE OF STOCK—DEFENSE.

In a suit in equity by the superintendent of banks for the value of bank stock bought by defendant, defendant could not be heard to say by way of defense that he had given certain property in exchange for the stock, where it appeared that after becoming president of the bank he removed such property from the bank's assets and converted it to his own use.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. ¶49.]

10. BANKS AND BANKING ¶39—LIABILITY OF STOCKHOLDERS—RELEASE—VALIDITY.

Where a purchaser of bank stock gave in exchange therefor practically worthless property, a release, executed in the name of the bank and signed by its manager and cashier, of all claims against such purchaser, was ineffective, where it was executed without authority of the board of directors or of the stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 44-48; Dec. Dig. ¶39.]

11. BANKS AND BANKING ¶49—INSOLVENCY — SUIT BY SUPERINTENDENT OF BANKS — DEFENSE.

An indemnity agreement purporting to be a sale of bank stock to another by defendant, who had purchased same giving practically worthless property therefor, was unavailable to protect defendant from liability for the value of stock in a suit by the superintendent of banks, where it appeared that the transaction was in fact a retransfer of the stock to the bank and a mere subterfuge to circumvent the law which prohibits a bank from purchasing its own stock, and was adopted to enable defendant to escape liability.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 69, 70; Dec. Dig. ¶48.]

12. BANKS AND BANKING ¶49—CONVERSION OF BANK STOCK — RESTORATION—RIGHT OF RECOVERY.

Where, in a suit brought by the superintendent of banks in the interest of creditors and innocent stockholders of an insolvent bank for the unlawful appropriation of bank stock which defendant, while president of the bank, unlawfully and without consent of the directors, caused to be issued to himself and for which he paid nothing, it appeared that defendant had restored the equivalent of that which he had thus unlawfully retained, and that the bank had lost

nothing by the transaction, plaintiff was not entitled to recover for such conversion.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.]

13. BANKS AND BANKING § 49—INSOLVENCY—SUPERINTENDENT OF BANKS—JURISDICTION IN EQUITY.

That the books of an insolvent bank showed on their face a regular purchase and issue of bank stock to defendant and a payment credit of the reasonable value thereof in realty and stock of another company, when in fact such realty and stock were worthless and such credit fraudulent, and that defendant had obtained an apparently regular release of liability signed by the officers of the bank, when in fact the release was unauthorized and fraudulent, authorized the institution of a suit in equity by the superintendent of banks; it clearly appearing that a suit at law would not afford an adequate remedy in such case.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.]

14. BANKS AND BANKING § 49—INSOLVENCY—SUIT BY SUPERINTENDENT OF BANKS—DEFENSE—BOND OF INDEMNITY.

In a suit by the superintendent of banks against a stockholder of an insolvent bank to recover the value of stock issued to him in exchange for practically worthless property, a bond signed by another stockholder and the bank, indemnifying defendant against liability to stockholders of the bank, constituted no defense; the stockholder's undertaking being a personal matter between him and defendant, and the bank's undertaking being void as to its creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.]

15. BANKS AND BANKING § 49—INSOLVENCY—SUIT BY SUPERINTENDENT OF BANKS—PARTIES.

In such suit, it was not necessary to make all the stockholders of the bank parties; the superintendent of banks having authority to bring any suit that the bank or any stockholder could have brought.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.]

16. BANKS AND BANKING § 49—INSOLVENCY—SUIT OF SUPERINTENDENT OF BANKS—DEFENSE.

In a suit by the superintendent of banks for the value of stock exchanged for practically worthless property, it was no defense that other stockholders had failed to pay in full for their stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.]

17. BANKS AND BANKING § 49—INSOLVENCY—SUIT BY SUPERINTENDENT OF BANKS—PLEA IN ABATEMENT—PENDENCY OF ANOTHER SUIT.

In such suit, a plea in abatement alleging that plaintiff was suing another person for a subscription for the same stock was not available, though such fact might be considered as evidence of an admission by plaintiff that such other person and not defendant was the person liable.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 71-81½, 513, 534, 535; Dec. Dig. § 49.]

In Banc. Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Suit by S. G. Sargent, as Superintendent of Banks of the State of Oregon, on behalf of the creditors of the American Bank & Trust Company of Portland, Or., insolvent, against the American Bank & Trust Company of Portland, Or., a corporation, and L. O. Ralston. From decree for plaintiff, defendant Ralston appeals. Modified.

This is a suit brought by the plaintiff on behalf of all the creditors of the American Bank & Trust Company against said bank and L. O. Ralston, in which it is sought to secure a decree against the defendant Ralston for the sum of \$34,300, with legal interest alleged to be due the bank on account of certain transactions between him and the defendant bank. The complaint states two causes of action. The first of them may be summarized as follows:

"The defendant corporation has an authorized capital stock of \$150,000, divided into 1,500 shares of the par value of \$100 a share; that on or about the 2d day of May, 1903, the defendant L. O. Ralston subscribed for 245 shares of the capital stock of said corporation; that the said defendant L. O. Ralston in payment of the said 245 shares of said capital stock of said defendant corporation transferred by quitclaim deed to the said defendant corporation, the following described property [here follows description of the property]; that at the same time, and as a part of the same transaction the said defendant L. O. Ralston transferred to the said defendant corporation, as a part consideration for the said 245 shares of the capital stock of defendant corporation, 23 shares of the capital stock of the City Messenger & Delivery Company; that the said defendant L. O. Ralston represented to the officers and directors of the defendant corporation that the real property described in paragraph 5 hereof was of the reasonable value of \$22,200; that he had a good merchantable title to said real property; that he would convey the said real property free of all incumbrance and by warranty deed to the said defendant corporation; that relying upon these representations, which the defendant L. O. Ralston well knew to be false at the time he made them, the said defendant corporation issued 245 shares of its capital stock to the said defendant Ralston, to its prejudice and injury herein; that the said representations were false and fraudulent at the time he made them; that the only title said defendant Ralston had to the said real property, or any part thereof was, by virtue of deed from the sheriff of Multnomah county, Or., as tax collector; that the said real property was sold in January, 1905, to the said defendant L. O. Ralston for delinquent taxes of the year 1903; that since January, 1905, the defendant L. O. Ralston has acquired no further right, title, or interest in or to said real property; that the total consideration paid by the defendant Ralston to the sheriff of Multnomah county for said real property was \$99.64; that the title held by the said defendant Ralston to said real property was practically valueless, and known by the said defendant Ralston to be practically valueless; that the said defendant Ralston, though often requested by the officers and directors of the said defendant corporation, has failed, neglected, and refused to convey the said real property described in paragraph 5 hereof, by a warranty deed to the said defendant corporation; that the said defendant Ralston has further failed, refused, and neglected to pay any other or further consideration for the said 245 shares of the capital

stock of the said defendant corporation issued to him as aforesaid; that on the 2d day of May, 1908, the said defendant L. O. Ralston was duly elected as president of the said defendant corporation, and continued as such president until on or about the 10th day of January, 1910; that during the time the said Ralston was president of said defendant corporation, he removed from the said defendant corporation without any action of the board of directors, or without any authority therefor, or without paying any consideration therefor, the said 23 shares of the capital stock of the said City Messenger & Delivery Company; that the said defendant corporation received no consideration for the purchase of the said 245 shares of its capital stock other than as hereinabove alleged, save and except the sum of \$300 received for the sale of lot No. 5, in section No. 30, township No. 1, north of range 5 east, containing 11.35 acres, more or less, lying and being within Multnomah county, state of Oregon, said above-described real estate being a portion of the real property conveyed by the said defendant Ralston to the said defendant corporation, and being the only portion of said real property so conveyed by the said defendant Ralston that the defendant corporation could dispose of for the reason that the title to the said property was of no value, as hereinbefore alleged; that the par value of the said 245 shares of the capital stock of the said defendant corporation so subscribed for by the said defendant L. O. Ralston, as alleged in paragraph 5 hereof, is \$24,500, which sum the said defendant Ralston promised and agreed to pay therefor, and that no part thereof has been paid, except the sum of \$300 received for said 11.35 acres lot described in paragraph 7, and that there is now due and owing from the said defendant L. O. Ralston to this plaintiff as state superintendent of banks of the state of Oregon on behalf of the creditors of the defendant corporation the sum of \$24,200, with interest thereon from the 2d day of May, 1908, at the rate of 6 per cent. per annum."

The second cause may be stated as follows:

"That the said defendant corporation has an authorized capital stock of \$150,000, divided into 1,500 shares of the par value of \$100 a share; that on or about the 11th day of May, 1908, the defendant L. O. Ralston caused to be issued to himself 91 shares of the capital stock of the said defendant corporation; that on or about the 8th day of December, 1908, the defendant Ralston caused to be issued to himself 10 shares of the capital stock of the said defendant corporation; that the defendant L. O. Ralston caused the said stock to be issued to himself without any authority of the board of directors of said defendant corporation, or without paying any consideration therefor; that the said defendant, though often requested, has failed, refused, and neglected to pay any consideration for the said 91 shares of the capital stock of the said defendant corporation or for the said 10 shares of the capital stock of said defendant corporation, and there remains due and owing the plaintiff on behalf of the said defendant corporation from the defendant L. O. Ralston therefor the sum of \$9,100 and interest thereon from the 11th day of May, 1908, at the rate of 6 per cent. per annum, and the further sum of \$1,000 and interest thereon from the 8th day of December, 1908, at the rate of 6 per cent. per annum."

It is also alleged that a release of liability from the defendant bank to Ralston was executed without consideration and without authority of the board of directors, and was void. The defendant demurred upon each of the statutory grounds specified in section 68, L. O. L., and, the demurrer being overruled,

answered, denying all the material allegations of the complaint, and pleaded a number of affirmative defenses, among which was a transfer by defendant Ralston of the 346 shares of stock of defendant bank to Samuel Connell, a release executed in the name of the bank and signed by its president and secretary of all claims against defendant Ralston, and a bond signed by Connell and the defendant bank indemnifying defendant Ralston against all liability to existing creditors of the bank as to any balance due on said shares of stock or any other claim or demand that might arise out of Ralston's ownership of said 346 shares, and containing a covenant that Connell should satisfy all such claims and save Ralston harmless therefrom. It was further alleged that such proceedings were taken with the knowledge and consent of the officers and stockholders of the bank, that Connell was still the owner of the 346 shares of stock, and that the plaintiff, the defendant corporation, and its officers and stockholders were therefore estopped to maintain this suit. By a further and separate answer it was averred that all persons who were creditors of the defendant bank at the date of the assignment of stock by Ralston to Connell had ceased to be creditors upon the commencement of this suit. It was also declared that Connell was a necessary party to this suit, and should be made a defendant therein. A further defense stated that plaintiff had no legal authority to sue, which defense was stricken out on motion of plaintiff. Thereafter a supplemental answer was filed by the defendant, alleging, in substance, that on or about the 27th day of August, 1913, the plaintiff in this suit commenced another and different suit, in the same court, against G. W. Waterbury, E. C. Knoernschild, C. W. Miller, S. Logan Hays, Julius H. Alexander, John E. Davis, and W. A. Currie, defendants therein, to recover from them on their subscription to 2,500 shares of the capital stock of the Bank of America, setting forth the complaint in that suit, including the prayer, and making the following additional allegations, to wit:

"That any capital stock of the American Bank & Trust Company, which this defendant ever owned or held therein, was delivered to him from and out of the capital stock of the said defendants in the said suit commenced on or about the 26th day of August, 1913, and which is now pending before this court, and that such suit was commenced after the commencement of this suit, and after this defendant Ralston had filed his answer herein; that the plaintiff in the suit commenced, on or about the 26th day of August, 1913, and which is now pending before this court, and that such suit was commenced after the commencement of this suit, and after this defendant Ralston had filed his answer herein; that the plaintiff, in the suit commenced on or about the 26th day of August, 1913, seeks to recover from the defendants therein on account of their respective subscriptions of capital stock of said corporation, for and on account of the subscriptions to the identical capital stock, and the issue thereof, to such defendants, for which the plaintiff seeks

to recover against this defendant for and on account of his alleged subscription to such capital stock, and the alleged issuance of such capital stock to this defendant; that any and all of the capital stock of the American Bank & Trust Company, which was ever owned or held by, or was ever issued to this defendant, was the capital stock which a long time prior thereto had been subscribed for and was issued to the defendants in the other suit, by reason of which the plaintiff is not entitled to have or recover any decree against this defendant for any stock which was issued to, or ever owned or held by him, which prior thereto had been subscribed for and issued to the defendants, or either of them, in the other suit above mentioned."

A further statement of issues appears in the opinion. There was a decree for plaintiff, and defendant appeals.

C. A. Johns and Jay Bowerman, both of Portland, for appellant. Sidney Graham, of Portland, and I. H. Van Winkle, of Salem (Geo. M. Brown, Atty. Gen., on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1] At the threshold of the discussion of this very intricate case we are met with the suggestion that the superintendent of banks has not the legal capacity to maintain this suit. It must be premised that the authority of that officer is purely statutory, and unless it is given in express language or by necessary implication from the language used, he does not possess it. Section 4586, L. O. L., as amended by the Laws of 1911, chapter 171, provides, among other things, that the superintendent of banks may under certain circumstances (shown to exist here), take possession of the property and business of a bank, and liquidate its affairs and administer upon its assets. It is further provided that he may collect money due the bank and do such other acts as are necessary to preserve its assets and business, and may, if necessary to pay the debts of such bank, enforce the individual liability of stockholders. The first cause of action is based upon the allegation that defendant Ralston subscribed for 245 shares of stock, and procured its transfer by promising to convey to the bank certain real estate, which he falsely represented was of the value of \$22,500, whereas in truth he had only a practically worthless tax title to the property, from which the bank realized only \$300; that the worthless character of his title was well known to him, and that such representations were made with intent to defraud the bank; that in 1910 Ralston caused to be executed a release from all liability to the bank, signed by the manager and cashier, but that said release was not authorized by the board of directors or by the stockholders, and was without consideration and void. Other allegations too numerous to be inserted here show the insolvency of the bank, the extent of its assets, liabilities, and the necessity of enforcing the liability of stockholders. The superintendent of banks represents pri-

marily the creditors and depositors of the bank. If he merely represented the corporate entity, there would be little reason for permitting him to interfere in the winding up of an insolvent institution. His duties and rights are, except as somewhat extended by the statute, analogous to those of a receiver of a national bank or a trustee in bankruptcy under the federal statutes. The extent of the authority of a trustee in bankruptcy has been defined by this court in the case of *Falco v. Kaupisch Creamery Company*, 42 Or. 422, 70 Pac. 286, in the following language:

"From this doctrine it necessarily follows that unpaid subscriptions to the capital stock of a corporation pass like other assets to the trustee in bankruptcy, and he is the only party that can bring an action or proceeding thereon. *Sanger v. Upton*, 91 U. S. 56 [23 L. Ed. 220]; *In re Crystal Springs Bottling Co.* (D. C.) 96 Fed. 945; *Lane v. Nickerson*, 99 Ill. 284. And it also follows that any fraudulent act of the corporation itself, intended to deprive the creditors of a right to resort to the unpaid subscription, is of the same nature as fraudulent conveyances of any other property of the bankrupt, and may be avoided at the suit of a trustee."

The rights and duties of a receiver of a national bank are prescribed in the following opinions of the federal and state courts:

In *Case v. Terrell*, 11 Wall. 202, 20 L. Ed. 134, wherein it was contended that the receiver represented the government, the court answered said contention:

"As to the receiver, the claim, if any such be made, is not worth serious consideration. He represents the bank, its stockholders, its creditors, and does not in any sense represent the government."

In the case of *Brown v. Schleier*, 118 Fed. 986, 55 C. C. A. 475, the court says:

"As such receiver he is vested with all the rights of creditors and the rights of the corporation itself, and may doubtless challenge any wrongful act which creditors could challenge, and maintain such suits against third parties, including actions against directors and stockholders of the bank on account of wrongful and fraudulent acts, as the corporation might maintain."

[2] Nor is a receiver, and by parity of reasoning the commissioner of banks in the instant case, bound by the fraudulent or unauthorized acts of the bank. The reasons for this are clearly stated in *Hayes v. Kenyon*, 7 R. I. 141, wherein the court says:

"The first objection urged to the verdict is, that the court misdirected the jury when instructing them that the plaintiff represented the creditors of the bank, and could look behind its acts in the assertion of their rights. It is difficult, however, to see the force of this objection in a case where the charge and the proof is, that the defendant, in a breach of his trust, as president of the bank, connived with sharpers to sell out the bank to them, and take payment from them in the assets of the bank, knowing, or having every reason to know, that their purpose in the purchase was to defraud the public. One would think, especially if this was done without authority even formally legal, that it was a wrong for which the bank itself might have redress, if it was ever rescued from the hands into which it had fallen so as to be able

to seek it, and that the plaintiff might maintain this action as representing the corporation only. Considering, however, the purpose of the bank act, we deem this a very narrow and false view of the scope of the receivership provided by it. The proceeding under which the receiver is appointed, is not a proceeding by the corporation, but against it. It is not for the corporation, but exclusively for the public, as billholders, and for those having funds in its hands as depositors; and it is only when they are in danger of being defrauded, or the bank has become insolvent, that commissioners or the court can act. Rev. St. c. 126, § 47. The duty of the receiver, as marked out by the statute, regards the creditors, and not the corporation, which is to be wound up. The forty-ninth section provides for the payment of the debts of the corporation out of its assets, giving a preference to billholders; and it is only after the creditors are satisfied and the expenses of the trust paid, that the stockholders are to receive anything. It is true, that by the fiftieth section, the receiver is clothed with all the powers and rights of the corporation in respect to the collection of debts, conferred upon it by charter or otherwise; but this, so far from being designed to limit his powers, was designed to clothe him with special powers and authorities. His principal office, under the law, as we have seen, is to care for and represent the interest of creditors; and in all such cases, the receiver or assignee, call him by whatever name you will, may take advantage of any fraud in derogation of the rights of creditors, to which the insolvent debtor was a party. A deed which is void as against creditors, is void also as against those who, by law, represent creditors. *Doe d. Grimsby v. Ball*, 11 M. & W. 531, 533. If this principle were not applied to the receivers of insolvent banks, the receivership would, in a great number of cases, be of very little use."

[3-5] We will now consider the facts relating to defendant Ralston's relations with the company in order to determine whether he is to be treated as a subscriber for stock held by the company or a purchaser of stock previously subscribed and paid for and repurchased by it. It appears from the testimony that previous to Ralston's dealings with the bank one G. W. Waterbury and others had subscribed for 850 shares of stock in the corporation, and had pretended to pay for it in assets of the Bank of America, representing them to be of the value of \$85,000, although they were in fact probably worthless. Waterbury subsequently attempted to surrender his shares, which were taken up by the bank and canceled. This proceeding was wholly outside of the law and in defiance of section 4569, L. O. L., which forbids a bank to become the purchaser of its own stock, except under circumstances which are not shown to have existed at the time the stock in question was surrendered. It follows that the transaction was void, and the bank never legally became the owner of the Waterbury stock, and therefore had no legal right to reissue it. When Ralston contracted to purchase stock, he did not apply for the Waterbury stock or any particular stock. He merely contracted to purchase 245 shares of stock, and to pay therefor by conveying to the company real property worth \$22,200, and 23 shares of city messenger stock to cover the balance of the purchase price. The memoranda upon stubs of the stock certificate book show that the

shares issued upon the consideration of Ralston's conveyance and the deposit of messenger stock were a reissue from the shares surrendered by Waterbury and his associates; but such memoranda are evidently made at a later date than the issue of the stock, contain interlineations and erasures, are written with different ink from that used on other parts of the stub; and, considering the fact that Ralston a short time subsequently became president of the bank, he either made the memoranda himself or caused them to be made by the then superserviceable MacGibbon with the intent to escape liability as a subscriber. Even granting that it was surrendered to the bank by Waterbury because not paid for, because the consideration failed, or for any reason, and that after it had been so surrendered, the bank in form reissued it to Ralston, this fact would not render him any the less a subscriber. The bank had no right to purchase its own stock. If it did so, it diminished its capital by just so much as the shares purchased represented, unless the stock so surrendered or purchased is to be treated, as in equity it should, as having gone back into the general mass of original stock and thereby become subject to subscription. This view is sustained by the following authorities: *State ex rel. v. Smith et al.*, 48 Vt. 266; *Pabst v. Goodrich*, 133 Wis. 43, 115 N. W. 398, 14 Ann. Cas. 824; *Porter v. Plymouth Gold Mining Company*, 29 Mont. 347, 74 Pac. 938, 101 Am. St. Rep. 569; *Bank v. Wickersham*, 99 Cal. 655, 34 Pac. 444; *Wells & Co. v. Thompson Mfg. Co. and Foley*, 54 Mo. App. 41; *Commonwealth v. Boston & Albany R. Co.*, 142 Mass. 146, 155, 7 N. E. 716; *Belknap, Receiver, v. Adams and Rice*, 49 La. Ann. 1350, 22 South. 382. So that while the testimony indicates that there was original stock on hand to satisfy the exigency of Ralston's purchase, yet upon his own theory he is still liable as a subscriber for any amount he has failed to pay. Some question is raised on account of the fact that the certificates for 35 of the shares included in the transaction were issued in the name of L. R. Ralston and 10 shares in the name of J. M. Long, but the fact remains that they were issued upon the faith of defendant's agreement to pay for them by conveying the real estate and transferring the messenger stock, and he cannot escape liability by causing them to be issued upon the books of the company to other persons. We are of the opinion that defendant Ralston must be treated as a subscriber for the 245 shares embraced in the transaction above detailed. *McAllister v. American Hospital Association*, 62 Or. 530, 125 Pac. 286; *Jackson v. Traer et al.*, 64 Iowa, 469, 480, 20 N. W. 764, 52 Am. Rep. 449. This conclusion being reached, we will next consider the evidence as to payment.

[6] It may be premised that the law and public policy alike demand that a stock subscription shall be paid for in money or something just as good as money. The evidence

indicates that Ralston offered to deed to the bank property of the value of \$22,200. There is slight evidence as to its value, but the fact was that he had no title to the property beyond that obtained by a tax certificate or deed; such titles in this state being notoriously worthless as a basis of title, and for which he had paid \$90. After getting the stock transferred, he tendered a quitclaim deed, which even MacGibbon, the then president, refused to accept or record, demanding a warranty deed, but which subsequently, probably after Ralston's election to the office of president, found its way into the record, and the bank was afterward dispossessed of the property, but in some way did manage to get \$300 out of it. The whole transaction was a swindle upon the bank, its stockholders, and creditors, worthy of the cheapest bunco steerer. It does not lie in the mouth of Ralston to say that the title was as valuable as the bank stock. For many months afterward he acted as president of the bank, received deposits, disposed of stock, and in every way held it out to the public as a solvent and reputable bank, when, if its stock was as worthless as the title he attempted to palm off on the bank, he knew that the concern was rotten. If it was, it was he and MacGibbon and Waterbury and their ilk who made it so, and justice will be subserved by holding them to their subscriptions until every creditor is satisfied. Defendant should pay this \$22,200 in full, less the \$300 realized out of the property.

[7-9] The discussion as to whether a contract to "make a deed" is fulfilled by giving a quitclaim deed is beside the question which is involved in the instant case. We are not prepared to dispute the contention of learned counsel that ordinarily such a contract is fulfilled by giving a quitclaim deed, but in the purchase of stock from a bank another consideration is involved. Its capital stock is its life blood. It is that upon which depositors rely in making their deposits. It is a sacred fund which the law requires to be kept intact; hence, the rule announced that capital stock must be paid for by the subscriber in money or in something worth the money, and he who subscribes for stock from a bank must exercise the utmost good faith to see to it that what he gives in exchange is equal to the par value of the stock translated into terms of dollars and cents. Another proposition which is conclusive of this branch of the subject is that the bank had no authority to accept this real estate either in payment for stock or for any reason which appears in this case. Section 4571, L. O. L., provides:

"Any person, firm, or corporation doing a banking business in this state may purchase, hold, and convey real estate for the following purposes and no others: 1. Such real estate as shall be necessary in which to transact the business of any such bank, including with its banking offices, other premises in the same building to rent as a source of income, but which shall not exceed in cost to such bank fifty per cent.

of its paid in capital, surplus and undivided profits. 2. Such real estate as shall be purchased by or conveyed to such bank in satisfaction of, or on account of debts previously contracted in the course of its business. 3. Such real estate as it shall purchase at sale under judgments, decrees, or mortgage foreclosure under securities held by it. * * *

In view of this section it is plain that an attempted payment in realty by Ralston for the stock purchased by him amounted to no payment at all, except to the extent that the proceeds of such attempted payment went to swell the assets of the bank. The alleged part payment in messenger stock was no payment at all. It is not shown to have been paid-up stock, or to have had any real value at the time it was turned over, and Ralston, after he became president, took it away, saying that he would either have to do that or pay for it, which indicates that it was either unpaid stock or that he was not the owner of it. In a court of equity a party will not be heard to say that he paid a consideration for property and afterward stole the consideration, even if it actually possessed some value. Ralston was upon the witness stand and gave no explanation whatever of this transaction. We find that the shares of messenger stock were then of no value, and that there was a failure of consideration to the extent that they were accepted as a payment.

[10, 11] The attempted release of defendant from liability executed by the manager and cashier of the bank was without authority of the board of directors or of the stockholders, and is void. While the indemnity agreement purports to be a sale of the shares to Samuel Connell, the evidence shows that it was in fact a retransfer of the shares to the bank, and the assignment to Connell was a subterfuge used to circumvent the law, which prohibits a bank from purchasing its own shares. It was a device used for the purpose of enabling defendant to escape payment of his subscription, and is void as against creditors and innocent stockholders of the insolvent institution who are here represented by the bank examiner. The effect of the transaction upon the matters included in the second cause of action will be hereafter discussed.

[12] Passing now to the second cause of action it will be noticed that it is not brought to recover upon a subscription to capital stock, but substantially in damages for the unlawful conversion of shares of stock. It is alleged, in substance, that defendant, as president, unlawfully and without the consent of the board of directors caused to be issued to himself 101 shares of stock and has refused to pay for the same, and judgment is asked for \$10,100, the par value of the shares so unlawfully appropriated. The facts appear to be that for some reason, probably to enable the bank to sell the shares at less than par value or to cover up the fact that it was holding or purchasing its own stock in violation of law, a block of stock consisting

of 182 shares of the par value of \$18,200, and being part of the stock surrendered by Waterbury and his associates, was held in the name of Ralston and MacGibbon as trustees for the bank; Ralston holding one half the shares, and MacGibbon the other half. With what seems to be a characteristic disposition to appropriate anything lying around loose, Ralston caused the 91 shares held by him as trustee to be issued to himself personally, and appears to have disposed of part of them for his own benefit or to have kept them. He paid the bank nothing for them, and when he was finally requested to withdraw he brought in what he had disposed of, and turned over to Connell apparently as an individual, but in fact as trustee for the bank, these shares, together with the 245 shares he had subscribed for in the first instance. Another certificate for 10 shares was issued to Mr. Ralston to enable him to borrow \$1,000 for the bank. The money was borrowed and afterward repaid, and upon the final closing up of Ralston's business with the bank this stock was turned over to Connell. At the same time that the stock was turned over Ralston was permitted to take out certain notes due the bank of the face value of \$8,500, and was paid \$1,500 in cash. Connell gave his personal note for \$10,000 to cover this, and afterward paid the note. Now as Ralston is not sued as a subscriber for this 101 shares of stock, but merely for the conversion of it, and it appears that it was returned and accepted by the officers of the bank, and that the bank has lost nothing by the transaction, receiving, in fact, \$8,500 of Connell's money in exchange for notes of doubtful value, it would seem inequitable to compel Ralston to pay for the stock for which he is not sued as a subscriber and which he has returned.

[13] The contention that plaintiff's remedy is by an action at law is untenable. The fact that the books of the bank showed upon their face a regular purchase and issue of stock and a payment credit of \$22,200 in real estate transferred and of \$2,300 in stock of the messenger company, when in fact such real estate and stock were worthless and such a credit a fraud upon the bank, its creditors, and stockholders, and the further fact that the defendant Ralston had obtained a release from all liability signed by the officers of the bank and apparently regular, when in truth the release was unauthorized, illegal, and therefore fraudulent, rendered the interposition of a court of equity imperatively necessary in order that these and other fraudulent devices of Ralston and his associates should be uncovered. To have submitted the mass of evidence and exhibits which have consumed a week of our time in their examination to a jury whose time for deliberation is necessarily limited would have been a farce.

[14-17] The plea in abatement was not well

taken. The undertaking by Connell to hold defendant harmless in any proceeding which might thereafter be had against him on account of his transactions with the bank is a personal matter between defendant and Connell. So far as the bank undertook to be surety on such undertaking, the transaction is wholly void and unauthorized as to creditors of the bank, as already intimated. As to its effect between defendant and Connell, it is unnecessary to express an opinion. Neither was it necessary to make all stockholders of the bank parties. The superintendent of banks, in our opinion, has authority to bring any suit that the bank or any creditor or stockholder could have brought. The bank itself, if it could have been freed from the corrupt or incompetent officials who mismanaged its affairs, could have repudiated their unauthorized acts and compelled him to pay for the stock, and previous to the superintendent's taking possession any stockholder in the event of the refusal of the officers of the bank to act, could have brought such suit. The stock in contemplation of law was purchased upon an agreement to pay for it immediately in property equivalent to it in par value. The shares were delivered, but the defendant fraudulently failed to convey such property, and tendered a conveyance, which was practically worthless as an asset. Thereupon a cause of suit arose to compel him to pay in money this demand, which was an asset of the bank that its officials, one of whom was the defendant, fraudulently failed to enforce. The bank now having fallen into honest hands, a suit is brought to uncover the unauthorized acts by which defendant's fraud was concealed, and to compel him to do equity in the premises by paying the money for the stock for which he has subscribed. His contract to pay for stock is individual, and not dependent upon whether or not other persons have failed to pay in full for stock. Nor is the plea that the plaintiff is suing another party for a subscription for the same stock available here. If such a fact were shown it might be considered as evidence in the nature of an admission by plaintiff that such other party, and not the defendant, was the person liable; but as heretofore intimated we are of the opinion that the evidence tends to show that plaintiff bought original unissued stock, and that the stubs in the stock certificate record have been fraudulently "doctored" in the interest of the defendant.

The history of this bank from the beginning is a record of deception, fraud, and mismanagement. Publishing to the world by its articles that it had a capital stock of \$150,000, an examination of the testimony shows that such capital was represented by \$85,000 of the assets of an insolvent "tincup" bank of small value, something which is termed "Mt. Hood" stock, presumably a paper railroad and of less value, a little office furni-

ture, a few other "chips and whetstones" of like character, and a very few thousand dollars in real money beguiled from the pockets of men like Leiter and Connell who were deceived into believing that they were investing in a real bank and are now awake to the actual facts poorer in pocket, but immensely richer in experience.

The decree of the court below will be modified so that plaintiff receive of defendant Ralston the sum of \$24,200, with interest at 6 per cent. per annum from May 2, 1908, and the costs and disbursements of this court and of the circuit court.

JAKIN, J., took no part in the consideration of this case.

(47 Utah, 330)

TYNG v. CONSTANT-LORAINÉ INV. CO.
(No. 2655.)

(Supreme Court of Utah. Jan. 3, 1916.)

1. CORPORATIONS ⇐428—OFFICERS—RATIFICATION OF ACTS BY CORPORATION.

R., in reply to a telegram from plaintiff's broker, wired an offer to accept \$1,000 for a 30-day option to purchase certain property at a specified price, such \$1,000 to be deposited to his credit immediately in a named bank, and such deposit was made by plaintiff. R. was president of the defendant corporation, and title to the property was in defendant, and it made and forwarded to the bank a deed to the property. *Held*, that it thereby ratified the transaction and became bound by whatever contract was made by R.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. ⇐426.]

2. APPEAL AND ERROR ⇐1195—LAW OF THE CASE—NEW TRIAL.

In an action to recover back a payment on a contract for the sale of land on the ground that defendant did not have title to all of the land agreed to be conveyed, the Supreme Court held that defendant had neither authorized nor ratified an agreement by a bank with which the payment was deposited by defendant's direction, with respect to the terms of the sale, and that telegrams passing between defendant's president and plaintiff's broker evidenced the terms of the contract. *Held*, that whether right or wrong, this holding was the law of the case, and was binding on a retrial on the same evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. ⇐1195.]

3. EVIDENCE ⇐460—PAROL EVIDENCE TO REMOVE AMBIGUITY.

Where telegrams concerning an option for the sale of real estate described the real estate as "property west side State street," the description was ambiguous, and extrinsic evidence was competent to aid the ambiguity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. ⇐460.]

4. VENDOR AND PURCHASER ⇐80—CONSTRUCTION OF CONTRACT—EVIDENCE.

Plaintiff's broker wired defendant, asking for its price on property described as "west side State" and defendant, after some intervening telegrams in which the broker was referred to K. and G. for exact information, wired the broker that it would accept \$1,000 for a 30-day option on "property west side State street," the

balance to be paid within 30 days, and the \$1,000 to be deposited immediately in a named bank. Defendant owned only one lot on the west side of State street, and the plat in the recorder's office showed this lot to be 55x165 feet, but the abstract books and records of deeds showed that defendant had title by warranty deed to only 53½ feet, and that it had a quitclaim deed to 1½ feet, which 1½ feet were in the adverse possession of other parties. Plaintiff deposited \$1,000 with the bank, and received a receipt from it, stating that it was on account of the purchase price of property described as a lot 55x165 feet, and that the property was to be conveyed by warranty deed upon payment of the balance of the purchase price, but this agreement by the bank was neither authorized nor ratified by defendant. It did not appear that plaintiff ever examined the plat in the recorder's office, or the abstract books or records of deeds or the property itself, or that he saw K. and G. for information, but it did appear that he saw a "real estate man's plat" which showed the property to be 55x165 feet, before or after paying the \$1,000. It did not appear where the bank got its information as to the size of the lot. There was other evidence justifying a finding that plaintiff understood that 55 feet were to be conveyed by warranty deed. *Held*, that while the bank's receipt was not evidence of the terms of the contract, it was competent evidence to show how plaintiff understood the ambiguity in the contract as to the number of feet which was to be conveyed by warranty deed, it having been seen and relied on by him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 132-135; Dec. Dig. ⇐80.]

5. VENDOR AND PURCHASER ⇐80—CONSTRUCTION OF CONTRACT—EVIDENCE.

There was no sufficient evidence to justify a finding that defendant agreed to convey 55 feet by a warranty deed, or that it meant or intended to convey any other or different property than was owned by it, and the court therefore erred in submitting the question in an action to recover back the payment made, as to whether it agreed to convey 55 feet by warranty deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 132-135; Dec. Dig. ⇐80.]

6. VENDOR AND PURCHASER ⇐152—PERFORMANCE BY VENDOR—TENDER OF DEED.

If plaintiff understood and regarded the contract as an agreement to convey whatever property defendant owned on the west side of State street, defendant performed its agreement by tendering a deed warranting title to 53½ feet, and quitclaiming as to 1½ feet, and was under no obligation to return the payment made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 304, 305; Dec. Dig. ⇐152.]

7. VENDOR AND PURCHASER ⇐334—FAILURE OF MINDS TO MEET—RECOVERY OF PAYMENTS.

If plaintiff understood the ambiguous contract as an agreement to convey 55 feet by warranty deed, there was no meeting of the minds, and no contract, and he was entitled to recover the amount paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. ⇐334.]

8. VENDOR AND PURCHASER ⇐241—ACTIONS—EVIDENCE.

The evidence was not so conclusive that plaintiff understood the contract as an agree-

ment to convey 55 feet by warranty deed to entitle him to a directed verdict.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008-1017; Dec. Dig. § 341.]

9. EVIDENCE § 244—DECLARATIONS OF AGENT—ADMISSIBILITY.

In an action to recover a payment on a contract for the purchase of land on the ground that defendant did not have title to all of the land agreed to be conveyed, defendant contended that the contract was made by its president personally and not by it. Plaintiff was permitted to testify that after a former trial resulting in defendant's favor, he had an interview with defendant's president, in which he offered to discuss the case "man to man" and "settle this between ourselves," that defendant's president declined to discuss the case, saying that "the jury says it is mine, and I guess it is mine," and offered to flip a penny to see who would take the amount involved. He also testified that nothing was said as to whether his suit lay against defendant or the president. *Held*, that this was not admissible to contradict defendant's claim that if any one was liable it was its president and not it, or to show its reason for withholding the money, as the president by virtue of his office had no authority to make admissions against defendant as to past events.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.]

Appeal from District Court, Salt Lake County; F. C. Loofbourrow, Judge.

Action by Charles Tyng against the Constant-Loraine Investment Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 37 Utah, 304, 108 Pac. 1109.

Howat, Macmillan & Nebeker, of Salt Lake City, for appellant. Pierce, Critchlow & Barrette, of Salt Lake City, for respondent.

STRAUP, C. J. The substance of the complaint is, that the defendant, a resident corporation of California doing a real estate business, was, subject to a \$20,000 mortgage, "the record owner, as appeared from the plat books and other records in the office of the county recorder of Salt Lake county, Utah," of particularly described real property, a lot 55x165 feet, on the west side of State street, in the city of Salt Lake; that the defendant, on the 9th of September, 1907, gave the Equity Investment Company, a Utah corporation doing a real estate business in Salt Lake City, an option to purchase the property subject to the mortgage, for \$30,000, \$1,000 cash, and \$29,000 on or before 30 days thereafter, and that in pursuance thereof, the Equity Investment Company, for the credit of the defendant, deposited with the National Bank of the Republic at Salt Lake City, \$1,000, and took the bank's receipt therefor, which, so far as material, acknowledged payment of the \$1,000 "on account of the purchase price" of the property described in the complaint, a lot 55x165 feet, and recited the further payment of \$29,000, to be made within 30 days thereafter, when the property was to be deeded by warranty deed, free from all incumbrances, except the mortgage, and

the taxes for 1907. The receipt or writing further recited that:

"This deposit is made with the National Bank of the Republic and accepted by them under authority of the following telegram from R. A. Rowan: 'Los Angeles, California, Sept. 6-7, 1907. Thomas E. Rowan, Salt Lake, Utah: Will accept one thousand for thirty days option for property west side State street. Price fifty thousand subject to twenty thousand mortgage. Balance thirty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with National Bank of Republic, they to notify me by wire. R. A. Rowan.'"

It then is alleged that the Equity Investment Company, in paying the money and taking the receipt, acted for the plaintiff and that he understood and believed that the defendant was the owner and in possession of 55x165 feet, and that it legally could convey that much ground by warranty deed, and that the Equity Investment Company, immediately upon paying the money, made over and assigned the bank's receipt or writing to the plaintiff. It further is alleged that on the 9th of October, 1907, and within the option period, the plaintiff tendered the sum of \$29,000 and demanded a warranty deed, but that the defendant tendered a warranty deed for only 53½x165 feet and a quitclaim for 1½x165 feet. This the plaintiff declined to accept and averred that the defendant was the owner and in possession of only 53½x165 feet, and that it, at no time, was the owner or in possession of the 1½x165 feet, which, as is averred, was possessed and held adversely by another, by reason of which the defendant, at no time, could grant or convey any interest therein, but of which the plaintiff had no knowledge until after the payment of the \$1,000. It further is alleged that the deed tendered by the defendant "was not in conformity with the terms of said option on offer or agreement to sell" as evidenced by the bank's receipt and writing; that upon the defendant's failure to give a warranty deed for the whole of the 55 feet, the plaintiff demanded a return of the \$1,000 theretofore paid, which was refused. Hence the plaintiff prayed judgment for \$1,000 and interest.

The case was tried to a jury who rendered a verdict in plaintiff's favor in accordance with the prayer of the complaint. The defendant appeals and urges that the court erred in refusing to direct a verdict, to charge the jury as requested, in misdirecting the jury, and in permitting answers to be made to certain questions propounded to the plaintiff as a witness.

As shown by the records in the recorder's office of Salt Lake County, one Colgate, in 1903, by warranty deed, conveyed the lot, 55x165 feet, to one Halloran. In June, 1905, Halloran, by warranty deed, conveyed 53½x165 feet, and by quitclaim 1½x165 feet, to R. A. Rowan of Los Angeles. In December,

1905, Rowan, by warranty deed, conveyed $53\frac{1}{2} \times 165$ feet, and by quitclaim $1\frac{1}{2} \times 165$ feet to the defendant, and in July, 1906, the defendant, by R. A. Rowan, its president, and P. D. Rowan, its secretary, by warranty, conveyed $53\frac{1}{2} \times 165$ feet, and by quitclaim, $1\frac{1}{2} \times 165$ feet to one Snell of Salt Lake City. The plat in the recorder's office shows the lot to be as conveyed by Colgate to Halloran, 55×165 feet. When thereafter it was conveyed by Halloran and Rowan, $53\frac{1}{2}$ by warranty and $1\frac{1}{2}$ by quitclaim, the plat continued to show the lot to be 55×165 feet, and showed the necessary substitutions of names of grantees. The recorder testified that when conveyances are made either by warranty or quitclaim, no change as to the description or dimension of the lot conveyed is made on the plat, but that the grantee's name merely would be changed. He further testified that:

"Colgate having given a warranty deed to all of the 55 feet, we don't question whether he owned it or not; so that the plat itself would not reveal whether the man or the corporation in whose name the property stood held title by warranty or quitclaim deed; in order to ascertain that it would be necessary to go to the deeds themselves or to the abstracts. We have an abstract book of all the transactions; a mere glance at that abstract book will show whether it is a quitclaim deed or what it is,"

—and that the record of deeds showed the character of title acquired and held by the defendant. Thus, the plat in the recorder's office indicated that the defendant was the owner of a lot 55×165 feet; but whether by warranty or quitclaim deed would not there be disclosed. The abstract book and records of deeds, however, readily disclosed the defendant's title, and the number of feet of ground $53\frac{1}{2}$ feet it had by warranty and $1\frac{1}{2}$ by quitclaim, the same as was conveyed to it by Rowan and by Halloran to Rowan.

Some time prior to September 4, 1907, the plaintiff informed the Equity Investment Company that he was desirous of purchasing property on the west side of State street, between Second and Third South, and in the block where the property in question is located. In pursuance of that, one T. E. Rowan, a real estate agent at Salt Lake City, but not related to the Rowans at Los Angeles, nor in any manner connected with the defendant, on September 4, 1907, wired R. W. Rowan at Los Angeles:

"Advise cash price west side State, taxes prorated, whether leased."

R. W. Rowan, the next day replied:

"Will accept fifty thousand. Property now mortgaged for twenty thousand at five per cent. Leases very short. See Kelsey and Gillespie for exact information. Several people now figuring on this property. Doubtless will be sold, as figure named is ten thousand less than its present value."

The same day, T. E. Rowan wired R. A. Rowan:

"Responsible party offers one thousand for thirty days' option, recommend."

R. A. Rowan, the next day replied:

"Will accept one thousand for thirty days' option for property west side State street, price fifty thousand, subject to twenty-thousand mortgage. Balance thirty thousand to be paid in cash on or before thirty days from date. Taxes to be prorated. One thousand to be deposited to my credit immediately with the National Bank of the Republic; they to notify me by wire."

Upon payment of \$1,000 to the Equity Company by the plaintiff, that company, on the 9th of September, deposited the \$1,000 with the National Bank of the Republic to the credit of R. A. Rowan, whereupon the bank gave the Equity Company the receipt and writing heretofore referred to, and in which it is stated that the lot, described as 55×165 feet, was to be conveyed by warranty to the Equity Company on the further payment of \$29,000 within 30 days thereafter. Up to this point the name of the defendant nowhere appeared in any of the telegrams, writings, or negotiations. The receipt itself is signed alone by the bank, and on its face purports to be signed on authority of the telegram from R. A. to T. E. Rowan. It, however, is shown that R. A. Rowan then was the president of the defendant and that it did some business in Salt Lake City, buying, selling, and renting real estate, had a bank account with the National Bank of the Republic in the name of R. A. Rowan, and that at the time of the negotiations, and for nearly 2 years prior thereto, it, and not Rowan, was the owner of the property, and through R. A. Rowan as its president, and another as its secretary, about a year thereafter, conveyed the property to Snell. It further is made to appear that R. A. Rowan, on the 20th of September, 1907, sent to the National Bank of the Republic a deed from the defendant, conveying the lot to the Equity Company, $53\frac{1}{2}$ feet by warranty and $1\frac{1}{2}$ feet by quitclaim, to be delivered on payment of \$29,000 on or before the 9th of October, 1907. The plaintiff, on the 9th, tendered \$29,000 to the bank who, in return, tendered the deed forwarded to it. The plaintiff declined to accept that and demanded a warranty deed to 55 feet. The bank was unable to make a tender of such a deed, whereupon the plaintiff demanded repayment of the \$1,000. Here we thus have the propositions concerning which the parties disagree. By the defendant it is contended that whatever agreement was entered into was made between the plaintiff and R. A. Rowan and not between the plaintiff and the defendant, and that in all events the defendant had tendered a deed to the whole of the property owned by it and to all of the ground it, or Rowan, by the terms of the option, had agreed to convey. By the plaintiff it is contended that the contracting parties were himself and the defendant, and that by the terms of the option the defendant had agreed to give a warranty deed to 55×165 feet, and

hence in fulfillment of the contract was required to convey by warranty that much ground.

The case was here on a former appeal: 37 Utah, 304, 108 Pac. 1109. On that trial the plaintiff was let to the jury and permitted to recover on the theory that the receipt or writing given by the bank to the Equity Company, wherein it was recited that 55x165 feet were to be conveyed by warranty, evidenced the terms of the option, and that the bank was authorized by the defendant to give such a writing, or, that it, with full knowledge that such a writing had been given by the bank, had ratified it. On that appeal we held that there was no evidence to justify findings that the defendant had authorized the making of such a contract, or that it had ratified it, and hence that the case was submitted to the jury on a theory unsupported by evidence. We thus reversed the judgment and remanded the case for a new trial. Our views as to that are given in our former opinion. On the retrial, while the receipt or writing given by the bank was put in evidence, the court, nevertheless, charged the jury that there was no evidence to show that the defendant had either authorized or ratified the writing, and that hence the recital in the receipt, to convey 55x165 feet by warranty deed, was not binding on the defendant. Thus on the retrial the case was withheld from the jury on such theory. It was submitted on the theory of whether the defendant, independently of that writing, had agreed to convey by warranty 55 feet, or only the ground and title tendered by it, 53½ by warranty and 1½ by quitclaim. The court also charged that to find for the plaintiff the jury were required to find that he "in good faith, made the payment to the defendant of \$1,000 as an acceptance of the offer contained in the telegrams, and that the defendant company wrongfully failed to perform its part of the contract resulting from said transactions."

[1-4] A point is made that there is no evidence to show that R. A. Rowan, in sending the telegrams, or in anything that he did, acted for the defendant, or that the \$1,000 which was paid to the bank was deposited to the credit of the defendant, or for its benefit, or that it received the money, it, in such respect, being contended that Rowan acted for himself, and that the money was deposited to his credit and for his benefit. While everything was done in the name of R. A. Rowan, except the making of the deed which was in the defendant's name, still there is sufficient evidence to justify findings that Rowan acted for the defendant, and that it received the money deposited in the bank. At any rate, the defendant, by making and forwarding the deed to the bank, ratified the transaction to convey whatever west side State street property was owned by it, upon payments being made as specified in the tele-

grams. The serious question is: What contract in such respect was made? As has been seen, we, on the former trial, held that neither Rowan nor the defendant authorized the bank to make a contract to convey 55x165 feet by warranty, or to make any agreement with respect to the terms of the option, or that either ratified the writing which the bank gave in such particular. We also held that the telegrams which passed between Thomas E. Rowan and R. A. Rowan evidenced the terms of the option. Whether right or wrong, our holding as to that is the law in the case and was binding on a retrial on the same evidence. The evidence as to the bank's authority to give the writing, or as to the defendant's ratification thereof, is the same on this as on the other trial. And so was it regarded by the trial court, and for that reason were all questions as to such authority and ratification withheld from the jury. The writing which the bank gave can therefore not be looked to for the terms of the option. For that we must look elsewhere, primarily to the telegrams. In them we have the offer, acceptance, and terms of the option. Everything therein expressed is sufficiently definite and certain, except the description of the property. The description stated in the telegrams is, "property west side State street." That, of course, is ambiguous. It was competent to aid the ambiguity by extrinsic evidence, which the parties were permitted to do. The further question is: Was the ambiguity sufficiently aided to ascertain the intention of the parties as expressed by them in the contract? It is clearly enough shown just where the lot is, and that the defendant owned but one lot on the west side of State street. By extrinsic evidence it also is made to appear that the plat in the recorder's office showed the lot to be 55x165 feet. It, however, is just as clearly made to appear by the abstract books and records of deeds that the title which the defendant had by warranty deed was only to 53½ feet and 1½ feet by quitclaim. It also is made to appear that on the 1½ feet stood a wall of an old two-story house adversely possessed and held by another. To aid the ambiguity, "property west side State street," we do not think the plat in the recorder's office was alone conclusive as to what was intended by the parties. That, of course, was some evidence of their intention, and some evidence as to what they meant by the language, "property west side State street." But the abstract book and the records of deeds also were evidence for the same purpose. It is not shown that the plaintiff, before he paid the \$1,000, saw the plat in the recorder's office, or the abstract books or records of deeds, or even examined the property to ascertain its frontage, or that he saw Kelsey and Gillespie for information as was stated in one of the telegrams he could do for "exact information." He did see a

"regular real estate man's plat" which showed the property to be 55x165 feet, just as indicated by the plat in the recorder's office. But it is not made to appear that he even saw that before he paid the \$1,000. So far as disclosed by the record it is not made to appear just what information as to the exact number of feet in the lot the plaintiff had prior to, or at the time of, the payment of the \$1,000, except as recited in the writing given by the bank that the lot was 55x165 feet, and that a warranty deed was to be given for that much ground. Nor is it made to appear from what source the bank got information as to the number of feet of ground to be conveyed or what induced it to give a receipt calling for 55 feet. Certain it is the telegram pointed to by it in its receipt as authority to accept the money, gave it no such authority, and, indeed, gave it no authority to make or specify any of the terms of the option to purchase. And we think the bank, by the recital of the telegram in *hac verba*, disclosed just what authority it had, that of a mere depository. After the payment of the \$1,000, and when the abstract of title was examined by plaintiff's counsel, it was discovered that the defendant had title by warranty to only 53½ feet and a quitclaim to 1½ feet. Then it was that he and his counsel visited the premises and found the wall of the house on the 1½ feet. There, however, is evidence to justify a finding that the plaintiff believed and understood that the defendant was to convey 55 feet by warranty deed. That is supported by the bank's receipt which, while not competent, because unauthorized, to show the terms of the option, nevertheless, as it was seen and relied on by the plaintiff when the \$1,000 was paid, was competent with other matters to show how he regarded the ambiguity and understood the contract as to the number of feet which, by its terms, was to be conveyed by warranty. But since it is not made to appear that the defendant or Rowan, its president, had, prior to plaintiff's refusal of the defendant's tender, knowledge of the terms of the bank's receipt calling for a conveyance of 55 feet by warranty, the receipt was not evidence to show either the terms of the contract or in what sense the defendant understood them with respect to the ambiguity. We also think there is other evidence to justify a finding that the plaintiff, by the ambiguity, believed and understood that 55 feet of ground was to be conveyed by warranty. On the other hand, there is evidence to show, that, had he, before he paid the \$1,000, inspected the records to ascertain what "property west side State street," the defendant had, the exact number of feet which it owned and was capable of conveying by warranty could have been ascertained, and thus he could have known just what the defendant meant by the phrase, "property west side State street." Thus, when the extrinsic evidence is looked to, the meaning of the

ambiguity, "property west side State street," is about as doubtful as it was before.

[5-8] Upon the record we deduce these propositions: Since the writing given by the bank was neither authorized nor ratified, there is no sufficient evidence to justify a finding that the defendant had agreed to convey 55 feet by warranty, or that it, by the ambiguous phrase, meant, or intended, to convey any other or different property than was owned and tendered by it. Hence the court erred in submitting the case to the jury on the theory that the defendant had agreed to convey 55 feet by warranty and in binding the jury as was done, that to render a verdict for the plaintiff the jury was required to find that the defendant had agreed to convey 55 feet by warranty. As to the plaintiff's understanding of the ambiguity, and in what sense he regarded the contract, there are two views: One is, that he understood and regarded it in the sense that the defendant understood it and as tendering by its conveyance, whatever property was owned by it on the west side of State street. If so, then the minds of the parties met; then did the defendant tender a deed in accordance with the agreement; and then was there no breach and no obligation to return the \$1,000. The other view is, that the plaintiff understood the ambiguity to mean a conveyance by warranty of 55 feet. If so, then the minds of the parties did not meet; then was there no contract; and then was the plaintiff entitled to a return of the \$1,000 paid by him, not on the theory of any breach of contract, but of money had and received. And for that reason was the defendant not entitled to a direction of a verdict. On such view—the view that the minds of the parties had not met as to what was agreed to be sold and conveyed, and, therefore, if the jury so found the facts, the plaintiff was entitled to a return of the \$1,000—the plaintiff asked to go to the jury; and, as appears by his requests, that was the only view on which he asked a submission of the case. The court refused the requests or to submit the case on such theory; but, as has been seen, submitted it on the theory alone of whether the parties, independently of the recitals in the bank's receipt, and especially as evidenced by the telegrams, had entered into an agreement to convey 55 feet by warranty, or only 53½ feet by warranty and 1½ feet by quitclaim. Notwithstanding there are no cross-assignments, and no request or motion in the court below on behalf of the plaintiff to direct a verdict in his favor, he, nevertheless, in defense of the verdict and judgment, urges an affirmance, on the theory embodied in his refused requests. Since this is a law case in which our power to review—except jurisdictional matters—is restricted to assignments of error, and where we may not, as in equity, look into the evidence to determine the correctness of the judgment, and as there was

no motion nor request to direct a verdict in plaintiff's favor, nor even any assignment presenting the rulings refusing his request, our power to affirm the judgment on the theory of money had and received is doubtful, even though on a review of the evidence it should appear that such a direction, had it been asked, would have been justified. But looking into the record as we have, we, as already indicated, are of the opinion that the evidence is not so conclusive as to have entitled the plaintiff to such a direction had such a request been asked or motion made. So too, apparently, was the case regarded by the plaintiff himself, and hence asked for no such direction as matter of law, but for a submission as matter of fact. Thus is it apparent that to now affirm the judgment on the theory urged would be to infringe upon the right to trial by jury and to uphold the judgment upon a wholly different theory from that on which the case was submitted. The judgment, therefore, must be reversed, and the case again remanded for a new trial.

[9] There is another point presented. The plaintiff, over the defendant's objection, was permitted to testify to a conversation he had in California with R. A. Rowan nearly a year after the commencement of the action, and after a trial of the cause resulting in a verdict in the defendant's favor. The plaintiff, in such respect, testified that in November, 1908, while visiting in California, he entered Rowan's office, and, on being presented to him, Rowan said: "You are the fellow who is suing me," and after inviting him to his room asked what he could do for him. The plaintiff replied: "I just happened to be passing, and looked up here and saw your windows, and seeing that I had a lawsuit with you I thought I would come up and discuss it man to man. I thought possibly I could show you I was right or wrong, and we might settle this between ourselves." Rowan, after calling for the correspondence in his office, and looking over it, said: "Tyng, I don't know as I want to discuss this thing with you. The jury says it is mine, and I guess it is mine. Come on, let's go out and see the town." As they were leaving, Rowan said: "Tyng, I will flip a penny with you to see who takes the \$1,000." Tyng said: "Rowan, I am a pretty good gambler, but I never yet flipped a penny for a thousand dollars." Rowan thereupon said: "That \$1,000 is mine. If you had called the bluff, I probably would have backed down." Plaintiff testified that thereupon they left, and that he was shown the town by Rowan, and that "we were two pretty good friends; that is all there was about it." Then the plaintiff was asked what, if anything, in that

conversation, was said as to whether "your lawsuit lay against" the defendant or Rowan, and over further objections was permitted to answer that "nothing was said."

This testimony was permitted on the theory, putting it in the language of plaintiff's counsel, that "any observations of the president of this company upon the matters in issue between the plaintiff and the defendant are competent testimony whether it be admissions against interest or what it may be," and of an implied admission to dispute the defendant's claim, that if any one was liable to the plaintiff, the liability was Rowan's and not the defendant's. It is quite clear no authority was shown on behalf of Rowan to then make admissions against the defendant as to past events. No such authority can be implied from the fact that he was an agent or officer of the defendant. 3 Clark and Marshall, Private Corporations, § 727; Meyers v. Railroad, 36 Utah, 307, 104 Pac. 736, 21 Ann. Cas. 1229; Idaho v. Insurance Company, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586. Here it also is urged that the evidence was material as bearing on "the question of a demand of the money and as showing the reason why the same was withheld by the defendant." That but involves the same principle, binding the principal by the admission of an assumed agent, not made in the course of a transaction or in the course of any business then being conducted for and on behalf of the principal, but wholly as to past events, without even a showing that any agency at all then existed between the defendant and Rowan. It further is argued that the testimony was harmless. Because it so slightly tended to prove what was claimed for it, it does not appear to be very harmful. Still, the testimony, in some slight degree, affords a basis of just such arguments as are made concerning it, to show the defendant's "observations on the matters in issue," and showing "a demand of the money and the reason why it was withheld by the defendant." To that extent it may have done harm; at least it is hard to say it did no harm. It involved not only matters of incompetency, but also of irrelevancy; an apparent fairness on the part of the plaintiff to adjust his controversy out of court, "man to man," and the defendant's willingness to hazard its claim or defense on a "flip of a penny." The testimony probably was not so harmful as to alone require a reversal of the judgment.

But for the reasons heretofore given, together with this, the judgment is reversed and the case remanded for a new trial. Costs to appellant.

FRICK and McCARTY, JJ., concur.

(47 Utah, 378)

RICH COUNTY v. BAILEY et al., State Board of Equalization. (No. 2839.)

(Supreme Court of Utah. Jan. 12, 1916.)

1. TAXATION §299 — APPORTIONMENT BY STATE BOARD OF EQUALIZATION—CORRECTION.

Comp. Laws 1907, § 2561, as amended by Laws 1909, c. 63, provides, relative to the apportionment of the property and franchises of railroad and other companies operating in more than one county for purposes of taxation, that the state board of equalization shall before the fourth Monday in June transmit to the county auditor of each county a statement showing the property assessed and its assessed value, as fixed and apportioned to such county. Section 2562 provides that on the second Monday in August the board of county commissioners of each county must enter an order stating and declaring the property assessed by the state board, and that such board shall apportion the assessed valuation of the property and franchises of railroad companies so apportioned to the county to the several city, town, or other lesser taxing districts in the county. Section 2588, as amended by Laws 1909, c. 63, requires the state board, before the last Monday in July, to determine the rate of state tax, and section 2593, as amended by Laws 1915, c. 111, requires the board of county commissioners of each county to fix the rate of county taxes between the last Monday in July and the second Monday in August. *Held* that, where the state board by mistake apportioned to a county railroad property which it afterwards became satisfied was located in and should have been apportioned to a different county, it had jurisdiction, at any time before the second Monday in August, to correct the error and make the apportionment to the proper county.¹

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 472; Dec. Dig. §299.]

2. TAXATION §299 — APPORTIONMENT BY STATE BOARD OF EQUALIZATION—REVIEW BY CERTIORARI.

Where, owing to the topography of the country and the somewhat uncertain legislative description of the boundary line between R. and S. counties, the precise location of such line was doubtful, its location was a question of fact, and, where the state board of equalization acted in good faith and in accordance with its best judgment in determining where the boundary line was located and in apportioning railroad property in S. county for taxation which it was claimed was situated in R. county, it did not exceed its jurisdiction so as to make its acts subject to a writ of certiorari, even though it was afterwards determined by a higher authority that the property was in R. county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 472; Dec. Dig. §299.]

3. TAXATION §299 — APPORTIONMENT BY STATE BOARD OF EQUALIZATION—CONCLUSIVENESS.

The state board of equalization's determination, in apportioning railroad property, as to the location of the boundary between adjoining counties, is not conclusive with regard to any succeeding fiscal or taxing year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 472; Dec. Dig. §299.]

4. TAXATION §299 — APPORTIONMENT BY STATE BOARD OF EQUALIZATION—CONCLUSIVENESS.

The state board of equalization's determination, in apportioning railroad property for taxation, as to the location of the boundary line between adjoining counties must at some time become conclusive for the current year, and that time arrives when all of the apportionments, including those to lesser taxing units, have been made and the taxes have been levied for the year.²

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 472; Dec. Dig. §299.]

5. TAXATION §299 — APPORTIONMENT BY STATE BOARD OF EQUALIZATION—REVIEW BY CERTIORARI.

Where an application for a writ of certiorari to review the action of the state board of equalization in apportioning to S. county for taxation railroad property claimed to be located in R. county was not applied for until after the second Monday in August, the date on which apportionments were required to be made by the county commissioners of the several counties of the state to the lesser taxing units, and the board did not clearly exceed its powers or jurisdiction, a peremptory writ would not be granted, in view of the disturbance of apportionments and tax levies in S. county and the mischievous consequences which would result.³

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 472; Dec. Dig. §299.]

Certiorari by Rich County against William Bailey and others, constituting the State Board of Equalization of the State of Utah. Writ quashed, and application dismissed.

Howat, Macmillan & Nebeker, of Salt Lake City, for plaintiff. P. H. Neeley, of Coalville, and A. R. Barnes, Atty. Gen., for defendants.

FRICK, J. On the 11th day of August, 1915, one W. T. Rex, as chairman of the board of county commissioners of Rich county, filed an application in this court in behalf of said county praying for a writ of certiorari. In the application he prayed that William Bailey, John Watson, Harden Benion, and Amos G. Gabbot, constituting the state board of equalization of Utah, hereinafter called defendants, be required by this court to show cause why said defendants should not annul certain acts or proceedings relating to the apportionment of certain railroad property, which proceedings, it was alleged, are illegal. In said application, after stating the necessary matters of inducement, it was, in substance, alleged that the Union Pacific Railroad Company, hereinafter called company, owned and operated a certain line of railroad through certain counties of this state, and that a portion of such railroad is in Rich county and is subject to taxation therein; that on the 16th day of February, 1915, said company filed with said defend-

¹ Juab County v. Bailey, 44 Utah, 377, 140 Pac. 764.

² Juab County v. Bailey, 44 Utah, 377, 140 Pac. 764; Crosby v. Probate Court, 3 Utah, 53, 5 Pac. 552.

ants a statement as required by law showing the number of miles of main line and the length of side tracks it owned in said Rich county; that thereafter said defendants duly assessed the whole line of railroad and side tracks in Utah, and on the 15th day of June, 1915, as required by law, duly assessed that portion of said railroad which is within said Rich county, together with other property connected therewith, and thereafter apportioned said property for taxation to said county; that thereafter, and prior to the fourth Monday of June, 1915, as required by our statutes, the said defendants transmitted to the auditor of said Rich county a statement showing the assessment they had made of said line of railroad within said county, and that such assessment amounted to the sum of \$113,019, and in said statement it was also made to appear that the defendants had apportioned the amount of said assessment to said Rich county for taxation; that thereafter, to wit, on the 29th day of July, 1915, said defendants, without authority, and in excess of their jurisdiction, rescinded their said order and action by which they had apportioned said sum of \$113,019 to said Rich county, and apportioned the same to Summit county; that the acts of said defendants in rescinding said apportionment made to Rich county and in reapportioning the same to Summit county were without authority, and that the plaintiff thereby is deprived of the tax which is levied upon said railroad and other property within said county, and that it has "no plain, speedy, or adequate remedy at law." A writ of certiorari was duly issued by this court requiring said defendants to show cause why the acts and proceedings complained of should not be annulled. The defendants, at the time fixed in the writ, appeared through the Attorney General and demurred to the application. The parties were heard on the demurrer, and at the conclusion of the hearing, without passing upon the same, we required the defendants to certify up the record of the proceedings which are complained of in said application. The defendants accordingly certified up the whole proceedings which are now before us.

From the return made by the defendants it appears that the portion of the railroad in question here had during all of the past years been regarded as lying within Summit county, and not as being in Rich county; that said railroad line had always been assessed in Summit county and apportioned for taxation to said county; that for the year 1915 the tax officer of said railroad company filed the tax statement required by our statute with the defendants; that in said statement said officer returned 4.98 miles of the main line of railroad and .82 of a mile of side track for taxation in Rich county, and that the attorney for said company demanded that said mileage be assessed in Rich

county; that pursuant to said return and demand the defendants assessed the number of miles aforesaid as being in, and apportioned the same for taxation to, said Rich county; that after said apportionment had been made Summit county, in which said 4.98 miles of main line and said side tracks had always been assessed and apportioned, protested against apportioning the same to said Rich county, and, after investigating the matter, said defendants became convinced that they had erred in making said apportionment to said Rich county, and on the 29th day of July, 1915, rescinded their action by which said mileage was apportioned to said Rich county, and apportioned the same for taxation to Summit county, to which county the same had always been apportioned, as before stated.

[1] Counsel for plaintiff vigorously insist that, inasmuch as it is provided by Comp. Laws 1907, § 2561, as amended by chapter 63, Laws Utah 1909, the defendants "shall before the fourth Monday of June" in each year make and transmit the apportionment of railroad property to the respective counties in which it is located and is assessed, they exceeded their power or jurisdiction in changing the apportionment from Rich to Summit county as before stated. It is further contended that such is the effect of our holding in the case of Juab County v. Bailey, 44 Utah, 377, 140 Pac. 764. In that case we had before us an application by Juab county for a writ of mandate, which application was filed on the 1st day of November, 1913, and in which we were asked to require the defendants to reconvene as a state board of equalization and to require them to hear evidence upon and determine the question whether the net proceeds of a certain mine should or should not be apportioned to said Juab county which had theretofore been apportioned to Utah county in the preceding June of that year. The gist of that decision is correctly reflected in the headnote in the following words:

"Held that, where a mining company incorrectly reported to the state board of equalization the gross yield of certain mines as located in U. county, when they were largely located in plaintiff county, and under such report the assessed valuation was apportioned to U. county, plaintiff, after such apportionment and the rate of taxation had been fixed in accordance therewith, and all levies had been completed, could not maintain mandamus to compel the state board of equalization to grant a hearing and reapportion the assessed value of such mining property to plaintiff county."

It is quite true that there is language used in the opinion from which it might be inferred that after the defendants had made and transmitted the apportionment to the several counties, which they must do not later than the fourth Monday in June of each year, they had no further jurisdiction or power in the premises, but a careful reading of the opinion shows that what was

actually decided is expressed in the portion of the headnote which we have quoted above. The headnote is squarely based upon what is said in the opinion. In referring to the question to be decided, we, in the course of the opinion, said:

"The question involved and to be decided now, however, is: Can this court by writ of mandate coerce said board to grant a hearing for the purposes aforesaid *after the apportionments have been made, the rate of taxation fixed in accordance with such apportionments, and all levies have been made pursuant thereto?*" (Italics mine.)

It is conclusively shown that we there had in mind the additional apportionments which are required to be made by the county commissioners as will hereinafter appear, the determining of the tax rate and the making of the levies, and not only the single apportionment which must be made on the fourth Monday of June by the defendants. Moreover, in concluding the opinion, we said:

"But the right of the plaintiff to invoke the action of the state board of equalization and the authority of that board to grant the relief prayed for at this time and under the circumstances disclosed in the application are too doubtful to authorize us to coerce that board to grant the hearing requested by the plaintiff."

That application was made in November, when the apportionment there in question had been made on or before the fourth Monday in June. Section 2562, which was then and is now in force, and which we had in mind then, provides:

"On the second Monday in August the board of county commissioners of each county must take and cause to be entered in the proper record an order stating and declaring the property assessed by the state board of equalization apportioned to such county; and the said board of county commissioners, acting as a board of equalization for said county, shall in like manner apportion the assessed valuation of all the property and franchises of railroad, * * * companies, so apportioned to said county by the state board of equalization, to the several city, town, school, road, or other lesser taxing districts in the county."

In section 2588, as amended by Laws 1909, p. 105, it is provided that the defendants, before the last Monday in July of each year, must determine the rate of state tax which is "to be levied and collected upon the assessed valuation of the property of the state," that is, the property assessed within the state. Section 2593, as amended by Laws 1915, p. 191, § 1, provides:

"The board of county commissioners of each county must, between the last Monday in July and the second Monday in August in each year, fix the rate of county taxes."

On that day all the levies must also be completed.

All of the foregoing provisions were therefore in our minds, although they were not all stated or referred to in the opinion in *Juab County v. Bailey*, supra, and the result in that case was based upon all of them.

We are still of the opinion, and adhere to the ruling, that, after the apportionments have been made and certified to the several

counties, the defendants ought not to be, and cannot be, coerced by mandamus to grant a hearing for the purpose of changing an apportionment regularly and timely made to one county and reapportion the same to another county. Within that statement, however, is not included the further proposition that in case the defendants had arbitrarily, capriciously, or wrongfully made an apportionment to a county which clearly was not entitled thereto, or, if they, by mistake, had apportioned property to one county which clearly and manifestly should have been apportioned to another, they could not be compelled to correct the wrong in the first instance, or could not on their own motion or at the instance of others correct the error in the second, provided the application to correct the wrong was made so that it could be heard and determined before the second Monday in August, and the error was corrected before that time, which is the date on which all the apportionments must be completed to all of the lesser taxing units of the several counties and at which time the rate of taxation must be fixed and all the levies made. In *Juab County v. Bailey*, supra, the county had delayed making its application until all of the apportionments had been made to the lesser taxing units of the several counties and after the rate of taxation had been determined and the levies had been made, although it could have made its application at any time after the second Monday in February and before the fourth Monday in June. Then, again, its claim was one that was, to say the least, doubtful. To our minds there is a substantial difference between such a case and one where it is clear that the defendants have acted arbitrarily or capriciously, or where they were mistaken in making an apportionment.

[2] Where there is doubt with regard to whether a certain assessment should be apportioned to one county or to another, and the question is one of fact, and the defendants have passed upon the facts, then neither this nor any other court can control their action. If, as appears from the record before us, the precise point where the boundary line between Rich and Summit counties is located is doubtful, and the same must be established by measurements or surveys, then the question of where the boundary line should be located is one of fact, and, if the defendants have acted in good faith and in accordance with their best judgment in determining the boundary line, they have neither exceeded their jurisdiction nor power so as to make their acts subject to the writ of certiorari; nor can they be compelled to change their action by writ of mandate. The record discloses that, owing to the topography of the country and the somewhat uncertain legislative description of the boundary line between Rich and Summit counties, the precise point where it should be fixed is in doubt. Since it is the duty of the defendants to assess all of the railroad lines, side tracks, and other railroad

property, and to apportion the same to the counties in which the railroad lines and side tracks are located, it is their duty, in case of doubt, to determine in what county a particular portion of the tracks is located, and their judgment in that regard, if honestly and conscientiously exercised, must prevail until the boundary line is determined and fixed upon the ground by some authority higher than theirs. There is—there can be—no escape from that conclusion. In view of all the facts and circumstances and the evidence that was before them, as disclosed from their return, the defendants were justified in believing that they had erred in making the apportionment to Rich county, and, in view that the error was corrected before the final apportionments had been made by the county commissioners and before the tax levies had been determined upon and made, we think the defendants had full power or jurisdiction in the premises.

[3-5] If it should hereafter be determined by a higher authority that the railroad line in question is, in fact, in Rich county, and not in Summit county, such determination, under the circumstances, would not militate against the defendants' jurisdiction, but would only establish the fact that they were in error in determining the county line. Under our statutes certiorari cannot be resorted to for the purpose of correcting mere errors unless the errors occur through acts in excess of jurisdiction. So long as the county line between the two counties remains in doubt, the defendants must determine where such boundary is as best they can, which, it seems, they did. Of course, their determination for one fiscal or taxing year is not conclusive with regard to any other succeeding year. For the reasons pointed out in *Juab County v. Bailey*, supra, the boundary line must, as a matter of necessity, at some time become conclusive for the instant year, and that time, under our statute, arrived when all of the apportionments, including those to lesser taxing units, have been made, and the taxes have been levied for the year. An attempt to disturb the apportionments after that time might result in much mischief. Moreover, when that time has arrived there is no longer any authority given by the statute to make further changes or corrections. In this case the apportionment which is complained of was made at least ten days before the final apportionments of the county commissioners could have been made, as appears from section 2562, supra. Counsel for plaintiff have cited a number of cases which, they insist, support their contention that the defendants exceeded their jurisdiction in reapportioning the assessment in question to Summit county. After a careful consideration of those cases, however, we do not see how anything therein decided in any way militates against or affects the foregoing conclusions. We are of the opinion, therefore, that the alternative writ heretofore issued should be quashed.

There is, however, another reason why peremptory writ of certiorari should not issue in this case. As we have seen, the application for that writ was not made until the 11th day of August, 1915, or two days after the second Monday of August, the date on which the final apportionments were required to be made by the county commissioners of the several counties of this state to the lesser taxing units. If the writ were sustained, therefore, we would be required to do precisely what we in *Juab County v. Bailey*, supra, held ought not to be done, namely, disturb all the apportionments and tax levies for the year 1915 in Summit county. In 6 Cyc. 747, the law upon this subject is stated to be that the writ should not be granted "where, should the writ be granted, and the proceedings be quashed or reversed, mischievous consequences would ensue and the parties or third persons could not be placed in statu quo." It is further said (page 748):

"Where great public detriment or inconvenience would or might have resulted from interfering with the proceedings of public bodies which exercise rights in which the people at large are concerned, and no substantial injury would result from its refusal, the writ has been denied, and its allowance in such cases is discretionary."

The foregoing text is sustained by the great weight of authority. *Crosby v. Probate Court*, 3 Utah, 53, 5 Pac. 552; *Hager v. Supervisors*, etc., 47 Cal. 228; *Keys v. Marin County*, 42 Cal. 255; *Rutland v. County Com'rs*, 20 Pick. (37 Mass.) 79; *People v. Mayor*, etc., 2 Hill (N. Y.) 12; *Woodworth v. Gibbs*, 61 Iowa, 398, 16 N. W. 287; *Meads v. Belt Copper Mine*, 125 Mich. 456, 84 N. W. 615; *Cavanagh v. Bayonne*, 63 N. J. Law, 179, 43 Atl. 442. We do not mean to be understood as holding that, where it is clearly made to appear that an inferior tribunal has exceeded its powers or jurisdiction, the writ should be granted or withheld at the discretion of the court, but what we mean, and now hold, is that, where, as is the case here, the proceedings complained of are not clearly beyond the jurisdiction or power of the tribunal or body who made them, and where, as here, to set aside the proceedings and to annul them would cause mischievous consequences, in that it would or might seriously affect the revenues of Summit county, the writ should be withheld, and especially so since the application was not made until the time within which all the apportionments to the lesser taxing units and for the levying of all the taxes had fully elapsed.

It is therefore ordered that the writ heretofore issued be, and the same is, quashed, and the application is dismissed at plaintiff's costs.

McCARTY, J., concurs.

STRAUP, C. J. (concurring). It is claimed by the plaintiff that there is about 5.8 miles of railroad owned by the Union Pacific Rail-

road company in Rich county and which ought to have been assessed in that county. The board assessed it as being in Summit county. We, on certiorari, are asked to annul that ruling. I think it was within the province of the board to determine whether the disputed property was within the one or the other county, and that the exercise of the board's discretion in such a matter cannot be controlled, except for an abuse of discretion. On a review of the board's proceedings as returned to us I do not find that the board acted arbitrarily, capriciously, or otherwise abused its discretion, or evaded any positive duty. To the contrary, I think it appears that its ruling was based on evidence and upon an investigation as to whether the property is within the one or the other county. True, on the statement made by the railroad company the board first assessed the property as being in Rich county, but, when its attention was called to the matter, and upon investigation and ascertaining the facts, it rescinded that action and assessed the property as being in Summit county. This, it is said, the board then was without power to do. For the reasons stated by Mr. Justice FRICK, I think the board then had such power, and that it acted within its jurisdiction. Whether it decided the question right or wrong is not the point. It is sufficient that the board acted within its power, and not in abuse of its discretion.

(47 Utah, 394)

THOMAS v. OREGON SHORT LINE R. CO. (No. 2800.)

(Supreme Court of Utah. Jan. 12, 1916.)

1. RAILROADS \S 401—INJURIES TO PERSONS ON TRACKS—ACTIONS—INSTRUCTIONS.

In an action for injuries to a child injured by a railroad engine at a point where the track was used by school children and others generally as a footpath, there was evidence that the injured child was standing with some other children and some section men at the side of the track and started to run across the track directly in front of the engine. The court charged that, if the jury found from the evidence that plaintiff was not on or dangerously near the track, but was standing sufficiently clear thereof and showing no disposition to go upon the track or get dangerously near it, the operators of the train would not be required, in the exercise of reasonable and ordinary care, to anticipate that she would go upon the track, get dangerously near, or attempt to cross it, but would be entitled to proceed upon the assumption that she would remain where she was. *Held*, that this was not erroneous, as it did not tell the jury that the train operators, regardless of the facts and circumstances, had the right to assume that plaintiff would not go dangerously near or attempt to cross the track, but was predicated on assumed facts.¹

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1382-1390; Dec. Dig. \S 401.]

¹ Distinguishing *Jensen v. Railroad Co.*, 44 Utah, 100, 128 Pac. 1185; *Palmer v. Oregon S. L. R. Co.*, 24 Utah, 466, 98 Pac. 639, 16 Ann. Cas. 229; *Kyne v. Southern Pacific Ry. Co.*, 41 Utah, 363, 126 Pac. 311.

2. NEGLIGENCE \S 141—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—CHILDREN.

In an action for injuries to a girl eight years old, it was not error, in charging relative to contributory negligence, to charge that, if she were above the standard of ordinary children of her age in understanding, knowledge, and appreciation of the circumstances, she would be held to the degree of care that persons of her intelligence, knowledge, and experience would ordinarily exercise under such circumstances and in view of such knowledge.²

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 382-399; Dec. Dig. \S 141.]

3. NEGLIGENCE \S 85—CONTRIBUTORY NEGLIGENCE—CHILDREN.

In determining whether a child is guilty of contributory negligence, its age, experience, and intelligence may be considered, and, if it has had a greater experience or familiarity with or better knowledge of instrumentalities and dangers involved, or has greater capacity and intelligence than an ordinary child of its age, this fact may be considered.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 121-128; Dec. Dig. \S 85.]

4. TRIAL \S 252 — INJURIES TO PERSONS ON TRACK—ACTIONS—EVIDENCE.

In an action for injuries to a child eight years old sustained while crossing a railroad track, evidence as to her familiarity with the railroad tracks and yards, the operation of trains and cars, the danger therefrom, and that she was an especially bright child, in connection with her appearance and manner in giving her testimony, *held* to raise a question as to whether she was above the standard of ordinary children of her age in understanding, knowledge, and appreciation of the circumstances, and hence an instruction that, if she was, she would be held to the degree of care that persons of her intelligence, knowledge, and experience would ordinarily exercise under such circumstances and in view of such knowledge, was not inapplicable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 505, 596-612; Dec. Dig. \S 252.]

McCarty, J., dissenting.

Appeal from District Court, Salt Lake County; F. C. Loofbourrow, Judge.

Action by Pearl Thomas, an infant, by William Thomas, guardian ad litem, against the Oregon Short Line Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Thos. Marioneaux and Willard Hanson, both of Salt Lake City, for appellant. Geo. H. Smith, J. V. Lyle, and Paul Williams, all of Salt Lake City, for respondent.

STRAUP, C. J. This is an action to recover damages for personal injuries alleged to have been suffered through the negligence of the defendant. The accident occurred on one of the defendant's tracks in the northern limits of Salt Lake City, several hundred feet south of a public school building and in an inhabited and well-settled portion of the city. A track on the east of the school building ran to a quarry north and east of the building. To the south the track led into another track

² *Christensen v. Railway*, 29 Utah, 192, 80 Pac. 746; *Riley v. Rapid Transit Co.*, 10 Utah, 423, 37 Pac. 681.

running west of the building. The accident occurred a short distance north of the junction of these tracks. There were also a number of tracks west of these. It was averred, and evidence was given to support the averments, that for a long time, with the knowledge and acquiescence of the defendant, the track on which the injury occurred had been traveled and used by school children in going to and from school and by others generally as a footpath. The defendant, on the quarry track, was operating an engine backwards drawing cars from the quarry. The charged negligence is that the defendant failed to give warning of the train's approach by sounding the whistle and ringing the bell, failed to observe a lookout, and operated the engine and cars in violation of an ordinance requiring a constant ringing of bells of locomotives in motion in inhabited portions of the city, and negligently failed to have the engine under proper control and to stop it and avoid the injury. The defendant denied the charged negligence, and averred contributory negligence.

The plaintiff was eight years of age. She had just come from a dismissal of school. At the place of the accident four or five section men were at work. There is evidence to show that the whistle on the engine was sounded and the bell rung at a crossing near the school building, about 300 feet north of the place of the accident, but that the bell was not ringing at the time of the accident and had not been rung nor had the whistle been sounded for a distance of about 300 feet. As the train approached the plaintiff and other children were standing with or near the section men, 6 or 8 feet from the track. A switchman stood on the footboard of the engine and on the foremost part of it as it approached. When the train was but a few feet away, the plaintiff started to run across the track in front of the moving engine to go on the other side of the track and down the railroad yard to play with a little girl companion. The switchman, seeing her, reached for her just as she stumbled and fell forward. She cleared the track, except the toes of one foot, which were run over and so injured as to require amputation. The plaintiff testified:

"I had been to school that day. It was in the afternoon. I was going home from school, and there was a train on the other side of the track. I did not see the one coming. I was going to run down in the yard to play with Sara's little sister. I didn't see the train coming, so I went across the track, and then I slipped. I fell down, and the train ran over my toes. Then Mrs. Nelson came out and carried me in the house, and took off my shoes and stockings."

On cross-examination she testified:

"We started from school as soon as it was out. We went down the track on the right side. We did not walk between the rails. We walked to one side. I saw some men working along the track. I knew one of them. There were three or four other men. I did not know them. I saw a hand car off to one side of the track. I don't know much about tracks. I know there

were a good many tracks there. Some of them were passenger tracks and some of them were freight tracks. The two nearest our house are passenger tracks; then there are the freight tracks; then the spur tracks off from the freight tracks. The men that were working were down towards the end of the spur track. I had passed the cattle-guard when the accident happened. The men working there were just below the cattle guards. I knew that passenger trains passed on these two tracks, and that freight trains passed both ways on the freight line. I also knew that trains ran up on this track that went past the school out into the gravel pit. I have seen trains go back and forth on these and other tracks when I have been going and coming from school. I knew that I had to keep out of the way of a train. I knew that if I got on the track in front of the train that I might get hurt. I knew of the dangers of the tracks. I knew that, if I got on the track in front of the train, it could not be stopped, and that I would get hurt if I stayed there. I knew a train could not be stopped as quick as I could stop walking. I knew that before crossing a track I would have to look out to see whether they were clear or not. I would make it a business to look across a track before crossing. I knew that if I did not look and listen for trains when I started to cross a track that I might get hurt. I have waited for trains to pass before I crossed the track. One can look up the track from Mrs. Nelson's and see a train above the Bonneville School. While I was talking to Henry [one of the workmen] the little Van Leuwen girl was with me. She was up by me. I was off to the side of the track. I did not see any one move away from the track while I was talking to Henry. I did not see them stop work. The men were using picks. I did not see them stop and step back. Up to the time that I started to cross the track I had been standing still. I did not see the train coming, and I did not know that it was coming. I have heard gravel trains come down, and heard the squeaking and screeching of the wheels. Sometimes the trains make a big noise. I did not hear that on that day. I had not seen the train coming. I was eight or nine feet from the track when I started to cross it. I started straight across. I did not decide to run across to get across before the train came. It was after I fell that I knew that the train was coming. The train did not strike me. I stumbled and fell. After I fell I could not get out of the way. It ran over me before I saw it. The bottom of my foot was up. I did not hear any one shout when I started to run. I did not notice that any one grabbed me and pulled me out from under the tender of the train. Mrs. Nelson was the first person who took hold of me. The first I knew of the train was when the wheels ran over."

Other witnesses also testified that as the train approached without warning the plaintiff was standing with other children and the workmen eight or nine feet from the track, and that she started to run across the track in front of the moving engine and stumbled and fell. The switchman on the running board testified:

"I was on the rear footboard, and, as we were backing down, that would be the most forward part of the equipment. I was on the right-hand corner. I was occupying that position from the time we left the gravel pit. I was keeping a lookout ahead, and also from that position I can signal to the engineer. After we came from the gravel pit, we stopped for the Bamberger crossing. We went on over the crossing, then went on slowly down the grade until we came to the Bonneville School, and we whistled for the crossing, then rang the bell, and that was about all that was done until the accident. I saw some section men and some

children standing outside of the track about six or eight feet from the track. The track was about clear, and we came on down the grade. When we were about even with the section men, the little girl started across in front of the engine. She was within two feet of the corner of this footboard. Just as she got about in the center of the track she began to fall and stumble. She fell with her body the other side of the other rail, with one foot on the rail. She cleared the track, except for the one foot. When I saw her I hollered at her just as loud as I could. She paid no attention, but went right ahead. I figured to catch hold of her, but at the time she was in a falling position I could not reach her. I had to hold on with one hand, and make a reach with the other one. As soon as she fell I jumped right off, and took hold with this hand. The engine had gone the length of the tank, probably twenty feet, but I got hold of her before the side rods would strike her. When I got hold of her, I was right under the engineer, but the wheels struck her. * * * The children were in among the section men. They were playing there. I did not observe which way they were looking. The train was going slow. There was no movement of the children or of the men until this girl ran. Nobody acted like he was going across the track. The children were standing right near this pole. * * * As soon as I saw her I thought she would get cut in two. My first thought was to grab her. I don't know what I said when I shouted, but I shouted loud. I did not have time to give any signal, and I did not try. I tried to get hold of her. The speed of the train was five or six miles an hour."

[1] The case was submitted to the jury, who rendered a verdict in favor of the defendant. The plaintiff appeals. She complains of this charge:

"You are instructed that, if you find from the evidence in this case that at the time and place of the accident in question the plaintiff was not on or dangerously near the track, but was standing sufficiently clear thereof and showing no disposition to go upon the track or get dangerously near it, the operators of the train in question would not be required, in the exercise of reasonable and ordinary care, to anticipate that she would go upon the track, get dangerously near, or attempt to cross it, but would be entitled to proceed upon the assumption that she would remain where she was. And, if you find from the evidence that she did approach dangerously near to the track or attempt to cross the same after the train was so close to her that it could not be stopped in the exercise of reasonable and ordinary care, your verdict must be for the defendant, unless you find that some other act or omission of the defendant or its servants alleged in the complaint, operating independently of any negligent act of the plaintiff, was the cause of the accident."

It is urged that it is in conflict with the cases of *Jensen v. Railroad Co.*, 44 Utah, 100, 138 Pac. 1185, and *Palmer v. O. S. L. R. Co.*, 34 Utah, 466, 98 Pac. 689, 16 Ann. Cas. 229, where we held that it generally was a question of fact, and not of law, as to what the servants of a railroad company, in charge of a train, might assume as to the conduct of a deceased or injured person in stepping away from or leaving a track on which the train approached, and that it is in conflict with the general rule (notes *Southern Ry. Co. v. Chatman*, 6 L. R. A. [N. S.] 283) that, when those in charge of a train see a child of tender years upon a track or dangerously near it, they, as matter of law,

may not assume that it will get out of the way. We do not think the charge in conflict with these holdings. In view that the plaintiff was a child of tender years, the charge perhaps would have been better had the court charged that, if a prudent person, in the exercise of ordinary care, situated and surrounded as were the train operators in charge of the train in question, and knowing what they knew of the situation, and seeing what they saw or could have known or seen, would not have anticipated that the plaintiff, under all the circumstances, would go upon or dangerously near the track or attempt to cross it, then the train operators were not negligent in assuming that the child would not do that; but we think the charge substantially conveyed that thought. It is not, as was the request in the *Jensen Case*, a direction, regardless of the facts and circumstances of the case, that those in charge of the train might, as matter of law, assume one thing or another, or that a traveler on or dangerously near a track would leave it. The charge here is predicated on assumed facts. It is: If the jury, from the evidence, found that the plaintiff was not on or dangerously near the track, but was standing sufficiently clear thereof and showing no disposition to go upon the track or to get dangerously near it, then the operators of the train would not be required, in the exercise of ordinary care, to anticipate that she would go upon the track or get dangerously near it or attempt to cross it. We do not see anything wrong with that. The cases cited by the appellant (*Jensen v. Railroad Co.*, supra; *Palmer v. Railroad Co.*, supra; *Kyne v. Southern Pacific Ry. Co.*, 41 Utah, 368, 126 Pac. 311; *Terre Haute, etc., Traction Co. v. Maberry*, 52 Ind. App. 114, 100 N. E. 401; *Cleveland, C. & St. L. Ry. Co. v. Means* [Ind. App.] 104 N. E. 787; *Southern Ry. Co. v. Chatman*, 124 Ga. 1026, 53 S. E. 692, 6 L. R. A. [N. S.] 283, 4 Ann. Cas. 675; 33 Cyc. 802), in our judgment, do not make against this; for the charge, as heretofore observed, is not a direction to the jury that the train operators, regardless of the facts and circumstances of the case, had the right to assume that the plaintiff would not go dangerously near or attempt to cross the track.

[2] On contributory negligence the court gave this:

"In determining whether or not the plaintiff in this case was negligent, you are entitled to, and should, take into consideration her age, development, experience, intelligence, and knowledge and appreciation of the danger incident to being upon or crossing railroad tracks as shown by the evidence; and, if you should find therefrom that she did know and appreciate such danger, she would be held to exercise that degree of care that a person of her knowledge, experience, and understanding would ordinarily exercise under such circumstances. In other words, if she were above the standard of ordinary children of her age in understanding, knowledge, and appreciation of the circumstan-

es, she would be held to the degree of care that persons of her intelligence, knowledge, and experience would ordinarily exercise under such circumstances and in view of such knowledge."

The point made is that the charge ought to have been that the plaintiff was only required to exercise that degree of care and discretion which a child of ordinary experience, intelligence, and knowledge of the same age would be expected to use under the same circumstances; but that the charge erroneously stated that, if the plaintiff was "above the standard of ordinary children of her age in understanding, knowledge, and perception of the circumstances, she would be held to the degree of care that persons of her intelligence, knowledge, and experience would ordinarily exercise under such circumstances and in view of such knowledge." It is urged that this is in conflict with the cases of *Christensen v. Railway*, 29 Utah, 192, 80 Pac. 746; *Riley v. Rapid Transit Co.*, 10 Utah, 423, 37 Pac. 681; *Denver City Tramway Co. v. Nicholas*, 35 Colo. 462, 84 Pac. 813; *Smith v. Pittsburg & W. Ry. Co.* (O. C.) 90 Fed. 783. In each of these cases the question before the court was as to whether the child, as matter of law, was conclusively guilty of contributory negligence. In each it was held that it was not; that the question was for the jury. With that in view the court, in the first case, observed that to hold that the child was guilty of negligence required a holding that:

"It failed to exercise that due care for his own safety while in pursuit of his cow that would reasonably be expected of a boy of his age [and years], * * * intelligence, understanding, and experience, which the record shows was equal to, if not superior to, that of the average boy of his years; for it is well settled that a child is only required to exercise that degree of care and discretion as is reasonably expected from children of his own age. * * * As to whether the boy used that same degree of caution and prudence for his own safety as would be expected of children of his age, experience, and intelligence, under same or similar conditions was, under the circumstances of this case, a question for the jury."

In the second case the court used this language:

"It is a well-established rule that children are not chargeable with the same degree of care in protecting themselves as grown people, and the child in this case was only bound to use such care as a child of his age, experience, and intelligence might reasonably be expected to use for his own protection."

In the third:

"The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case."

In the fourth:

"While it is the duty of children to exercise ordinary care to avoid injury, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances."

We do not think the charge violative of the rule as announced by these cases. In 29 Cyc. 535, it is stated:

"The degree of care required [of children] has been variously stated as the care reasonably to be expected of a child of his age; age and discretion; maturity and capacity; youth and inexperience; mental and physical capacity; age and capacity; age and intelligence or intellectual capacity; age, experience, and intelligence; age, experience, and capacity; capacity and discretion; age, capacity, and intelligence; age, experience, and discretion; age and mental and physical development; age, intelligence, experience, and ability to comprehend danger; age, courage, intelligence, and ordinary prudence. It is said that there is no inflexible rule by which to determine the capacity of children for observing and avoiding danger, but a child is bound to use the reason he possesses and exercise the degree of care and caution of which he is capable."

In the case of *Gegas v. Railroad*, 33 Utah, 156, 93 Pac. 274, 13 L. R. A. (N. S.) 1074, we put the proposition thus:

"The degree of care required of a child must be graduated to its age, capacity, and experience, and must be measured by what might ordinarily be expected from a child of like age, capacity, and experience under similar conditions."

That, among other cases, is supported by the following: *Twist v. Winona & St. Peter Ry. Co.*, 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626; *Merryman v. Chicago, etc., Ry. Co.*, 85 Iowa, 684, 52 N. W. 545; *Cleveland, etc., Ry. Co. v. Miles*, 162 Ind. 646, 70 N. E. 985; *Illinois Central R. Co. v. Wilson*, 63 S. W. 608, 23 Ky. Law Rep. 684; *Klatt v. D. N. C. Foster Lumber Co.*, 97 Wis. 641, 73 N. W. 563; *Kinnare v. C. & N. W. Ry. Co.*, 114 Ill. App. 230; *Houston & T. C. R. Co. v. Bulger*, 35 Tex. Civ. App. 478, 80 S. W. 557.

We think the charge in harmony with those views.

[3,4] In determining whether a child is or is not guilty of contributory negligence, we think it proper to consider its age, experience, and intelligence. If it has had a greater experience or familiarity with, or has better knowledge of, instrumentalities and dangers involved, or has greater capacity and intelligence, than an ordinary child of its age, we see no good reason why such fact should not be considered. But it is claimed that nothing of that kind was made to appear; and for that reason was the charge inapplicable. It was made to appear that the child lived near the tracks and railroad yards; that it frequently traveled them in going to and from school; that it was familiar with the tracks and yards and the operation of trains and cars about them, and knew which were freight and which passenger tracks; and that in attempting to cross or go upon tracks it knew the necessity and duty of looking for approaching cars and appreciated the danger of coming in contact with moving cars. Her father testified that "she was an especially bright child, the teachers said, more than the average for her age." And then the child was before the jury and gave her testimony. From her appearance and manner in which she gave her testimony and recalled and related facts the jury had

an opportunity, to some extent at least, to judge of the child's intelligence and capacity. We think the charge was applicable and properly given. We therefore are of the opinion that the judgment ought to be, and it accordingly is, affirmed, with costs.

FRICK, J., concurs.

MCCARTY, J. (dissenting). While there is a difference in the phraseology of the instruction (No. 15) given in this case and that of the instruction requested in the Jensen Case, 44 Utah, 100, 138 Pac. 1185, yet the two instructions, as I read them, declare the same rule of law.

Instruction No. 15 Given in This Case.

"You are instructed that, if you find from the evidence in this case that at the time and place of the accident in question the plaintiff was not on or dangerously near the track, but was standing sufficiently clear thereof and showing no disposition to go upon the track or get dangerously near it, the operators of the train in question would not be required in the exercise of reasonable and ordinary care to anticipate that she would go upon the track, get dangerously near, or attempt to cross it, but would be entitled to proceed upon the assumption that she would remain where she was. And, if you find from the evidence that she did approach dangerously near to the track or attempt to cross the same after the train was so close to her that it could not be stopped in the exercise of reasonable and ordinary care, your verdict must be for the defendant, unless you find that some other act or omission of the defendant or its servants alleged in the complaint, operating independently of any negligent act of the plaintiff, was the cause of the accident." (Italics mine.)

The doctrine declared in the Jensen Case is, in my judgment, a sound and wholesome one. The instruction (No. 15) given in this case, in view of the peculiar facts and circumstances, was equivalent to a directed verdict for the defendant. The conclusion arrived at in the prevailing opinion on this point, I think, is clearly at variance with, and antagonistic to, the rule announced in the Jensen Case.

I am therefore of the opinion that the

Instruction Requested in the Jensen Case.

"The engineer had a right to assume that Clarence Jensen was in possession of his senses and faculties, and that, as a reasonable person, he would stop out of the way of harm before the engine reached him, and said engineer was under no duty to attempt to stop his train until it was otherwise apparent to him. If you should find from the evidence that Clarence Jensen was walking down between the track operated by the Western Pacific Railroad company and that operated by the defendant, and that suddenly, when the train of the defendant was within six, eight, or ten feet of him, he stopped in front of said train, and that he was there run over and killed by said engine, then you are instructed that the defendant is entitled to a verdict." (Italics mine.)

cause should be reversed, with directions to the lower court to grant a new trial, and hence dissent.

(47 Utah, 407)

UTAH BANKING CO. v. OLER. (No. 2797.) (Supreme Court of Utah. Jan. 12, 1916.)

BILLS AND NOTES \Leftrightarrow 537—MOTION FOR NON-SUIT—GROUNDS—SUFFICIENCY OF EVIDENCE.

In an action by a bank, holder of a note given for the price of a piano, evidence held insufficient to support a nonsuit on the grounds that the payee of the note made false and fraudulent representations that he was the owner of the piano, that he had no authority to take the note in his own name or to sell or indorse it, that the bank purchased with notice of the true owner of the piano and of the note, and that the bank did not have the legal capacity to sue on the note.¹

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1893; Dec. Dig. \Leftrightarrow 537.]

Appeal from District Court, Utah County; A. B. Morgan, Judge.

Action by the Utah Banking Company against James Oler. From a judgment dismissing the action on defendant's motion for nonsuit, plaintiff appeals. Judgment reversed, and cause remanded for new trial.

C. S. Patterson, of Salt Lake City, for appellant. Harvey Cluff, of Provo, for respondent.

STRAUP, C. J. This is an action on a conditional sale note executed and delivered by the defendant to one Giles, and by him sold and indorsed to the plaintiff. The defendant admitted the execution of the note, but averred:

That it was given for the purchase of a piano; that the Baldwin Company, a corporation, and not Giles, was the owner of the piano, and that he "had no right or authority at any time to sell the said piano, except as the agent of the Baldwin Company, or to take in payment therefor any note, contract, or written instrument of any kind except in the name of the Baldwin Company, a corporation, or to enter into any contract for the sale of said piano, except in the name of said company, all of which the plaintiff herein well knew. That the said H. E. Giles, Jr., had no power or authority to sell, indorse, transfer, or otherwise dispose of any note, contract, paper, or instrument in writing for or on behalf of the Baldwin Company, all of which the plaintiff well knew. That in order to retain possession of the said piano, this defendant has been compelled to and has settled in full for the said piano with the Baldwin Company, and the note above mentioned is made without any consideration whatever, and if plaintiff holds said conditional sale note, its possession of the same is unlawful."

At the close of the plaintiff's evidence the court, on the defendant's motion, granted a nonsuit, and dismissed the action. The plaintiff appeals.

The motion for nonsuit is based on the grounds of "false and fraudulent representations of Giles that he was the owner of the

¹ Distinguishing Utah Banking Co. v. Newman, 44 Utah, 194, 133 Pac. 1146.

piano"; that he had no authority to take the note in his own name, or to sell or indorse it; that the plaintiff purchased with notice that the Baldwin Company was the owner of the piano and of the note, and that Giles had no authority to take the note in his own name or to sell it; and that "the plaintiff did not have the legal capacity to sue on the note."

But two witnesses testified in the case, Giles and the assistant cashier of the plaintiff. The former testified that he was a piano salesman and procured, on consignment, pianos from the Baldwin Company; that they were consigned to him at a fixed price, which sum he was required to remit to the Baldwin Company when the pianos consigned to him were sold; that he did not sell on commission, but retained and had the right to retain, the excess of the sale price over the consignment price; that under such an arrangement he sold the piano to the defendant and took the conditional sale note in his own name, and on the same day sold the note and indorsed it to the plaintiff, remitting to the Baldwin Company the price agreed to be paid on consignment, and retaining the remainder received on the note. That, in substance, is all of his testimony. In addition there was shown a written contract between him and the Baldwin Company. In brief, it is that he agreed "to take instruments furnished by" the Baldwin Company "on consignment to be accounted for at an agreed price" and upon conditions that "the instruments and proceeds of sale are to remain" the property of the Baldwin Company and subject to its orders. He further agreed "to send the cash to" the Baldwin Company "for each and every instrument separately as soon as sold," and on demand to deliver and return free of all charges and expenses, including freight charges, all consigned goods remaining unsettled for at the time of the demand, and to render each month a report of all instruments consigned and unsettled for, etc.

The piano was sold and the note given on the 28th of August, 1909. On September 7, 1909, he rendered a report to the Baldwin Company, a "statement of instruments on hand belonging to" the Baldwin Company "held by me on consignment." The statement included an item of the piano "sold to Oler at Pleasant Grove."

The other witness, plaintiff's assistant cashier, testified that he purchased the note for the plaintiff on the day it was given at a discount of about 10 per cent. That is all of his testimony. And that, together with the note itself, was all the evidence in the case. We think it does not support the grounds of the motion. It does not show that Giles was unauthorized to sell the piano or to take a note in his own name, or that he falsely stated that he was the owner of the

piano, or that he misrepresented anything to the defendant, or that the plaintiff purchased the note with notice, or that it did not have legal capacity to sue on the note.

The respondent claims that this case falls within the case of *Utah Banking Company v. Newman*, 44 Utah, 194, 138 Pac. 1146. The two cases are materially dissimilar. In the *Newman Case* the note was taken in the name of the Baldwin Company by its agent authorized to sell pianos for it in its name, and was by that agent without authority, either express or implied, sold and indorsed to another. Because of a want of such authority on behalf of the agent to sell or indorse the note, we held the indorsee did not obtain title. Here the payee of the note and the indorser are the same. The claim made by the respondent is that the Baldwin Company was the owner of the piano, and, while it had conferred authority on Giles, as its agent, to sell pianos, yet it had not given him authority to sell in his own name, or to take a note in his own name, or to make any contract whatever, except in the name of the Baldwin Company. We do not think the record supports the claim, at least not so conclusively as to justify a nonsuit. We therefore think the motion was improperly granted.

The judgment is reversed, and the cause remanded for a new trial. Appellant to recover costs.

FRICK and McCARTY, JJ., concur.

(47 Utah, 411)

WOODWARD v. DALY-WEST MINING CO.
(No. 2757.)

(Supreme Court of Utah. Jan. 12, 1916.)

1. DAMAGES ⇐216—INJURIES TO SERVANTS—INSTRUCTIONS—PLEADING.

A servant suing for personal injuries alleged in his complaint injuries to his back and spine. On his cross-examination he denied claim for injuries to his ribs. Defendant's witness testified to rib fractures as well as to spinal injuries. The court instructed the jury in awarding damages to consider all the injuries received, and refused to exclude consideration of the rib fractures, in spite of defendant's exception. *Held*, that the injuries to the ribs, being probably concurrent with those to the spine, were covered by the pleadings, so that the submission thereof was not error.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 548-555; Dec. Dig. ⇐216.]

2. APPEAL AND ERROR ⇐197—RESERVATION OF GROUNDS OF REVIEW—EVIDENCE—DEFENSES.

The defendant's evidence having disclosed rib fractures and defendant having failed to object to plaintiff's evidence to such injury, defendant could not urge that the pleadings were insufficient to warrant submission to the jury of the issue of damages for the rib fractures.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. ⇐197; *Pleading*, Cent. Dig. §§ 1428-1441.]

3. APPEAL AND ERROR \S 213—SCOPE OF REVIEW—PRESERVATION OF GROUNDS OF REVIEW.

Where defendant merely excepted to the charge given and failed to request withdrawal of the issue of rib fractures from the jury, he could not urge the error, if any, for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1165, 1304–1308; Dec. Dig. \S 213.]

4. APPEAL AND ERROR \S 1066—SCOPE OF REVIEW—HARMLESS ERROR.

Where a servant in his complaint alleged only spinal injuries, but the evidence of both plaintiff and defendant disclosed rib fractures, and defendant failed to request a charge excluding its consideration in awarding damages, but merely excepted to the charge given, which included that issue, and failed to assail the verdict finding its negligence to be the cause of the injuries, the error, if any, in submitting the issue of rib fractures, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. \S 1066.]

Appeal from District Court, Summit County; T. D. Lewis, Judge.

Action by William W. Woodward against the Daly-West Mining Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

King & Nibley and P. T. Farnsworth, Jr., all of Salt Lake City, for appellant. Evans, Evans & Folland, of Salt Lake City, for respondent.

FRICK, J. The plaintiff obtained judgment for damages for personal injuries against the defendant. Defendant appeals.

The plaintiff, in his complaint, after alleging that he was injured through the negligence of the defendant, and after stating the particulars respecting the injuries and how the accident occurred, described his injuries thus:

"That by reason of the premises, the plaintiff received, as he is informed and believes, permanent injuries. That he was rendered temporarily unconscious and was confined to a hospital for a period of about two weeks, during which time he suffered great pain, and that he still continues to so suffer. That he received injuries to his back and spine as a result of which he is disabled and incapacitated for the performance of manual labor, or otherwise engaging in any occupation which requires bodily exertion; all of which injuries the plaintiff is informed and believes to be permanent."

The evidence relating to plaintiff's injuries is substantially as follows: Dr. Le Compte, called on behalf of defendant, said:

"I examined William W. Woodward, shortly after the accident, and found him suffering great pain, a serious bruise on his back, evidence of one, two, or three ribs being fractured, though no examination was made by X-ray. From his condition, as I remember it, I could not determine whether or not the injury was permanent. Owing to the applicant's condition, and swelling, I could not then determine whether there was curvature of the spine produced by the injury. If any curvature of the spine was produced by said injury, I would consider it very unusual if he could thereafter pitch hay, or handle a scraper, or do heavy manual labor."

Dr. Dannenberg, called on behalf of plaintiff, testified that some time after the plaintiff had been injured the witness examined him. As to that examination the doctor said:

"At that time I found that there were three ribs on the right side fractured, also considerable contusion and swelling along the spine and on the side, and he also passed some blood in his urine."

The blood, the doctor said, was "from the kidney." The spine, the doctor testified, "had deviated from the natural curvature. It had deviated considerably, showing considerable—I don't know as you could say depression in the spinal column; it was an abnormal curvature from the natural state." The curvature, the doctor said, seemed to have been caused by a "blow of some kind." The doctor also stated that some of the "ligaments and muscles" in plaintiff's back were "probably torn," and that that condition would "leave more or less permanent injury" to plaintiff's back. The plaintiff, in the course of his testimony, after describing his injuries and the pain suffered by him, also incidentally referred to his fractured ribs. On cross-examination defendant's counsel asked him the following questions, which he answered as indicated:

"Q. By the way, why didn't you say in your complaint in this case anything about three ribs being broken? Didn't you consider that of sufficient importance to mention in the complaint? A. Well, I have had an idea the ribs would get well. Q. That would not affect the proposition that you had three ribs broken. Why didn't you say something about that? A. I didn't think the ribs amounted to anything, to say anything about; I did not think it amounted to enough. Q. You don't claim anything about them? A. No, sir. Q. You don't want any damage for that? A. No, sir."

We remark that all of the foregoing evidence was admitted without objection, and, as we have seen, that part testified to by Dr. Le Compte was produced by the defendant. Upon the question of damages the court instructed the jury as follows:

"If, in view of the evidence and under the instructions of the court, your verdict is in favor of the plaintiff, you will assess his damages, and in doing so you should take into consideration the nature and extent of his injuries, and whether the same are permanent or not, and the physical pain or suffering, if any, growing out of such injuries, and the effect, if any, upon plaintiff's ability to labor and earn compensation therefor, and, so considering such elements, you should assess such damages as will do justice between the parties. You should not be influenced by sympathy, nor by any supposed wealth or lack of wealth of the parties. In case your verdict is for the defendant, you will so state, no cause of action."

Counsel for defendant excepted to the foregoing instruction "for the reason that the court fails to exclude any damages that may have been suffered by reason of broken or fractured ribs." Counsel further excepted "to that portion of the instruction wherein the jury are told that they may consider the

nature and extent of his injuries and the effect thereof and give damages therefor without excluding such damages by reason of broken or fractured ribs."

Upon the foregoing record, defendant's counsel state the question presented for review in the following words:

"The sole question to be decided on this appeal is whether or not instruction No. 18, as given to the jury by the trial court, is a correct statement under the pleadings and record in this cause of the rule of damages applicable and of the elements of damage which the jury should properly consider in assessing the amount due respondent upon a finding in his favor. In view of this situation, we will merely call attention to such evidence as appears to have a bearing on this matter."

[1,2] It is strenuously insisted that we should reverse the judgment for the reason that the court submitted matters to the jury outside of the issues presented by the pleadings. It is true that there is no express statement in the complaint concerning fractured ribs. The injuries are, however, described as being to the back and spine. Now, in the absence of any objections either to the complaint or to the evidence, the question is whether alleged injuries to the back and spine are so foreign to injuries to the ribs as to take the injuries to the latter clearly outside of the injuries described in the complaint. That the ribs are attached to portions of the spine, and that they thus are also a part of the back, are matters of general and common knowledge. It is true that one may sustain an injury to the back without also sustaining an injury to the ribs. But it is more likely that any severe injury to the back, such as the plaintiff sustained by having a mine car fall upon his back, would, or at least might, also injure or affect some part of the ribs. That the defendant was negligent, and that it caused the injuries suffered by the plaintiff, whatever they are, is, for the purpose of this decision, conceded. Indeed, the defendant itself proved that the plaintiff also suffered injuries to three of his ribs. When the plaintiff testified with regard to the injury to the ribs, the defendant offered no objection, and hence the court had a right to assume that its counsel considered the allegations of the complaint sufficiently broad to admit plaintiff's evidence upon that subject. That view was strengthened when the defendant itself offered evidence concerning the fractured ribs. Of course, defendant's counsel now

contend that the evidence was offered for the purpose of showing that the injury was not to the back; but the contention is unavailing here, since it offered evidence showing that plaintiff had in fact sustained an injury to his ribs, his back, and his spine, the extent of which its doctor was unable to state.

[3] Defendant's counsel, however, contend that the evidence is conclusive that the plaintiff had waived all damages which he might have sustained by reason of the fractured ribs, and therefore the court should have told the jury to exclude the injury to his ribs from their consideration. That, in view of the record, was a matter that the defendant could not properly raise by merely excepting to the instruction given by the court. Upon the whole record as made, the instruction is not faulty. If therefore the defendant desired to have any portion of plaintiff's injuries withdrawn from the jury, it was its duty to present a proper request for an instruction covering that subject, and, if the court then had refused such request, the defendant could have presented its exception together with the request to this court for review. As the record now stands, therefore, even if it were conceded that the charge as given was erroneous, yet the error is not properly before us.

[4] The judgment should, however, be affirmed for another reason. As we have seen, the defendant, in not assailing the verdict of the jury, in effect concedes its own negligence, and that such negligence was the proximate cause of the injuries complained of, including those to the ribs. Moreover, it, by its own evidence, showed just what those injuries were. If therefore it were conceded that some of those injuries were not clearly or even sufficiently described in the complaint, and that the trial court for that reason should have sustained proper objections, if made upon that ground, yet, in view that no objections were interposed and the defendant itself had produced evidence upon that subject, it cannot now be heard to say that any of its substantial rights were invaded by what occurred at the trial. To reverse judgments under such circumstances would make a mere travesty of justice.

The judgment is therefore affirmed, with costs to plaintiff.

STRAUP, C. J., and McCARTY, J., concur.

(89 Wash. 495)

**YOUNG MEN'S CHRISTIAN ASS'N OF
SEATTLE v. PARISH, County As-
sessor. (No. 12335.)**

(Supreme Court of Washington. Feb. 5, 1916.)

**STATUTES §95—STATUTORY EXEMPTION—
CONSTITUTIONALITY—"SPECIAL LAW"—
"GENERAL LAW."**

Rem. & Bal. Code, § 9098, as amended by Sess. Laws 1913, p. 351, exempting from taxation all property of Young Men's Christian Associations which shall be wholly used or to the extent solely used for the religious purposes of the association, is violative of Const. art. 7, § 2, providing that such property as the Legislature may by general laws provide shall be exempt from taxation, since the statute is a "special law," one relating to particular persons or things, and not a "general law," one applying to all persons or things of a class, because it excludes from its operation the property of other organizations which may be devoted to religious purposes (citing Words and Phrases, Second Series, Special Law; see, also, Words and Phrases, First and Second Series, General Law).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 105, 108; Dec. Dig. §95.]

En Banc. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Young Men's Christian Association of Seattle against Albert E. Parish, as County Assessor of King County. From a judgment dismissing the action, plaintiff appeals. Affirmed.

Geo. H. Walker and Fletcher Lewis, both of Seattle, for appellant. John F. Murphy and Samuel Morrison, both of Seattle, for respondent.

MAIN, J. This is an action brought for the purpose of restraining the county assessor of King county from listing for taxation certain real property. The trial resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals.

The appellant, at the time the action was instituted, was the owner of lots 2 and 3 and the east half of lots 6 and 7, in block 21, of Boren's addition to the city of Seattle. This property fronted on the west side of Fourth avenue in the city of Seattle, and extended from Madison street to Marion street. The appellant had for some years owned lots 2 and 3, and had erected thereon a six-story brick and concrete building, which is known as the Y. M. C. A. building. After this building had been erected, the association acquired two adjacent half lots on the south, facing Fourth avenue, and extending from the main building to Marion street. This latter property was, when acquired, and still is, improved by the east half of the former Stander Hotel, a six-story brick and stone structure. Since its purchase by the association, it has been connected with the main building as an annex thereof, and is permanently partitioned off from the unacquired part of the Stander hotel. The entire property thus owned by the association is used for the various activities and depart-

ments of the Young Men's Christian Association.

The objects of the association, as set forth in its articles of incorporation, are:

"The improvement of the spiritual, mental, social, and physical condition of the young men of Seattle by the support and maintenance of lectures, gospel services, libraries, reading rooms, gymnasiums, recreation grounds, etc. * * *

The county assessor of King county was asserting the right to list this property for purposes of taxation upon the tax rolls for the year 1913, when the present action was brought for the purpose of restraining such listing.

The controlling question in the case is whether the statute under which it is claimed the property is exempt from taxation is constitutional or unconstitutional.

The statute, Rem. & Bal. Code, § 9098, as amended by chapter 117 of the Session Laws of 1913, relating to taxation, after exempting certain other specified property, provides:

"Also, all property of Young Men's Christian Associations * * * which shall be wholly used, or to the extent solely used, for the religious purposes of such association."

It will be noted that this is an exemption to the association by name, with a limitation that only such of its property as is "wholly used," or to the extent "solely used" for the religious purposes of such association, shall be exempt.

Section 2 of article 7 of the state Constitution, after requiring that the Legislature shall provide by law a uniform and equal rate of assessment and taxation upon all property in the state, and prescribing such regulations by general law as shall secure a just valuation for the taxation of all the property, provides:

"That the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the Legislature may by general laws provide, shall be exempt from taxation."

Under this section of the Constitution, all property within the state is subject to taxation, unless it falls within one of the classes mentioned in the Constitution and is exempted therefrom by a general law. The question then arises: Is the statute by which the property of Young Men's Christian Associations is claimed to be exempt a general or a special law. If it is a special law, obviously the attempted exemption is invalid under the constitutional provision quoted. If it is a general law, then it conforms to the constitutional requirement.

The authorities are in substantial harmony upon the rule by which a law is to be tested to determine whether it is general or special. A "special law" is one which relates to particular persons or things, while a "general law" is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class con-

sists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions. 4 Words and Phrases (2d Series) p. 635; *Budd v. Hancock*, 66 N. J. Law, 133, 48 Atl. 1023; *State ex rel. Attorney General v. Miller*, 100 Mo. 439, 13 S. W. 677; *Sutherland, Statutory Construction*, § 121.

In *Words and Phrases*, *supra*, the rule is stated:

"A special law is one that relates to particular, as distinguished from a general law, which applies to all persons or things of a class."

The rule is stated in *Budd v. Hancock*, *supra*, as follows:

"A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places, or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained, the law is general. Within this distinction between a special and a general law, the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply. If the only limitation contained in a law is a legitimate classification of its objects, it is a general law. Hence, if the object of a law have characteristics so distinct as reasonably to form, for the purpose legislated upon, a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation."

Many other authorities could be cited supporting the rule; but as the controversy upon this phase of the case is over the application of the law, rather than its statement, further citation in support of the rule seems unnecessary.

In applying the rule, this court in *Town of Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926, held that an act of the Legislature which attempted to confer upon certain municipal corporations which had previously undertaken to incorporate under an invalid law the right to incorporate under the statute without reference to the population, but solely by reason of their peculiar condition, was a special and not a general law. It was there said:

"As to such communities, is this a general or a special law? It is claimed by the learned counsel for the appellants that it is general, because it applies to all communities in the state similarly situated. But we think that cannot be said to be the exclusive test. If the operation and effect of a statute is necessarily limited to a particular class or number of persons or things, it is as much a special statute, whatever may be its form, as it would be if it applied to but one person or thing only."

In *Terry v. King County*, 43 Wash. 61, 86 Pac. 210, 9 Ann. Cas. 1170, the court had under consideration a statute which specifically conferred upon King, Pierce, and Spokane counties, and the cities of Seattle, Tacoma, and Spokane, power to contract indebtedness for the purpose of purchasing armory sites,

and assisting in the construction of armories. No other counties or towns in the state were mentioned in the act. Nor was it possible for any other county, even though its population should equal that of the counties named, to come within its provisions. It was there held that the law was special and not general, citing the previous case of *Town of Denver v. Spokane Falls*, *supra*.

Applying the rule of law stated and its application as appears in the two cases last cited, to the facts in the present case, was the statute exempting the Young Men's Christian Association general or special? The exemption covers the property of such associations wholly used or to the extent solely used for religious purposes of the association. If the property should not be devoted to a religious purpose, then it does not come within the exemption. The effect of the statute is to exempt only the property of Young Men's Christian Associations which is devoted to religious purposes. Under this statute, other property in the state devoted to religious purposes would not be exempt. The property of the class referred to in the statute is that devoted to religious purposes. The association is one organization which devotes property to such purposes. The property of other associations devoted to a religious purpose could not claim the exemption. The statute is special, and not general, because it excludes from its operation the property of other organizations which is or may be devoted or set apart for religious purposes.

It would hardly be claimed that a statute exempting the church property of a particular religious denomination by name, and which thus would exclude from its provisions the church property of all other denominations, would be a general law. Likewise a statute which exempts property of Young Men's Christian Associations only to the extent such property is devoted to religious purposes, as already stated, must necessarily exclude the property of other organizations and associations devoting property to the same purposes. The operation and effect of the statute is limited to one of the organizations which compose a class, and is therefore special. The case falls within the holdings of this court in the cases of *Town of Denver v. Spokane Falls* and *Terry v. King County*, *supra*.

A number of cases are cited in the briefs where the property of Young Men's Christian Associations has been held exempt. In every one of the cases cited, with one exception, the exemptions were under statutes which did not exempt the property of the associations by name, but exempted all property by general language which was devoted to religious, benevolent, or charitable purposes. Had the statute in this state under which this case arose contained some such general language, an entirely different question would be presented. The one case referred to as supporting an exemption where the statute applied to a Young Men's Christian Association by

name was that of Young Men's Christian Association v. City of Keene, 70 N. H. 223, 46 Atl. 186. In the state of New Hampshire, however, where that case was decided, there was no constitutional provision against the passage of a special law.

In reaching the conclusion that the statutory provision is unconstitutional, we have not overlooked the rule adopted by the previous decisions of this court that a law will be presumed constitutional and valid until the contrary clearly appears, and that it is the duty of the court to sustain the law unless its invalidity is so apparent as to leave no reasonable doubt upon the question. *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918. Notwithstanding this rule, we see no escape from the conclusion that the statute containing the exemption is special, and therefore, under the Constitution, is invalid.

The judgment will be affirmed.

MORRIS, C. J., and MOUNT, ELLIS, PARKER, HOLCOMB, CHADWICK, and FULLERTON, JJ., concur.

(89 Wash. 494)

JOHNSTON v. SEATTLE TAXICAB & TRANSFER CO. et al. (No. 12302.)

(Supreme Court of Washington. Feb. 5, 1916.)

APPEAL AND ERROR ⇐803—JURISDICTION OF APPEAL—POWER TO AFFIRM.

The Supreme Court, dismissing an appeal for want of jurisdiction, cannot affirm the judgment below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169-3173; Dec. Dig. ⇐803.]

En Banc. Appeal from Superior Court, King County; John E. Humphries, Judge.

On rehearing. Affirmance of judgment modified, the part of the former opinion directing an affirmance recalled and stricken, and, as so modified, judgment entered as first directed.

For former opinion, see 85 Wash. 551, 148 Pac. 900.

John W. Roberts and Geo. L. Spirk, both of Seattle, for appellant Goerig. Brightman, Halverstadt & Tennant, of Seattle, for appellant Seattle Taxicab & Transfer Co. McCafferty, Robinson & Godfrey, of Seattle, for respondent.

PER CURIAM. Upon the original hearing of this appeal the judgment was reversed as to some of the parties, and the appeal of the Seattle Taxicab & Transfer Company was dismissed. As against it the judgment was affirmed. *Johnston v. Seattle Taxicab & Transfer Co.*, 85 Wash. 551, 148 Pac. 900. The dismissal was upon jurisdictional grounds.

The Taxicab Company thereupon filed a petition for rehearing, contending that, hav-

ing dismissed its appeal for want of jurisdiction, the judgment could not be affirmed, as such affirmance was an exercise of jurisdiction. It is clear that this contention is sound. While we have rendered judgment for costs against appellant upon the dismissal of appeals, we have uniformly held that lack of jurisdiction to hear the appeal is lack of jurisdiction for all purposes, and refused to affirm the judgment below upon the appeal being dismissed upon jurisdictional grounds. *Grune-wald v. West Coast Grocery Co.*, 11 Wash. 478, 39 Pac. 964; *Henry v. Great Northern Ry. Co.*, 16 Wash. 417, 47 Pac. 895; *Jones & Co. v. Cunningham*, 79 Wash. 4, 139 Pac. 612; *Davis v. Virges*, 39 Wash. 256, 81 Pac. 688; *Davis v. Huth*, 43 Wash. 383, 86 Pac. 654.

It follows that the affirmance of the judgment was an inadvertence, and it must be modified. All that part of the former opinion directing an affirmance of the judgment is recalled and stricken. As so modified, the judgment will be entered as first directed.

EILERS MUSIC HOUSE v. RITNER.
(No. 12939.)

(Supreme Court of Washington. Feb. 5, 1916.)

1. COURTS ⇐83—STARE DECISIS—RULE OF PROPERTY.

Where a former case announced a rule affecting the rights of parties to contracts of conditional sale under which property rights have become vested, the doctrine of stare decisis requires it to be followed, except as otherwise determined by a subsequent statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 336-339; Dec. Dig. ⇐93.]

2. APPEAL AND ERROR ⇐835—REHEARING—RIGHTS OF PARTIES—DETERMINATION.

The rights of the parties under a contract of conditional sale must be determined as of the time when the judgment appealed from was entered, and, though the appellant subsequent to the first hearing filed its claim with the buyer's receiver, it might, on rehearing, urge its right to the property.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3241-3243; Dec. Dig. ⇐835.]

En Banc. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

On rehearing. Judgment reversed, and cause remanded, with instructions to allow plaintiff's claim against the property.

For former opinion, see 88 Wash. 218, 152 Pac. 1008.

Marx & Conger, of Tacoma, for appellant. Geo. H. Funk, of Olympia, for respondent. Alex. M. Winston, of Spokane, amicus curiae.

PER CURIAM. [1] Being convinced that the opinion heretofore handed down herein, as found in 88 Wash. 218, 152 Pac. 1008, is contrary to the rule announced in *Malmo v. Washington Rendering & Fertilizing Co.*, 79 Wash. 534, 140 Pac. 569, a rehearing en banc was called for that the court might determine which rule should be adhered to.

So far as either rule affects situations arising subsequent to the time when chapter 95, Laws of 1915, became effective, the question is unimportant, as that act makes all conditional sales contracts absolute as to subsequent creditors whether with or without a lien upon the property, unless a memorandum of such sale is filed within ten days after the taking of possession by the vendee. The question is important, however, as to rights accruing between the announcement of the rule in the Malmo Case, and the time when the act of 1915 became effective. While we are not in harmony as to which rule is the better were the question a new and independent one, we are all of the opinion that as the Malmo Case announced a rule of property, and property rights have become fixed and determined thereunder, that the doctrine of *stare decisis* demands it be followed, except as otherwise determined by the act of 1915. The majority of the department which heard this case when first submitted had no intention of overruling the Malmo Case, but were of the opinion that the two cases could be distinguished upon the facts. We are satisfied this cannot be done.

[2] It was suggested at the rehearing that appellant had, subsequent to the first hearing, filed its claim with the receiver, and it cannot now be heard to urge its right to the property. The rights of the parties must be determined as of the time when the judgment appealed from was entered.

The judgment is reversed, and the cause remanded, with instructions to the lower court to allow appellant's claim against the property.

(39 Wash. 456)

PETERSON v. BREWER et ux. (No. 12857.)
(Supreme Court of Washington. Feb. 2, 1916.)
APPEAL AND ERROR ⇨1010—REVIEW—FINDING.

In an action for breach of an express warranty as to the value of bank stock sold, where all the witnesses testified to defendant's warranting the stock in general, and the plaintiff testified consistently to its being warranted as worth the particular sum of \$235 a share, a finding explicitly for plaintiff as to a warranty in such express sum will not be disturbed, as it was uncontradicted by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. ⇨1010.]

Department 2. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Action by Charles Peterson against J. W. Brewer and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Hurn & Upton, of Spokane, and O. J. Lambert, of Wilson Creek, for appellants. W. E. Southard, of Wilson Creek, for respondent.

BAUSMAN, J. Action in damages for deceit, tried without a jury, with a second cause of action on express warranty. Plaintiff was a director and vice president of a

bank when its defendant cashier sold him some more of its stock while concealing its insolvent condition. The evidence upon the first cause of action we find it needless to set out at length, since we are satisfied that, while a fraud was intended, the facts have not left it actionable.

We pass to the second cause of action. The cashier's alleged warranty was that the stock had a value of \$235 a share, and the judgment of the lower court was for the purchase price on that basis. Defendant and his wife appeal.

The situation presented is that of a country bank in which the plaintiff, a farmer obviously unfamiliar with banking, was one of three directors. The entire business, it is plain, was left to the cashier, defendant Brewer, and while plaintiff as a director would be estopped to plead ignorance of some things of which he complains were this action between himself and others such as depositors, we see no reason to apply that rule as between him and Brewer. The plaintiff relates that, at the first interview concerning the purchase of this stock, Brewer specifically "guaranteed" its value to him at \$235 a share. A second interview occurred some time later, when plaintiff brought a check with which to complete the purchase. He then said, there being some hesitation on Brewer's part as to accepting the check, that if Brewer would guarantee the stock "as he had promised," he for his part would have a man guarantee the check.

At this second interview others were present, all of whom agree that Brewer did warrant the stock in general terms, though none of them mention a particular amount, and plaintiff himself, testifying as to this talk, refers to Brewer's language as general. Cross-examined about this interview, he appears to state that what was then said about the warranty was all the warranty he ever had, but on redirect examination he reasserts that there was a warranty at the first interview, without again saying in what amount.

Now, the lower court found explicitly in plaintiff's favor on a warranty in the express sum of \$235 a share, and this court, following its numerous decisions to that effect, will not disturb such a finding where the evidence does not contradict it. Here we find everybody testifying to Brewer's warranting the stock in general, and the plaintiff testifying to its being warranted in a particular sum. Nobody as to this last contradicts him at all, so the contradiction, if any, must be inferred from his own narrative as we have set it out. The lower court with all the witnesses before it evidently found no inconsistency in his account of the two interviews, and the words "as he had promised," used at the second interview, fairly imply that the witness did not mean to withdraw what he had said as to the first. The lower

court also found the stock to have been worthless when sold to plaintiff.

Judgment affirmed.

MORRIS, C. J., and MAIN, HOLCOMB, and PARKER, JJ., concur.

(39 Wash. 442)

BONTHUIS et ux. v. GREAT NORTHERN RY. CO. (No. 12435.)

(Supreme Court of Washington. Feb. 2, 1916.)

1. WATERS AND WATER COURSES ¶119—DEFLECTING SURFACE WATERS—LIABILITY OF RAILROAD COMPANY.

Where a railroad company constructed a trestle in place of a solid roadbed to allow flood waters to escape through a bed of a creek which was ordinarily dry, it was not liable to adjacent landowners whose property was injured by such waters, where the waters were not deflected, but were merely allowed to run in their original course.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131-134; Dec. Dig. ¶119.]

2. WATERS AND WATER COURSES ¶126 — DAMMING OF STREAMS — EVIDENCE — SUFFICIENCY.

In an action by an adjacent landowner who claimed that his property was inundated and damaged because of a dam formed by debris left in a bed of a creek which was dry save at flood stages, evidence held insufficient to show that the dam was formed or that the railroad company's servants left materials at the point claimed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 139, 141, 142; Dec. Dig. ¶126.]

3. WATERS AND WATER COURSES ¶119 — SURFACE WATERS—RIGHT OF LANDOWNER.

A landowner may hurry the outflow of surface waters from his property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 131-134; Dec. Dig. ¶119.]

4. WATERS AND WATER COURSES ¶126—SURFACE WATERS—BURDEN OF PROOF.

Where an adjacent landowner claimed that a railroad company unfairly turned surface waters off of its premises, onto his own, he has the burden of proving such unfair diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 139, 141, 142; Dec. Dig. ¶126.]

En Banc. Appeal from Superior Court, Lincoln County; R. L. McCroskey, Judge.

Action by D. C. Bonthuis and wife against the Great Northern Railway Company. From a judgment for plaintiffs, defendant appeals. Case remanded, and action ordered dismissed.

Charles S. Albert and Thomas Balmer, both of Spokane, for appellant. W. A. Wilson and H. N. Martin, both of Davenport, for respondents.

BAUSMAN, J. Defendant's railway goes through plaintiffs' land parallel to Crab creek. When floods raise the water to a certain old bed which is dry most of the year, the creek flows through this also, rejoining the main stream in a loop crossed by the

tracks upon two trestles. The trestle at the upper or receiving mouth of this dry bed being washed away by a flood in 1909, the company rebuilt it with a broader span. In 1910 there was another flood, and this did much mischief within the loop to the land of plaintiffs, who lay it to the widening of the span and also to some clearing done by defendant.

[1, 2] Now, the unruly stream not only overflows at every flood the entire neighborhood, but it damaged this land in 1909 through the same bed and trestle. Two things are plain: Not only had plaintiffs' land been flooded through this bed before the building of the railway, but it was not saved by the railway embankment in 1909. So far, then, as the grievance is the rebuilding of this trestle, with its wider span, we have here no deflecting of surface waters, but only a going back to original exposure.

Plaintiffs contend that at least in clearing its right of way farther up the company damaged them because the clearing let the flood down too rapidly into the dry bed. It seems that, after the flood of 1909 and before this of 1910, the company cut down much growth of saplings and bushes along the main creek above the intake of the dry bed, and plaintiffs say that the debris was negligently allowed to float down, dam the main creek opposite the intake, and aggravate the inflow during the flood.

Here is a possible grievance in law were it one in fact, but the grievance is ill proved. To begin with, the worst thing the company could do as to itself, after its experience in 1909, was to dam the creek at this point. It is consequently improbable, and should be clearly proved. Its workmen testified, not only that no such dam accumulated, but that the saplings and bushes had been burned as they cut them. As for plaintiffs' witnesses, they are on this point exceedingly vague. The dam they describe is composed of such debris as is common after riot and overflow in any waters, and does not resemble the growth that was cut. But more, they do not say that they actually saw any dam during the flood. What they assert is that they saw this debris stretched across the main channel after the waters went out.

[3, 4] Plaintiffs have not assisted the court by brief or argument, and we can find nothing to sustain their judgment, so defendant's challenge to the evidence should have been sustained. Without deciding, if it were possible to pronounce a general rule, what constitutes an unfair manner of turning surface waters off one's own land to a neighbor's, it is clear that there has been no unfairness shown here. The burden in this respect was on plaintiffs, for the company has a primary right under familiar decisions of this court to hurry the outflow of surface waters from its property. *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859; *Harvey v.*

Northern Pacific R. Co., 63 Wash. 669, 116 Pac. 464.

Let the case be remanded, and the action dismissed.

MORRIS, C. J., and CHADWICK, MAIN, MOUNT, FULLERTON, HOLCOMB, PARKER, and ELLIS, JJ., concur.

(89 Wash. 447)

LARSEN et ux. v. STANDARD RY. & TIMBER CO. et al. (No. 12843½.)

(Supreme Court of Washington. Feb. 2, 1916.)

NEGLIGENCE \S 134—FIRES—EVIDENCE—CONJECTURE.

Proof that a fire had occurred on defendants' timber land, and that during an interim of two years between visits to the land, plaintiffs' timber had also been destroyed by fire, coupled with evidence that the scars of the fire pointed towards plaintiffs' land, will not warrant a verdict against defendants; there being no showing that the lands were adjoining or that the fires were simultaneous.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 267-270, 272, 273; Dec. Dig. \S 134.]

Department 2. Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by Peter Larsen and wife against the Standard Railway & Timber Company and the Sultan Railway & Timber Company. From a judgment for plaintiffs, defendants appeal. Reversed and remanded, with directions to dismiss.

J. A. Coleman and James M. Hogan, both of Everett, for appellants. A. M. Wendell, of Arlington, and Cooley & Horan and R. Mulvihill, all of Everett, for respondents.

BAUSMAN, J. Action for damages, tried before a jury on a complaint alleging that a fire, negligently started in defendants' timber by one of their own locomotives, had caused another fire in that of plaintiffs. Defendants unsuccessfully challenged the sufficiency of the evidence, and now complain of the court's ruling upon that, as well as of certain instructions to the jury, which gave plaintiffs a verdict.

The challenge to the evidence should have been sustained. The fire on defendants' land occurred two years before this suit was brought, and not one person swears as to when the fire occurred on plaintiffs'. The most to that effect is that a fire had previously occurred there. But when? Plaintiff himself was not on his lands, he admits, between 1908 and 1913. All he could state was that the scars of a fire, subsequently discovered on defendants' lands, pointed toward his own, which is the most that is testified to by anybody else. That a fire did occur on defendants' lands in May, 1912, is admitted, and, had the burning on plaintiffs' been shown to be simultaneous or close upon that, then, under our rule in this class of cases, the con-

comitant events could have been submitted to the jury as affording reasonable ground of conjecture. Northwestern Mut. Fire Ass'n v. Railway Co., 68 Wash. 292, 123 Pac. 468, Ann. Cas. 1913E, 968; Asplund v. Railway Co., 63 Wash. 164, 114 Pac. 1043; North Bend Lumber Co. v. Railway Co., 76 Wash. 232, 135 Pac. 1017.

While that rule permits a degree of conjecture, it cannot be carried to all limits. It should not be extended to the vague situation here, where no one so much as fixes the year of plaintiffs' damage. Moreover, in May, 1912, other fires, not traced to the one started in the timber of defendants, broke out in that district on lands other than those of defendants. Nor did plaintiffs' land adjoin that of defendants. There was even testimony to show that defendants' fire could not have reached plaintiffs' tract, because there remains unburnt timber between. Summed up, the consequence alleged here lacks identity in date, connection in area, and exclusion of other causes. Conjecture was sought to be piled upon conjecture.

For the foregoing reasons, the judgment must be reversed, and the cause remanded, with instructions to dismiss.

MORRIS, C. J., and MAIN, PARKER, and HOLCOMB, JJ., concur.

(89 Wash. 444)

WOODWORTH v. CITY OF DAYTON.

(No. 12804.)

(Supreme Court of Washington. Feb. 2, 1916.)

MUNICIPAL CORPORATIONS \S 821—OBSTRUCTION IN STREET—PERSONAL INJURIES—CASE FOR JURY.

Where, in an action for injuries from being thrown from a horse at night because of a pile of building stone and gravel remaining in the street without warning lights, the evidence permitted a difference of opinion as to whether the city's negligence was the proximate cause of the injuries, and authorized a finding that it was more probable that the injuries came from the city's negligence, in that the obstruction caused the horse to stumble, or suddenly stop and turn, throwing plaintiff off, than from any other cause, the case was for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1745-1757; Dec. Dig. \S 821.]

Department 2. Appeal from Superior Court, Columbia County; Chester F. Miller, Judge.

Action by Nettle Woodworth against the City of Dayton. From a judgment for plaintiff, defendant appeals. Affirmed.

Leon B. Kenworthy, of Dayton, for appellant. R. M. Sturdevant and Will H. Fouts, both of Dayton, for respondent.

PARKER, J. This is an action to recover damages for personal injuries which the plaintiff alleges she suffered as the result of the negligence of the city. Trial before the superior court with a jury resulted in verdict

and judgment in favor of the plaintiff, from which the city has appealed to this court. The only question here presented is as to the sufficiency of the evidence to sustain the verdict and judgment, which question was presented to the superior court during the course of and at the conclusion of the trial, by appropriate motions made in the city's behalf, and overruled by the trial court.

There was introduced upon the trial evidence sufficient to warrant the jury in believing the following: For some time prior to and after the 16th day of July, 1914, the city suffered a pile of building stone and gravel, which was being used for concrete and masonry work, to be and remain upon a considerable portion of Patit avenue. This stone and gravel obstructed the roadway portion of the avenue used by horses and vehicles, to a considerable extent, so that it was necessary such travel to pass round the obstruction close to the parking on one side.

Insufficient lights of any nature were showing the location of the obstruction. Ordinary street lights did not indicate its location or existence, and it was not until after dark, except upon close inspection, that it was discovered. It was some 2 to 2½ feet high, somewhat more than half way across the traveled portion of the roadway. At about 8 o'clock of the evening of July 16th, a woman was riding horseback along the roadway on the usually traveled portion of the way towards this obstruction, ignorant of its existence. It was then dark. She was riding recklessly as to speed or otherwise, though apparently riding faster than a walk. On suddenly coming to the obstruction she was thrown from the horse onto or near the pile and severely injured. It happened so suddenly, and she being rendered unconscious at the time, she was thereafter unable to assign any positive cause therefor. Other witnesses plainly heard her horse's feet strike the gravel or stone and her outcry at almost the same instant. She and her horse were immediately thereafter found in such positions relative to the pile as to indicate that the horse had, upon reaching the pile, either stumbled upon it, or suddenly stopped and turned to the right in such manner as to throw her forward and somewhat to the left, upon or near the extreme outer end of the pile; the pile being on the right side of the roadway as she was traveling, and obstructing the roadway to a point somewhat beyond the middle thereof. The jury viewed the location, and by consent of the parties the location of the obstruction was pointed out to the jury by a witness who was familiar with it.

There is no contention made that the city was not negligent in so suffering this obstruction to be maintained in the avenue, nor that respondent was guilty of contributory negligence. But the real contention made in behalf of the city is that the evidence does not show that its negligence was the proximate

cause of the injuries received by respondent, and that the conclusion reached by the jury has no basis other than speculation and conjecture. While it must be conceded that the evidence does not present a very clear case against the city as to its negligence being the proximate cause of respondent's injuries, we nevertheless think that there is reasonable ground, in the light of the facts we have noticed, for difference of opinion upon this question. While there are other possible theories of the case compatible with the city's negligence not being the proximate cause, upon the whole evidence the jury might well believe that it appeared more probable that respondent's injuries came from the city's negligence—that is, that the obstruction caused the horse to stumble or suddenly stop and turn to the right, throwing respondent off—than from any other cause. We think, therefore, that the cause was properly left to the jury for decision. Observations made in the following decisions are in harmony with this conclusion: *Graaf v. Vulcan Works*, 59 Wash. 325, 109 Pac. 1016; *Shaw Showcase Co.*, 76 Wash. 419, 133 Pac. 998; *Atwood v. Washington Water*, 79 Wash. 427, 140 Pac. 343. The result is affirmed.

J., and MAIN, HOLCOMB,
J.J., concur.

(89 Wash. 459)

SOUND CONSTRUCTION & ENGINEERING CO. v. GREEN. (No. 12884.)

Washington. Feb. 2, 1916.)

CITY OF SEATTLE—ERECTING BUILDING—ADVERTISING ELEVATOR—CLAIM FOR EXTRA—ARCHITECT'S DECISION.

Plaintiff contracted to erect a building for defendant which was to be either six or ten stories high, as defendant should determine during the course of construction, and in accordance with such understanding provision was made for three elevator shafts, two to be used in the event the building went only six stories, in which case the extra space was to be otherwise utilized, and three elevators being contemplated for the building if it went ten stories. The architect was made an umpire to decide disputes between the parties under the contract; his decision to be final and binding. Defendant decided on a ten-story building, and fixed with the contractor a price therefor. After the erection of the building the contractor presented a claim for the third elevator as an extra, which defendant refused, claiming its installation to be covered by the price as fixed. The contract, plans, and specifications were reasonably open to either construction regarding the price of the elevator. *Held*, that the decision of the architect in favor of defendant was binding on the plaintiff in the absence of an arbitrary or fraudulent decision or palpable mistake on the architect's part.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1308, 1309, 1312-1316, 1318-1338, 1340-1342, 1344-1346, 1348, 1350-1351; Dec. Dig. § 287.]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Sound Construction & Engineering Company against Joshua Green. Judgment for defendant, and plaintiff appeals. Affirmed.

Weter & Roberts, of Seattle, for appellant. Bronson, Robinson & Jones, of Seattle, for respondent.

MAIN, J. This action arises out of a building contract, and has for its basis a claim for an item in the sum of \$4,078.40 as an extra. After the issues were framed the cause was tried to the court sitting without a jury, and resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals.

On April 23, 1912, the respondent contracted with the appellant for the erection of a six-story building at the southwest corner of Fourth avenue and Pike street, in the city of Seattle, for the sum of \$188,000. This building was to be constructed according to plans and specifications then agreed upon. Thereafter, and before the construction of the building was entered upon, it was decided to alter the original plans from what was known as slow-burning construction to reinforced concrete construction, with foundation and walls sufficiently heavy to carry four additional stories, provided the owner should elect to have the building erected ten stories instead of six. For the purpose of evidencing this modification of the original contract a supplemental contract was entered into on June 25, 1912. This supplemental contract provided that the contractor would build the four additional stories in accordance with the specifications for the sum of \$86,496, provided the owner should declare his intention of having these stories added before the seventh floor slab should be completed. Plans or contract drawings were signed by the parties. Under the contract for the six-story structure two elevators were to be installed, and the building was so constructed that a third elevator could be added. If the building was erected only six stories, the space for the third elevator was to be used for other purposes.

The owner within the time specified in the supplemental contract notified the contractor that he desired the building erected to ten stories instead of six. The architect, acting for the owner, then directed the contractor to construct the building for the third elevator. The ten-story building was erected, and three elevators provided for. In the construction of the three elevators the contractor was not required to remove any previous construction. His claim as an extra for this work is based upon constructive work only.

The controversy in this case is over the claim by the contractor that the third elevator was an extra. The question is whether the plans and specifications required the installation of the third elevator if the owner

exercised, as he did, his option to have the building erected the four additional stories. The contract between the parties, except in particulars not here material, made the architect the arbiter or umpire for the purpose of deciding questions that might arise under the contract, and provided that the decision of the architect upon all such matters as between the owner and the architect should be final and binding. The architect construed the plans and specifications to call for the third elevator for the ten-story building. According to this construction the contractor would not be entitled to recover for the third elevator as an extra. According to the contention of the contractor the construction of the third elevator was not called for by the plans and specifications if the building should be erected to the height of ten stories.

It is not claimed in this case that the parties did not have the right by contract to constitute the architect an umpire for the purpose of settling disputes, and making his decision final in the absence of fraud, arbitrary conduct, or palpable mistake; but it is claimed that the architect, in construing the plans and specifications as calling for a third elevator when the four additional stories were added, acted arbitrarily, and did not exercise an honest and independent judgment.

Upon the trial of the cause the contractor produced a number of expert witnesses who testified that the plans and specifications could not reasonably be read to call for the construction of a third elevator when the four additional stories were added. The owner, the respondent, produced a number of expert witnesses who testified that the proper reading of the plans and specifications required the contractor to make the construction of the third elevator for the ten-story building. The trial court found that the contract, plans, and specifications reasonably meant that, if the additional stories were added the third elevator was to be installed, and that the decision of the architect was not fraudulent, arbitrary, or the result of palpable mistake on his part.

The question here is not whether the architect can read into the plans and specifications what is not found there, and thus, in effect, make a new contract for the parties, but is whether the architect acted arbitrarily, and did not exercise an honest and independent judgment in construing the plans and specifications as calling for the third elevator. A careful study of the plans and specifications lead us to the conclusion that the architect's construction of them was not arbitrary, and that he is not guilty of having failed to exercise an honest and independent judgment. It is doubtless true that, taking the plans and specifications as they are, the minds of men may honestly and reasonably differ as to their construction; but this would not be sufficient to overturn the judgment of the architect who had by the contract been

made the arbiter to settle questions that might arise, and whose decision should be final and conclusive upon the parties. Had the plans and specifications been such that they would bear reasonably only one construction, and that was the opposite from that given by the architect, a different question would be presented.

The judgment will be affirmed.

MORRIS, C. J., and BAUSMAN, HOLCOMB, and PARKER, JJ., concur.

(39 Wash. 418)

SMITH et al. v. IMHOFF. (No. 12765.)

(Supreme Court of Washington. Jan. 28, 1916.)

1. TRUSTS \S 17, 18—EXPRESS TRUST IN REALTY—PROOF BY PAROL.

An express trust in real estate cannot be proven by parol.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 15-24; Dec. Dig. \S 17, 18.]

2. PARTNERSHIP \S 20—TRANSACTION IN REALTY—CONSTRUCTION OF AGREEMENT.

An oral agreement whereby plaintiffs, who had property listed with them for sale for \$1,800, agreed to forego their commission of \$90 if defendant would purchase it at \$1,710, and that upon a resale, and after repaying defendant the money he had invested, the profits should be divided equally between them, constituted a special partnership purchase of the property.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 6, 7; Dec. Dig. \S 20.]

3. FRAUDS, STATUTE OF \S 56—PARTNERSHIP TRANSACTION IN REALTY—PROOF BY PAROL—"CONTRACT FOR SALE OF REALTY."

Such special partnership purchase was not a contract for the sale or transfer of realty, required to be in writing, but might be proven by parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 83-89, 136-138; Dec. Dig. \S 56.]

For other definitions, see Words and Phrases, Second Series, Agreement for Sale of Real Estate.]

4. PARTNERSHIP \S 86 — TRANSACTION IN LAND—PROFITS.

Under such agreement, executed by defendant's payment of the purchase price of the land, less the plaintiffs' usual commission on the understanding that the property should be held and sold at a profit, to be shared equally between the parties, plaintiffs, after a sale at a profit, were entitled to one-half of the same.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 184; Dec. Dig. \S 86.]

5. PARTNERSHIP \S 122 — RELATION — QUESTION FOR JURY.

Upon undisputed facts with reference to an agreement for the purchase and sale of land and a division of the profits, it was for the court to say whether a partnership existed with reference to such land.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. \S 185, 186; Dec. Dig. \S 122.]

Department 1. Appeal from Superior Court, Whatcom County; William H. Pemberton, Judge.

Action by C. M. Smith and others against Charles Imhoff. Judgment for plaintiffs, and defendant appeals. Affirmed.

William J. Biggar and Thomas R. Waters, both of Bellingham, for appellant. George Livesey, of Bellingham, for respondents.

MOUNT, J. This action was brought to recover a balance of \$404.12 alleged to be due upon an oral agreement made by the defendant with the plaintiffs, whereby the defendant agreed to purchase certain real estate, and all the parties agreed to sell the same, and to divide the profits equally between the plaintiffs and the defendant. Upon issues joined the case was tried to the court and a jury. At the conclusion of the plaintiffs' evidence, and again at the conclusion of all the evidence, the defendant moved for a directed verdict. These motions were denied. The case was submitted to the jury, and a verdict was returned in favor of the plaintiffs for the sum of \$265.15. After a motion for a new trial was denied, a judgment was entered in favor of the plaintiffs. The defendant has appealed from that judgment.

The facts are as follows: In January, 1909, the plaintiffs, who were engaged in the real estate business, had listed with them for sale the real estate in question for the sum of \$1,800. Their commission for the sale of the property was to be 5 per cent., or \$90. They advised the appellant that if he would purchase this property they would deduct their commission, so that the purchase price would be \$1,710 net to him; that if he would purchase it, and survey it into 20-acre tracts, the plaintiffs, together with the defendant, would find a purchaser, repay to the defendant the money he had paid as the purchase price, for surveying, and the expenses of keeping the property, and that then the plaintiffs and the defendant would divide the profits. The appellant thereupon purchased the property for \$1,710, and took a deed in his own name. Thereafter the plaintiffs sold the timber upon the land separately, and afterwards the land itself was sold. The total amount received for the land and the timber was \$4,684.96. The defendant, prior to the sale, had paid out for surveying, taxes, and other expenses, something over \$300, so that the total amount paid by him upon the land was \$2,176.21. There is some dispute in the evidence as to the amount that was paid out by the defendant.

The complaint, after alleging the copartnership of the plaintiffs, and that they had the real estate listed for sale upon commission, alleged as follows:

"That at said time plaintiffs and said W. I. Brisbin agreed orally with defendant that the above-described property should be purchased by all of said parties and the title thereto was to be taken in the name of defendant. That at the time of said purchase it was understood and agreed by all of said parties that defendant was to advance the price to be paid for said property, to wit, \$1,710. And it was further un-

derstood and agreed that all of said parties should use their best efforts to make an advantageous sale of said property, and that when a sale was made the first moneys derived out of said property should be used by said parties to repay to defendant such moneys as he might have paid on said property, and that any surplus over and above the amount of money paid by defendant on said property should be divided equally between plaintiffs and said W. I. Brisbin on the one side and defendant on the other."

The principal point presented upon this appeal by the appellant is to the effect that this alleged contract, being an oral agreement for an interest in real estate, cannot be proved by parol; that it was the duty of the trial court for that reason to direct a verdict for the defendant at the close of the plaintiffs' case, and also at the close of all the evidence in the case.

[1] A large number of authorities are cited in the appellant's brief to the effect that an express trust in real estate cannot be proven by parol. It is argued that, if this contract is anything, it is an express trust. There can be no doubt that an express trust in real estate cannot be proven by parol. This court has many times so held. *Malmö v. Washington Rendering, etc., Co.*, 79 Wash. 534, 140 Pac. 569.

[2] But we think the question of a trust, either express or ex maleficio, is not in this case. The evidence for both the plaintiffs and the defendant upon the trial shows conclusively that the agreement between the parties was to the effect alleged in the complaint. It was an oral agreement that, if the defendant would purchase the property at the price of \$1,710, the plaintiffs would forego their commission of \$90, to which they would be entitled if the property were sold to other parties at the list price, and upon a resale of the property, after paying the defendant the money which he had invested therein, that the profits should be divided equally between them. There is apparently no dispute upon this question. The evidence is clear and conclusive to that effect. In other words, we think it is clear from these facts that these parties entered into a special partnership for the purchase and sale of the real estate. The defendant advanced \$1,710. The plaintiffs reduced their commission by \$90, so that the plaintiffs had an investment of \$90, while the defendant had an investment of \$1,710 in the purchase price. It was clearly, we think, a special partnership purchase of this particular piece of property.

[3] It was not necessary that the partnership agreement should be in writing.

"It is generally held that agreements to share profits and losses arising from the purchase and sale of real estate are not contracts for the sale or transfer of interests in land and need not be in writing." 20 Cyc. p. 237.

This court in *Case v. Seger*, 4 Wash. 492, 30 Pac. 646, a case similar to this, said:

"It is contended by the respondents that an agreement to purchase and sell land, which is not in writing, is in contravention of the pro-

visions of the statute of frauds, and cannot, therefore, be enforced, while the appellant contends that a parol agreement of this kind can be enforced. It cannot be questioned that there is conflict of decision on this point."

Then the court referred to the case of *Smith v. Burnham*, 3 Sum. 435, and *Dale v. Hamilton*, 5 Hare, 369. In the latter case it was held that a partnership agreement, where the parties were interested in a speculation for buying and improving land for sale, may be proven without being evidenced by a writing signed by the parties to be charged. This court then said:

"We think the weight of authority, and especially modern authority, supports *Dale v. Hamilton*, and we are inclined to follow the doctrine there announced."

And in *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149, the Supreme Court of Oregon discusses at length the authorities upon this question, and concludes:

"From a careful examination of the authorities, we are of the opinion that a valid contract of partnership for the purpose of speculating in real estate may be made by parol."

We are satisfied from the reasoning in these cases that the agreement made here was a valid agreement which could be proved by parol, and did not come within the statute of frauds, and does not involve the question of a trust, either express or resulting. We are of the opinion, therefore, that the trial court properly submitted the case to the jury.

[4] Several assignments of error in the appellant's brief are based upon instructions which were given by the court, or requested by the defendant and refused to be given by the court. The trial court instructed the jury, in substance, that if they found from the evidence that the agreement alleged in the complaint was entered into between the plaintiffs and the defendant at the time of the purchase of the property, and that the defendant paid the purchase price thereof, less the usual commission, and agreed that the property should be held and sold at such profit as could be obtained therefor, and that the profits should be divided equally between the plaintiffs and the defendant, then they should find for the plaintiff. We are satisfied that this was a correct instruction upon the question, and if the jury found from the evidence as the court instructed them, then it was their duty to return a verdict in favor of the plaintiffs for one-half the profits.

[5] The court also instructed the jury with reference to the expenses which the defendant had incurred upon the property, and that, if they found the agreement had been complied with, then they should return a verdict in favor of the plaintiffs for the balance of one-half the profits. It seems plain that these instructions fully covered the case, and it was not necessary to instruct the jury with reference to what constituted a partnership, as was requested by the defendant. Under the admitted facts it

was for the court to say whether a partnership existed or not with reference to this particular land. We are satisfied that, if the court was required to instruct at all upon this question, it was to tell the jury that there was a partnership. It is needless, therefore, to review the requested instructions upon these points.

The main point in the case is whether or not the agreement could be proven by parol. From our conclusion above upon that question, it follows that the judgment must be affirmed; and it is so ordered.

MORRIS, C. J., and ELLIS and FULLERTON, JJ., concur.

(89 Wash. 427)

STATE v. BROOKS. (No. 12916.)

(Supreme Court of Washington. Jan. 28, 1916.)

1. WITNESSES \Leftrightarrow 277—PRIVILEGE OF WITNESS—WEIGHT—CRIMINAL PROSECUTION—EFFECT.

Where accused testifies in his own behalf, he is subject to all the rules of law relating to cross-examination of other witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. \Leftrightarrow 277.]

2. CRIMINAL LAW \Leftrightarrow 1159—TRIAL—WITNESSES—CREDIBILITY—QUESTIONS FOR JURY.

The question of credibility of witnesses in a criminal prosecution is for the jury, whose finding is conclusive upon the court on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. \Leftrightarrow 1159.]

3. CRIMINAL LAW \Leftrightarrow 941—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where the questions of mentality of the prosecuting witness and his credibility were fully gone into, and the showing on such questions on a motion for new trial does not go beyond the showing made on the trial, it is not error to refuse a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. \Leftrightarrow 941.]

Department 1. Appeal from Superior Court, Yakima County; Thomas E. Grady, Judge.

Isaac Brooks was convicted of castrating the prosecuting witness, and he appeals. Affirmed.

William M. Thompson, of North Yakima, for appellant. Harold B. Gilbert, of North Yakima, for the State.

MOUNT, J. The appellant was convicted of the crime of castrating the prosecuting witness. He appeals from that judgment.

While a number of errors are assigned, the argument is based upon three contentions, as follows: First, that the appellant did not have a fair trial; second, that the evidence is not sufficient to sustain the conviction; and, third, that the court erred in denying the motion for a new trial. We shall notice these contentions briefly.

[1] It is argued first that the court erred in allowing the prosecuting attorney upon

cross-examination to inquire the names of associates of the appellant, and statements made by him upon different occasions relating to castration, and questions of that character. We shall not set out these statements because of their disgusting character. It is sufficient to say that, when a defendant voluntarily goes upon the stand in his own behalf, he is subject to all the rules of law relating to cross-examination of other witnesses. State v. Morden, 151 Pac. 832. We are satisfied that the cross-examination in this case was within the rule there announced.

[2] Second. The principal contention of the appellant is that the evidence is insufficient to sustain a conviction, because the appellant was not sufficiently identified as one of three persons who assisted in the castration of the prosecuting witness. The prosecuting witness went upon the stand and positively identified the appellant as one of the men who held him, while another assisted in holding him, and another used a knife upon the prosecuting witness. The appellant argues that because the fact that the prosecuting witness was shown to be a moral pervert, and that he associated with disreputable characters, and because of his mentality, he was unworthy of belief. The question of the mentality of the prosecuting witness, the character of his associates, his disgusting habits, and all these things were fully gone into at the trial of the case; so that the credibility of the witness was for the jury to determine. After considering all the evidence in the case, and being properly instructed upon the question, the jury found a reasonable doubt that the accused was one of the men who assisted in the forcible castration of the prosecuting witness. We think under all the evidence that the question of the credibility of the witness was clearly for the jury. It is not for this court, after a jury and the trial court have passed upon questions of fact of this kind, to determine otherwise.

[3] It is finally argued that the court erred in denying the motion for a new trial upon the ground of newly discovered evidence. There is a showing upon that motion to the effect that after the trial the prosecuting witness had threatened to do counsel for the appellant bodily injury. There is also a showing by affidavits to the effect that certain persons believed the prosecuting witness to be unsound mentally, and an affidavit to the effect that after the trial the prosecuting witness was mistaken in the identity of an officer who had arrested him at one time. This is claimed to be newly discovered evidence upon which the trial court should have granted a new trial. The question of the mentality of the prosecuting witness and the question of his credibility were fully gone into at the trial. The showing made, we think, amounts to the same thing as was gone into upon the trial. It is simply cumulative; and we think

it is insufficient to justify us in reversing the lower court.

We find no prejudicial error.

The judgment must therefore be affirmed.

MORRIS, O. J., and FULLERTON, OHADWICK, and ELLIS, JJ., concur.

(39 Wash. 426)

FOLMSBEE et al. v. DANIELL et ux.
(No. 12885.)

(Supreme Court of Washington. Jan. 28, 1916.)

APPEAL AND ERROR ⇐1011—SCOPE OF REVIEW—QUESTION OF FACT—CONCLUSIVENESS OF FINDING.

Where the only question on appeal is of fact, the finding of the court below, where the evidence is conflicting, cannot be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇐1011.]

Department 2. Appeal from Superior Court, Okanogan County; E. K. Pendergast, Judge.

Action by Harry Folmsbee and another against William E. Daniell and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

Geo. S. Lee and Smith & Gresham, all of Okanogan, for appellants. Chas. A. Johnson, of Okanogan, for respondents.

BAUSMAN, J. Action in deceit for damages, tried without a jury. The real question here is whether an erased clause was stricken from a contract before it was signed. The appellants claim that it was not. Upon this, the sole point that we find it necessary to review, the lower court made an express finding against them.

There being conflicting evidence and no preponderance against this finding, our decision is controlled by our own numerous and recent utterances.

We shall not review the finding, and the judgment is affirmed.

MORRIS, O. J., and MAIN, PARKER, and HOLCOMB, JJ., concur.

(39 Wash. 699)

NORTHERN PAC. RY. CO. v. TUTTLE.
(No. 11306.)

(Supreme Court of Washington. Jan. 27, 1916.)

COURTS ⇐97—UNITED STATES SUPREME COURT—FEDERAL QUESTION.

Where a case presents the same federal question already decided in another case by the United States Supreme Court, its adjudication thereon is controlling.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. ⇐97.]

Department 2. Appeal from Superior Court, Spokane County; E. K. Pendergast, Judge.

Action by the Northern Pacific Railway Company against W. R. Tuttle. From a judgment for plaintiff, defendant appeals. Affirmed.

Harris Baldwin, of Spokane, for appellant. Edward J. Cannon and Cannon, Ferris & Swan, all of Spokane, for respondent.

PER CURIAM. This case presents the same legal question involving the right of adverse possession of respondent's right of way as presented in Northern Pacific Ry. Co. v. Concannon, 239 U. S. 382, 36 Sup. Ct. 153, 60 L. Ed. —. The question being a federal one the cited case is controlling.

Judgment affirmed.

(39 Wash. 412)

In re BLATTNER'S ESTATE.

BLATTNER v. ABEL. (No. 12751.)

(Supreme Court of Washington. Jan. 28, 1916.)

EXEMPTIONS ⇐50—LIFE INSURANCE—PROCEEDS.

Rem. & Bal. Code, § 569, declares that the proceeds of all life insurance shall be exempt from all debts, while section 6158, subsequently enacted, provides that if a policy of insurance is effected by any person on his own life or on another life in favor of a person other than himself having an insurable interest, the lawful beneficiary other than himself or his legal representatives shall be entitled to the proceeds against the creditors and representatives of the person effecting the same. Held, that the latter statute, while it did not repeal the earlier one, changed the law, so that a policy of insurance payable to the insured's estate is liable for his debts.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 75; Dec. Dig. ⇐50.]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

In the matter of the estate of F. S. Blattner. Claim by W. H. Abel. From an order directing Dora D. Blattner, as administratrix, to pay claimant out of the proceeds of life policies, the administratrix appeals. Affirmed.

Chapman & Bailey and L. B. Da Ponte, all of Tacoma, for appellant. A. R. Titlow, of Centralia, and W. H. Abel, of Montesano, for respondent.

MOUNT, J. This appeal is from an order of the lower court directing the administratrix of the estate of F. S. Blattner to pay to the respondent, out of the proceeds of certain insurance upon the life of Frank S. Blattner, the sum of \$2,921.70, together with the costs of the action, less such sum as Mr. Abel hereafter receives as distributee of the general funds of the estate. There is no substantial dispute upon the facts which are briefly as follows:

On June 26, 1912, Mr. Abel delivered to Mr. Blattner two notes for the sum of \$1,500 each, to be cashed for the purpose of raising \$3,000, which was to be used by Mr. Blattner as the

agent of Mr. Abel in purchasing certain real estate. Mr. Blattner cashed these notes and obtained the money therefor. He did not purchase the real estate, but held the money in his possession. Thereafter Mr. Blattner lost his life. The money which he had received from Mr. Abel had been mingled with his own private funds, and came into the hands of the administratrix as assets of the estate. After the death of Mr. Blattner, his widow was appointed as administratrix of his estate. In March, 1913, Mr. Abel presented his claim to the administratrix, the same was allowed by her, and in January, 1914, the claim was approved by the court and became a claim against the estate. Thereafter payments were made upon the claim amounting to \$493.77.

At the time of his death Mr. Blattner had two insurance policies upon his life payable to his estate. These policies amounted to \$14,258.83. They were collected by the administratrix. Thereafter, upon an ex parte application of the administratrix, without notice to Mr. Abel, the court made an order directing one half of the insurance money to be paid to Mrs. Blattner, and the other half to Dorothy M. Blattner, the daughter of the deceased. Upon the final report of the administratrix being filed, Mr. Abel objected to the payment of the insurance money to the widow and the daughter of the deceased. Upon the hearing of these objections the court entered the order herein appealed from.

The principal question presented is whether the proceeds of a life insurance policy payable to the estate of the deceased is exempt from the debts of the deceased where, in his lifetime, the property of the deceased would not be exempt from the payment of this claim.

Many pages of the briefs of the appellant and the respondent are taken up with a discussion whether section 564, Rem. & Bal. Code, is applicable to this case. This section provides that no property shall be exempt from execution issued upon a judgment against an attorney or agent on account of any liability incurred by such attorney or agent to his client or principal on account of any moneys or other property coming into his hands from or belonging to his client or principal. But in view of our conclusion upon another question which seems to us to control, we shall not pass upon the applicability of that statute to this particular case.

The appellant relies upon the provision of section 569, Rem. & Bal. Code, which provides:

"The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt."

It is strenuously argued that because the money in question was derived from an insurance upon the life of Mr. Blattner, that under this section it is exempt from the payment of Mr. Abel's claim. This statute is a sweeping statute, and this court has many times held that, when considered alone, it

applies to all debts created after the statute took effect. *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851; *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326; *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, L. R. A. 1915A, 1201; *German-American State Bank v. Godman*, 83 Wash. 231, 145 Pac. 221.

Section 6158, Rem. & Bal. Code, provides as follows:

"If a policy of insurance is effected by any person on his own life, or on another life in favor of a person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall unless contrary to the terms of the policy, be entitled to its proceeds against the creditors and representatives of the person effecting the same; and the person to whom a policy of life insurance is made payable may maintain an action thereon in his own name. * * *

In the case of *Northwestern Mutual Life Ins. Co. v. Chehalis County Bank*, supra, it was contended that this latter statute repealed section 569, Rem. & Bal. Code, above quoted; but we denied that contention, saying, that if it was repealed at all it was repealed by implication, and:

"That repeals by implication are not favored is the established doctrine in this state, and that they will not be allowed, unless the will of the Legislature is so manifest that the statutes cannot be read in *pari materia* without violence to the earlier statutes is a fundamental rule of construction from which courts are not at liberty to depart."

Neither the opinion nor the record in that case shows the beneficiary of the insurance policy. The question presented in the case at bar was neither decided nor discussed in that case, except in so far as we held that section 569 was not repealed by implication by section 6158. It is apparent from our decision in that case that we regarded these two statutes as being in *pari materia*, and that they should be construed accordingly. We think it is plain from the provision of section 6158 quoted, that the Legislature intended that the proceeds of a life insurance policy should be exempt from creditors of the estate only when the beneficiary in the policy is some person other than the insured himself or his legal representatives, for it says:

"If a policy of insurance is effected by any person on his own life, * * * the lawful beneficiary thereof, other than himself or his legal representatives, shall, unless contrary to the terms of the policy, be entitled to its proceeds against the creditors and representatives of the person effecting the same. * * *

Otherwise, the phrase "other than himself or his legal representatives" is entirely meaningless, for the statute at section 569 above quoted provides that the proceeds and avails of all life and accident insurance shall be exempt from all liability for any debt. We think it was intended by the later statute to modify that sweeping provision of the former statute to the extent of providing

that if a policy of insurance is effected by any person on his own life in favor of himself or payable to his estate, that in such a case the proceeds are not exempt against the creditors and representatives of the person effecting the insurance. When these two statutes are construed together in pari materia, we think that is clearly the meaning, because the words "other than himself or his legal representatives" were used for a purpose, and that purpose was to limit the exemption, as stated.

In the case of *German-American State Bank v. Godman*, supra, we held that the proceeds of certain insurance policies payable to the estate of the insured and to the legal representatives of the insured were not subject to certain debts. In that case the point now being considered was not raised or discussed, for in that case we said:

"Although not relied upon by the appellants, it is equally plain that Laws of 1909, p. 553, § 36 (Rem. & Bal. Code, § 6153), have no application to the facts in the case at bar."

The decision in that case was rested principally upon the provisions of section 560, and the court did not attempt to construe the provisions of section 6158, supra, as affecting that section, because the point was not relied upon. It was held in that case that the words "legal representatives" mean ordinarily executors or administrators. We there said:

"The law does not differentiate between policies payable to the 'executors, administrators, or assigns,' and policies payable to 'the estate' of the insured."

This is plainly so, and where a policy is made payable to one's estate it is payable to his legal representatives. We are therefore satisfied that under the provisions of section 6158 above quoted that it was the intention of the Legislature that the proceeds of insurance policies payable to an estate should be liable to the creditors of the estate. In order that the proceeds may not be liable to the creditors of the estate, the insurance must be effected in favor of a beneficiary other than the insured or his legal representatives, for example, the wife, a child or children, or some other specified person. Where the policy is made payable to the insured or to his estate, or "his legal representatives," the proceeds thereof are not exempt, but are available to the creditors of his estate. This being so, it is plain that the trial court was right in holding that the proceeds of this policy were liable for the debt in question. The judgment is therefore affirmed.

MORRIS, C. J., and CHADWICK, J., concur.

FULLERTON, J. While I concur with the majority in the conclusion reached in this cause, I do not think it can be differentiated from the case of *German-American State Bank*

v. Godman, 83 Wash. 231, 145 Pac. 221. It is true the parties to that appeal did not cite or rely upon the statute now found to be controlling, but the court itself did not overlook the statute. On the contrary, the statute was cited in the opinion and held to have no application. I did not have the privilege of sitting at the hearing in the earlier case, but I thought then and I think now that a wrong conclusion was reached therein. This opinion therefore should do in terms what it does in fact, namely, overrule that case, to the end that no uncertainty should exist as to the rule properly to be applied to like cases.

ELLIS, J. I concur with Judge FULLERTON.

(89 Wash. 463)

STATE v. LYNN. (No. 12981.)

(Supreme Court of Washington. Feb. 2, 1916.)

1. FALSE PRETENSES — ELEMENTS — FALSE REPRESENTATIONS OF FACT.

A false and fraudulent representation, to constitute the crime of larceny by color or aid of false representation, must be of an existing or past fact.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.]

2. FALSE PRETENSES — ELEMENTS — FALSE REPRESENTATIONS OF FACT — BURDEN OF PROOF.

Where it was charged that the accused procured the prosecuting witness to invest certain moneys in a store by the representation that the accused had \$4,000 which he was going to invest, it was incumbent on the state to prove that he did not in fact have \$4,000 at the time he so represented.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 54; Dec. Dig. § 39.]

3. FALSE PRETENSES — ELEMENTS — FALSE REPRESENTATIONS OF FACT — EVIDENCE.

Where the only evidence as to the falsity of the statement that the accused had \$4,000 was that not more than \$225 worth of goods were put into the store, that was insufficient to show beyond a reasonable doubt that the representation as to the amount of money he had was false.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.]

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

E. H. Lynn was convicted of grand larceny, and he appeals. Reversed and remanded, with directions to dismiss.

Shepard, Burkheimer & Burkheimer, of Seattle, for appellant. O. T. Webb, Percy Gardiner, and E. C. Dailey, all of Everett, for the State.

MAIN, J. The defendant in this case is charged with the crime of grand larceny. Whether by the information it is intended under Rem. & Bal. Code, § 2601, to charge larceny by "color or aid of any fraudulent or false representation," or larceny by ember-

zlement, or both, does not clearly appear. From a reading of the state's testimony, and the remarks of the trial judge, it would appear that up to the time when the state rested its case, there was an attempt to prove larceny by embezzlement. When the evidence in chief for the state was in, the defendant moved for a directed verdict, claiming that the evidence was insufficient to establish any crime, and that the venue was improperly laid in Snohomish county. In denying this motion the trial court required the state to elect whether it would have the cause go to the jury under the claim that the crime was committed by false and fraudulent representations, or by embezzlement. The state concluded to interpret the information as charging the crime of larceny by false and fraudulent representations. Thereupon the evidence upon behalf of the defendant was introduced, and the cause was submitted to the jury. A verdict of guilty was returned. Motion for a new trial being made and overruled, the defendant appeals from the sentence and judgment.

The facts briefly stated are: On June 18, 1914, and for some time prior thereto, the prosecuting witness, one J. B. Waggett, was operating an automobile truck between Seattle, in King county, and Cathcart, in Snohomish county, Wash., with his residence in Seattle. On that day the appellant called upon Waggett for the purpose of engaging him to haul certain store fixtures from Seattle to Cathcart. Prior to this date the parties had no acquaintance. In the course of the conversation relative to the hauling of the store fixtures, Lynn told Waggett that he was going to organize a corporation to conduct a grocery business at Cathcart in a certain store building there situated, which he had previously leased, and that the store fixtures which he was desiring to move were to be used in such business. Waggett then told the appellant that he, Waggett, also contemplated starting a store at the same place. The question of Waggett taking stock and becoming interested in the corporation to be organized by the appellant was discussed at that time by the parties. Waggett claims, and he so testified, that the appellant told him that he had sold two stores in Seattle for \$4,000, and that if Waggett would invest \$800 or \$1,000, the appellant would invest \$4,000 in cash in the business enterprise. Waggett gave a somewhat different version, which it is unnecessary here to detail.

On June 20th Waggett hauled the fixtures from Seattle and Cathcart. About a week later Waggett went to Cathcart and began constructing partitions in the rear end of the store building which was to be occupied by the business preparatory to moving his family therein, which he did on July 8th following.

Articles of incorporation for the Cathcart Grocery & Mercantile Company were duly prepared and filed; a certificate of incorpo-

ration being issued on July 14, 1914. Thereafter, and on July 17th, the appellant and wife turned over to the corporation, in payment for stock subscribed for by them, real and personal property listed at the value of \$4,352.31. On July 20, 1914, Waggett, in Seattle, King county, paid to the corporation \$300 in cash, and turned over a note of the face value of \$500. Thereupon 16 shares of the capital stock of the corporation of the par value of \$50 per share were issued and delivered to him.

After the store was opened, both Waggett and the appellant worked therein. The business was conducted some months, when it became insolvent and a receiver was appointed. After the appointment of the receiver, Waggett filed a verified claim with the receiver in which he stated that the \$300 was a loan to the corporation. Upon the trial Waggett testified that there was not placed in the store more than \$225 worth of merchandise.

The controlling question in this case is whether the evidence shows that the appellant was guilty of grand larceny committed by color or aid of any fraudulent or false representation. It is claimed that the false representation consisted in the appellant's statement that he had \$4,000 in cash as the result of the sale of two stores, when in fact he did not have that amount, or any sum in excess of \$100.

[1] A false and fraudulent representation, under the statute, in order to constitute a crime, must be of an existing or past fact. 2 Bishop, New Criminal Law, § 415; 1 McClain, Criminal Law, § 678.

[2] The falsity of a fact past or present being one of the elements of the crime, it was incumbent on the state to prove that the appellant did not in fact have \$4,000 in cash at the time it is claimed he so represented. State v. Hurley, 58 Kan. 668, 50 Pac. 887.

[3] The articles of incorporation of the Cathcart Grocery & Mercantile Company state its objects, among other things, to be, to conduct a general mercantile business for the purpose of purchasing and selling of all kinds of groceries and merchandise, and to acquire by purchase or otherwise real and personal property of every kind and description. A number of other purposes are also set out, such as usually appear in articles of incorporation.

The evidence relied upon to show the falsity of the statement as to the \$4,000 is that of the complaining witness that not more than \$225 worth of groceries were put into the business. This obviously does not disprove the statement attributed to the appellant that he had sold two stores in Seattle, and had received therefrom \$4,000 in cash, which he expected to put into the business. For aught that appears in the evidence, he may have had the \$4,000 as it is claimed he said he had. The evidence is doubtless sufficient to cast suspicion upon the truthfulness

of his alleged claim that he had \$4,000 in cash. But if he is guilty of a crime, all the elements of the crime must be established by competent evidence, and the conviction cannot be sustained, unless the evidence was such that the jury had a right to find that all the elements of the crime were proven beyond a reasonable doubt.

It may well be doubted whether the venue was properly laid in Snohomish county, construing the information as charging the crime as being committed by color or aid of false and fraudulent representations. But it is not necessary to decide this question, since the other question discussed is decisive of the action.

The judgment will be reversed, and the cause remanded, with directions to dismiss.

MORRIS, C. J., and BAUSMAN, HOLCOMB, and PARKER, JJ., concur.

(89 Wash. 423)

HUSCHKE v. ARCADIA ORCHARDS CO.
(No. 12833.)

(Supreme Court of Washington. Jan. 28, 1916.)

1. WATERS AND WATER COURSES ¶254—IRRIGATION WATERS—CONTRACT TO FURNISH—TIME OF PERFORMANCE.

Where an irrigation company's deed to lands clearly agreed to supply them with water, but fixed no time within which it was to be furnished, the company was under duty to furnish water within a reasonable time, considering the facts contemplated by the parties when the contract was made.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 811; Dec. Dig. ¶254.]

2. DAMAGES ¶141—PLEADING—COMPLAINT—SUFFICIENCY.

Where the complaint of plaintiff, suing for breach of contract, sufficiently stated a contract, its breach and proximate injury, the complaint was good, although it set out an improper measure of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 406-408, 412, 414, 415; Dec. Dig. ¶141.]

3. WATERS AND WATER COURSES ¶263—IRRIGATION WATERS—ACTION FOR BREACH—MEASURE OF DAMAGES.

In an action for failure to furnish water by the grantee of one whose lands defendant had contracted to supply, where the proximate injury was the destruction of a number of fruit trees and damage to others, the measure of damages was the difference between the value of the growing trees, had water been furnished according to the contract, and the value of the trees without water, limiting the damages to such injuries only as were occasioned by its lack, since the proper measure of damages for breach of contract is the injury proximately resulting.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. ¶263.]

Department 1. Appeal from Superior Court, Spokane County; E. K. Pendergast, Judge.

Action by Ernst Huschke against the Arcadia Orchards Company. From a judg-

ment of dismissal, plaintiff appeals. Reversed and remanded for new trial.

Munter & Flood, of Spokane, for appellant. Cullen, Lee & Matthews, of Spokane, for respondent.

MORRIS, C. J. Appeal from a judgment of dismissal based upon the insufficiency of the complaint. The complaint recited that in March, 1909, respondent sold to one Grant 200 acres of land, together with a perpetual water right to the use of certain water for irrigation purposes during the period from May 15th to September 1st of each year, from canals, ditches, flumes, or pipe lines to be constructed by respondent, which would deliver the water at the highest point of the granted land; that the grantee subsequently sold 20 acres of this land to appellant, together with a proportionate share of the perpetual water right as specified in the deed to Grant; that appellant went into possession of his land in 1910, purchased and planted a large number of fruit trees, but that respondent failed and neglected to furnish water as specified in the Grant deed, and had so failed up to May 1, 1913; that appellant was unable to procure water elsewhere; and that by reason of respondent's failure to comply with the terms of its contract in the furnishing of water he lost many of his fruit trees, and others were greatly damaged. It is then alleged that with water the land was worth \$400 per acre; without water not to exceed \$85, and appellant's damage was consequently fixed at \$6,300, for which judgment was demanded. Issues were joined, and a jury impaneled to try the same, when respondent objected to the admission of evidence upon the ground that the complaint was insufficient. This objection was sustained, and appellant refusing to further plead, the cause was dismissed.

[1] No time seems to have been fixed within which the water was to be furnished, but inasmuch as the deed clearly calls for a supply of water, the law fixes the time as a reasonable time considering the facts within the contemplation of the parties at the time the contract was entered into, and what would be a reasonable time would be one of the ultimate facts to be determined.

[2] It is apparent that appellant has misconceived the measure of his damages in seeking to recover the difference between the value of the land with and without water; but this does not call for a dismissal of the action. It is not essential to the statement of a good cause of action that the complaint should set out a proper measure of damages, since that is a question of law to be determined by the court in instructing the jury or in the conclusions of law if tried without a jury. If the appellant sufficiently stated a contract, its breach and proximate injury, he stated a cause of action irrespective of what

the pleader conceived to be the proper measure of damages. *Wetmore v. Porter*, 92 N. Y. 76; *St. Louis S. W. Ry. Co. v. Jenkins* (Tex. Civ. App.) 89 S. W. 1106; *Norton v. Kull*, 74 Misc. Rep. 476, 132 N. Y. Supp. 387; *Weller v. Missouri Lumber & Mining Co.*, 176 Mo. App. 243, 161 S. W. 853; *Ara v. Rutland* (Tex. Civ. App.) 172 S. W. 993.

[3] The proper measure of damages in the breach of a contract is the proximate injury. In this case the pleader alleged that proximate injury to be the destruction of a number of his fruit trees and damage to others. The measure of damages then would be the difference between the value of his growing trees had water been furnished within a reasonable time according to the terms of the contract and the value of the trees without water; bearing in mind, of course, all the elements which enter into the growth of fruit trees, and limiting the damages to such injuries only as were occasioned by lack of water. *Hanes v. Idaho Irrigation Co.*, 21 Idaho, 512, 122 Pac. 859; 3 *Kinney on Irrigation and Water Rights*, p. 3139.

Reversed and remanded for new trial.

FULLERTON, MOUNT, ELLIS, and CHADWICK, JJ., concur.

(89 Wash. 404)

MARSHALL-WELLS HARDWARE CO. v. TITLE GUARANTY & SURETY CO.
(No. 12746.)

(Supreme Court of Washington. Jan. 28, 1916.)

1. LIMITATION OF ACTIONS — SUI IN REM — SUIT BY CONTRACTOR'S SURETY TO RESTRAIN PROSECUTION OF CLAIMS — CLAIMANT'S APPEARANCE — STATUTORY ESTOPPEL.

Defendant, as surety on a contractor's bond guarantying the construction of a state aid road, brought a suit in the federal court to restrain the prosecution of numerous claims under the bond in the state courts, to avoid a multiplicity of suits, praying an injunction against the institution or prosecution of any other action under the bond, and asserting its readiness at all times to pay all claims properly established as true claims against the bond. Plaintiff, who had a claim for materials furnished the contractor and who was about to bring an action in a state court, entered its appearance in the federal court suit relying upon the promise to pay properly established claims, and a further promise to the same effect by counsel for defendant in such suit in respect of plaintiff's claim individually. Plaintiff proved its claim in the federal court, as did numerous other claimants, but after all the evidence was in the court on motion dismissed all claims less in amount than \$2,000, which included plaintiff's claim; no injunction, however, was issued against bringing or prosecuting state court actions. In the meantime the statute of limitations had run against the institution of a new action on such claim, but plaintiff brought an action in the state court, asserting the foregoing facts as an estoppel of the assertion by the defendant of the statute of limitations. *Held*, that there was not an estoppel under Rem. & Bal. Code, § 172, providing for the tolling of the statute of limitations by an injunction staying the commencement of an action, or under section 173, providing for the commencement of a new action by

the plaintiff within a year of the reversal of a judgment for him in an action commenced within the time prescribed, since no injunction was issued nor had there been reversal of the action of the federal court.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 56-58; Dec. Dig. ¶13.]

2. LIMITATION OF ACTIONS — SUI IN REM — SUIT BY CONTRACTOR'S SURETY TO RESTRAIN PROSECUTION OF CLAIMS — CLAIMANT'S APPEARANCE — CONDITIONAL PROMISE TO PAY — EQUITABLE ESTOPPEL.

The fact that in requesting plaintiff's appearance in such federal court suit defendant promised to pay its claim as soon as it should be properly established against the bond did not create an equitable estoppel of defendant from asserting the statute of limitations in plaintiff's subsequent action, since the promise to pay, being conditional, was not within the rule that in order to toll the running of the statute of limitations such promise must be certain, definite, and unconditional.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 56-58; Dec. Dig. ¶13.]

3. ELECTION OF REMEDIES — SUI IN REM — SUIT BY CONTRACTOR'S SURETY TO RESTRAIN PROSECUTION OF CLAIMS — CLAIMANT'S APPEARANCE.

The fact that plaintiff appeared in such federal court suit in order to avoid the issuance of an injunction against it created no ground for defendant's equitable estoppel in such subsequent state court action, since, plaintiff not being compelled to enter it, such appearance was voluntary and in connection with plaintiff's reliance upon establishing the claim in the federal court suit, was an election of remedies whereunder the statute of limitations ran against plaintiff's right to proceed in the state court.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 12; Dec. Dig. ¶7.]

4. LIMITATION OF ACTIONS — SUI IN REM — FORBEARING SUIT — PROMISE TO PAY — TOLLING STATUTE.

The mere promise by the debtor to pay if not sued affords no ground for estopping him from urging the defense of the statute of limitations, since in order to toll the statute, there must be a distinct agreement by the defendant not to interpose such defense in consideration of the forbearance of the suit.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 62-65; Dec. Dig. ¶15.]

Department 1. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by Marshall-Wells Hardware Company against the Title Guaranty & Surety Company. From a judgment sustaining a demurrer to its complaint, plaintiff appeals. Affirmed.

Cassius E. Gates, of Seattle, for appellant. James B. Murphy, of Seattle, and Williamson, Williamson & Freeman, of Tacoma, for respondent.

MOUNT, J. The trial court sustained a demurrer to the plaintiff's complaint. The plaintiff elected to stand upon the allegations thereof, and the action was dismissed. This appeal followed.

[1] The complaint alleges in substance that in July, 1910, W. F. Guernsey & Co. entered

into a contract with the State Highway Commission for the construction of a state aid road in King county; that in accordance with the provisions of section 1159, Rem. & Bal. Code, W. F. Guernsey & Co. executed and filed a bond on which the defendant in this action is surety; that thereafter between August 8 and September 27, 1910, the plaintiff furnished culvert pipe of the value of \$1,478.27, which culvert pipe was used in the work; that a claim was filed against the bond on June 9, 1911; that the work was accepted by the Highway Commission on September 3, 1911. The complaint also sets out a copy of the bond, which is a joint and several bond. This action was brought against the bonding company alone. The complaint was filed and served on June 16, 1914.

It is conceded by the appellant that the action is barred by the three-year statute of limitation, unless the further facts pleaded in the complaint have suspended the operation of the statute. The allegations of the complaint upon that question are as follows:

"That heretofore, and in the month of September, 1911, the defendant herein instituted suit in the United States District Court for the Western District of Washington, Northern Division, entitled Title Guaranty & Surety Company, a Corporation, Complainant, v. W. F. Guernsey et al., Defendants, No. 2022, and in April, 1912, filed an amended complaint alleging inter alia as follows: That said W. F. Guernsey & Co. had entered into a contract with the state of Washington as alleged in this complaint, and that pursuant to said contract, said W. F. Guernsey & Co. had entered upon the work of performing the same, and had in fact completed the work, and that said work had been accepted by the state. That the said complainant had executed a bond in behalf of said W. F. Guernsey & Co. to secure the faithful performance of said work. That said bond was duly accepted and filed; that said W. F. Guernsey & Co. had not at the time of the completion of said work under said contract sufficient property or assets from which any claim of the complainant might have against it could satisfy, and had not sufficient property subject to execution in said district or in the state of Washington, or elsewhere, and that said company was wholly unable to respond in damages sufficient to reimburse complainant for any sums for which it might be liable under said bond. That many claims had been filed with the State Highway Commissioner against said bond, and many of said claims were for less than the sum of \$2,000, and not appealable to the Supreme Court of the state of Washington. That a uniform holding might not be obtained in each case, and that, since the commencement of said action in the federal court, certain of the claimants brought suit upon said bond, some in a court of one county, and some in the court of another. That many of them were threatening to bring suit in the justice court and the superior court, upon claims not appealable to the Supreme Court. That some of said suits were prosecuted against the surety alone, and the court refused to require the principals upon said bond to be joined. That said complainant believed that, if the said claimants were not restrained therefrom, a multiplicity of suits would be instituted in different courts entertaining different opinions as to the construction of said statute regarding suits upon bonds of this character, and that the only way in which uniform rulings could be had upon all of said claims was a suit in equity such as

complainant filed at that time. That said complainant stood ready and willing at all times to pay any and all claims, and fully perform the covenants of its bond as soon as and whenever said claims were properly established as true claims against said bond. That the defendants in said action, the State Highway Commissioner of the State of Washington, the State Treasurer of the State of Washington, the State Auditor of the State of Washington, the county treasurer and county auditor of King county, had in their possession certain funds which they were threatening to turn over to the Scandinavian-American Bank of Tacoma, and claimed said funds by virtue of a purported assignment thereof from said W. F. Guernsey & Co.

"That in said action the said complainant therein, which is the defendant in this action, prayed the court for an injunction restraining and enjoining said state and county officials from transferring any funds in their possession, which said injunction was entered in said action on October 9, 1914, and in said action said complainant prayed for an injunction against all the defendants therein, including the plaintiff in this action, restraining them from instituting or prosecuting any other suit upon said bond. That the undersigned attorney for plaintiff in this action was advised of the filing of said complaint, and was threatening to file suit in the superior court against said bonding company, but at the request of James B. Murphy, counsel and attorney in fact for said Title Guaranty & Surety Company, filed in said action an appearance in order to eliminate the necessity of having a restraining order served upon this plaintiff. That said appearance was entered relying upon the allegations contained in said complaint and relying particularly upon the allegation therein to the effect that said bonding company, defendant herein, would pay any and all claims as soon as said claims should be properly established as true claims against said bond. That a large number of the other defendants in said action who had furnished materials and labor for use in the construction of the work under said contract also filed appearances and cross-complaints in said action. That this plaintiff endeavored at numerous times to have said case set down for trial, but that it was delayed and did not come on for trial until the 14th of May, 1914. That the said defendants who furnished material and labor aforesaid introduced evidence in support of their respective claims, and that this plaintiff proved that the material alleged in this complaint to have been furnished was actually used in the construction of said road, and was a valid claim against said bond. That, after all the evidence in said case was introduced, the court in that action, upon motion of the alleged assignee of said W. F. Guernsey & Co., dismissed said action as to all cross-complainants whose claims were less in amount than \$2,000. That, although said motion was filed in the name of said assignee, it was in truth and in fact made at the request and for the benefit of the defendant in this action.

"That plaintiff alleges that said action was instituted, and the delay of the trial thereof, caused by defendant herein, for the sole purpose of defeating the claim of this plaintiff and others similarly situated, and that the defendant herein is threatening to plead the statute of limitations as against the claim of this plaintiff on the ground that more than three years have expired since the materials used in the construction of said road were delivered. That the plaintiff herein has at all times acted in good faith and would not have appeared in said action in the federal court except for the fact that an injunction had been prayed for in said suit, and that its appearance therein would tend to avoid a multiplicity of suits, and except for the further fact that plaintiff in that action asserted its willingness and promised therein to pay all claims as soon as they should be proper-

ly established as true claims against said bond. "That defendant in this action has by its acts, words, and conduct aforesaid estopped itself from pleading the statute of limitations in this action, and that said defense is not available to the said defendant at this time. That said defendant is preparing to plead the statute of limitations as a defense and should be enjoined from so doing."

The question presented upon this appeal is whether these allegations are sufficient to estop the defendant from raising the question of the statute of limitations. The statute at section 172, Rem. & Bal. Code, provides:

"When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

Section 173, Rem. & Bal. Code, provides:

"If an action shall be commenced within the time prescribed therefore, and a judgment there-in for the plaintiff be reversed on error or appeal, the plaintiff * * * may commence a new action within one year after reversal."

It is plain, we think, that these provisions of the statute are not applicable to this case for the reason that no injunction or statutory prohibition is alleged in the complaint. It is not alleged or claimed that the action in the federal court has been reversed. So that it is plain that these provisions of the statute are not applicable to the present action.

[2] It is argued at some length by the appellant that the facts above pleaded constitute an equitable estoppel against the defendant from raising the statute of limitations. It is no doubt the rule that where a fraud, or circumstances amounting to a fraud, prevents a party from maintaining an action against another, the equitable rule of estoppel will apply. The authorities are abundant to that effect. This court has held, in *Kreiselshelmer v. Gill*, 85 Wash. 175, 147 Pac. 871, that where a promise is made to pay as soon as a suit against a person secondarily liable is over, regardless of the outcome of that suit, and a creditor was thereby induced to delay the enforcement of his claim, an equitable estoppel would follow. But we think that case does not control here by reason of the fact that in that case there was an absolute promise to pay. And, furthermore, the account in that case was by the act and solicitation of the payor put beyond the control of the creditor for the time being, and the suit was still pending thereon. The rule is plain that where there is a promise to pay, before it will toll the running of the statute of limitations, the promise must be certain, definite, and unconditional. *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998; *Bank of Montreal v. Guse*, 51 Wash. 365, 98 Pac. 1127; *Thisler v. Stephenson*, 54 Wash. 605, 103 Pac. 987; *Coe v. Rosene*, 66 Wash. 73, 118 Pac. 881, 38 L. R. A. (N. S.) 577, Ann. Cas. 1913C, 741. The promise alleged in this case, as stated in the complaint above quoted, was that, if the plaintiff in this case would enter an appearance in the federal

court, the claim of the plaintiff would be paid "as soon as said claims should be properly established as true claims against said bond." This was clearly a conditional promise to pay, and meant, of course, that if the plaintiff in this case would make an appearance in that case, and properly establish his claim against the bond, the claim would be paid. The only way the claim could be established in that case was by a judgment of the court. It is true it is alleged in the complaint that the plaintiff in this case "proved that the material alleged in this complaint to have been furnished was actually used in the construction of said road and was a valid claim against said bond." It is then alleged that:

"After all the evidence in said case was introduced, the court in that action, upon motion of the alleged assignee of said W. F. Guernsey & Co., dismissed said action as to all cross-complainants whose claims were less in amount than \$2,000."

So it is clear there is no allegation that the claims of the appellant were allowed in that case; but the fact is, as stated in the complaint, that the claims were not allowed, and as to the appellant, the action was dismissed.

[3] The complaint above quoted also alleges that in the case in the federal court an injunction was sought, and that this plaintiff, in order to avoid the issuance of an injunction, entered an appearance in that case. It is apparent that the appellant was not compelled to enter an appearance in that case. It could do so or not, as it saw fit. No injunction was issued against the appellant. If an injunction had been issued, then clearly, under the terms of the statute above referred to, the statute of limitations would not run pending that injunction. The plaintiff therefore voluntarily entered its appearance relying, as it says, upon establishing his claim as a true claim against said bond in that court. In other words, the appellant elected its remedy in the federal court instead of maintaining an action in the state court. In electing that remedy, the statute ran against the claim in the state court. *Hinchman v. Anderson*, 32 Wash. 198, 72 Pac. 1018; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271.

It is stated in the complaint in this case that an injunction was entered in the federal court on October 9, 1914. That injunction, according to the allegations of the complaint, ran only against state officers mentioned in the complaint in the federal court, and was not effective against this appellant. It is not claimed, as we understand, that any injunction was issued against this appellant in the federal court. It entered that court voluntarily. It was not required to remain there, but could at any time have been dismissed therefrom, and could have brought an action in the state court. This fact distinguishes this case from the case of *Kreiselshelmer v. Gill*, supra. Clearly there is no

agreement to waive the statute of limitations alleged in the complaint in this action. The only agreement attempted to be alleged is that the plaintiff in the federal court promised this appellant that if it would make an appearance in the federal court, and there properly establish as true its claim against the bond, then this appellant would be paid. There was evidently no thought in this promise to waive the statute of limitations.

[4] It has been held that the statute of limitations will run unless waived by an agreement expressly or clearly to be implied. *McKay v. McCarthy*, 146 Iowa, 546, 123 N. W. 755, 34 L. R. A. (N. S.) 911.

In *Monroe v. Herrington*, 110 Mo. App. 509, 85 S. W. 1002, it was said:

"In order to prevent the defense of the statute of limitations by estoppel or waiver, there must have been a distinct agreement by the party sued not to interpose the defense. Mere reliance on the debtor's promise to pay if not sued affords no ground for cutting him off from the defense when sued. *Hill v. Hilliard*, 103 N. C. 84, 9 S. E. 639; *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702; *State Bank v. Hill*, 10 Humph. (Tenn.) 176, 51 Am. Dec. 698; *Andrae v. Redfield*, supra, 98 U. S. 225 [25 L. Ed. 158]."

We are satisfied therefore, from the allegations of the complaint above set out, that there was no agreement to waive the statute, and no fraud, and no ground for equitable estoppel. The trial court was right in sustaining the demurrer.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., and ELLIS and FULLERTON, JJ., concur.

(39 Wash. 475)

BERTRAND v. HUNT et al. (No. 12977.)

(Supreme Court of Washington. Feb. 4, 1916.)

1. BAILMENT §14—PRINCIPAL AND AGENT §14—INJURIES TO PROPERTY BAILED—LIABILITY.

Plaintiff was attempting to sell his automobile to L., and P., a dealer in automobiles, interested himself in the sale, believing that if plaintiff sold his car he might be able to sell plaintiff a new car. P. suggested to plaintiff that he and L. be allowed to take the car for a day or two. Plaintiff, knowing of P.'s interest in the transaction, allowed him to take the car for the purpose of demonstration in furtherance of their mutual designs. P. permitted L., who was inexperienced, to drive the car, teaching her to drive it, and at an angle in the road she drove into a gulch, killing herself and damaging the car. Held, that L.'s estate was not liable to plaintiff, as P. was plaintiff's agent for whose negligence plaintiff was responsible, and an inexperienced person learning to drive an automobile in the presence of and under the tuition of an experienced man cannot be held liable in damages, unless there is positive negligence.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45-55; Dec. Dig. §14; Principal and Agent, Cent. Dig. §§ 26-33; Dec. Dig. §14.]

2. PRINCIPAL AND AGENT §14 — IMPLIED AUTHORITY—ESTOPPEL TO DENY AGENCY.

Agency may be implied from all the attending circumstances, or in other words a person may so use his property with relation to others that he will be estopped to deny an agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 26-33; Dec. Dig. §14.]

Department 1. Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Action by Philip Bertrand against William Hunt, as administrator of Minnie B. Leitch, deceased, and another. From a judgment in favor of the administrator, plaintiff appeals. Affirmed.

Bridges & Bruener, of Aberdeen, for appellant. Hogan & Graham, of Aberdeen, for respondent Hunt. G. R. Snider, of Aberdeen, for respondent Poulson.

CHADWICK, J. [1] Plaintiff was the owner of a Chalmers automobile. He learned that Mrs. Minnie Leitch might buy a machine. He sought her out and offered her his machine for \$1,200. Defendant Poulson operated a garage at Aberdeen, and was the selling agent for the Chalmers Company. It coming to the knowledge of Poulson that plaintiff had spoken to Mrs. Leitch, and believing that he might be able to sell plaintiff a new car of the same make, he took it upon himself to discuss the matter with her, he being a boarder at her house.

On the 22d day of May, 1914, Poulson was at the home of Mrs. Leitch for lunch, and he asked her to go with him and examine and ride in the car of the plaintiff. They must have discussed, in some way, the price and size of the car. Testimony shows that Poulson had obtained the offer of better terms than had been made by plaintiff; that is to say, that if Mrs. Leitch bought the car plaintiff would take \$600 down and \$600 in 60 or 90 days, without interest. At any rate, Mrs. Leitch went with Poulson, and they drove to the place where plaintiff had his car. Poulson obtained a tapeline and measured the car to see if it would go into a chicken house which Mrs. Leitch intended to use as a garage if she bought the car.

Plaintiff testifies that he was about to make some repairs on the car in the way of putting in a new pump, and that Mrs. Leitch suggested that they be allowed to take the car and return it in a day or two, when he might make the repairs. The other witnesses do not agree whether Mrs. Leitch or Poulson made such proposal. The weight of testimony would sustain the finding that if any such suggestion was made, it was made by Poulson. Poulson and Mrs. Leitch took the car. After driving for a few blocks Mrs. Leitch got into the driver's seat so that Poulson could teach her the working of the machine. He had had her, with some friends, out with him the night before for the purpose

of instructing her, and a few days before had directed her in driving a car from the golf grounds into the city.

While driving down a hill on Fourth street, Mrs. Leitch at the wheel, the car came to a bridge situated at an angle of about 45 degrees with the road. Mr. Poulson testifies that he directed Mrs. Leitch to turn to the left, and that instead of turning to the left she gave a quick turn to the right. The car went over a sidewalk, into the railing, and down into the gulch below. Mrs. Leitch was killed, and this action was brought on the theory that Poulson and Mrs. Leitch were gratuitous bailees and liable to answer for the damages to the machine.

The court below found that Poulson was not the agent of the plaintiff, and found him liable for the damages sustained. He further found that Mrs. Leitch was in no way responsible for the accident, and entered judgment accordingly. Poulson has not appealed.

Appellant accepts the findings of fact and instances that inasmuch as Poulson was not the agent of respondent, it follows that he was a gratuitous bailee, and that Mrs. Leitch, having an interest in the purchase of the car, was equally liable with him. This might be so under some circumstances, but we cannot agree with the finding, which was excepted to, that Poulson was not the agent of the appellant.

Mrs. Leitch was no more than a prospective buyer. Plaintiff was desirous of selling his machine. Poulson believed if the machine were sold he would be able to replace it with a new machine. Appellant knew of his interest in the transaction and allowed him to take the car for the purpose of demonstration in furtherance of their mutual designs.

The car would not have been taken under the circumstances if it had not been for the suggestion of Poulson, and we may assume that appellant would not have permitted his car to be taken by any prospective buyer, unless he was satisfied that he was a competent and efficient driver, or in the company and under the direction of a skillful chauffeur.

The law will not put an inexperienced person, who is learning to drive an automobile in the presence of and under the tuition of an experienced man, to the hazard of answering in damages, unless there is proof of positive negligence. We find no such proof in the record.

[2] It may be suggested that there is no proof that Poulson was ever made the agent of appellant, but agency may be implied from all the attending circumstances. To state the rule in a negative way, a person may so use his property with relation to others that he will be estopped to deny an agency.

We find that the duty of care to safely guide the machine was upon Poulson, that he was the agent of appellant, and that the negligence, if any, was the negligence of the agent, and in law, that of the plaintiff, and that he cannot maintain an action against the estate of Mrs. Leitch.

Affirmed.

MORRIS, C. J., and FULLERTON, MOUNT, and ELLIS, JJ., concur.

(39 Wash. 478)

STATE v. TOWESSNUTE (No. 13083.)

(Supreme Court of Washington. Feb. 4, 1916.)

1. INDIANS — 3 — INDIAN TREATY — CONSTRUCTION—INCONVENIENCE TO STATE.

While inconvenience or loss to the state, however great, is no ground for taking away any rights possessed by the Indians, it is a matter proper to consider in determining from an Indian treaty of doubtful meaning whether Congress intended to bestow rights claimed by the Indians.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5-7, 11; Dec. Dig. — 3.]

2. INDIANS — 3 — INDIAN TREATY—RIGHT TO FISH OUTSIDE RESERVATION—SUBJECT TO STATE LAW.

The Yakima Treaty of March 8, 1859 (12 Stat. 951), providing that the exclusive right of taking fish in all streams running through or bordering on the reservation is secured to the Indians, as also the right of taking fish at all usual and accustomed places "in common with citizens" of the territory, does not authorize a tribal inhabitant of the Yakima Indian reservation to fish in a river several miles outside the reservation without a license, contrary to a law of the state; the words quoted indicating an intent not to give the Indian an advantage, but to save him from a disadvantage, and to permit the state laws to operate on both races alike in respect to the right to fish outside the reservation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5-7, 11; Dec. Dig. — 3.]

3. INDIANS — 12 — TITLE TO LAND—INDIAN TREATIES.

Treaties with the Indians in respect to lands recognize, not that the Indian had a salable title to the land, but that they had a mere possessory right of use for the purpose of sustenance.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 27, 28; Dec. Dig. — 12.]

4. INDIANS — 2 — INDIAN TREATIES — CONSTRUCTION—"NATION."

The designation of an Indian tribe as a "nation" in an Indian treaty is not a recognition of the tribe as an independent state or sovereign nation, but is a mere recognition of it as an Indian tribe and ward of the federal government.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 2, 8; Dec. Dig. — 2.]

For other definitions, see Words and Phrases, First and Second Series, Nation.]

5. FISH — 8 — CONSERVATION—POLICE POWER.

The police power of the state is not confined to subjects of safety, but extends to those of convenience and prosperity, including the conservation of fish.

[Ed. Note.—For other cases, see Fish, Cent. Dig. § 16; Dec. Dig. — 8.]

6. CONSTITUTIONAL LAW §81—POLICE POWER—RIGHT TO SURRENDER.

The police power of the state cannot, by any act of the Legislature be surrendered to the national government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. §81.]

7. CONSTITUTIONAL LAW §81—POLICE POWER OF STATE—FEDERAL DECISIONS.

In controversies involving the exercise of the police power of the state, the federal courts will resolve every doubt in favor of the state law, and, even in case of a state law on a subject within the control of the federal government, the state law will be upheld until the federal law has been extended to that subject.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. §81.]

8. CONSTITUTIONAL LAW §81 — POLICE POWER.

An owner cannot remove his property from the police power of the state by making a contract concerning it, nor can the state under the police power commit a confiscation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. §81.]

9. INDIANS §3 — INDIAN TREATY — IMPLIED REVOCATION — ADMISSION TO STATEHOOD — POLICE POWER.

The admission of a state to the union on equal terms with the other states, impliedly revokes provisions of an Indian treaty granting rights which impair the state's police power.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 5-7, 11; Dec. Dig. §3.]

Holcomb, J., dissenting.

Department 1. Appeal from Superior Court, Benton County; Bert Linn, Judge.

Alec Towessnute was charged with fishing without a license in violation of statute. A demurrer to the information was sustained, and the State appeals. Reversed, with directions that case be reinstated, and demurrer overruled.

W. V. Tanner, Atty. Gen., C. W. Fristoe, of Prosser, and Lindsay L. Thompson, of Olympia, for the State. Francis A. Garrecht, of Spokane, for respondent.

BAUSMAN, J. It is conceded by stipulation and in argument that the Indian Towessnute, tribal inhabitant of the Yakima Indian reservation, has committed violations of our fishing statutes on the Yakima river, not only several miles outside of the reservation, but at a spot in no way appurtenant to it by path or easement. It is also conceded that, if his tribe may continue to do these things, the salmon industry of this state must be grievously wounded in its very nurseries, because the Yakimas and other tribes, whose contentions in cases now pending are the same, claim many such spots on various waters to be exempt from these statutes, and because these people, once savage and wandering, now in some degree pursue fishing for a profit. The habits of salmon in seeking at certain seasons the highest fountains of our streams to spawn in are well known, and such is their persistence and thronging at the entrance to them and at either rapids

or dams that the state has found it imperative to save them at such places by regulations.

[1] These considerations, together with what we conceive to be a misunderstanding of certain federal decisions, make it best to discuss this case somewhat at length. Inconvenience or loss to ourselves, however great, is no ground, indeed, for taking away any rights that the Indians may actually possess, but is proper to be considered in deciding from a dubious document whether Congress, looking to the future of this commonwealth ever intended to bestow them.

[2] What Towessnute did contrary to the statute was to fish without a license, snag salmon with a gaff hook, and catch fish without hook or line within a mile of the dam. These acts constitute for the purpose of this discussion one offense, since all were committed at one place where Indian privileges are asserted to justify them. Towessnute's defense is that his manner of fishing was ancient in his tribe, and the spot an immemorial resort where he required no license. The lower court justified him under the Yakima Treaty of March 8, 1859 (12 Stats. at Large, 951), which was passed after Washington had been made a territory with legislative power over "all rightful subjects of legislation," and which, after creating a reservation whither the Yakimas should retire, provided:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The reasoning was that the words "in common with" would be unduly stretched if the Indians were to be subjected even at a fishing resort beyond the reservation to state regulation. All that he lost by that phrase, it was contended, was that the white man might fish there, too. Within the reservation only the Indian might fish; outside both; the former in his old way; the white man as the state should prescribe. To express the argument concisely, the Indian, as a sovereign, merely yielded a partnership. The old locations were his before the treaties. By that convention he admitted the white man but the white man got only what the Indian clearly conceded. In terms, indeed, the treaty, mentioning nothing of the manner of fishing, secured to the Indian only the place. But it was not necessary to secure the manner also in express terms. Not surrendered, it was retained. In support of this argument counsel point to the priority of the Indian's possession, to the fact that the document is called a treaty,

that this treaty deals with the Yakimas as a "nation," and that the words on the Indian side are "concede," "convey," and "relinquish." In short, the Yakimas kept the reservation and ceded the outside places on their own terms.

[3] The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors, in getting title to this continent, ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. From France, from Spain, from Mexico, and from England we have ever proclaimed our title by purchase, by conquest, and by cession, in all of which great transactions the migratory occupant was ignored. Only that title was esteemed which came from white men, and the rights of these have always been ascribed by the highest authority to lawful discovery of lands occupied, to be sure, but not owned, by any one before. *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681. If in *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483, the Supreme Court speaks of the Indians having something which the whites had yet to purchase, it was not title, but mere possessory uses for subsistence. Later cases continue to plant our title on discovery. *Martin v. Waddell*, 16 Pet. 367, 409, 10 L. Ed. 997; *United States v. Rogers*, 4 How. 567, 572, 11 L. Ed. 1105.

[4] The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left so long as civilization did not demand his region. When it did demand that region he was to be allotted a more confined area with permanent subsistence. True, arrangements took the form of treaty and of terms like "cede," "relinquish," "reserve." But never were these agreements between equals. Even when we dealt with a "nation," the Indians were not "within the description * * * of an independent state or sovereign nation, but of an Indian tribe, * * * wards of the nation, * * * communities dependent on the United States, * * * the recognized relation, * * * that between a superior and an inferior." *Choctaw Nation v. United States*, 119 U. S. 1, 27, 7 Sup. Ct. 75, 30 L. Ed. 306.

These arrangements were but the announcement of our benevolence, which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy, and whom we have so often permitted to squander vast areas of fertile land before our eyes.

The treaty, then, interpreted as provision from the great guardian of this tribe, should be construed toward benevolence, and even be bent somewhat toward the Indian's notion of his rights. On the other hand, the chil-

dren of the donor are not to be ignored. The whites, too, were to enjoy, and enjoy by right, the waters and the soil. The document must be read from that point of view as well. But suppose in it a purpose solely of protecting the Indian; we must here first inquire what was particularly aimed at in allowing him these outside resorts of fishery, when the reservation itself is watered by the Yakima and other streams. It could not have been to insure the Indian's existence. It certainly was not done out of a fear that he would not find within the reservation sufficient food; for, if that was in the mind of the donor or of the Indian, why was the white man allowed to share these resorts? Nothing could be plainer than that the numbers of the white fishers, their advancing population, and their encroaching towns and mills would speedily render the reserved fishing spot worthless. Accordingly those who deem these locations of vital importance to the Indian must surely wonder why Congress failed to state in positive words that these resorts too were to remain exclusively the Indian's. Why were they not declared inviolate on both banks of all the streams and forever? Not only was this not said, but there are inserted the words "in common with citizens of the territory." Such as argue that the Indians relied on either the literal words or the general spirit of this treaty must acknowledge that this expression is perfectly plain, that the Indian expressly admitted the white man to these locations, and that he did not deem it indispensable to keep the white man off them altogether. It must be assumed that the Indians understood this simple phrase. In our opinion, they did understand it and did not object to it; but, since it is asserted to be historically true that there was great discontent among the Yakimas concerning this treaty, and that some of their chiefs refused to sign it, it is possible that they understood this privilege as we understand it, and that this feature was one of the things not acceptable to them.

As for Congress and the intent of that body, it was not unaware that Indians, when off the reservation, have ever been subject to the criminal laws of the states and territories, that the police power is indispensable to any commonwealth, and that the right of regulating fish and game is a proper exertion of such a right. *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *State v. Tice*, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469; *Sligh v. Kirkwood*, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835.

Was it, then, intended that the Yakimas at ancient places of fishing outside of their reservation were forever to fish as they pleased and when they pleased, ignoring the regulations of the future commonwealth for the preservation of what would keep such a place useful to both parties in interest? Surely it is not fretful to suppose that the treaty gave to the Indians the exclusive part of their

privileges in the reservation, and that nothing better than equality with the white man was given outside of it. Let us consider the situation at that line. The Indian already saw the approaching end of his roving, already felt it best to get an area that should be his alone. His hunting ground already narrowed by the settlements, he was really giving up little. By the treaty he was gaining an exclusive domain of 800,000 acres, immunity from intrusion by the white man, freedom from local laws, either civil or criminal, and perpetual existence in a valley both fair and ample. In return we must suppose that he was to give up everything outside of it. Whatever he could retain outside by this negotiation was, so to speak, so much added to the bargain.

The main purpose of the government was to separate the Indian from the white man and to care for the Indian in a more confined district. Yet it was natural to indulge him with the right of hunting on the outside public lands whilst these remained unsold and to let him fish at his old resorts outside. But at these last he should have no advantage over the white man. The title to the spot should not be the Indian's, only an easement. The two races should fish in common. The territory, in general, was to be the white man's, and he could even acquire absolute title; but he was to let the Indian fish, and that he might not by crafty statute subsequently cut off the Indian's privilege at these places, a positive easement was impressed upon the land. Then were inserted the words "in common with citizens." These words were not used to give something to the white man, but to give something to the red man; not to give the Indian an advantage, but to save him from disadvantage. Such, in our opinion, is their true intent. They are an eternal guaranty that at these spots the Indian shall have equal, but not more than equal, rights. The fishing grounds remain for both races without advantage to either. The white man's laws may operate on the enjoyment of the right, but must operate on both races alike, and the Indian, since the lands were to be sold to settlers, should be sure of access to the water by an easement.

[5] To adopt the other construction is not only to ignore a simple phrase and give the Indian an advantage, but is to suppose that Congress designedly crippled the government of a future state in powers salutary and essential. The police power is not confined to subjects of safety, but extends to those of convenience and prosperity. *Chicago, B. & Q. Ry. Co. v. Drainage Com'rs*, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175. It undoubtedly extends to the conservation of fish. *Smith v. Maryland*, 18 How. 71, 15 L. Ed. 269.

[6, 7] Nor is it given up, nor can it be given up, by any Legislature to the national government. It must be exerted, to be sure, in

such manner as will not infringe other rights which the states by the Constitution gave up to the central authority, but in controversies on this point the federal decisions clearly resolve every doubt in favor of the local law. Indeed, even on a subject within the exclusive rights of the general government the state laws of police will be upheld until the federal law has actually been extended to that subject. *Sligh v. Kirkwood*, supra.

It can hardly be imagined, then, that the easement was to be forever exempt from that local sovereignty, which, in the promotion of mere prosperity, has compelled a railway company to rebuild at its own great expense a lawfully constructed bridge in order that tracts below might be rendered, not healthful, but more salable and tillable; which has compelled farmers to suffer without compensation floods that were caused by the government's damming the stream; which has cut off old and valuable landing places, by an artificial shifting of a river, without compensation to the riparian owner; which has rendered a dock useless and lost to the owner while the public tediously builds a tunnel. See the cases collected in *Chicago, B. & Q. Ry. Co. v. Drainage Com'rs*, supra.

[8] But, it will be said, the local government may so legislate that at the place of easement there can be no fishing in future at all. Replying to this, it is plain that the white man must in that event equally lose. In the second place, the police power, when exerted not for public health or safety, but for prosperity, it encounters vested rights, may become unlawful by excessive degree; so it will be time enough to discuss such a situation when it arises. On the one hand, an owner cannot remove his property from the police power by making a contract concerning it. On the other hand, the state under the police power cannot commit a confiscation. Thus it is properly instanced that, while a city may lawfully restrict the height of buildings, it must not restrict to such a degree as renders the land entirely useless. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 28 Sup. Ct. 529, 52 L. Ed. 823, 14 Ann. Cas. 560.

It is a peculiarity of almost every legal principle that, enforced to an extreme, it changes its character, and, as both time and the circumstances must be considered in deciding whether an exertion of police power is really gnawing a constitutional right, it is not improbable that what might have been reckoned a needless or excessive exertion of it over these Indian rights in the early days of 1859, might be adjudged a proper one in 1915 by reason of the vast changes in the white population and the altered manners of the Indians. As much undoubtedly was conceded by the federal Supreme Court in respect to the exclusive power of Congress to prohibit the alcohol traffic with the Indians in a case in which it was argued that a

state's criminal jurisdiction would be unfairly cramped by such federal law; the court, while upholding that statute, remarking as to a future situation in which the Indians might greatly diminish and become scattered through the state:

"A prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from federal * * * control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the state." *Perrin v. United States*, 232 U. S. 478, 486, 34 Sup. Ct. 387, 390, 58 L. Ed. 691.

[9] If it be argued that the rights of this commonwealth while a territory were less than those of a state, and that the police power was then at the mercy of Congress, we must remember that the supreme federal tribunal has held Congress itself incompetent to cut off this power from a future state. Long after one of these Indian treaties Congress by an act admitting a state to the Union on equal terms with its sisters was adjudged to have revoked and to have had the right to revoke whatever in the treaty itself may have impaired the police power. *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244. There it was held that the act admitting Wyoming was superior to a treaty with the Bannock Indians, in so far as the latter were by that treaty eternally privileged to hunt as they pleased on unoccupied federal land, since so extensive, numerous, and scattered were the unsold lands that Wyoming would practically be deprived of her police power in respect to game and would enter the Union no equal sister state.

In *Coyle v. Smith*, 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853, Oklahoma was relieved of a feature of its admission act that attempted to fix the location of its capital city. Congress, it was held, had no power to admit states under conditions unequal in these respects.

The first decision establishes a repeal of an Indian treaty even by implication, rather than that a state be crippled in its police power. The other decision maintains the insufficiency of any act of Congress, even when designed to such an end, to impair the equal sovereignty of the state that it was then creating.

Nor is *United States v. Winans*, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, in conflict with these views, though under this same Yakima treaty it sustains the tribe in an ancient fishing place on another river, the Columbia. Nothing can be clearer than that what was there involved was a white settler's attempt to ignore the Indian's easement. The adjoining land had passed from the general government to a white owner, who, the court properly held, was making it impossible for the Indian to enjoy his privilege. What the case decided was that the government grantee had bought the land with that ease-

ment on it, and even from this commonwealth the grantee could not get something additional that would impair that easement. As for the police power, it was neither involved nor discussed in that case, so it is little in point to remark that the act admitting this state to the Union was also held not to have affected the easement derived by the treaty. The court was careful to be understood as sustaining a mere easement. That it might not put the privilege above the police power it says of the easement, 198 U. S., at page 384, 25 Sup. Ct., at page 665 (49 L. Ed. 1089):

"Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

Winters v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340, is as easily distinguished; for what that decided was that the Enabling Act of Montana did not give water appropriators rights superior to appropriations made by government officials on an Indian reservation for the benefit of that reservation, when the appropriations were made before statehood. The equal-footing right of Montana when entering the Union was clearly not impaired.

Neither do we find contrary authority in such cases as *United States v. Sandoval*, 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. 107; *Ex parte Webb*, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520. What these and several other similar cases hold is that the acts admitting territories into statehood do not prevent the general government's continuing to protect Indians by its own laws and beyond the bounds of the reservation from persons who seek to sell them alcohol. The new state's equal footing is not diminished by such enactments or by the continuation of such authority; for the tribal Indian is a ward of the general government under the clause of the federal Constitution to which the states expressly consent, and such a ward he remains wherever he may be.

The judgment is reversed, with instructions that the case be reinstated, and that the demurrer to the information be overruled.

MORRIS, C. J., and MAIN and PARKER, JJ., concur.

HOLCOMB, J. (dissenting). Whatever may be the views of the majority as to what an Indian treaty with our national government is, whether it is a treaty between two sovereigns or not, it is certainly a solemn compact binding in law and in honor upon both parties to it. The majority in this case treat this compact as one that the national government through Congress rightfully could, either expressly or by implication, set aside at will without the consent of the other party, the Indian tribe, and that it did so by implication by force of the Enabling Act au-

thorizing the formation of the territory of Washington into a state. I cannot concur therewith. Good faith requires the observance of the spirit as well as the letter of the compact with the Indians, more especially because the Indian tribe is the weaker of the two parties to the compact. In doubtful questions the doubt has most generally been resolved in favor of the Indian tribes.

The stress laid upon that phrase in the clause of the treaty under consideration, "the right of taking fish at all usual and accustomed places, in common with citizens of the territory," is strained construction. Had the phrase been "upon the same terms" in place of "in common with" the citizens of the territory, the construction would have been just. At the time of the treaty it was not known, possibly not even surmised, that the future state would rigidly regulate and partially prohibit the fishing in its streams; that certain fishing apparatus would be prohibited, the number or quantity of fish taken limited, the fishing season limited, and license required to fish at all.

It is undoubted that the state can assume and assert its police power over game and fish for their protection and conservation. But that sovereign power is subject to a still more supreme power—that of the federal government when exercising its lawful jurisdiction. In some fields of government the state is supreme; in others the nation. I am as jealous of the proper restriction of each as any one. In the exercise of its lawful power over a matter of which it had supreme and exclusive jurisdiction, the nation made a compact with the Yakima Tribe of Indians whereby the Yakima Tribe "relinquished and ceded" to the United States its rights or claims, whichever term may be preferred, to certain territory, in return for which the United States granted to the Yakima Tribe a certain area of land, together with certain immutable rights outside thereof.

The view of the majority is exactly that of the District Judge in *United States v. Winans*, who, concerning this same treaty and the same clause, said:

"The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired * * * proprietary rights, and this, it seems to me, is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

That view was disapproved by the federal Supreme Court in language rather testy and ironical. The case was appealed, and the lower court was reversed by the Supreme Court; the decision being reported in 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089. The opinion stated the issue as above summarized, and further made these observations:

"In other words, it was decided that the Indians acquired no rights, but what any inhabitant of the territory or state would have; *indeed, acquired no rights but such as they would have without the treaty.* [Italics mine.] This is certainly an impotent outcome to negotiations

and a convention, which seemed to promise more and give the word of the nation for more. And we have said, we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' [*Choctaw Nation v. United States*] 119 U. S. 1 [7 Sup. Ct. 75, 30 L. Ed. 306]; [*Jones v. Meehan*] 175 U. S. 1 [20 Sup. Ct. 1, 44 L. Ed. 49].

* * * There was a right outside of those boundaries [of the reservation] reserved 'in common with citizens of the territory.' As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. * * * And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees. [Italics mine.]

To my mind, by this construction, the rights of the appellant in question are as plainly and emphatically determined as if the decision were in the present case. It is conclusive of this controversy and binding in law upon this court. We have no option whatever but to construe this treaty right as has the Supreme Court of the United States concerning the same treaty.

Furthermore, if the state can regulate the fishing of the Indians under the guise of police power, it can prohibit, and that in the face of the treaty, for regulation is a part of the power to prohibit, and the one but a step toward the other. If the state should prohibit citizens of the state from fishing in any manner upon these streams in question, it would either be compelled to except Yakima Indians not citizens because of the treaty, or include them in the general effect of the law, and thus abrogate the treaty as to those rights—a thing the state cannot do.

I therefore dissent.

(29 Wash. 492)

STATE v. ALEXIS. (No. 13084.)

(Supreme Court of Washington. Feb. 4, 1916.)

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

John Alexis was convicted of fishing without a license in violation of statute, and appeals. Affirmed.

Craven & Greene, of Bellingham, for appellant. W. V. Tanner, Atty. Gen., W. P. Brown, Pros. Atty., of Bellingham, and L. L. Thompson, of Olympia, for the State.

PER CURIAM. This case is identical in all respects with *State v. Towessnute*, 154 Pac. 805, just decided, except that it involves the rights of another tribe of Indians, the Lummi, and a different treaty, the Muckl-teeh, proclaimed in 1859. The language involved in that treaty is the same as in the *Towessnute* Case and the same justification is attempted. The lower court in this case held with the state, and, under our opinion in the other, did so correctly. This cause having been argued as one controversy with the *Towessnute* Case, it will not be necessary to enlarge upon our opinion already rendered.

Judgment affirmed.

HOLCOMB, J. For the reasons stated in my dissent to the decision in *State of Washington v. Alex Towessnute*, 154 Pac. 805, I dissent.

(39 Wash. 295)

In re CRIM'S ESTATE. (No. 12744.)

(Supreme Court of Washington. Jan. 23, 1916.)

1. EVIDENCE \Leftrightarrow 400 — PAROL EVIDENCE AFFECTING WRITING.

In probate proceedings by the buyer of a decedent's corporate stock from his executor for confirmation of the contract, parol evidence of the agreement of sale, as made and performed by the buyer, was properly admitted, where there was no contemporaneous writing intended to evidence the contract, but only a writing, made almost a month after the contract had been fully performed on the buyer's part, not to evidence it, but to exhibit to the buyer's banker.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1778-1793; Dec. Dig. \Leftrightarrow 400.]

2. APPEAL AND ERROR \Leftrightarrow 338 — TIME FOR TAKING APPEAL—STATUTE.

In probate proceedings by the buyer of a decedent's corporate stock from the former executor for confirmation of the contract of sale, where notice of the cross-appeal of the administrator de bonis non was given more than 15 days, but less than 90 days, after entry of a decree for the buyer, such appeal was not tardily taken, as it was authorized by Rem. & Bal. Code, § 1716, subd. 1, providing that any party aggrieved may appeal to the Supreme Court from the final judgment in any proceeding made by the superior court, the time for which is 90 days.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1879-1882, 3057; Dec. Dig. \Leftrightarrow 338.]

3. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 162 — EXPRESS AUTHORIZATION OF CONTRACT—NECESSITY.

Where under a will no order of the court was necessary to authorize an executor to sell part of corporate stock, the only asset of the estate, to raise money to save the balance of the stock from forfeiture and to pay debts, the subsequent probate of the will in effect ratified the sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 639, 645; Dec. Dig. \Leftrightarrow 162.]

4. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 168 — AVOIDANCE OF CONTRACT.

Where decedent's executor, named in a purported nonintervention will, before appointment, sold corporate stock of the estate for a fair price to avoid forfeiture of the balance of the stock and to pay debts, and afterwards the will was admitted to probate by a court of competent jurisdiction, but was later declared void for lack of testamentary capacity, the administrator de bonis non could not avoid the sale as against the buyer.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 644, 646; Dec. Dig. \Leftrightarrow 168.]

5. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 162 — CONTRACT—EQUITABLE CHARACTER.

Where a buyer of corporate stock of a wholly speculative value from the executor of the deceased owner purchased for a few hundred dollars to enable the executor to save the unsold balance of the stock from forfeiture and to pay debts of the estate, a chance which no other person would take, the sale was fair.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 639, 645; Dec. Dig. \Leftrightarrow 162.]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Petition by W. K. Miner for confirmation of his contract with T. H. Gourley, former

executor of the estate of Leslie L. Crim, deceased. From a decree in part for petitioner, he appeals, and E. P. Tremper, administrator de bonis non, prosecutes a cross-appeal. Affirmed.

Milo A. Root, of Seattle, for appellant. C. D. Murane and Ballinger & Hutson, all of Seattle, for respondent.

ELLIS, J. This case arises on a petition in probate for the confirmation of a contract with an executor of a will, which will was subsequently declared void for lack of testamentary capacity and undue influence, and for delivery to the petitioner of certain shares of stock claimed by him under the contract.

Leslie L. Crim died, leaving a purported nonintervention will. One Gourley was named therein as executor and trustee. The estate consisted of 200,000 shares of the capital stock of Lost River Tin Mining Company, a corporation owning the inchoate title to an unpatented tin mining claim in Alaska. The other assets were admittedly so insignificant as to be negligible. Some time prior to his death Crim had executed a promissory note to the Scandinavian-American Bank of Seattle, and had deposited all of the certificates of this stock with the bank to secure payment of the note. Shortly before its maturity the bank transferred the note to one Sadie E. Smith, who, as it appears, intended to forfeit the pledged stock on the maturity of the note in default of payment. At the time of the transaction here in question, the debt evidenced by the note amounted, with interest, to \$790. There were other debts amounting to \$460. Prior to probating the will, but assuming to act under it, Gourley sought to procure a loan upon or to sell a part of the stock to raise money to redeem the stock and pay these debts. Failing elsewhere, as he testified, he applied to the petitioner, Miner, and on September 5, 1911, it was agreed between them that, in consideration of a sale to him of one-fourth of the stock, Miner would pay to Gourley \$1,250 with which to redeem the stock and pay the other debts. Pursuant to this agreement on that day the money was paid to Gourley, who at once made a tender of the amount of the note to the bank, and a few days later to the attorney for Sadie E. Smith. These tenders were refused.

The only conflict in the evidence is as to the agreement between Gourley and Miner. Gourley testified that Miner was to receive only one-fourth of the stock. In this he is corroborated by another witness, to whom Miner applied for a loan of the money, and who testified that Miner then told him he was to receive one-fourth of the estate. Miner testified that the original agreement was that he should receive one-half of the stock. In this he is corroborated by his wife, who was present when the agreement was made.

On October 3, 1911, Gourley sent to Miner a paper as follows:

"Islandale, Washington, October 3, 1911.

"This is to certify that whereas the estate of Leslie L. Crim is incumbered by a certain note, due September 8, 1911, and unpaid, and having no funds of the estate to meet payment of said note and other indebtedness now due, and acting under clause 2 of the last will of Leslie L. Crim, which authorizes me as executor and trustee to pay out of his estate all debts outstanding. I hereby agree for the sum of \$1,250.00 to me paid to assign 100,000 shares of the capital stock of the Lost River Tin Mining Company, of Alaska, as soon as the same is transferred to me upon the books of said company, to W. K. Miner.
[Signed] T. H. Gourley."

Gourley explained that this was given to satisfy a bank to which Miner owed money, that the bank had threatened Miner with proceedings for a receivership, and that this paper was given to Miner to exhibit to the bank, and that it was without other consideration. Miner admitted that the agreement was reduced to writing to satisfy his banker, but testified that it embodied the true terms of the original verbal agreement of September 5th.

The will was probated September 18, 1911. Gourley was appointed executor pursuant to its terms, and entered upon the management of the estate. He brought an action against Sadie E. Smith for the recovery of the stock, and paid the \$790 into court in that action, to keep his tender good. That action finally resulted in a judgment in Gourley's favor, which judgment on February 28, 1914, was affirmed by this court on appeal. *Gourley v. Smith*, 78 Wash. 286, 139 Pac. 58. Meanwhile a contest of the will was instituted, which resulted in a decree setting aside the will on the grounds of testamentary incapacity and undue influence. On appeal that decree, on March 7, 1914, was affirmed by this court. *Ingersoll v. Gourley*, 78 Wash. 406, 139 Pac. 207, Ann. Cas. 1915D, 570. E. P. Tremper was then appointed, qualified, and is now acting as administrator de bonis non of the estate. In this proceeding, which had been held in abeyance pending the contest of the will, the trial court, on February 6, 1915, entered a decree, ratifying and confirming the sale of stock by Gourley to Miner, but finding that it was only for one-fourth of the stock—50,000 shares—instead of one-half or 100,000 shares, as claimed in the petition. From that decree the petitioner prosecutes an appeal and the administrator de bonis non a cross-appeal.

[1] The appellant contends that the writing of October 3, 1913, cannot be controverted by parol evidence, and that in any event the court erred in finding that the agreement was for 50,000 instead of 100,000 shares.

The first claim is effectually answered by the fact that the writing of October 3d. was not a contemporaneous writing intended to evidence the contract. It was written almost a month after the contract had been fully performed on Miner's part. It was admittedly made, not for the purpose of evi-

dencing the contract as between the parties, but for the sole purpose of satisfying Miner's banker. When the original agreement was made and the money paid by Miner, there was no intention that the agreement should ever be reduced to writing. The writing was based upon no new consideration. Unless it did in fact embody the terms of the actual agreement upon which the money was paid, it could not be binding upon the estate so as to estop the representative of the estate to question its terms. Parol evidence of the agreement of September 5th as made and performed by Miner was properly admitted.

As to whether the original agreement was a sale of 50,000 or 100,000 shares the evidence is in sharp conflict. We have attentively studied the record. We cannot say that the evidence preponderates against the court's finding.

[2] The appellant moves to dismiss the cross-appeal as tardily taken. The notice was given more than 15 days, but less than 90 days, after the entry of the decree. The appellant claims that the cross-appeal falls under subdivision 6, § 1716, Rem. & Bal. Code. It is clear, however, that it falls under subdivision 1 of that section. Though the proceeding was by petition in the probate of the estate the decree was a final disposition of the matter in controversy. The time for appeal was therefore 90 days. *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 305, 136 Pac. 147. The motion is denied.

The cross-appellant contends that the contract was not merely voidable, but void; that, the will having been declared void for lack of testamentary capacity and undue influence, the sale was thereby annulled. The case of *Wallace v. Grant*, 27 Wash. 130, 67 Pac. 578, is cited and relied upon. In that case an administrator mortgaged real estate under an order of court based upon a petition, affirmatively showing that the personal property of the estate had not been exhausted, and there was no showing that the estate was actually the recipient of the money loaned. That case is readily distinguishable from the one before us.

[3, 4] Had the will in the case here never been held invalid, there could be no question that the sale, if a fair one, would have been valid and binding upon all persons interested, since the stock was the only asset and the sale was made for the purpose of raising money to save the balance of the stock and to pay debts of the estate, and it is admitted that the money was so used. Under the will no bond was required of the executor and no order of court was necessary for such a sale. The subsequent probate of the will, therefore, in effect ratified the sale. The probate of the will supplied all that was necessary to establish the authority to make the sale. That is all that an order ratifying a sale could do, even in a case where an order of sale would have been necessary. This is self-evident. The order admitting the will to

probate was made by a court of competent jurisdiction. It had jurisdiction of the subject-matter. A different case would be presented had the assumed testator been still alive. The order was not void, but only voidable. Things, therefore, done under it, or ratified by it, if necessary to and fairly done in the due and legal course of administration, such as raising money to pay the debts and preserve the assets, are valid and binding upon all interested.

"And the rule to be favored at the present day is that all acts done in the due and legal course of administration are valid and binding on all interested, even though the letters issued by the court be afterwards revoked or the incumbent discharged from his trust. And although one's appointment as executor or administrator may have been erroneous, or voidable, the safer doctrine is that the letters and grant issued from the probate court shall not be attacked collaterally where the court had jurisdiction at all, and least of all by common-law courts, and that the acts of the representative de facto shall bind the estate and innocent third parties." 2 Schouler on Wills, Executors, and Administrators (5th Ed.) pp. 1121, 1122.

The case of *Brown v. Brown*, 7 Or. 285, presents a state of facts in the main closely analogous to that presented here. The court said:

"The fourth point relied on by the appellants as a defense is that, the will having been declared void by the probate court, the sale of the land to the respondents was thereby annulled. We hold the law to be otherwise. The probate court had exclusive jurisdiction of the subject-matter in regard to the probate of what purported to be the will of Cyrus Olney. It was duly proved to be his will before that court, and letters testamentary were issued thereon, and until these proceedings were annulled, the validity of the will could not be collaterally drawn in question by any one, nor by any other court. Administration of the estate under it could be conducted and enforced as under any other will duly proved. Such being the case, all acts done in the due course of administration, while the will remained unannulled, and the letters testamentary were unrevoked, must be held entirely valid."

In *Foster v. Brown*, 1 Bailey, Law (S. C.) 221; 19 Am. Dec. 672, speaking of a sale by an administrator who had fraudulently suppressed a will, the court said:

"It is true that, on the revocation of an administration, for whatever cause, he to whom the subsequent administration is granted may maintain trover against the first administrator for goods of the deceased which he has converted to his own use. But it is equally clear that all acts done in the due and legal course of administration are valid and binding on all interested, although it be afterwards revoked. *Benson v. Rice and Byers*, 2 N. & M. 577. Nor can the manner of obtaining the administration, whether fairly or fraudulently, vary the question. Suppose it fraudulently obtained, yet if the administrator pays the debts of the estate, or does any other act which a rightful administrator would be bound in law to do, thus far, at least, it would be fair, and for the most obvious reasons would be binding."

Mutatis mutandis the language quoted applies with even more force to the case here. As said in *Kittredge v. Folsom*, 8 N. H. 98:

"There is evidently an inaccuracy in the use of the term 'void,' in many instances in the books, upon this and other subjects: and the attempt to reconcile all the authorities upon the

matter now under consideration must be in vain. An administration granted by the competent authority, upon a proper case made, can, with no propriety, be termed a nullity, and all the acts of the administrator held to be void, notwithstanding a will may afterwards appear and the administration be revoked. 6 Co. 19, *Packman's Case*; 2 Lev. 90, *Semine v. Semine*. The acts of such administrator must be quite as valid as those of an executor under a will which has been revoked by the testator. The grant of administration confers an existing authority, which cannot be resisted or disregarded until the will appears. 1 Lev. 235, *Noel v. Wells*. The administrator in such case comes into his office by color of an authority. *Plow. 282*. He is administrator de facto, and his acts, done in due course of administration, must be valid, at least so far as third persons are concerned. [*Tucker v. Aiken*] 7 N. H. 131."

See, also, *Shephard v. Rhodes*, 60 Ill. 801; *Roderigas v. East River Savings Institution*, 63 N. Y. 460, 20 Am. Rep. 555; *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980; *Foulke v. Zimmerman*, 14 Wall. (U. S.) 113, 20 L. Ed. 785.

We do not say that we would go as far as some of the cases which we have cited go, but we do say that they furnish ample authority for the view that Gourley was administrator de facto until his appointment was revoked; that the sale of the stock was not void, but only voidable, and cannot be avoided as against the purchaser, Miner, if found to be fair and for the benefit of the estate, and we so hold. A different case would be presented had the sale been made by a devisee, as such, under a void will and solely for his own benefit. *Hughes v. Burriess*, 85 Mo. 660.

[5] It remains, therefore, only to inquire whether the sale was under the circumstances a fair one. It was clearly for the benefit of the estate that the stock be saved from forfeiture, and that the debts of the estate be paid. It is fairly apparent that no one but the appellant, Miner, was willing to advance the money for this purpose on any terms. The value of the stock was purely speculative. Though Gourley represented to Miner at the time that he had a sale in prospect which would net \$70,000 for all of the stock, it was only a prospect. The fact remains that at least \$790 had to be raised at once in order to save the stock, whatever its value, and there is not the slightest evidence that even that amount could have been raised in any other manner or on better terms than those accepted by Miner. There is no evidence that Miner at least acted otherwise than in good faith. He was willing to take a chance that others would not take. The cross-appellant concedes that he is entitled to a return of his money, with interest, but the contract was not for a loan; it was a sale. We find no warrant in the evidence for holding the contract void. Having taken a chance which has resulted in preserving to the heirs whatever of value there is in the estate, we think Miner is entitled to the benefit of his contract. Affirmed.

MORRIS, C. J., and CHADWICK, MOUNT, and FULLERTON, JJ., concur.

(89 Wash. 436)

LOUTZENHISER v. PECK et al.
(No. 12926.)

(Supreme Court of Washington. Jan. 28, 1916.)

1. CONTRACTS —117— VALIDITY — LEGALITY — OF OBJECT—RESTRAINT OF TRADE.

A contract of the seller of a business not to engage in the same business in the same locality "for not less than two years," is not invalid as an illegal restraint of trade without limitation as to time; it being clear that the seller agreed not to engage in business for a period of only two years from the date of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 554-569; Dec. Dig. —117.]

2. CONTRACTS —147—CONSTRUCTION—INTENTION OF PARTIES.

The intention of the parties, as expressed or reasonably implied in a written contract, must prevail.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. —147.]

3. INJUNCTION —61—BREACH OF CONTRACT —NEW SUBJECT—CONSIDERATION.

A husband purchased a meat market with funds acquired prior to his marriage. After marriage, the proceeds of the business were used to support his family. He sold the market agreeing not to engage in the same business in the same locality within two years. Within that period he purchased and opened another market with his separate funds and gave it to his wife. The purchaser of the first market sued to enjoin both husband and wife from operating the new market. *Held*, that support of the family from the proceeds of the first market was sufficient consideration for an agreement binding on the community not to engage in the business, so that injunction might run against the husband, the wife, and the community.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 120-123; Dec. Dig. —61.]

4. PLEADING —72— CONTRACTS — BREACH — PRAYER FOR RELIEF—EQUITABLE RELIEF.

In spite of Rem. & Bal. Code, § 258, subd. 3, providing that if the recovery of money or damages be demanded, the amount thereof shall be stated, where the complaint alleged all facts from which damages flowed, alleged that the ultimate damages for breach of contract not to engage in business for a period could not be ascertained, and prayed for an ascertainment of accrued damages, for injunction and for general equitable relief, and the defendant failed to demur or move for more specific statement, the complaint was not bad, but the court could award such relief as was consistent with the pleadings and the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. —72; Damages, Cent. Dig. § 422.]

5. DAMAGES —189—BREACH OF CONTRACT— EVIDENCE.

Evidence *held* to show that the purchaser of a meat market suffered damages at least equal to those awarded in his action for breach of the contract of the seller not to engage in the same business in the same locality within two years.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 288, 512; Dec. Dig. —189.]

6. DAMAGES —23—BREACH OF CONTRACT — MEASURE OF DAMAGES.

Lost profits when reasonably ascertainable are recoverable as damages for breach of contract if they were reasonably within the contemplation of the parties as the probable result of its breach when the contract was made, so that where the purchaser of a business paid an increased price for the seller's agreement not to engage in the same business in the same locality within two years, on breach by the seller the

buyer could recover the lost profit resulting therefrom.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. —23.]

7. DAMAGES —176—BREACH OF CONTRACT— DAMAGES—EVIDENCE—ADMISSIBILITY.

Where the seller of a meat business, under agreement not to engage in the same business in the same locality for two years, broke his contract, the buyer could show in his action for damages that his gross receipts before the breach were in excess of such receipts for the corresponding months after the breach, and that the seller on opening his new market took in certain sums each day, and that the average profit was a given per cent. of the gross receipts; that being the best evidence on the question of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 461, 468, 471, 493; Dec. Dig. —176.]

8. HUSBAND AND WIFE —215—BREACH OF CONTRACT—JUDGMENT AGAINST WIFE.

A husband purchased a meat market with funds acquired prior to his marriage. After marriage the proceeds of the business were used to support his family. He sold the market agreeing not to engage in the same business in the same locality within two years. Within that period he purchased and opened another market with his separate funds and gave it to his wife. The purchaser of the first market sued for damages for the breach. *Held*, that no judgment for damages could run against the wife, since she was not a party to the contract of sale.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 451-456; Dec. Dig. —215.]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by H. F. Loutzenhiser against Hugh Peck and another. Decree enjoining defendants from engaging in business in violation of their contract, and awarding damages to plaintiff, and defendants appeal. Remanded, with directions to modify the decree.

Carl W. Swanson, of Spokane, for appellants. Donald F. Kizer, of Spokane, for respondent.

ELLIS, J. Action to enjoin the violation of a covenant not to engage in a certain business for a limited time in a limited locality, and for damages. It is conceded that prior to July 1, 1913, both the plaintiff and the defendant Hugh Peck were engaged in the retail meat business on Monroe street at Nos. 02717 and 02721, respectively, in the city of Spokane; that on that date Hugh Peck sold his stock, tools, and fixtures to the plaintiff, and executed a bill of sale thereof containing a covenant as follows:

"Party of the first part hereto hereby agrees not to engage in the retail meat business as owner, manager or clerk within one mile of New York Market at 02721 Monroe street, Spokane, Spokane county, Washington, for not less than two years."

It is conceded that the defendant Hugh Peck prior to the sale had been supporting his family from the business so sold. The defendant Katherine Peck avers in her answer that about January 1, 1914, her husband conveyed to her by bill of sale, certain fixtures.

tools, and implements for running a meat market at 02721 Monroe street; that the conveyance to her was a gift from her husband, the defendant Hugh Peck; that the property was thereafter her separate property, and that since that time she has been conducting, either personally or through a renter, a retail meat market at that place. The defendant husband testified that he purchased the fixtures and equipped the new market with his separate funds and gave it to his wife. The evidence further shows that he purchased the market sold to the plaintiff with funds acquired prior to his marriage.

The court made findings of fact and conclusions of law in favor of the plaintiff, and thereon entered a decree enjoining the defendants and each of them from engaging in the retail meat business within one mile of 02721 Monroe street in Spokane for a period of two years from July 1, 1913, and awarding the plaintiff judgment against the defendants and each of them for the sum of \$350 and costs. The defendants have appealed.

[1, 2] The appellants' first claim is that the covenant was invalid in that it was without limitation as to when the two years should begin or cease. Construing the contract as a whole, the covenant is not even ambiguous. No one reading the contract could have a doubt as to what was meant. It shows an intention by clear implication not to engage in the specified business within the specified limits within the period of at least two years from the date of the contract. The intention of the parties as expressed or reasonably implied in a written contract must prevail.

[3] The appellants next complain that both the injunction and the judgment, if any, should have been against the defendant husband alone because the sale in connection with which the covenant was made was a sale of his separate property. Though the property sold was the property of the husband, it is conceded that it was being used in support of the community. This fact furnished a sufficient consideration for an undertaking binding upon the community not to enter into the same business at least upon the same capital for a limited time in the same locality. Stating it in another way, the husband could not avoid the covenant, even conceding it his separate covenant, by turning his property over to his wife as a gift and setting her up in the same business at the same place. To permit him to do so would be to sanction the use of his own property in fraud of the respondent's rights and in palpable evasion of his own covenant. Looking through technicalities to essentials that is the ultimate end of appellants' position. It is unsound. The court committed no error on the admitted facts in running the injunction against the appellant Hugh Peck and the community. It is equally clear that under the evidence there is no error in enjoining the wife also. She was aiding the husband in violating his covenant. A different case

would be presented if there had been any evidence that she invested in the the new venture money from any other source than the alleged gift from her husband. On such a case we express no opinion.

[4] It is asserted that the complaint was insufficient to sustain any judgment for damages in that it contained no allegation of any specific amount of damages suffered as required by Rem. & Bal. Code, § 258, subd. 3, the last clause of which reads:

"If the recovery of money or damages be demanded, the amount thereof shall be stated."

The claim is untenable. In the complaint it is alleged in substance that the ultimate damages cannot be estimated, and the prayer is for an injunction, and that the damages already suffered be ascertained and allowed and for such other relief as may be consistent with equity and good conscience. All the facts from which the damages flowed were pleaded. The appellants were advised of the exact nature of the recovery sought. No demurrer was interposed nor any motion to make the complaint more specific. On tardy objection every intentment will be indulged in favor of the pleading. Substantial justice is the criterion imposed by statute. Rem. & Bal. Code, §§ 285, 307.

This is specially true where, as here, the action is one of equitable cognizance. In such a case under a prayer for general relief the court is justified in granting any relief consistent with the equities of the case sustained by the facts alleged and proved. *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123. This even though the prayer for special relief be defective. *MacKay v. Smith*, 27 Wash. 442, 67 Pac. 982; *Dormitzer v. German Savings & Loan Society*, 23 Wash. 132, 62 Pac. 862.

[5] It is stoutly urged that no damages were proven. It was shown by a comparison of respondent's sales for the months of August, September, October, and November in the year 1913, with his sales for the same months for the year 1914, that the former exceeded the latter in the sum of \$2,409.40. Respondent testified that about the same ratio of loss prevailed during the other months of the year 1914 after appellants reopened their market. There is also evidence that the appellants were taking in from \$20 to \$25 a day after they reopened their market. This would more than equal the falling off of respondent's trade at the same time. This coincidence in a suburban district such as this, where the public to which the markets catered was necessarily limited, had a strong tendency to show that the one was the result of the other. There was evidence that the profits of retail meat markets generally amount to from 20 to 25 per cent. of the gross sales. No evidence was offered to the contrary. The loss of profits so computed even in the four months mentioned would much exceed the amount of damages awarded by

the court. But it was also shown that there was a general decline in the retail meat business in Spokane during the year 1914. The court evidently, and we think properly, took this into consideration. Considered as a whole the evidence fairly and with as much certainty as can usually be attained established a loss of profits due to the appellant's violation of the covenant in an amount at least equal to the damages awarded.

[6, 7] It is now generally held that lost profits when reasonably ascertainable are recoverable as damages for breach of contract whenever from the nature of the case they were reasonably within contemplation of the parties as the probable result of its breach when the contract was made. An established business is not a commodity with a fixed market value. It is an investment for the purpose of producing profits. Both the vendor of such a business who covenants not to enter into competition for a given time and in a given locality and the vendee who, as the evidence here shows, pays more for the business because of the covenant, must certainly contemplate at the time, that a breach of the covenant will result in damage by causing a loss of profits. The evidence adduced was the best evidence of the damages of which the case in its nature was susceptible. Such evidence is always admissible. For a decision in a case closely analogous so holding, see *Wittenberg v. Mollyneux*, 60 Neb. 583, 83 N. W. 842. In *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80, another cognate case, Judge Lurton, in a well-considered opinion touching evidence of the same character as that here assailed, said:

"The evidence offered was relevant and competent. It related directly to the business conducted by Anthony both before and after the contract, and before and after its breach, and did not touch any mere collateral business or anticipated collateral profit. The admission of evidence as to the past profits of that business as bearing upon future profits prevented was not error. It was a most important circumstance, which any business man would look to as a factor in any estimate of the future value of a business; and no reason occurs why a jury may not equally as well look to that element in considering whether there were any profits prevented by competition."

As said by the Supreme Court of New Hampshire in *Salinger v. Salinger*, 69 N. H. 589, 45 Atl. 558:

"During the term of the contract, each day of the defendant's competition constituted a continuing wrong done to the plaintiffs. Their rights were constantly violated, and in such a way that the ensuing loss of profits must have been contemplated by the parties. The plaintiffs are to be compensated for all such damages, if they are capable of computation. *Hurd v. Dunsmore*, 63 N. H. 171, 173, and cases cited; *Crawford v. Parsons*, 63 N. H. 438, 444. That it cannot be demonstrated to a mathematical certainty what profits have or have not come from a certain source of business, is no objection to their recovery."

[8] Finally it is claimed that no personal judgment should have been entered as against the defendant Katherine Peck binding her separate estate. This contention must be sustained. She was not a party to the contract. Though the circumstances were such as to warrant an injunction against both members of the community personally and as a community and to warrant a judgment for damages against the defendant husband and the community; there was no evidence warranting a judgment against the wife.

The cause is remanded, with direction to modify the judgment in accordance with this opinion. Appellant Katherine Peck may recover her costs in this court.

MORRIS, C. J., and MOUNT, FULLERTON, and CHADWICK, JJ., concur.

(89 Wash. 389)

RITCHIE v. TRUMBULL et al. (No. 12739.)

(Supreme Court of Washington. Jan. 28, 1916.)

1. QUIETING TITLE \S 30—PARTIES—TRUSTEES OF EXPRESS TRUST.

Where a railroad company purchased public lands and before payment assigned its interest to plaintiff's predecessor in interest as trustee, it was immaterial whether the beneficiaries of the trust named in the action to quiet title were the beneficiaries for whose benefit the original assignment from the railway company was made, as shown by a letter to the commissioner of lands, since the trustee of an express trust may sue in his own name, and it is of no importance who the beneficiary was so long as it was not the railroad company whose interest was sold under the sheriff's levy.

[Ed. Note.—For other cases, see Quietening Title, Cent. Dig. \S 64-66; Dec. Dig. \S 30.]

2. COURTS \S 201—PROBATE COURTS—EXECUTION OF DEEDS—JURISDICTION.

It is within the power of the probate court to determine all matters necessary to the due administration of an estate, so that it may authorize the administratrix to convey property held in trust for the benefit of others to a trustee to be substituted for the deceased.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 86, 87; Dec. Dig. \S 201.]

3. PUBLIC LANDS \S 185—TIDELANDS—ASSIGNMENT BY PURCHASER—EVIDENCE.

Where a railroad purchased tidelands on installments, and thereafter became insolvent and assigned its interest to one of its officers as trustee for other officers, evidence held not to show an interest in the railroad in the lands at the time of a sheriff's execution sale of its property thereafter made, sufficient to entitle defendants in an action to quiet title, who claimed title under the sheriff's sale, to a judgment.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. \S 598; Dec. Dig. \S 185.]

Chadwick, J., dissenting.

Department 1. Appeal from Superior Court, Clallam County; J. M. Ralston, Judge.

Action by William B. Ritchie, trustee, against Victoria L. Trumbull and others. From a decree quieting title to lands in the plaintiff, defendants appeal. Affirmed.

Ballinger & Hutson, of Seattle, and Thomas F. Trumbull, of Port Angeles, for appellants. William B. Ritchie, of Port Angeles, and Fletcher & Evans and Robert B. Walkinshaw, all of Tacoma, for respondent.

MOUNT, J. This action was brought to quiet title to certain tideland lots in front of the city of Port Angeles, in Clallam county. The plaintiff sues as trustee, alleging that he is the trustee for F. H. Carlisle, Flora E. Craig, Charles B. Smith, W. F. Delabarre, F. B. Carlisle, and Rachel Newman; that as such trustee the record title of the real estate described is vested in him; that he owns and holds the same in trust for the above-named persons; that the lands are tidelands; that the plaintiff and his grantors have paid the taxes and assessments against the same since the year 1900. The plaintiff also alleges that the defendants claim some interest in the lands, but that the same is wrongful and not of right. The defendants, for answer to the complaint, admit the character and description of the lands, and deny all the other allegations of the complaint, and as an affirmative defense allege: That in December, 1912, the property was sold under a judgment obtained by John Trumbull against the Port Angeles & Eastern Railroad Company, and that the defendants purchased the lands under that judgment, and claim title thereunder. The reply admits the alleged death of John Trumbull, who obtained the judgment, but denies all the other allegations of the affirmative answer. Upon these issues the case was tried to the court without a jury. Findings were made in favor of the plaintiff. A decree was entered, quieting the title in the plaintiff. The defendants have appealed.

The principal facts in the case are not in dispute. They are record facts. It is admitted that the Port Angeles & Eastern Railroad Company, through its treasurer, Arthur Shute, on September 1, 1899, entered into several contracts with the state of Washington to purchase the lands described in the complaint, and other lands. These contracts provided for annual payments extending over a period of eight years. The amount due upon the contracts each year was \$800, and interest. The railroad company made the first payment upon the contracts. Thereafter, and two days before the next payment became due, when the state could forfeit the contracts if the payment was not made, the contracts, 15 of them, were assigned by the railroad company to David W. Craig, as trustee. The consideration named in the assignment was \$1. These assignments were acknowledged before John Trumbull, since deceased, who was then a notary public. When these assignments were submitted to the commissioner of public lands of the state, he refused to approve them unless the parties for whom the land was held were named. Thereupon Mr. Craig, the trustee, to

whom the assignments had been made, wrote a letter to the commissioner of lands of the state, saying:

"A party comprising the following gentlemen have purchased the interest in these lands held by the P. A. & E. R. R., and with their holdings intend forming a terminal company in the future: Arthur Newman, F. H. Carlisle, C. Vey Holman, Fred A. Cooke, Lemuel Pope, and David W. Craig. They have appointed me as their trustee."

Thereupon the commissioner of public lands approved the assignments. Thereafter David W. Craig caused to be paid each year the taxes, interest, and principal due upon the contracts until the same were fully paid. The money to make these payments was furnished by Mr. Craig and his associates. Thereafter on May 9, 1907, the state executed deeds to David W. Craig, trustee, for the real estate covered by the contracts. In the year 1906 the railroad company, then being insolvent, and probably insolvent at the time the assignments of the contracts above stated were made, executed quitclaim deeds to Mr. Trumbull for all the lands it then owned which were held in trust by one James Stuart. It also made a bill of sale of all its office furniture and fixtures to Mr. Trumbull. Mr. Trumbull was then attorney for the railroad company. After the trustee above named had acquired title from the state, sales of some of the lands were made to other parties, and deeds were executed by the trustee. In February, 1912, Mr. Craig died, his estate was probated, and Flora E. Craig, his wife, was appointed as administratrix thereof. In that estate she presented a petition to the superior court, stating, in substance, that the property now in suit was held by David W. Craig, in trust for the persons named in the complaint in this case as beneficiaries; that Mr. Craig had no interest therein. She asked for the appointment of the plaintiff as trustee to hold the property instead of the deceased. At the same time powers of attorney from persons claiming to be cestui que trust were filed, authorizing the appointment of the plaintiff, William B. Ritchie, to act as trustee. Thereupon the superior court made an order, directing the administratrix to execute a deed of the property to the plaintiff as trustee. A deed was subsequently executed. Thereafter on December 12, 1912, John Trumbull took a default judgment against the Port Angeles & Eastern Railroad Company in the sum of \$19,918.25, and costs. An execution was issued upon that judgment, and levied upon the tidelands now in dispute. They were sold at sheriff's sale, and bid in by the defendants, heirs of John Trumbull. On the 24th day of February, 1914, a sheriff's deed was issued to the defendants.

[1] These facts are all admitted in the case. It is plain, we think, that the legal title to this property rests in the plaintiff. His title is deducible of record from the state of Washington. It is argued by the appel-

lants that the beneficiaries of the trust are not the same as the beneficiaries mentioned in the letter from Mr. Craig to the commissioner of public lands, and that therefore it was error for the trial court to receive in evidence the contracts made by the state for the sale of the lands with the assignments thereon. There is no merit in this contention, because it was not necessary for the cestuis que trust to be made parties to the action. The statute provides, and this court has held, that the trustee of an express trust may maintain an action in his own name. *Carr v. Cohn*, 44 Wash. 586, 87 Pac. 926. It is of no importance to the appellants who the beneficiaries of the trust are, so long as the beneficiary is not the railroad company, through whom they necessarily must claim.

[2] The appellants also argue that the court erred in receiving in evidence the probate record, wherein the court ordered Mrs. Craig, the wife of the deceased trustee and the administratrix of his estate, to execute a deed to the respondent in this action. If we understand the contention, it is that the probate court had no jurisdiction to authorize the administratrix to make such a deed. This court has held that the probate court has power to determine all matters necessary to the due administration of an estate; and it certainly has authority to authorize the administratrix to convey property held in trust. In *Re Martin's Estate*, 82 Wash. 226, 144 Pac. 42, after referring to the case of *State ex rel. Keasal v. Superior Court*, 76 Wash. 291, 136 Pac. 147 and other cases, we said:

"Under the rule of these cases, it is clear that a superior court in a probate proceeding can exercise all of the powers of a court of general jurisdiction. It has power in such a proceeding to determine every matter necessary to the due administration of an estate, and it is its duty to do so when such matters are properly presented for its consideration."

We are satisfied, therefore, that the superior court had jurisdiction to authorize the making of the deed, and that the deed from the administratrix to the respondent conveyed whatever interest the deceased as trustee had. The respondent, as his successor, therefore stands in the same position as the original trustee. It is plain, therefore, that the plaintiff in this case holds the legal title from the state of Washington to himself, subject to the trust.

[3] Before the appellants in this case can prevail, it is necessary for them to show that the Port Angeles & Eastern Railroad Company had some interest in the property at the time of the sale under the judgment of John Trumbull against that company. The appellants attempt to show this by arguing that the original trustees were officers of the railroad company; that there was no consideration paid for the assignment from the railroad company to David W. Craig. It is

true that the original trustees were officers of the railroad company. It is probably true that the railroad company at that time was insolvent. But we think the record fairly shows that at the time of the assignment, the second installment of the purchase price for the lands due the state would be due within two days, and the railroad company had no money with which to continue the contracts. And the evidence fairly shows, also, that at that time the railroad company entered into a contract with these officers, to the effect that these officers would make payments becoming due, that the railroad company would repurchase the property by paying the amount which those officers had advanced, and that if repurchase was not made within three years, then the rights of the railroad company would be forfeited. There is no evidence that the railroad company retained any other interest in these contracts. Six years later the railroad company conveyed all its real estate and personal property to John Trumbull, and did not include therein any of the lands in these contracts. John Trumbull was then the attorney for the railroad company. He, as a notary public, had taken the acknowledgments of the assignments of the contracts by the railroad company for the lands in dispute, and we have no doubt knew all the circumstances of that transfer. There is no claim made that the railroad company, or any one for it, repurchased the lands, or offered to do so.

We are satisfied from a review of all the facts in the case that the railroad company had no title to or interest in the lands in dispute at the time the judgment of Mr. Trumbull was levied upon these lands. If the railroad company had no interest, then of course a sale under that judgment would convey no interest to the purchaser. We are satisfied that the respondent holds both the legal and equitable title, and that the trial court arrived at a correct conclusion.

The judgment is therefore affirmed.

MORRIS, C. J., and FULLERTON and ELLIS, JJ., concur.

CHADWICK, J. (dissenting.) The equitable title to the land was in the railroad company and passed under the execution sale to appellants. The railroad company could have asserted its right at any time. The deed to respondent and the powers of attorney gave him no interest, for the parties had no personal interest to convey or protect. Craig was trustee for the railroad company, not for the other parties. They were all trustees in equity, for the railroad company, and not cestuis que trustent, as is held by the majority.

For these reasons, I dissent.

(89 Wash. 429)

WOODY v. WAGNER et al. (No. 12923.)

(Supreme Court of Washington. Jan. 28, 1916.)

1. CROPS — GROWING CROPS — CONVEYANCE OF LAND.

Growing crops so far partake of the nature of realty that they pass by a sale or conveyance of the land as an appurtenance thereto; the same being true when a mortgage upon the land is foreclosed or when a leasehold interest is forfeited.

[Ed. Note.—For other cases, see Crops, Cent. Dig. §§ 2, 3; Dec. Dig. —5.]

2. CHATTEL MORTGAGES — GROWING CROPS—PRIORITIES.

A farm lease declared that the land was being offered for sale, and that, if the purchaser demanded immediate possession, the lease might be declared void by the lessor upon giving notice of sale and paying the lessee a reasonable price for all labor expended and the value of any growing crops. The lessee, having planted wheat, mortgaged the growing crop with other personalty. Thereafter the lessor sold the land, and the purchaser recovered possession; the lessee receiving payment for his work and for the value of the growing wheat. *Held*, that the title to the growing wheat passed, under the terms of the lease, which was superior to the mortgage, to the purchaser, who harvested it, so that neither the purchaser nor the lessor were liable for a deficiency judgment; the other personalty mortgaged not being sufficient to satisfy the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228-236; Dec. Dig. —138.]

Department 2. Appeal from Superior Court, Adams County; Edward C. Mills, Judge.

Action by W. S. Woody against Julius Conner and others. From the judgment, defendants Wagner and Neufelt appeal. Reversed.

Geo. E. Lovell, of Ritzville, for appellants. Adams & Naef, of Ritzville, for respondent.

PARKER, J. The plaintiff, W. S. Woody, commenced this action in the superior court for Adams county seeking foreclosure of a chattel mortgage given to him by Julius Conner upon certain live stock, farming implements, and two-thirds of a crop of wheat seeded in the fall of 1913 upon land occupied by him under a lease from the defendant E. E. Wagner, the owner thereof, which land was thereafter conveyed to the defendant A. A. Neufelt. The case being tried and submitted upon the merits, on November 24, 1914, the superior court rendered a personal judgment against the defendant Conner for the full amount of the debt secured by the mortgage, decreed foreclosure and sale of all the mortgaged property, excepting the crop of wheat, and rendered a personal deficiency judgment against the defendant Wagner, evidently because of the appropriation of the crop upon its maturity by him and Neufelt, his grantee. From this disposition of the cause the defendants Wagner and Neufelt have appealed to this court, claiming that the wheat was lawfully appropriated

by them without any obligation to account therefor to any one.

The cause comes to us upon conceded facts which may be summarized as follows: Appellant Wagner, being the owner of the land upon which the wheat was seeded and grown, leased the same to Conner for the term of six years commencing January 1, 1913. By the terms of the lease Conner was to pay Wagner as rent for the land one-third of the crops to be grown thereon. The lease contained, among other provisions, the following:

"It being understood that this land is being offered for sale, it is agreed that, if the sale of the land is made, and the purchaser demanding immediate possession, this lease may be declared void and of no effect by said lessor giving notice of such sale, and paying said lessee a reasonable price (not exceeding \$2.00 per acre) for all labor expended in preparing any ground not in crops, and on further payment of the value of any crops which may be growing or immatured."

Conner went into possession of the land. He seeded it to wheat in the fall of 1913 for the crop of 1914. On October 14, 1913, Wagner, having sold and conveyed the land to Neufelt, caused to be served upon Conner two notices as follows:

"You are hereby notified that I have sold all of [describing the land] to A. A. Neufelt, and under the terms of the lease you will be required to give possession of the said premises to the said A. A. Neufelt within ten days from the receipt of this notice. All sums due you will be indorsed on the notes which you gave me and which I now hold.

"Dated this 14th day of October, 1913.

"E. E. Wagner."

"You are hereby notified, that I have purchased the [describing the land], and under the terms of purchase I hereby demand immediate possession of the above-described lands.

"Dated this 14th day of October, 1913.

"A. A. Neufelt."

On October 24, 1913, Conner, being indebted to Woody in the sum of \$1,629, executed and delivered to Woody a chattel mortgage upon certain live stock, farming implements, and two-thirds of the crop of wheat which he had seeded upon the land shortly prior thereto. This chattel mortgage was duly filed for record, and Wagner had actual knowledge thereof prior to November 1, 1913. On October 25, 1913, Wagner and Conner being unable to agree upon the amount due Conner under the terms of the lease above quoted, because of the sale of the land to Neufelt and the termination of the lease, Wagner and Neufelt commenced an action in the superior court for Adams county for possession of the land and to have determined the amount due to Conner for which he should be credited upon the indebtedness due from him to Wagner because of the termination of the lease. That case was tried, and in April, 1914, judgment rendered therein by the superior court determining the amount Conner was entitled to because of the sale of the land to Neufelt

and the termination of the lease. Thereupon, in compliance with the judgment so rendered, Wagner delivered to Conner certain notes evidencing indebtedness due from Conner, and also paid Conner the additional sum of \$65.75, thereby fully complying with the terms of the judgment and fully paying all sums due Conner because of the sale of the land and the termination of the lease. Neufelt has been in possession of the land at all times since the rendering and satisfaction of that judgment. In the summer and fall of 1914, Neufelt harvested, hauled to market, and sold the whole of the crop of wheat which had been seeded by Conner in the fall of 1913 while in possession of the land under the lease.

[1, 2] We are unable to see any sound legal grounds upon which the personal judgment rendered by the court against Wagner can be rested. When he sold and conveyed the land to Neufelt, gave Conner notice thereof, demanded possession of the land, and paid to Conner all sums due to Conner because of the cancellation of the lease, he became entitled to the land and all growing unsevered crops thereon. All of this occurred long before the maturity and harvesting of the crop. That it occurred after the giving of the chattel mortgage upon the crop by Conner does not militate against the title to the crop acquired by Wagner and Neufelt upon the sale of the land to Neufelt and the termination of the lease. Manifestly the mortgage rights of Woody were subject to the terms of the lease, and were liable to be defeated by its termination under the provisions thereof above quoted.

The passing of unsevered crops with the title to land upon transfer of title thereof is elementary law. It is so when the transfer is by an ordinary deed of conveyance executed by one having perfect title to the land. The rule is stated in the text of 12 Cyc. 977, as follows:

"According to the great weight of authority, crops so far partake of the nature of realty that in the absence of reservation or exception they pass by a sale or conveyance of the land as appurtenant thereto, whether unripe or matured, so long as there has not been a severance, actual or constructive, of such crops from the land." 8 Ruling Case Law, 358.

It is so when the title passes by sale under a foreclosure of a mortgage upon the land, when the mortgagor is the owner, and his title to the crop is not impaired by some leasehold or contractual interest in some other person. *Jones v. Adams*, 37 Or. 473, 59 Pac. 811, 62 Pac. 16, 50 L. R. A. 388, 82 Am. St. Rep. 766; *Reilly v. Carter*, 75 Miss. 798, 23 South. 435, 65 Am. St. Rep. 621; *McMaster v. Emerson*, 109 Iowa, 284, 80 N. W. 389; 8 Ballard, Real Property, § 101. It is so when the title of a lessee passes back to the lessor by forfeiture of the leasehold interest, and it has been held that the voluntary surrender of the leasehold interest to the lessor carries

title to unsevered crops even as against a mortgagee of such crop. This latter holding, however, has no application here, since Conner's leasehold interest in the land and the unsevered crop passed back to Wagner, the lessor and owner of the land, by termination of the lease in pursuance of its express terms. 24 Cyc. 1071; *Gregg v. Boyd*, 69 Hun, 583, 23 N. Y. Supp. 918; *Gammon v. Bull*, 86 Iowa, 754, 53 N. W. 340.

Counsel for Woody seem to proceed upon the theory that Wagner and Neufelt have unlawfully appropriated the crop as against Woody, the mortgagee thereof. We have seen that Wagner and Neufelt acquired possession of the land and caused termination of the lease by paying to Conner all he was entitled to under the terms thereof, long before the crop was matured or severed from the soil. Now, Conner's title to the crop was at all times, until it was actually severed from the soil, subject to acquisition by Wagner and his grantee under the express terms of the lease. It seems quite clear to us that the giving of the mortgage by Conner to Woody could not in the least curtail this right of Wagner and his grantee, nor were they required to pay any attention to the rights of Woody as mortgagee. They were not garnisheed, nor did they hold anything in trust for Woody as mortgagee. What they did was in strict compliance with the terms of the lease under which Conner at all times held the land, and subject to which Woody took his mortgage on the crop.

The judgment against appellant E. E. Wagner is reversed. The record before us does not show the rendering of any judgment, in terms, against appellant A. A. Neufelt, but, in so far as the decree and judgment might be construed as rendering Neufelt liable to any extent, it is reversed.

MORRIS, C. J., and BAUSMAN, MAIN, and CHADWICK, JJ., concur.

(39 Wash. 502)

WHITE v. POWERS et al.

(Supreme Court of Washington. Feb. 5, 1916.)

1. CONSTITUTIONAL LAW § 309—LIENS § 19—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—NOTICE.

Rem. & Bal. Code, § 1157, provides that a lien on chattels for labor and material may be enforced against the owner or persons interested by notice and sale in the same manner that a chattel mortgage is foreclosed, or by decree of any court exercising original equity jurisdiction. Section 1105 provides the form of notice on foreclosure of a chattel mortgage. Section 1106 provides that such notice shall be placed in the hands of the sheriff or other proper officer and personally served in the same manner as provided for by law for the service of a summons, provided that if the mortgagor cannot be found in the county of foreclosure, the general publication directed in section 1107 shall be sufficient. Section 1107 provides for publication as for sale on execution after notice to the mortgagor. Sec-

tion 226, subd. 12, provides that summons shall be served on the defendant personally, or by leaving a copy thereof at the house of his usual abode with some person of suitable age and discretion therein resident. Section 228 provides for service by publication when the defendant cannot be found within the state, and the court has jurisdiction of the subject of the action. *Held*, that construing all the provisions together they were intended to provide for due notice, so that although the owner of personal property resided within the state, foreclosure of chattel mortgage or other liens could be lawfully made by a mere constructive service of notice, since the statutes do not violate Const. U. S. Amend. 14, and Const. Wash. art. 1, § 3, requiring due process of law, that requirement being fulfilled by proceeding according to the established forms of law and the grant of a right to proceed in equity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. ☞ 309; Liens, Dec. Dig. ☞ 19.]

2. CONSTITUTIONAL LAW ☞ 305—"DUE PROCESS OF LAW."

A general law administered in its regular course, according to the form of procedure suitable to the nature of the case, conformably to the fundamental rules of right, affecting all persons alike, is due process, the elements of which are notice and opportunity to defend, though due process does not require any particular form of proceedings.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925-927; Dec. Dig. ☞ 305.

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. CONSTITUTIONAL LAW ☞ 106 — VESTED RIGHTS.

There is no vested right in any particular remedy or form of proceeding.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 186, 212, 238-245, 252-257, 259; Dec. Dig. ☞ 106.]

4. CONSTITUTIONAL LAW ☞ 309—LIENS ☞ 19 — DUE PROCESS OF LAW — DEPRIVATION OF PROPERTY — FORECLOSURE OF CHATTEL LIEN—NOTICE—EVIDENCE.

Plaintiff filed a written notice of lien on an automobile directed in compliance with Rem. & Bal. Code, § 1105, and delivered to the sheriff a copy of the chattel lien notice and demanded that he take possession of the automobile and sell it to satisfy the claim. The sheriff prepared and posted in three public places in the county a notice reciting the lien, the name of the owner of the automobile, the default in payment, and giving notice of sale. The sale was thereafter made and proper return entered. The defendant was not a resident of the county of foreclosure, but resided in another county in the same state. After the sheriff's sale he conveyed the automobile and his claims and demands for damages to the plaintiff, who is now the owner. *Held*, that since the notice given failed to comply with the statutory requirements, the sale thereunder was in violation of Const. U. S. Amend. 14, and Const. Wash. art. 1, § 3, requiring due process of law, and was therefore void.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. ☞ 309; Liens, Dec. Dig. ☞ 19.]

Department 2. Appeal from Superior Court, Lincoln County; Jos. Sessions, Judge.

Action by H. P. White against Ed. Powers and others, copartners under the firm name of Powers, Etter & Colwell. From an order sustaining a demurrer to the complaint and

dismissing the action on plaintiff's failure to plead further, plaintiff appeals. Reversed and remanded, with instructions.

Hibschman & Dill, of Spokane, for appellant.

HOLCOMB, J. On October 14, 1913, one W. G. Nelms was the owner of a certain Avery truck automobile, with the serial number 953, motor number 8681, and on that day one E. A. Johnson performed labor and skill and furnished material in repairing it, amounting to \$13.50.

On December 22, 1913, Johnson, through his agent, filed a written notice of lien upon the automobile truck, describing it, in the office of the county auditor of Lincoln county, Wash., the filing and form of notice of lien complying with the provisions of section 1155, Rem. & Bal. Code.

On December 29, 1913, Johnson, through his attorney, delivered to the sheriff of Lincoln county a copy of the chattel lien notice, and demanded that the sheriff take possession of the automobile and sell it for the satisfaction of the lien claim. The sheriff accordingly on that date took into his possession the automobile, and prepared and posted in three public places in the county a notice reciting the claim of lien, the name of the owner of the automobile, and the default in payment, and giving notice of sale of the automobile more than 10 days thereafter on January 9, 1914, at a specified place, at 10 o'clock a. m. The notice was signed by the attorney for the lien claimant as well as by the sheriff. On January 9, 1914, sale was made pursuant to the notice for the sum of \$38.85 to the lien claimant, to satisfy his claim and costs, in all aggregating the amount for which the property was bld in, and of all of which the sheriff made return to the county auditor on the same day.

On July 9, 1914, appellant filed his complaint against respondents, alleging the foregoing facts, and further alleging that at all the times mentioned Nelms was a resident of Spokane county, Wash., and was not at any of the times mentioned present in Lincoln county; that no notice of any kind was given to Nelms, except the posted notice of sale; that defendants obtained possession of the automobile by reason of some transaction with Johnson, and that in so doing they and Johnson ignored the rights of Nelms and of appellant, and respondents claim to have the title to the automobile by reason thereof and of the lien and foreclosure proceedings of Johnson, and not otherwise; that all of the proceedings to establish and foreclose the chattel lien were had under and by virtue of statutes relating thereto (specifically mentioned), but that the statutes relied upon are unconstitutional and void under the Constitution of Washington and the Fourteenth Amendment to the Con-

stitution of the United States, and attempted to deprive Nelms of his property without due process of law; that Nelms duly conveyed all his right, title, and interest in the property to appellant by bill of sale, and his claims and demands for damages by an instrument in writing on May 7, 1914; that appellant is now the owner thereof; that the automobile was, at the time of sale referred to and now is, of the value of \$1,500, and that Nelms, prior to May 7, 1914, had been injured and damaged by the detention thereof by respondents in the sum of \$1,000. For the recovery of the automobile or the value thereof, and \$1,000 damages for its detention, judgment was demanded. Defendants demurred upon all the statutory grounds. The demurrer was sustained and the action dismissed upon appellant refusing to further plead.

[1-3] 1. The statute providing for a chattel lien in such cases as this provides (Rem. & Bal. Code, § 1157) that the lien may be foreclosed by the same two optional methods of procedure provided for the foreclosure of chattel mortgages. Sections 1105, 1106, and 1107, Rem. & Bal. Code, provide that chattel mortgages may be foreclosed by placing in the hands of the sheriff of the county a notice containing a full description of the mortgaged property with a statement of the amount due, signed by the mortgagee or his attorney; that the notice shall be personally served in the same manner as is provided by law for the service of a summons; that if the mortgagor cannot be found in the county where the mortgage is foreclosed, notice must be published in the same manner and for the same length of time as required in cases of the sale of like property on execution; that is, by posting written or printed copies of the notice of sale in three public places in the county for a period of not less than 10 days prior to the date of sale; that such notice shall be sufficient authority for the officer to take the mortgaged property into his immediate possession. These provisions of the statute were complied with, except that the sheriff made no certificate either of service of the notice of sale upon Nelms, or that he could not then be found in the county. The sheriff's proceeding was therefore *prima facie* defective. Appellant alleges that Nelms was not, at any of the times recited in the proceedings, present in Lincoln county, thus affirmatively showing that the prerequisite of "not found in the county" then existed, and a constructive basis of notice by publication in the manner provided by the foreclosure statute might have been certified by the sheriff.

The statute relating to foreclosure of chattel mortgages upon which this proceeding was based provides that the notice shall be personally served in the same manner as provided by law for the service of a summons. The law providing the manner of serving a summons (Rem. & Bal. Code, § 226, subd. 12)

provides that the summons shall be served by delivering a copy thereof to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Section 228, Rem. & Bal. Code, provides that, when the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought that the defendant cannot be found in the county is *prima facie* evidence), and upon the filing of an affidavit of the plaintiff, his agent, or attorney, stating that he believes that the defendant is not a resident of the state or cannot be found therein, and that he has deposited a copy of the summons and complaint in the post office directed to the defendant at his place of residence, unless he has stated in his affidavit that such residence is not known to the affiant, and stating among other things that the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action, the service may be made by publication of the summons. It is provided, however, in section 1106, relating to service of notice of a sale under a chattel mortgage, that if the mortgagor cannot be found in the county where the mortgage is being foreclosed, it shall not be necessary to advertise the notice or affidavit in a newspaper, "but the general publication directed in the next section shall be sufficient service upon all the parties interested." The "next section" is section 1107, Rem. & Bal. Code, which provides that, after notice has been served upon the mortgagor, it must be published in the same manner and for the same length of time as required in cases of the sale of like property on execution.

2. Reading and construing these provisions of the various statutes together, it is plain that the legislative enactments intended to provide for due notice, and therefore due process of law. Appellant contends that a statutory enactment which allows foreclosure of a lien against a resident of the state without personal notice violates the constitutional provisions. Section 3, art. 1, Const. Wash.; amendment 14, Const. U. S. There are some authorities which support this view and hold that, where the owner of personal property resides within the state, foreclosure of a chattel mortgage or other lien upon the same can only be lawfully made by giving the owner reasonable notice aside from the mere seizure of the property, and constructive service is insufficient to confer jurisdiction. But that has never been universally followed. Due process of law means according to established forms of law, and the requirement is satisfied by the grant of a right to proceed in equity. *Sisson v. Supervisors*, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440. In this state it has never been questioned that the proceeding to foreclose a chattel mortgage by notice of sale and by such construc-

tive service of notice as the statute provides, if substantially followed, is valid. It was stated in *State v. Allen*, 2 McCord (S. C.) 56:

"I think therefore that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be an exception to the right of trial by jury, and is embraced in the alternative, 'the law of the land.'"

To the same effect are *In re Hackett*, 53 Vt. 354, and *Weimer v. Bunbury*, 30 Mich. 201.

It will be observed that both the statutes relating to foreclosure of liens upon chattels and relating to foreclosure of chattel mortgages provide that the debtor, or any person interested, may remove a cause to the superior court and contest the right to foreclose as well as the amount claimed to be due. This proceeding recognizes the universal principle adopted in the law of the land that:

"Due process of law means an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard; and where such opportunity is granted by the law a citizen cannot complain of the procedure to which he is required to conform." *State ex rel. Barber Asphalt Paving Co. v. District Court*, 90 Minn. 457, 97 N. W. 132.

There is no vested right in any particular remedy or form of proceeding. A general law administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformably to the fundamental rules of right and affecting all persons alike, is due process. *People v. Apfelbaum*, 251 Ill. 18, 95 N. E. 995.

The essential elements of due process of law are notice and opportunity to defend, but due process does not require that any particular form of proceedings be observed, but only that the same shall be regular proceedings in which notice is given of the claim asserted and an opportunity afforded to defend against it. *Smith v. Medical Examiners*, 140 Iowa, 66, 117 N. W. 1118; *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092.

In this state it was held that a statute giving servants, clerks, laborers, etc., the right to claim from the proceeds of execution or attachment sale of the property of their employers any amount not exceeding \$100 due them for services rendered within 60 days next preceding the levy of the writ, and providing for the litigation of such claims if disputed, is not open to the objection that it deprives one of his property without due process of law. *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412, 47 Pac. 894.

[4] It has also been held that, in proceedings in rem, constructive service by publication is sufficient to give validity to a judgment purely in rem, and constitutes due process of law. *Wilson v. Beyers*, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858. The

case of *Anderson v. Great Northern Ry. Co.*, 25 Idaho, 433, 138 Pac. 127, cited by appellant, is in consonance with our views. In that case it was said:

"No process is 'due process' which does not give notice, either actual or constructive; and no 'taking of property' for debt is lawful, unless the debt has been created with the knowledge and consent of the debtor. This knowledge and consent may be constructive so far as it is necessary to create a charge against property, but the statute which furnishes the constructive notice must provide process by which the claims may be measured and established, so the property owner may have a ready and certain method of knowing or ascertaining his liability. No such method is furnished by the statute under discussion."

We think the case states the law correctly, but it does not apply to our statutes for foreclosing chattel mortgages or chattel liens. Our statutes provide for due process in that they provide for notice and for an opportunity to be heard in court to measure the claims and rights of the parties.

[5] 3. In *Robertson v. Mine & Smelter Supply Co.*, 15 N. M. 606, 110 Pac. 1037, the opinion reads as follows:

"It appears that a suit was brought to foreclose a materialman's lien upon a mining claim and decree of foreclosure was awarded. The appellants, owners of the property, were not served with process of any kind. Upon a notice of a proposed sale under the decree of foreclosure appearing in the local newspaper, the appellants brought an action to enjoin the sale. The court below refused the injunction and dismissed the complaint, from which judgment appellants appeal. The foreclosure proceeding plainly violated the 'due process of law' clause of the Fourteenth Amendment of the Constitution of the United States. The essential elements of due process of law, as applied to matters of this kind, are notice and opportunity to be heard. *Simon v. Craft*, 182 U. S. 427, 436 [21 Sup. Ct. 836, 45 L. Ed. 1165]. The judgment of foreclosure was therefore absolutely void as against appellants, the owners of the property."

That case is applicable to the case before us, for the reason that in the case before us the owner of the property and lien debtor was not served with process of any kind, but attempt was made to proceed upon purely constructive notice without any certificate and showing of necessity therefor; the lien debtor being at the time a resident of the state and not even a prima facie showing being made to the contrary. The proceedings in this case, therefore, plainly violated the due process of law clauses of the state and federal Constitutions, although in our opinion the statutes sufficiently comply with those constitutional requirements. The statutes themselves were not complied with. The sale was therefore void.

The judgment is reversed, and the cause remanded, with instructions to reinstate the cause and overrule the demurrer.

MORRIS, C. J., and PARKER, BAUSMAN, and MAIN, JJ., concur.

(89 Wash. 467)

HARGRAVE et ux. v. CITY OF COLFAX.
(No. 13142.)

(Supreme Court of Washington. Feb. 2, 1916.)

1. ACCORD AND SATISFACTION \Leftrightarrow 25—**SUFFICIENCY OF PLEADING—STATUTE—"ACCORD."**

In view of Rem. & Bal. Code, § 258, abolishing common-law distinctions as to the form of actions or pleadings, and providing that a complaint shall consist of a plain and concise statement of facts constituting the cause of action and a demand for the relief claimed, and section 264, providing that the answer shall contain a general or specific denial of each material allegation of the complaint controverted by defendant, and a statement of any new matter constituting a defense or counterclaim, in ordinary, concise language, without repetition, an affirmative answer by a city in an abutting owner's action for damages from the regrading of a street that the building of a retaining wall by the city made everything satisfactory to the plaintiffs, in the absence of a motion to make more definite or a demurrer thereto, was good as a plea of accord and satisfaction; an "accord" being a satisfaction agreed upon by the parties injuring and the parties injured.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 151, 153-160; Dec. Dig. \Leftrightarrow 25.]

For other definitions, see Words and Phrases, First and Second Series, Accord.]

2. ACCORD AND SATISFACTION \Leftrightarrow 27—**EVIDENCE—QUESTION FOR JURY.**

Evidence in such action held to make it a question for the jury as to whether the agreement to build or the building of such wall was accepted in satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 31, 59, 83, 97, 110, 135, 150; Dec. Dig. \Leftrightarrow 27.]

3. HUSBAND AND WIFE \Leftrightarrow 270—**AGREEMENT AS TO REGRADE OF STREET—SETTLEMENT OF DAMAGES—SUFFICIENCY OF EVIDENCE.**

Evidence in an action by a husband and wife, owners of abutting property, for damages from the regrading of a street, held, in view of Rem. & Bal. Code, § 5918, declaring that the husband shall have the management of the community realty, sufficient to sustain a finding that an agreement to accept the city's construction of a wall as a protection to their property was made for and with both the husband and wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 968-971, 973-984, 988; Dec. Dig. \Leftrightarrow 270.]

4. ACCORD AND SATISFACTION \Leftrightarrow 28—**BURDEN OF PROOF.**

In such action the burden was upon the city to support its affirmative plea of an accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 162-165; Dec. Dig. \Leftrightarrow 28.]

5. TRIAL \Leftrightarrow 260—**REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.**

In such action the refusal of a requested instruction in effect the same as an instruction given upon the issue was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. \Leftrightarrow 260.]

Department 2. Appeal from Superior Court, Whitman County; R. L. McCroskey, Judge.

Action by R. G. Hargrave and wife against the City of Colfax. Judgment for defendant, and plaintiffs appeal. Affirmed.

Neill & Burgunder, of Colfax, for appellants. Chas. F. Voorhees, of Colfax, for respondent.

HOLCOMB, J. Appellants' action against respondent was to recover damages by way of diminished market value resulting from the regrade of streets on which their community property abuts. The streets being improved were Main and James streets, abutting on appellants' property on two sides. The original grade on both streets was established by ordinance in 1891, and the streets were afterwards physically graded to the established grade. Appellants' property was thereafter improved and adjusted with reference to the grade, and, among other improvements, a stone wall was built around the property on Main and James streets. Appellant R. G. Hargrave signed the petition to the city council to regrade and improve Main and James streets adjacent to the property of appellants. In April, 1912, respondent commenced to improve the streets by regrading and paving. The regrade cut each street at the corner of appellants' property about six feet below the old established grade. When the graders began to grade James street, they commenced to cut at the base of appellants' retaining wall without leaving a shoulder. Appellants called the attention of the street committee of the city council to the fact that, if the grade was made in that way, the retaining wall on James street would fall and appellants' property slide onto the street. The street committee of the council went to the property, and, in company with R. G. Hargrave, viewed the premises, and decided to build a concrete wall along James street about four feet out from the property line, and fill in behind it so as to hold the old retaining wall in place and prevent it from falling. This wall was afterwards built by the city at its expense. In its answer respondent alleges that, by reason of R. G. Hargrave having signed the petition asking for the street improvements referred to, and the fact that during all the time the improvement was being made appellants resided on the property and made no demand for damages prior to the bringing of the suit, they are estopped to claim any damages whatsoever by reason of the matters of which they complain in their complaint. It was also affirmatively alleged by respondent, in substance, that the building of the concrete wall hereinbefore referred to by the respondent, at its expense, would make everything perfectly satisfactory to appellants; and it was further alleged that in all the matters and at all the times referred to by respondent R. G. Hargrave acted for himself and for and on behalf of his wife and coplaintiff, Frances P. Hargrave. Appellants unsuccessfully moved to strike from the affirmative answer the allegations that

R. G. Hargrave acted for himself and for and on behalf of his wife and coplaintiff, that he signed a petition for the improvement of the street, that he at all times knew during the making of the improvement of the plans therefor, and never at any time made any objections, and that he expressed himself satisfied with a proposed 10 per cent. grade of the streets adjacent to their property. Upon the denial of these motions appellants replied, denying certain allegations, and admitting the allegation of respondent's answer that there was an understanding and agreement between the parties that respondent would build at its own expense the concrete wall referred to and in the manner mentioned, but denied that it was then understood and agreed that everything would be perfectly satisfactory to them. They further affirmatively alleged that there was no agreement and understanding between appellants, or either of them, and respondent, that the erection of the wall would compensate them or be in satisfaction for any of the damages claimed in the complaint. At the trial, when the defense rested, upon motion of appellants to strike from the record and to instruct the jury to disregard any and all testimony offered by respondent in relation to any affirmative matters alleged in its answer, except in regard to values and damages, the court allowed all of appellants' motion, except as to evidence pertaining to the understanding or agreement in connection with the building of the wall. Upon this issue the case was submitted to the jury, and the jury returned a general verdict in favor of respondent, and answered in favor of respondent the following special interrogatory:

"Did plaintiffs and defendant have an understanding or agreement at or about the time defendant agreed to build the concrete wall mentioned in the pleadings whereby or in pursuance of which all damages to plaintiffs' property caused by the regrading of Main and James streets should be fully settled?"

To this interrogatory the jury answered: "Yes."

[1] 1. All the errors claimed by appellants arose out of, or in connection with, the affirmative answer. As to most of the affirmative answer there is nothing of which appellants can now complain. All of the matters were stricken, and the jury instructed to disregard the evidence offered in support of them, except as to the understanding or agreement between the parties concerning the building of the concrete wall. It is claimed by appellants that what was left of the affirmative answer was intended by respondent to set up an equitable estoppel, and considered by the court to raise the question of accord and satisfaction. As to the accord and satisfaction, it is asserted that it does not sufficiently plead same; that a plea of accord and satisfaction "must allege that what was done or given was in satisfaction of the cause of action, and also that what

was done or given was accepted in satisfaction." 1 Cyc. 343, 344. It is asserted that in respondent's pleading it is nowhere alleged that the building of the wall was to be in satisfaction of all damages. It is true that the affirmative answer did not use the specific words "accord and satisfaction," and did not specifically say that the things agreed upon were to be in full satisfaction of all damages. It seems to have used language conforming to the form of the understanding or agreement, which, as shown by the record of the testimony on behalf of respondent, was that the building of the concrete wall and other minor matters by the respondent "would make everything perfectly satisfactory to appellants." There is no particular magic in words. Our Code abolishes all distinctions formerly existing at common law as to the form of actions or pleadings. It is now provided simply that a complaint must consist of "a plain and concise statement of facts, constituting the cause of action, without unnecessary repetition," and "a demand for the relief which plaintiff claims" (Rem. & Bal. Code, § 258); that an answer must contain "a general or specific denial of each material allegation of the complaint controverted by the defendant," and "a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition" (Rem. & Bal. Code, § 264). Accordingly, under the Code, the pleading is judged by the facts pleaded, and not by any technical rule obtaining under the common law. The allegations of the answer might possibly have been more specific or more technical, but appellants did not move to make them more definite and certain, and did not demur to the answer. No motion of any kind was made against that particular affirmative allegation of the answer upon which the case was submitted to the jury, except the motion, at the conclusion of respondent's evidence, that all testimony offered by defendant in relation to any affirmative matters alleged by it be disregarded by the jury. Upon this affirmative allegation appellants had joined issue and set up their version of the contract or agreement. They allege that the wall was built according to the agreement merely to prevent future damage by the sliding of their property. It is immaterial what technical name be given to the matter set up in its defense. It stated the facts as the Code requires, in ordinary and concise language. It certainly was competent to allege and to prove that the parties had agreed in advance upon the method of settling the matter of damage arising from the regrade of the streets; and, upon an allegation and showing that the agreement had been performed by the respondent, it would certainly be a good and sufficient defense to the action for damages, either as a legal or an equitable defense. An "accord is a satisfaction agreed upon be-

tween the party injuring and the party injured." 3 Blackstone, 15. We think accord and satisfaction were here sufficiently alleged.

[2] It is a question for the jury whether the agreement or the performance was accepted in satisfaction. *Bahrenburg v. Fruit Co.*, 128 Mo. App. 526, 107 S. W. 440.

[3] 2. Appellants contend that the wife never agreed to the building of the wall as a settlement of all the questions that might arise between them, that she never was a party to any contract or agreement at all, and that therefore she was not bound by any action taken by her husband involving the taking or damaging of their community property. There is ample evidence to the effect that R. G. Hargrave made the agreement alleged by respondent and as found by the jury. Whether Mrs. Hargrave authorized the same is another question.

The appellants joined in their pleadings and joined in the reply to the respondent's affirmative answer. In the reply they admitted that there was a contract between them and respondent, but denied that it was as alleged by respondent. The statute (Rem. & Bal. Code, § 5918) provides that:

"The husband has the management and control of the community real property, but he shall not sell, convey, or incur the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or incumbered."

The case of *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594, is cited and relied upon by appellants to sustain their contention. In that case it was held that, in an action for damages for the wrongful taking of community real property, the wife was a necessary party plaintiff with the husband; and it was stated that the husband alone could not authorize such taking or damaging of the community real estate in the first instance. The case is of little importance here, however, for the reason that, in this case, the husband and wife are joined in the action, and they admit and allege that a contract was made. Furthermore, there is evidence in the record tending to show that the wife first discovered the nature of the grade or cut that was being made adjacent to their property, that she telephoned her husband, and that her husband came to see the work and called the street committee of the city council to act in the matter. The wife did not testify. Whatever agreement was made was made at their residence. They resided upon the premises all the time. The appellants certainly cannot be heard to say that the community could authorize the husband to act as the agent to make one contract in regard to the matter then in controversy, for the benefit of appellants, and which was acted upon by respondent, but not another. The wife knowingly permitted the husband to deal with the matter. Under the circumstances we think

there was sufficient evidence to warrant the jury in finding that the agreement was made for and with both appellants. *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848; *Pearl Oyster Co. v. S. & M. Ry. Co.*, 53 Wash. 101, 101 Pac. 503.

3. The court instructed the jury, limiting their consideration of the matters involved in the case to the questions: (1) Was there a contract, understanding, or agreement between the plaintiffs and the defendant made or had at or about the time agreed to build the concrete wall mentioned in the evidence, whereby or in pursuance of which all damages occasioned to plaintiffs were settled by reason of the city erecting the wall? And (2) if there was no such understanding or agreement, then what damages, if any, did plaintiffs suffer by reason of the change of grade?

[4] These instructions were followed by others appropriate to those issues, and the jury were instructed that the burden of proof was upon respondent to support its affirmative allegation. These instructions were excepted to by appellants, and an instruction tendered and refused by the court is also made the basis of a claim of error. Under the issues in the case developed, however, we think the instructions given were proper, and the refusal of the instruction tendered by appellants was not prejudicial.

[5] The requested instruction was, in effect, the same as the instructions given by the court upon the issues submitted to the jury, except that it contained the further direction that, if the jury found by the preponderance of the evidence that R. G. Hargrave did make such agreement, it would not be binding on the plaintiffs unless they further found by a preponderance of the evidence that the plaintiff Frances P. Hargrave also made such agreement or authorized her husband to make such agreement.

Bearing in mind that a part of the affirmative allegation upon this issue of respondent's answer was that R. G. Hargrave was at all times and in all the things referred to acting for and on behalf of himself and his wife, and that there was some evidence tending to support that allegation, and that there was no testimony to the contrary on the part of appellants, and observing further that the court instructed the jury that the burden of proof was upon the defendant to prove by a preponderance of evidence the material allegations of the affirmative matter set up in its answer which had not been admitted by appellants in their reply or during the progress of the trial, we are of the opinion that the court committed no error in giving and refusing instructions.

We find no error.

Judgment affirmed.

MORRIS, C. J., and BAUSMAN, MAIN, and PARKER, JJ., concur.

(89 Wash. 449)

STATE v. HAWKINS. (No. 12855.)

(Supreme Court of Washington. Feb. 2, 1916.)

1. HOMICIDE \S 231—EVIDENCE—MALICE.

On a trial for homicide, evidence as to defendant's frame of mind when he arrived at a barn where deceased was, his possession of a revolver which the jury might have believed was concealed, and his manner of addressing those present immediately preceding the shooting held sufficient on the question of malice to support a conviction for murder in the second degree, especially as, where a killing is admitted or proved beyond a doubt to have been done by accused, the burden of justifying his act or reducing the crime to manslaughter is upon him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 479; Dec. Dig. \S 231.]

2. HOMICIDE \S 340—REVIEW—HARMLESS ERROR.

On a trial for homicide, where the jury found defendant guilty of murder in the second degree, thereby finding him not guilty of murder in the first degree, he was not prejudiced by the submission of the question of murder in the first degree, though there was not sufficient evidence of premeditated malice or premeditated design to effect deceased's death to warrant the submission of that degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 715-717, 720; Dec. Dig. \S 340.]

3. CRIMINAL LAW \S 824 — INSTRUCTIONS — NECESSITY OF REQUESTS.

On a trial for homicide, the court charged that, though deceased made the first attack, still if deceased, after such attack and before the fatal shot was fired, ceased his attack upon defendant and in good faith withdrew from the conflict by retreating or otherwise, then defendant would not be justified in taking deceased's life after he had so withdrawn from the conflict. It was defendant's claim that it was too dark for him to see that deceased was retreating, that he was being attacked by some of those present and because of the darkness did not know just which one, and that he shot without intent to injure any one other than those he thought were actually attacking him at the time. Held that, as the instruction given clearly stated the law generally applicable, defendant could not complain of its failure to present his theory where no instruction presenting such theory was requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1996-2004; Dec. Dig. \S 824.]

4. HOMICIDE \S 120 — SELF-DEFENSE — FOLLOWING UP ATTACK.

The state's evidence tended to show that defendant went to deceased's barn in an angry mood, carrying a revolver with him which, if not purposely concealed, was at least not seen by those present until actually drawn immediately preceding the shooting, that he accused those present of cutting a hog belonging to him, and when they denied it said that there was a lie between those present somewhere, that deceased asked if defendant meant him, and when defendant failed to answer struck him on the temple, that defendant drew his gun and shot deceased, though deceased was retreating and begging him not to shoot. Held that, while defendant may not have been the aggressor in the sense of striking the first blow, he was the aggressor in the sense that his actions brought on the affray, if the state's testimony was true, and if this did not deprive him of the right of self-defense he was not in any event justified in following up the affray rather than retreating or desisting in the light of the facts shown.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 175; Dec. Dig. \S 120.]

Department 2. Appeal from Superior Court, Whitman County; R. L. McCroskey, Judge.

John Hawkins was convicted of murder in the second degree, and he appeals. Affirmed.

Charles R. Hill, of Colfax, for appellant. R. M. Burgunder and Thomas Neill, both of Colfax, for the State.

PARKER, J. The defendant, John Hawkins, was charged by information filed in the superior court for Whitman county with the crime of murder in the first degree, in that he did on the 29th day of November, 1914, "feloniously and with premeditated design to effect the death of one George A. Miller, kill and murder said George A. Miller." His trial before the court and a jury resulted in a verdict of guilty of murder in the second degree against him. Judgment was rendered thereon sentencing the defendant to the penitentiary, from which judgment he has appealed to this court.

[1] Appellant and deceased were neighboring farmers living in Whitman county. On Sunday, November 29, 1914, appellant had been hunting, carrying a rifle and a revolver. On returning home near evening he found some of his hogs missing. He also discovered during the day that his boar had been castrated by some one. He started out hunting for his missing hogs. He came to Miller's place about 5 o'clock in the evening, evidently in an angry mood. He carried his revolver with him. Whether it was purposely concealed on his person, is not very clear from the evidence, but that it was not seen by the witnesses present at the time of the shooting until it was actually drawn by him immediately preceding the shooting, seems plain. Miller was in his barn feeding his horses. Two of his neighbors, Roberts and Hall, were there talking to him, evidently as mere visitors. Roberts' testimony as to what occurred upon appellant's arrival is as follows:

"A. He [Miller] was feeding his horses, and me and Mr. Hall was standing talking to him, and John Hawkins dashed into the door and ran up where we were at, and Mr. Miller says, 'Hello, John;' and he says, 'What the hell's the matter with you fellows?' and Mr. Miller says, 'Nothing, John; what's the matter with you?' and he says, 'What did you cut my hog for?,' and Mr. Miller says, 'I never cut your hog, John;' and he turned to me and says, 'Did you?' and I says, 'No;' and then he says, 'There is a damn lie between you fellows somewhere;' and I says, 'Do you mean me, John?' and he says, 'No;' and Mr. Miller says, 'You mean me, John?' and he didn't say anything; and Mr. Miller says so again and again, and he didn't say anything, and Mr. Miller tapped him with his fist and says, 'You mean me?' and he said— Q. What kind of a blow did he strike him? A. Like that (indicating), a kind of side strike, in the temple on this side (indicating). Then Hawkins drew a gun, and Mr. Miller he went running back and hollowing for him not to shoot, and Mr. Miller ran back eight or nine feet, and Hawkins followed him about eight feet before firing, and Mr. Miller was just running in behind Mr. Hall, and

he fired just then, and he had backed up along beside of me, and was drawing his gun toward me, and I knocked the gun back, and he shot at me as he turned round to his left, and we scuffled there, and while we was scuffling Mr. Miller stepped over against the hay, and Hawkins kept on scuffling towards him, and when he got up to two or three feet drew his gun up in Mr. Miller's breast and shot him. Then we got the gun away from him and held him until the sheriff come. Q. What was the effect of those two shots on Mr. Miller? A. How did it affect Mr. Miller? Q. Yes. A. Well, the first shot I couldn't tell that it affected him very much, only he just leaned against the hay and hollowed the first shot, "He shot me!" and the last shot killed him. Q. How long did he live after the last shot? A. I should judge half a minute, something like that."

Hall's testimony is substantially to the same effect as follows:

"A. Well, I, Mr. Roberts, and Mr. Miller were in the barn at Mr. Miller's place, and Mr. Miller was feeding the horses. Mr. Hawkins came in the barn and replied, 'Who of you—' He said first, 'What the hell's the matter with you fellows?' Mr. Miller says, 'Nothing, what's the matter with you, John?' John says, 'Who of you fellows cut my hog?' Mr. Miller says, 'It wasn't me.' Then he turned around to Mr. Roberts and asked him, and he says, 'It wasn't me either, John.' Mr. Hawkins says, 'There is a damn lie out among you fellows.' And Mr. Roberts was standing a little closer than Mr. Miller, and Mr. Roberts says, 'Do you mean me, John?' and he says, 'No; I didn't mean you.' And Mr. Miller made the same reply, and he made no answer. He walked around to him and asked him again, and he made no reply; and Mr. Miller struck him with his fist and staggered him over a little ways against a sack pile there. Mr. Hawkins raised with his gun in his hand. Mr. Miller asked him not to shoot, and I asked him the same thing, and Mr. Roberts also. He didn't hesitate, but shot Mr. Miller. Mr. Miller walked around behind me. At the time he put the first shot into Mr. Miller he was standing pretty near behind me. Then he turned around the second shot and shot at Mr. Roberts, and Mr. Roberts grabbed hold of him and turned him kind of around, and then the last shot, the next shot he fired at Mr. Miller again. As soon as he done it, Mr. Miller replied, 'He has killed me.' By that time Mr. Roberts got hold of Hawkins and succeeded in taking the gun away from him. I held Mr. Hawkins then, and Mr. Roberts went to phone for the sheriff. While he was gone to phone for the sheriff I asked him, 'Why did you do that?' and he says: 'I don't know what in the world I done it for. I didn't have a thing against you fellows. I just got mad and lost my head.' * * * Q. When he came in, did you notice the position of his hands before the shot was fired? A. Yes, sir; he had them under his sweater coat. Q. Which hand? A. The right hand. Q. What position was his left hand? A. Swinging down by his side. Q. When Miller struck him, what kind of a blow did he hit? A. Kind of a side blow. Q. Whereabouts did he strike him? A. On the left side of his face. Q. You say he staggered him? A. Yes, sir; some, over against a sack pile in the barn. Q. When did you first see the revolver in his hand? A. He was just about straightened up when I seen the revolver. He almost had it leveled when I noticed it. Q. When was the first time you saw his right hand when he came in the barn? A. Just as I looked around at him. I took a minute at that time to notice what he was going to do. Q. When was the first time after he came in the barn that you saw his right hand? A. Not until he pulled the gun. Q. At the time he pulled the gun, where was Miller? A. Stepping back behind me, kind of, asking him not to shoot him. * * * Q.

How far was Hawkins from Miller when the first shot was fired? A. Well, about eight feet. Q. How far was he away at the time the second shot was fired? A. Well, I should judge about three or four feet."

The jury was fully warranted by the evidence in believing, as it evidently did, that those versions of the affray given by Roberts and Hall in their testimony were substantially correct, and that it was light enough there to readily distinguish the action of each one present, though appellant in his testimony insists that it was dark at the time; that he did not know that Miller was in fact retreating, and believed that some one was actually assaulting him at the time he fired the shots.

It is contended by counsel for appellant that the trial court erred in refusing to withdraw from the consideration of the jury the charges of murder in both the first and second degrees and submit to the jury only two forms of verdict: One, "Not guilty;" and another, "Guilty of manslaughter"—so that the jury would have no alternative but to find in one or the other of these two forms. The substance of this contention is that there was not sufficient evidence of malice to warrant the jury finding the appellant guilty of murder in either the first or second degrees. It seems to us, however, that the facts above noticed, which the jury were clearly warranted in believing, fully answer this contention, especially in view of the general rule recognized by this and other courts as stated in *State v. Drummond*, 70 Wash. 260, 263, 126 Pac. 541, 542, as follows:

"The killing being admitted or proved beyond a doubt to have been done by the appellant, the burden of justifying his act or reducing the crime to that of manslaughter was upon him. *State v. Ware*, 58 Wash. 526, 109 Pac. 359; *State v. Clark*, 58 Wash. 128, 107 Pac. 1047, and cases there cited."

Indeed, even aside from this rule, the evidence seems ample to support the conclusion reached by the jury, so far as the question of malice is concerned, in view of the frame of mind in which appellant arrived upon the scene, his possession of the revolver which the jury might well have believed was concealed, and his manner of addressing those present immediately preceding the shooting. It seems quite plain to us that the trial court was amply justified in submitting to the jury at least the question of appellant's guilt of murder in the second degree.

[2] It is contended in appellant's behalf that the trial court in any event erred in refusing to withdraw from the jury the question of appellant's guilt of murder in the first degree; an instruction to that effect having been requested and refused. This contention we think finds its answer in the fact that appellant was not found guilty of murder in the first degree, but was acquitted thereof by the finding of his guilt of murder in the second degree. The argument seems to be that there was not sufficient evidence

of premeditated malice or "premeditated design to effect the death" of Miller, using the language of section 2392, Rem. & Bal. Code, defining murder in the first degree, to warrant the submission of that question to the jury. Were we to so hold as a matter of law, still appellant having been acquitted of that degree of murder, the denial of the request for withdrawal of that question from the jury proved not to be prejudicial to his rights. The following decisions support this view: *State v. Underwood*, 35 Wash. 558, 573, 77 Pac. 863; *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047; *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *Downing v. State*, 11 Wyo. 86, 70 Pac. 833, 73 Pac. 758.

[3] The trial court instructed the jury in part as follows:

"You are instructed that although you may believe from the evidence that deceased struck the defendant with his fist, and thereby made the first attack, still, if you further believe from the evidence that the deceased after such attack, and before the fatal shot was fired, ceased his attack upon defendant and in good faith withdrew from the conflict by retreating or otherwise, then the defendant would not be justified in taking the life of the deceased after the deceased, if you so find, had withdrawn from the conflict."

Counsel for appellant make but little contention against the correctness of this as a statement of the law, but urge that the instruction does not state all upon that subject which appellant was entitled to in view of the theory of his defense, which is, that he was acting in self-defense, that it was not light enough in the barn for him to see or know that Miller was retreating, that he was being attacked by some of those present, that he did not know just which one it was because of the want of sufficient light and the confusion and that he shot without intent to injure any one other than those he thought were actually attacking him at the time he shot. The complaint of appellant's counsel against the instruction seems to be that it fails to take account of his theory of the defense in that it makes no mention of what appellant's rights might be in the light of his want of knowledge of Miller's retreating. We note that counsel for appellant made no request for any instruction of this nature. We therefore think he is not in position to complain of the instruction above quoted, since it seems to clearly state the law generally applicable to such cases.

[4] While appellant may not have been the aggressor in the sense of striking the first blow, he manifestly was the aggressor in the sense that his actions brought on the affray, if the versions given by Roberts and Hall are to be believed, as the jury had the right to believe them. In the text of 21 Cyc. 807, touching the question of what constitutes one an aggressor in such an affray, it is said:

"Any wrongful or unlawful act of the accused which is reasonably calculated to lead to an affray or deadly conflict, and which provokes the

difficulty, is an act of aggression or provocation which deprives him of the right of self-defense, although he does not strike the first blow. So one is the aggressor when he provokes another into a quarrel causing a fatal affray, or commences an assault upon the other. The act of provocation must have been committed at the time the homicide occurred, and must have related to the assault in the resistance of which the assailant was killed."

These observations seem to be well supported by the authorities. This view of the law, as applied to the facts of this case, would argue strongly against appellant's right of self-defense. In any event, he was not justified in following up the affray rather than retreating or at least desisting in the light of the facts which the jury were warranted in believing, and evidently did believe. 21 Cyc. 820.

It seems quite plain to us that this record shows no prejudicial error against appellant, and that he has been awarded a fair trial.

The judgment is affirmed.

MORRIS, C. J., and MAIN, BAUSMAN, and HOLCOMB, JJ., concur.

(171 Cal. 741)

NEWLANDS v. SUPERIOR COURT OF LOS ANGELES COUNTY. (L. A. 4240.)

(Supreme Court of California. Jan. 19, 1916.)

1. DIVORCE \Leftrightarrow 286—REVIEW—DISCRETION OF COURT.

Only a clear abuse of discretion of the trial court in granting or refusing temporary alimony given by Civ. Code, § 137, will be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. \Leftrightarrow 286.]

2. MANDAMUS \Leftrightarrow 32—SCOPE OF WRIT—SUBJECTS OF PROTECTION.

Where the discretion of the trial court in granting, under Civ. Code, § 137, temporary alimony to enable wife to support herself or to prosecute a pending action of divorce, could be exercised in only one way, mandamus to enforce such discretion will issue.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 73, 78; Dec. Dig. \Leftrightarrow 32.]

3. DIVORCE \Leftrightarrow 182—ALIMONY—DISCRETION OF COURT.

Where the evidence showed that the wife had deserted her husband, that her action for divorce was not instituted until after the husband had inherited large estate, and that the husband was the aggrieved party and entitled to a decree, the court may refuse to award alimony under Civ. Code, § 137, pending an appeal from the decree for husband, the fact that the wife was afflicted with a disease incapacitating her for work not rendering her husband liable for her support.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. \Leftrightarrow 182.]

4. DIVORCE \Leftrightarrow 182—ALIMONY—ATTORNEY'S FEES.

Where the husband consented that the fees of attorneys for his wife should be determined at the conclusion of her appeal from a divorce decree in his favor, the court may properly deny fees pending appeal, it being no hardship to require the attorneys to wait the determination

of the action, as the payment of the fees was not jeopardized by the delay.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 568, 587, 588, 625, 638, 641, 657; Dec. Dig. § 182.]

In Bank. Application by Viola Newlands for writ of mandate against the Superior Court of the County of Los Angeles. Mandate denied, and writ discharged.

R. A. Dunnigan, of Los Angeles, for petitioner. George Beebe, of Los Angeles, for respondent.

HENSHAW, J. This is an original petition for mandate to compel the superior court of Los Angeles county and Hon. Charles Monroe, judge thereof, to grant the petitioner alimony pendente lite, attorneys' fees and costs, growing out of the matter of her proposed appeal from the judgment and decree of divorce awarded against her.

By his answer respondent shows that petitioner, Viola Newlands, brought her action against her husband, Joseph R. Newlands, on the 24th day of August, 1914. She charged that the defendant abandoned her in the city of New Orleans on the 3d day of April, 1911, and ever since has without cause failed to provide for her. She also charged him with the infliction of extreme cruelty upon her. The defendant answered and likewise filed a cross-complaint in which he sought a divorce from plaintiff upon the twofold grounds of her desertion and her cruelty. Pending the trial of this action plaintiff, under order not made by respondent, was in receipt of alimony pendente lite. The trial had before respondent resulted in his finding, upon ample legal evidence, that defendant had not deserted plaintiff and had not treated her with cruelty, had not applied to her violent and offensive names, and had never struck or beaten her; that defendant was not, as charged, at the time he contracted marriage afflicted with a loathsome venereal disease; that plaintiff upon the trial introduced evidence to show that she was and had been suffering from a venereal disease called gonorrhea, but neither this nor any other disease had been communicated to plaintiff by defendant; that during their married life together defendant provided for plaintiff according to his circumstances; that they were married in the city of New Orleans in 1909, and came to California in 1910; that on the 3d day of April, 1911, plaintiff, against the protest of her husband, insisted upon returning to New Orleans and did return, deserting and abandoning her husband and her child about one year of age; that defendant protested against this desertion and abandonment of himself and their child, and that plaintiff with profanity declared her intention of returning to New Orleans, and demanded money of defendant to enable her to do so, threatening to commit suicide and to kill herself and child if the money was not forthcoming. Defendant's pleadings were unavailing, and

on April 3, 1911, plaintiff took the train and went to New Orleans, where she remained until about the 4th of August, 1914. During the first year of her absence plaintiff wrote several letters to her husband asking him to send her money to enable her to return. The court found that defendant did not send her money directly, but did send money in payment of debts which she had contracted in New Orleans. The court further found that her offers to return and her demand for money were not made in good faith, and that plaintiff was at the time carrying on a correspondence of an improper character with another man in the city of Los Angeles. For about three years before her return to Los Angeles she had no manner of communication with her husband, and made no offer nor effort to return to him and to her child.

Defendant's mother died in 1914, and upon her death he inherited property to the value of at least \$100,000. Thereupon a woman, an enemy of defendant, caused advertisements to be published in New Orleans newspapers seeking to locate plaintiff and petitioner. She was thus located, and this woman then wrote to petitioner, telling of her husband's inheritance, and advising her to come to Los Angeles and bring suit and obtain some of the money. As a result of these efforts petitioner returned to Los Angeles in 1914 and began her action for separate maintenance. Upon the trial the respondent found and determined that plaintiff's case was without merit, and found and determined that there was an abundance of competent evidence justifying and demanding of the court the findings of fact, conclusions of law, and decree of divorce, which were given. In view of all these facts and circumstances and of the conclusion of the court embodied in its judgment that plaintiff's cause of action against her husband was without merit and the defendant was entitled to a divorce from plaintiff and petitioner, the respondent, in the exercise of the discretion vested in him by law, denied petitioner's motion for alimony pendente lite, under the conviction that she was no longer entitled to look to her husband for any support, and that her husband was neither morally nor legally bound to contribute to that support. In the matter of the appeal the respondent declares further his conviction that the appeal is not taken in good faith, but that to the end that petitioner may not be deprived of the power to present such matters upon appeal as may be thought to be meritorious, provision has already been made for the payment of the cost of preparing the transcript on appeal, which cost it has been arranged will be met by defendant. In the matter of attorneys' fees, expressing the same conviction that the proposed appeal is without merit and is not taken in good faith, respondent further declares that his discretion in the matter of the fixing of the fee can be the more wisely exercised upon the

coming down of the remittitur following the determination of the appeal to this court, and that he is prepared at the present time, upon suggestion or mandate from this court, to fix a minimum fee in the sum of \$50, with the understanding that full compensation will be awarded for the services of petitioner's attorney upon the termination of the litigation, when respondent's discretion can be the more wisely exercised to this end.

[1, 2] It must be conceded and indeed is not questioned but that a discretion is vested in the trial court in the matter here under consideration (Civ. Code, § 187), and that only a plain abuse of discretion is subject to correction at our hands (*Smith v. Smith*, 147 Cal. 143, 81 Pac. 411; *Gay v. Gay*, 146 Cal. 240, 79 Pac. 885). Nor does it require the citation of authority to the proposition that even where discretion is vested, if that discretion under the facts can be legally exercised in but one way, mandate will lie to compel the inferior tribunal so to exercise it.

[3] The simple question left for consideration, therefore, is one of fact. Can it be said that under respondent's showing of fact the position which he has taken evinces a plain abuse of discretion? He was the judge who tried the cause. Before him appeared all of the witnesses and he heard all of the evidence. It was his right to take into consideration all of these matters in exercising his discretion in the decision of the motion subsequently made before him. *Harron v. Harron*, 128 Cal. 305, 60 Pac. 932; *Gay v. Gay*, 146 Cal. 238, 79 Pac. 885. His conclusion upon the main case that plaintiff's action for separate maintenance was without merit and that defendant was entitled to a divorce, necessarily contained in it his conviction that the husband was no longer legally or equitably charged with the support of the wife. The affidavits of the wife filed in support of her motion that the venereal disease from which she suffered had impaired her health and rendered her incapable of performing manual labor as a domestic, which, it is said, was the only kind of labor at which she could support herself, would, if petitioner were destitute, make her an object of charity, but did not impose upon the divorced husband the duty of maintenance. The second phase of the matter, namely the costs upon appeal, is sufficiently covered by respondent's answer that costs upon appeal have actually been provided for and the appeal has been taken.

[4] In the matter of attorneys' fees we can perceive no objection to the attitude which the trial court took and has maintained. In all other cases an attorney's compensation is estimated when his services have been performed. It is not even open to question but that the value of those services can be better arrived at after they are performed than before. No more hardship is imposed upon

the attorney in such a case than is imposed upon the attorney for an executor or other trustee who must first perform the services and await the settlement of the executor's or trustee's account before receiving his award. Upon the determination of this appeal and the going down of the remittitur, the trial court will still have the parties litigant before it and the respondent can then, as he suggests, the more wisely exercise his discretion in the matter of the allowance of attorneys' fees.

The objection that an allowance of such attorneys' fees cannot be made after the services have actually been rendered, which objection is based upon the declarations in *Mudd v. Mudd*, 98 Cal. 322, 33 Pac. 114, *Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87, and *Lacey v. Lacey*, 108 Cal. 45, 40 Pac. 1056, is entirely obviated by force of the circumstance that in this case the husband did not object, but stipulated in writing his consent that this might be done. As the husband is the only person whose rights could be injuriously affected by such an order, his consent thereto removes any possible difficulty in the way of its legality and enforcement. And, finally, it may here be said that the same showing which we hold is sufficient to sustain the court's order refusing alimony pendente lite will equally sustain its order refusing any attorneys' fees whatsoever. Therefore it is unnecessary that mandate should issue. A suggestion to the trial court that it proceed to do what it has declared its willingness to do is sufficient in the premises.

Mandate is denied, and the writ discharged.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

(71 Cal. 691)

HOLABIRD v. RAILROAD COMMISSION
OF STATE OF CALIFORNIA.

(L. A. 3986-3988.)

(Supreme Court of California. Jan. 17, 1916.)

CERTIORARI — 24—DECISIONS REVIEWABLE—
FINALITY—PRELIMINARY ORDER.

Code Civ. Proc. § 1068, authorizes a writ of review when an inferior court, etc., exercising judicial functions, has exceeded its jurisdiction, and there is no appeal nor any adequate and speedy remedy, and section 1074 declares that review shall not extend further than the determination whether such inferior tribunal has regularly pursued its authority. Public Utilities Acts (St. Sp. Sess. 1911, p. 55; St. 1915, p. 161) § 67, provides that one aggrieved by any order of the Railroad Commission may apply to the Supreme Court for a writ of review to determine whether the commission has regularly pursued its authority, and section 60, giving the commission certain powers, does not authorize a proceeding to determine whether a particular person, etc., is carrying on a public utility or a private enterprise. The commission, on complaints of several parties that petitioner, a corporation organized to sell, rent, and distribute water to the public for irrigation purposes, had refused to deliver water to complainants, and

seeking an order requiring it to deliver water, over its demurrer to the complaints, on the ground that the commission had no jurisdiction, heard evidence, found it to be a public utility water system, and overruled the demurrer, leaving the case still pending for final determination. *Held*, that a petition for writ of review of the commission's rulings preliminary to the final determination was premature, and would be dismissed without prejudice.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 37; Dec. Dig. ¶24.]

In Bank. Petition for writ of review by W. H. Holabird, receiver of the property of the California Development Company, against the Railroad Commission of the state of California. Petition dismissed, without prejudice.

W. B. Mathews and S. B. Robinson, both of Los Angeles, for petitioner. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondent. Haines & Haines, of San Diego, and John M. Eshleman, of El Centro, amici curiæ.

SHAW, J. In each of the aforesaid cases the petitioner seeks to review and annul an alleged decision and order of the Railroad Commission. The order in No. 3986 was made upon the complaint of Louis J. Ivey to the commission; that in 3987 upon the complaint of Adolph Becker; and that in No. 3988 upon the complaint of F. W. Weeks, as president of the Holtville city council. The nature of the proceedings may best be shown by a brief statement of the facts alleged in the complaint of Becker and of the order made in that case.

Becker complained to the commission, alleging that the California Development Company was a corporation organized under the laws of New Jersey to carry on the business of selling, renting, and distributing water for irrigation purposes for compensation and hire; that it was operating an irrigation system in the county of Imperial, and thereby distributing, selling, and renting water generally to the public in that county, for the irrigation of the land of the Imperial valley, including a tract of land of Becker containing some 240 acres; that, in an action pending in the superior court, W. H. Holabird had been duly appointed receiver of said company, and in that capacity was carrying on the business of the company; that Becker needed water with which to irrigate his land, and had demanded the delivery thereof from said receiver, offering to pay the usual rate fixed therefor, but that the receiver thereupon refused, and still refuses, to deliver any water to said Becker. The prayer was that the commission make an order requiring the receiver to deliver water to Becker for the irrigation of said land at the same price and terms upon which it delivered water to other persons owning lands under the system. The receiver appeared and filed a paper, denominated a demurrer to the complaint of Becker, on the ground that

the commission had no jurisdiction of the proceeding. The particular point stated in the demurrer was that it did not appear that the water supply in charge of the defendant as receiver is, or ever has been, dedicated to public use, or that the system controlled by him is a public utility. The commission did not see fit to rest its determination as to its jurisdiction upon the allegations of the complaint of Becker to which the demurrer of Holabird was addressed, but took evidence on the subject of the character of the company and made findings of fact upon the evidence. Thereupon it made the following order:

"A public consolidated hearing having been held in the above-entitled cases on the question whether the Railroad Commission has jurisdiction over the defendants, and this question being now ready for decision, the Railroad Commission, in reliance on each statement or finding of fact contained in the opinion which precedes this order, hereby finds that the water system of California Development Company is a public utility water system, and that W. H. Holabird, as receiver thereof, is a public utility, subject to the jurisdiction of the Railroad Commission. It is accordingly ordered that the demurrers in each of the above-entitled cases be, and the same are hereby, overruled, and the defendant in each of said cases is hereby given twenty (20) days from service of a certified copy of this opinion and order in which to satisfy the respective complainants or to answer."

It is this order which the petitioner here seeks to review. In regard to the complaints of Ivey and Weeks like proceedings were had, resulting in orders the same in form as that above given. At the close of its opinion, referred to in the above order, the commission says:

"It will be understood, of course, that the present decision deals only with the question of this commission's jurisdiction. If this decision stands, it by no means necessarily follows that complainants in any or all of these cases will ultimately secure the relief for which they ask."

Each case is still pending before the commission for final determination. The orders asked for have not been made and may yet be denied. No final determination of either case has been made. It may be that the receiver will not be injured or the system he controls at all be affected by the final orders. We think this proceeding is premature.

The writ of review lies only when the final determination of an inferior court, tribunal, or board is in excess of its jurisdiction. Code Civ. Proc. § 1068. The language of the section limits it to cases where the tribunal "has exceeded" its jurisdiction. It does not lie to determine the correctness, in point of law, of rulings or decisions made by such court, tribunal, or board, upon objections made or questions arising in the course of the proceeding or cause preliminary and prior to the final determination regarding the action which it is asked to take in the matter. *Wilson v. Sacramento County*, 3 Cal. 396; *People v. County Judge*, 40 Cal. 479; *Aberding v. Macham*, 40 Cal. 656; *Lamb v. Schottler*, 54 Cal. 320; *Sayers v. Superior Court*,

84 Cal. 642, 24 Pac. 296; Gauld v. Board, 122 Cal. 18, 54 Pac. 272. In *Wilson v. Sacramento County* the board of supervisors had overruled an objection that it had no jurisdiction over an application for a ferry license, but had not granted or refused such license. In *People v. County Judge* the judge had entertained an application of certain street commissioners asking him to fix the compensation which they should receive, and had set the application for hearing, but had not otherwise acted upon it. In *Lamb v. Schottler* one of the points involved was the right to a review of the action of the board of supervisors upon a proposed resolution, which was still pending before it and had not been adopted. In *Sayers v. Superior Court* the petitioner had been cited to show cause why he should not be punished in contempt for disobeying an order of the superior court, but he had not been adjudged guilty or tried on the charge. In *Gauld v. Board* an application had been made to the board of supervisors for a telephone franchise and certain proceedings had been taken under the statute toward the granting of such franchise, but none had been granted.

In all these cases it was held that the application for a writ of review was premature, and in each case the proceeding was accordingly dismissed or denied. In *People v. County Judge*, the court said:

"The writ of certiorari is a writ of review. Its office is to bring up for review final determinations and adjudications of inferior tribunals, boards, or officers exercising judicial functions, when there is no appeal, nor any plain, speedy, and adequate remedy. The writ is necessarily founded on a final determination."

It was further said that, if such writ might issue at any step in the proceedings of the inferior tribunal to annul its rulings:

"This would be the exercise of original jurisdiction by the court issuing the writ, and not a review of the determination of the inferior tribunal. The matter complained of would be, not that the tribunal had exceeded, but that it was about to exceed, its jurisdiction."

In *Sayers v. Superior Court*, the court said:

"The function of a writ of review is not to restrain the proceedings of an inferior tribunal, but to annul proceedings which have been taken without jurisdiction. It cannot be employed to prevent a threatened excess of jurisdiction. It is issued only when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer."

The present case cannot be distinguished from those above cited. There has been no final adjudication. The order merely overrules a demurrer. It does not decide the case. The decision of the commission that the California Development Company, through the receiver, is conducting a public utility, is preliminary only. Before proceeding to regulate, the commission must always ascertain that the person or corporation to be regulated is one over whom it is given authority, else it must refuse to act further. As it is a question affecting the jurisdiction

of the commission to act at all, it may revoke its ruling thereon at any time before the action invoked by the complainant has been taken or refused, or at any time before the authority to grant a rehearing has expired. A lack of jurisdiction of the subject-matter is sufficient cause for arresting a proceeding at any stage, whenever it appears or is called to the attention of the tribunal, and it is not bound by a preliminary decision thereon.

There is nothing in the Public Utilities Act, under which the commission proceeds, which changes the general rule concerning writs of review in this respect. Section 67 of that act provides that a person claiming to be aggrieved by any order or decision of the commission may apply to the Supreme Court for a writ of review for the purpose of having the lawfulness of the order or decision inquired into and determined, and that:

"The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or the state of California." *Stata. Spec. Sess. 1911, 55; Stata. 1915, 161.*

Except for the reference to constitutional questions, which is perhaps unnecessary, the language quoted is similar to that of section 1074 of the Code of Civil Procedure, which declares that the writ of review "cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer." There is nothing in section 67 or in any other part of the Public Utilities Act which in any way indicates an intention by the Legislature to enlarge the writ so as to authorize this court to intervene in the course of a proceeding before the Railroad Commission, stop the proceedings, and determine whether or not its intermediate rulings are within its powers. Neither does the act empower the commission to make general adjudications regarding the character of the several water corporations or persons using or disposing of water, or conducting other business enterprises, within the state, for the purpose of ascertaining whether or not they, or any of them, are public utilities, within the meaning of the Public Utilities Act, and therefore subject to the jurisdiction of the commission. No proceeding is authorized for the mere purpose of determining this question with respect to any person or corporation. Section 60 authorizes the commission, of its own motion, or upon the complaint of any person, to inquire into any act or thing done by any public utility, and to make such order therein as may be necessary to compel such public utility to comply with the law or with the orders or rules of the commission, but it does not authorize a proceeding for the sole purpose of inquiring and determining whether a particular person or corporation is carrying on a public utility, or is engaged in a private enter-

prise. It follows that the decision of the commission, in the cases here involved, that the California Development Company is a public service corporation carrying on a public service, is not an adjudication of that question which is made final by any provision of the Public Utilities Act, and it remains in fieri, as in any other similar proceeding before a court or tribunal. This being the case, it is not an order or decision which is subject to review by this court. If the final order of the commission in any of the cases is adverse to the interests of the company in charge of the receiver, the decision that it is a public utility, if it then stands unrevoked, may be attacked and reviewed upon an application for the review of such final order.

The petitions are dismissed without prejudice to any subsequent proceeding.

We concur: ANGELLOTTI, C. J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(171 Cal. 728)

**FIDELITY & DEPOSIT CO. OF MARYLAND
v. INDUSTRIAL ACC. COMMISSION OF
STATE OF CALIFORNIA et al. (S. F.
7424.)**

(Supreme Court of California. Jan. 18, 1916.)

1. MASTER AND SERVANT @250%, New, vol. 16 Key-No. Series—COMPENSATION FOR INJURIES—INDUSTRIAL COMMISSION—REVIEW OF DECISIONS.

Under Workmen's Compensation Act (St. 1913, p. 283) § 12a, subd. 3, as amended by St. 1915, p. 1081, imposing liability on employers without regard to negligence for any personal injury sustained by employes arising out of and in the course of the employment and for the death of any such employe where the injury is proximately caused by the employment with or without negligence, and is not so caused by the intoxication or the willful misconduct of the injured employe, the question whether an employe for whose death the Industrial Accident Commission awarded compensation was guilty of willful misconduct when he met his death is a jurisdictional question and subject to review by the Supreme Court.

2. MASTER AND SERVANT @87½, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION—WILLFUL MISCONDUCT AS DEFENSE.

Under Motor Vehicle Act (St. 1913, p. 649) § 22 requiring every person operating a motor vehicle on the public highways of the state to do so in a careful and prudent manner, etc., and providing that it shall be unlawful to drive at a rate of speed in excess of 30 miles an hour, and making a violation thereof a misdemeanor punishable by fine or imprisonment or both, an employe killed while driving an automobile at a speed of from 35 to 45 miles an hour was guilty of willful misconduct within Workmen's Compensation Act, § 12a, subd. 3, especially where such speed was wholly unnecessary, and it was immaterial that, as found by the Industrial Accident Commission, this speed was not unusual according to the usual custom of drivers of automobiles in the vicinity, and was not so excessive as to amount to speed mania or to foolhardiness or dare-devilry, or that it was not in violation of any instructions, rules, or orders of the employer.

In Bank. Original application by the Fidelity & Deposit Company of Maryland for a writ of review directed to the Industrial Accident Commission of the State of California and others. Award of the Commission annulled.

Guy Le Roy Stevick, A. C. Skaife, L. A. Redman, and Jewel Alexander, all of San Francisco, for petitioner. Christopher M. Bradley, of San Francisco, for respondents.

HENSHAW, J. By this review petitioner seeks to have an award given under section 84 of the Workmen's Compensation Act of 1913, as that act was amended in 1915, declared invalid. W. D. Head, president and superintendent of the Head Drilling Company, a corporation, was killed. The award was made to his widow. There is thus within this case the question of the power of the commission to make any award in case of death. But, as that question is not necessary to the decision of this case, and as it is now under the consideration of this court in another case, it is here passed over without determination.

[1, 2] The question presented is whether or not Head was guilty of willful misconduct when he met his death. Workmen's Compensation Act, § 12a, subd. 3. This question is a jurisdictional one, and therefore subject to review by this court. Great Western Power Co. v. Pillsbury, 149 Pac. 35. Over the facts there is no dispute. In the course of his employment Head, who was at Taft, was directed to go to Los Angeles on the work of his company. He hired an automobile, with a driver, to take him from Taft to Bakersfield, at which point he proposed to embark on a train for Los Angeles. The distance between Taft and Bakersfield is about 40 miles, and he had four hours of time to make the run and catch his train. Leaving Taft, he displaced the driver, and took the wheel himself. It was in the night time. The commission finds the following:

"That at said time he was driving the automobile at a rate of speed from 35 to 45 miles per hour. That said rate of speed was not entirely safe in view of the condition of the road at the place of the accident, but that the evidence is insufficient to establish that such speed was unusual according to the usual custom of drivers of automobiles in that vicinity, or that it was so in excess of customary rates of speed as to amount to speed mania, or that said excessive speed amounted to more than ordinary negligence or amounted to foolhardiness or dare-devilry; that the act of the deceased in driving at said rate of speed was not in violation of any instructions, rules, or orders made by the said employer, the W. D. Head Drilling Company, for the safety of its employes or any of them."

While so driving the car it ran into a sandy piece of road and overturned. Head was killed, and the driver injured.

The law of this state in the Motor Vehicle Act (Stats. 1913, p. 649) declares:

"Every person operating * * * a motor * * * vehicle on the public highways of this state shall operate * * * the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive" an automobile "or other vehicle on the public highway * * * as to endanger the life or limb of any person or the safety of any property: Provided, that it shall be unlawful to drive at a rate of speed in excess of 30 miles an hour." Section 22.

A violation of this provision is declared a misdemeanor, punishable by fine or imprisonment or both. Admittedly, therefore, under the very findings of the commission, Head was violating the express mandate of the law designed for his own protection, for the protection of the other occupants of the car, and for the protection of the general public. His act in so doing was criminal. Much of the finding of the commission which we have quoted at length is quite beside the question and without the slightest persuasive force. It matters not, for example, that the evidence is insufficient to establish that such speed was "unusual according to the usual custom of drivers of automobiles in that vicinity." That 40 men violate the law and commit crimes is neither justification nor excuse for the forty-first man who does the same thing. Nor yet does it matter that Head was not afflicted with "speed mania," nor that his excessive speed did not "amount to foolhardiness or dare-deviltry." Nor is it of the slightest consequence that Head was not violating any rule or order made by his company. Indeed, it would be as remarkable as it would be unnecessary for an employer to give a specific instruction upon a matter completely covered by a penal statute. The plain and unescapable fact is that Head was criminally violating a law designed for his own protection and for that of the general public. The statute itself forbade him from endangering "the life or limb of any person," himself as well as others, and fixed the danger point of speed at 30 miles an hour. The finding is that his rate of speed "was not entirely safe." But even without such a finding, or if the finding declared it to be a safe rate of speed, the fact still remains that the deceased willfully and deliberately misconducted himself and violated the plain mandate of the law. Says Willis (Workmen's Compensation, p. 58):

"Where there is a deliberate and unmistakable act of disobedience to an express order, or where there is a deliberate breach of a law or rule, which is framed in the interests of the workman, it will be held that such a breach or such disobedience amounts to serious misconduct."

There is no finding and indeed nothing in the record extenuating or excusing the conduct of the deceased. He was not even impelled by the desire to make the train connection. He had four hours in which to travel 40 miles. The conclusion is unavoid-

able that he was guilty of the willful misconduct contemplated by the law.

For this reason, without consideration paid to any of the other propositions urged upon our attention, the award of the commission must be and hereby is annulled.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SLOSS, J.; SHAW, J.; LAWLOR, J.

(171 Cal. 702)

TUCKER et al. v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 6279.)

(Supreme Court of California. Jan. 17, 1916.)

1. STREET RAILROADS ⇨103 — INJURIES TO PERSONS ON TRACKS — LAST CLEAR CHANCE DOCTRINE.

The last clear chance doctrine as to injuries on street car tracks applies in California.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⇨103.]

2. TRIAL ⇨397 — FINDINGS — NECESSITY.

In an action for the killing of one on defendant's street car tracks, where the pleadings raised the question whether deceased was guilty of contributory negligence proximately causing death, the failure of the court, the action being tried without a jury, to make a finding responsive to this issue, was error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. ⇨397.]

3. STREET RAILROADS ⇨102 — INJURIES TO PERSONS ON TRACKS — LAST CLEAR CHANCE DOCTRINE.

In view of Civ. Code, § 1714, declaring that every one is responsible, not only for the result of his willful acts, but for an injury caused by his negligence, no conduct of a street railway company, however willful or wanton, will release a person from using ordinary care in preserving himself from danger and injury; consequently, where deceased's contributory negligence was the proximate cause of the accident, the fact that the street railway company's servants were guilty of wanton negligence will not warrant recovery on the last clear chance doctrine.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 186, 194, 200, 203; Dec. Dig. ⇨102.]

4. APPEAL AND ERROR ⇨1011 — REVIEW — QUESTION OF FACT.

Where the evidence as to whether the car could have been stopped after deceased's presence was discovered conflicted, and plaintiff relied on the last clear chance doctrine, *held*, on the evidence, that the question whether her contributory negligence barred recovery is a fact to be determined as such by the trial court, which sat without a jury, and cannot be decided on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. ⇨1011.]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. E. Prewett, Judge.

Action by Theodore N. Tucker and another, heirs of Eva May Tucker, deceased, against the United Railroads of San Francisco, a corporation. From a judgment for plaintiffs and an order denying new trial, defendant appeals. Reversed and remanded.

Wm. M. Abbott and Wm. M. Cannon, both of San Francisco, for appellant. A. M. De Vall and Barclay Henley, both of San Francisco, for respondents.

MELVIN, J. Plaintiffs were successful in an action against the defendant for damages for the death of Eva May Tucker, which, it was alleged, was due to the negligence of defendant's servants in the operation of an electric street car. Defendant appeals from the judgment and from an order denying its motion for a new trial.

The accident took place at about 8 o'clock in the evening. The car had just traversed the curve from Clement street to Thirty-Third avenue, in San Francisco, and was proceeding in a southerly direction on the last-named thoroughfare, which at that place is unpaved. The car almost stopped at the curve, but on signal from the conductor the motorman applied the current, and the car moved into Thirty-Third avenue with increasing speed. The night was dark and somewhat foggy. There were no street lights, but the headlight was shining brightly, rendering objects on the track clearly visible for a distance of 40 feet from the motorman's position. The car was brilliantly illuminated within, and its lights could have been seen by a person having normal vision for a much greater distance than 40 feet. The car was a heavy one, and it made considerable noise while in motion, particularly in taking the curve into Thirty-Third avenue. When it began its journey along the avenue, the conductor went forward to the front platform. There was testimony tending to show that thereupon he engaged in some sort of a scuffle with the motorman, and that, putting on the motorman's cap, he took hold of the controller bar. This testimony is disputed, however, as we will have occasion to note in the further discussion of this case. The employees of defendant saw Eva May Tucker when the car had reached a point near the middle of the block about 300 feet from the curve. It was then moving quite rapidly. She was a few feet in front of the car, and was standing or walking on the track with her back partly turned toward the car. The motorman attempted to stop the car, but could not do so until the woman had been struck and killed. The trial was before the court without a jury, and judgment was given in favor of the plaintiffs for \$2,500. The court failed to find upon the alleged contributory negligence of the deceased. This is specified as error, and the appellant also asserts that upon the uncontradicted evidence the deceased was guilty of contributory negligence proximately causing her death.

[1] The respondents do not seriously question that the failure of the deceased to take note of the approach of the brilliantly illuminated car and to remain in a place of safety until after it had passed would have amounted ordinarily to negligence, but they insist

that her negligence was not the proximate cause of death, because the conduct of the servants of the defendant was gross negligence against which (they say) the defense of contributory negligence is of no avail. They cite numerous authorities from other states upholding the rule that gross negligence, amounting to a reckless disregard of public safety, when the death of another is directly due to such gross negligence, precludes a plea of contributory negligence on the part of the decedent to defeat the action. We will not pause to analyze these authorities, because the doctrine of "last clear chance" is, and for many years has been, a part of the law of California, and that of "comparative negligence" has never held a place in our jurisprudence.

[2] The pleadings clearly raised the issue, and the court was bound to find upon the question whether or not deceased was guilty of contributory negligence proximately causing her death. The failure of the court to make a finding responsive to this issue was error.

[3] We are urged to declare that the scuffle between the car men and the unlawful rate of speed of the car were facts established without controversy, and that therefore gross contributory negligence of the defendant's servants, continuing to the very instant of the impact of the car with the body of the pedestrian, makes the matter of her contributory negligence one of no moment. But the record reveals the fact that there was a conflict of testimony upon the subjects of the car's rate of speed and the conduct of the motorman and the conductor. Some of the witnesses testified that there was a scuffle in which the men exchanged hats, but they denied this, and each of them testified that the conductor removed the motorman's cap for the purpose of consulting the time table pasted inside. There was other testimony that the car was not exceeding the lawful rate of eight miles an hour when it hit the woman.

But really it makes no difference in the analysis of a defense based upon the contributory negligence of a person injured or killed whether the negligence of the defendant was gross, ordinary, or slight:

"Contributory negligence is as good a defense to a claim founded upon gross negligence as to any other." 1 Shearman & Redfield on Negligence (6th Ed.) 159.

The rule is thus stated in the opinion of this court in *Sego v. Southern Pacific Co.*, 137 Cal. 407, 70 Pac. 279:

"No conduct on the part of the company, no matter how willful and wanton, will release a person from using ordinary care in preserving himself from danger and consequent injury. As said in the case cited, under such circumstances both of the parties are equally at fault, and there can be no recovery. Even conceding the negligence of the company to be the greater negligence, still in this state the courts do not recognize the principle of law relating to comparative negligence which obtains in some of our sister states."

This quotation merely restates the principle embodied in section 1714 of the Civil Code, which is, in part, as follows:

"Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

In *Bennichsen v. Market Street Ry. Co.*, 149 Cal. 20, 84 Pac. 420, the evidence tended to show that the motorman, at the moment of the accident, was looking into the car, instead of fixing his attention upon the track ahead. It was held that such a case can be taken out of the doctrine of contributory negligence only where defendant had actual knowledge of plaintiff's perilous situation. The court cites *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85, and *Herbert v. Southern Pacific Co.*, 121 Cal. 232, 53 Pac. 651, in support of the rule. This rule has been announced many times. For example, in *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 754, 134 Pac. 709, it was again held that the doctrine of "last clear chance" is based upon the fact that the defendant actually did know of the danger, and not upon the proposition that by the exercise of common prudence he should have been aware of it. Clearly in the case at bar the court erred in failing to find upon this subject.

[4] The only evidence regarding the position of the woman when she first appeared upon the track comes from the two servants of the defendant. The conductor testified that she was six or eight feet in front of the car when he first observed her. At the same moment the motorman "threw off the motor and applied the air." The car moved twelve or fifteen feet between the time witness saw the woman and the moment it stopped. He did not give any estimate of the speed of the car. The motorman testified that the car was running at a rate of speed between eight and ten miles an hour at the time of the accident. According to his estimate the woman was from six to eight feet in front of the car when he first saw her. Witness McCausland, who was a passenger, said that the speed was from six to eight miles an hour. Formerly he had been in the employ of the defendant as a motorman. He said that a car in the position of the one in question, just coming out of a curve on such a grade as existed at that place, could and should have been stopped within five feet. Witness Tucker, another experienced man who had worked as a motorman, testified that a car could be stopped on that grade in five feet. In this state of the evidence, we cannot say that, as matter of law, the defendant was entitled to a judgment based upon the contributory negligence of Mrs. Tucker. The question of "last clear chance" was, under the circumstances, one which the court should have de-

termined (there was no jury) upon the facts presented by the testimony.

It follows that the judgment and order should be, and accordingly they are, reversed.

We concur: ANGELLOTTI, C. J.; HENSHAW, J.; SLOSS, J.; SHAW, J.

(171 Cal. 746)

FLYNN v. FLYNN. (S. F. 6564.)

(Supreme Court of California. Jan. 19, 1916.)

1. DIVORCE — § 91 — RESIDENCE — ALLEGATIONS — SUFFICIENCY.

The allegation in plaintiff's complaint for divorce that "plaintiff resides in the city and county of San Francisco, state of California, and has resided in said city and county for more than four years next immediately preceding the commencement of this action," was a sufficient allegation of the residence required by Civ. Code, § 128, without alleging that the residence was bona fide, since such allegation necessarily implied residence in good faith.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 287-289; Dec. Dig. — § 91.]

2. DIVORCE — § 125 — RESIDENCE — ADMISSION — PROOF REQUIRED.

Where, in an action for divorce, defendant admitted plaintiff's residence in her answer and the court granted plaintiff a divorce without further proof of residence, the judgment must be reversed on defendant's appeal asserting such ruling as error, since plaintiff's residence is an essential fact to jurisdiction in divorce requiring proof independent of the admissions or statements of the parties under Civ. Code, § 130.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 399-402; Dec. Dig. — § 125.]

3. DIVORCE — § 168 — COLLATERAL ATTACK — EXPRESS FINDINGS — DECREE — VALIDITY.

It is not essential to the validity of a decree of divorce as against collateral attack that there should be express findings of fact on the question of the essential residence or of other essential facts in the absence of a statute making such findings jurisdictional.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 549, 550; Dec. Dig. — § 168.]

Shaw, J., dissenting.

In Bank. Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by John Flynn against Ellen Flynn for divorce. Judgment for plaintiff was reversed by the District Court of Appeal of the Third District. Decision of the District Court of Appeal vacated, and case ordered transferred to the Supreme Court for determination. Judgment reversed.

Breen & Kelly, of San Francisco, for appellant. Charles F. Hanlon and Louis H. Brownstone, both of San Francisco, for respondent.

ANGELLOTTI, C. J. This is an action for divorce. Plaintiff was awarded an interlocutory decree, from which defendant appeals. The judgment was reversed by the District Court of Appeal of the Third District, solely on the ground that there was no express

finding that plaintiff had resided in the state or in the county in which the action was brought for the periods specified in section 128, Civil Code, that section providing that "a divorce must not be granted unless the plaintiff has been a resident of the state one year, and of the county in which the action is brought three months, next preceding the commencement of the action," and also that there was no evidence adduced on the trial to show such residence. The decision of the District Court of Appeal was vacated and the case ordered transferred to this court for determination because we were not satisfied as to the correctness of certain views expressed by that court in its opinion.

[1] Plaintiff's complaint contains a sufficient allegation of residence in accord with the provisions of said section 128, Civil Code, it being alleged that:

"Said plaintiff resides in the city and county of San Francisco, state of California, and has resided in said city and county for more than four years next immediately preceding the commencement of this action."

Any suggestion that such allegation is defective for the reason that it is not in so many words alleged that such residence was "bona fide" is unwarranted by anything contained in the statute, and if anything to the contrary is intimated by language used in *Coleman v. Coleman*, 23 Cal. App. 423, 138 Pac. 362, it must be considered as disapproved. Of course, the residence must be bona fide as a matter of fact, or it is not residence at all. The allegation of residence here necessarily implies residence in good faith, and entirely measures up to the requirement of the statute.

[2] The allegation of residence was not denied by the answer. In fact, in her cross-complaint, stating a cause of action for permanent support and maintenance under section 137, Civil Code, defendant alleged that both parties were and for more than one year next preceding the commencement of the action had been, residents of the city and county of San Francisco. The bill of exceptions, which affirmatively states that it "contains all of the testimony introduced and all of the proceedings had on the trial of said action," shows that no actual proof of residence was required, and that the court accepted the admission of the parties on that proposition, it being stated simply that "it was admitted that * * * the plaintiff had resided in San Francisco, as set forth in the complaint." The court made no express finding as to residence.

In the ordinary case, of course, it would be a complete answer to any suggestion of error warranting reversal under these circumstances, that the allegation of residence was admitted by the pleadings, and also expressly admitted by the parties on the trial. This would obviate the necessity of either proof or finding. But under our law an action for divorce is *sui generis*. The well-settled policy of the law is to protect the marriage relation

and to prevent its dissolution in any case, even where the parties consent to or desire its dissolution, unless cause recognized by the law as warranting the same exists. Section 130, Civil Code, provides, as it has ever since the year 1874, that:

"No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, * * * require proof of the facts alleged."

The object of this provision is, of course, to prevent the obtaining of a divorce by collusion between the parties, where no lawful ground for a divorce exists. Its effect necessarily is to make it erroneous for a court to grant a divorce in the absence of some proof, independent of the admissions and statements of the parties, of the facts warranting such action. That a party appealing from a judgment of divorce may successfully urge such error as a ground for reversal, even though the essential fact was admitted by the pleadings, appears to follow, and was decided in *Bennett v. Bennett*, 28 Cal. 599.

It must be taken as settled by the decisions that the residence prescribed by section 128, Civil Code, is essential to the jurisdiction of a court to grant a divorce, and also that the complaint must allege such residence. The question whether the residence essential to jurisdiction exists as matter of fact is, of course, one to be determined by the trial court, but obviously, in its determination, the trial court is controlled by the provisions of section 130, Civil Code, and cannot act upon the uncorroborated statement, admission or testimony of the parties. This we think is clearly the effect of the decision in *Bennett v. Bennett*, supra, which further, as already stated, sustains the right of a party to complain of error in the conclusions of the trial court in this regard, although in such court he had admitted the allegation of residence. In the case at bar the bill of exceptions affirmatively shows that the trial court failed to require the essential proof of residence, and that it acted entirely, so far as that question was concerned, on the uncorroborated admissions and statements of the parties. We are satisfied that under such circumstances the judgment cannot be upheld.

[3] In view of certain language of the opinion in *Coleman v. Coleman*, 23 Cal. App. 423, 138 Pac. 362, as well as certain language in the District Court of Appeal opinion in the case at bar, we deem it proper to add that it is not essential to the validity of a divorce decree as against collateral attack that there should be an express finding of fact on the question of the essential residence, or, indeed, express findings of fact on any question. A conclusion to the contrary would be opposed to the well-settled presumption in favor of the validity of judgments of courts of general jurisdiction, and would not be warranted in the absence of some statutory provision substantially making such express findings essential

to the jurisdiction of a court to grant a divorce. There is no such statutory provision. The only possible effect of a mere failure to make express findings in such a case is that the judgment may be reversed on an appeal taken by one of the parties. Whether a judgment should even be reversed on an appeal for mere failure on the part of the court to make an express finding on some matter essential to the granting of a divorce, where the fact is admitted by the pleadings, and there is no showing that sufficient proof of the fact was not made on the trial, is a question it is unnecessary here to determine. Here we have the showing that proper and sufficient proof of the essential fact was not made on the trial.

It is urged that if the judgment be reversed, we should order, in the exercise of our discretion, that a new trial be limited to the single issue of residence. We have examined the record with this suggestion in view, and are of the opinion that no such limitation should be made.

The judgment is reversed.

We concur: HENSHAW, J.; SLOSS, J.; MELVIN, J.; LAWLOR, J.

SHAW, J. I dissent. I think the case comes within the rule of section 4½ of article 6 of the Constitution. Furthermore, the case was hotly contested in the lower court. There was no collusion. The lack of corroborative evidence was not urged below. The objection should not be allowed to prevail on appeal. It is clearly the result of an afterthought.

(171 Cal. 697)

In re MURPHY'S ESTATE. (L. A. 4323.) (Supreme Court of California. Jan. 17, 1916.)

1. EXECUTORS AND ADMINISTRATORS §111—"ORDINARY PROBATE PROCEEDING"—ATTORNEY'S FEES—STATUTE.

Under Code Civ. Proc. § 1619, allowing attorneys for administrators a fee out of the estate for conducting the ordinary probate proceedings, an attorney's services in filing a brief in opposition to the petition for revocation of letters of administration granted to the public administrator and in preparing an order therein was not an ordinary probate proceeding, so that there was no basis for the allowance of an attorney's fee.

[Ed. Note.—For other case, see Executors and Administrators, Cent. Dig. §§ 448-462; Dec. Dig. §111.]

For other definitions, see Words and Phrases, Second Series, Ordinary Probate Proceedings.]

2. EXECUTORS AND ADMINISTRATORS §111—PUBLIC ADMINISTRATOR—ACT—ATTORNEY'S FEE—STATUTE.

Under Code Civ. Proc. § 1619, allowing attorneys for administrator's fees out of the estate for conducting the ordinary probate proceedings, with a further allowance for extraordinary services, and the county charter of Los Angeles County, by article 6, § 14, creating the office of county counsel, and by article 6, § 21, requiring such counsel to act as attorney for the public administrator, and in every matter to collect

the attorney's fee allowed therein by law, and to pay it into the county treasury, the county counsel, who gave no advice and rendered no service to the estate or to the public administrator administering it, except permitting the administrator to sign his name to the petition for letters of administration and other documents prepared by the administrator, and to which his signature would have the same legal effect as the signature of the counsel, was not entitled to an attorney's fee, and hence no sum was allowable to the public administrator administering an estate for services of an attorney in the matter.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 448-462; Dec. Dig. §111.]

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Louise M. Murphy, deceased. From an order refusing to allow an item for attorney's fees set out in his final account, Frank Bryson, administrator, appeals. Affirmed.

A. J. Hill, County Counsel, Roy V. Reppy, Asst. County Counsel, and Edward T. Bishop, Deputy County Counsel, all of Los Angeles, for appellant. Charles C. Montgomery, of Los Angeles, for respondent.

VICTOR E. SHAW, Judge pro tem. Frank Bryson, administrator of the estate of Louise Murphy, deceased, prosecutes this appeal from an order of court refusing to allow the item "Attorney's fees, statutory, \$1,142.18," set out in his final account as being by him incurred for attorney's fees for legal services rendered in conducting the ordinary probate proceedings in said estate.

The matter came on to be heard upon objections interposed to the administrator's final account and petition for distribution. The court made findings of fact upon which no attack is made. Appellant, however, insists that the order made is not supported by the findings. It appears that at all of the times in question Bryson was public administrator of Los Angeles county, in which capacity he administered the estate of deceased; that by section 14, art. 6, of the county charter of Los Angeles county there was created the office of county counsel, which office was, during the time of the administration, filled by A. J. Hill, and whose duties as such officer were prescribed by section 21, art. 6, of such county charter, which provides:

"The county counsel * * * shall also act as attorney for the public administrator in the matter of all estates in which such officer is * * * administrator, and the county counsel shall, in every such matter, collect the attorney's fees allowed therein by law and pay the same into the county treasury."

The name of A. J. Hill, but not by him or his deputies, was attached to all papers with his concurrence and with the intention on the part of said administrator of designating Hill as his attorney in the matter of said estate, as provided in said article 6, § 21, of said county charter. Prior to the filing of

objections to the final account all papers filed in said estate were prepared by said public administrator, or by his deputies and in his office, with the exception that said Hill, county counsel of the county of Los Angeles, prepared and filed in court a brief upon the legal questions raised by a petition filed in the proceeding asking for a revocation of the letters granted to said public administrator, and said A. J. Hill, county counsel, prepared the order which was signed by the judge of the court and filed, denying the petition for revocation of letters issued to the public administrator. Aside from this, said A. J. Hill, county counsel, did not nor did any of his deputies prepare any paper or make any appearance by personal presence in court, or give any legal advice, excepting in connection with said petition for revocation of letters aforesaid, concerning the administration of the estate. The public administrator, either personally or through his deputies, did, with the exception above noted, perform all the services which were performed in connection with the administration of said estate, and did not, except as stated, find it necessary to obtain assistance or advice from the said A. J. Hill, county counsel, or his deputies, upon any matters connected with the administration of the estate, though Hill was at all times ready to perform legal services in connection with such administration. As conclusions of law the court found that no legal services had been rendered the public administrator in the conduct of the administration of said estate, and that neither Bryson, Hill nor the county of Los Angeles is entitled to be allowed attorney's fees therein in any sum whatsoever.

[1] The service performed in filing the brief in opposition to the petition for the revocation of letters of administration granted to Bryson and the preparation of the order therein was not the ordinary proceeding referred to in section 1619, Code of Civil Procedure, and for which the fees are claimed. If regarded as extraordinary service, no fees were asked therefor. Moreover, in such contest the public administrator was not acting as a trustee of the estate of deceased, but acting solely in and for his own interest or that of the municipality entitled under the charter to the fees of administration. Estate of Lermond, 142 Cal. 585, 76 Pac. 488. Hence the services so rendered constituted no basis for the allowance of statutory fees.

[2] The question then fairly presented upon the findings is this: Is the estate of a deceased person chargeable with attorney's fees where the attorney claiming them gives no advice and renders no service to the estate or administrator thereof, the sole basis for his demand being that he permitted the administrator to sign his name to the petition for letters of administration and other documents prepared by the administrator and to which the latter's signature as administrator

would give them the same legal effect as though signed by the attorney? Section 1371, Code Civ. Proc. Appellant quotes from Estate of Goodrich, 6 Cal. App. 730, 93 Pac. 121, where it is said:

"Under our practice the services of an attorney are not only essential, but the burden and responsibility of his work are usually much greater than those of the executor or administrator. The effect of the law is simply to allow the executor an additional fee for a certain expense of administration."

While this is true, we know of no law which requires an administrator to employ an attorney, and conceding that, where one is employed and acts as attorney his responsibilities are as great as those of the administrator, certainly the fact in this case that the administrator performed all the service himself without the assistance or advice of counsel, not only shows that no necessity existed for employing an attorney, but also shows, since he did nothing, the attorney claiming the fees assumed no burden or responsibility whatever. The fees demanded are the statutory fees provided by section 1619, Code of Civil Procedure, for services rendered in the conduct of the ordinary probate proceedings. This section provides that the court may make further allowance for "extraordinary services such as sales or mortgages of real estate, contested or litigated claims against the estate," etc. Upon the presentation of a claim based upon alleged extraordinary services, it would devolve upon the attorney to show that he had rendered the service, and in the absence of such showing it would be the duty of the court to disallow such claim. Likewise, where a claim for statutory fees is presented for services rendered in conducting the ordinary probate proceedings, the burden, where objections are made thereto, rests upon the attorney to show that he has rendered such service. We know of no law, statutory or otherwise, which requires an administrator to employ an attorney; nevertheless, if it appears that he has employed an attorney who has rendered the ordinary service contemplated by the statute in such proceedings, he is entitled to the statutory fees. Estate of Goodrich, 6 Cal. App. 730, 93 Pac. 121. The charter provision does not purport to be a revenue measure in the interest of the county. It contemplates that the county counsel shall act—that he do something in conducting the probate proceedings—and section 1619, Code of Civil Procedure, contemplates that the attorney shall render some service in conducting the ordinary probate proceedings as a basis for his claim of compensation. Hill neither acted within the meaning of the charter nor performed any service whatsoever for the estate. In our opinion, it would be a travesty upon the law to uphold appellant's demand based as it is upon a mere pretense that he has rendered professional service to said estate.

This view renders it unnecessary to discuss the question of the validity of the charter provision. Suffice it to say that, assuming Hill had, at the administrator's request, rendered services to the estate, then, conceding the act invalid as claimed by respondent, he would nevertheless be entitled to the fees provided by section 1819, since it would be immaterial what motive prompted the administrator in employing him.

As stated, the appeal is prosecuted by the administrator, whose right so to do is not questioned by the respondent. Whether or not he is an aggrieved party possessing the right of appeal, since the statutory changes in sections 1816 and 1819, Code of Civil Procedure, providing for the making of an allowance direct to the attorney out of the assets of the estate and as to which the administrator incurs no liability, is not decided. The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.

(171 Cal. 719)

LARKIN et al. v. SUPERIOR COURT OF SHASTA COUNTY. (Sac. 2451.)

(Supreme Court of California. Jan. 17, 1916.)

1. DISMISSAL AND NONSUIT — 60—INVOLUNTARY—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 583, declaring that any action shall be dismissed by the court in which it shall have been commenced, or to which it may be transferred on motion of defendant after due notice to plaintiff, unless it is brought to trial within five years after defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended, is mandatory.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 60.]

2. DISMISSAL AND NONSUIT — 60—INVOLUNTARY—STATUTES—STIPULATION OF PARTIES.

Under such statute, a stipulation by counsel of the respective parties for an extension of the time of trial is a stipulation of the parties.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.]

3. DISMISSAL AND NONSUIT — 60—INVOLUNTARY—STATUTES—CONSTRUCTION.

Where the answer was filed June 30, 1909, and the minutes of the court showed that on November 27th, the date set for trial, the parties appeared in court and through their counsel stipulated that trial should be fixed for April 11, 1910, and the court so ordered, that on April 11, 1910, the case was continued until June 29th, and on June 29th the case was again continued until September 19th, but there was no record entry of independent stipulation in writing providing that time of trial should be extended beyond the five-year limit, the action must be dismissed under Code Civ. Proc. § 583, declaring that an action not brought to trial within five years after answer shall be dismissed, unless extended by written stipulation of the parties.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.]

4. DISMISSAL AND NONSUIT — 60—INVOLUNTARY—STATUTES—CONSTRUCTION.

That the original defendant administrator died within the five-year period after answer in which actions must, under Code Civ. Proc. § 583, be brought to trial, and no other administrator was appointed until after the expiration of that period, will not excuse plaintiff's failure to bring the action to trial and so preclude dismissal.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.]

5. DISMISSAL AND NONSUIT — 60—INVOLUNTARY—PERSONS BOUND TO BRING ACTION TO TRIAL.

After defendant's answer, plaintiff's attorney died, and defendants served no notice on plaintiff in accordance with Code Civ. Proc. § 286, declaring that when an attorney dies or ceases to act a party to an action for whom he was acting must, before any further proceedings are had against him, be required by the adverse party by written notice to appoint another attorney or appear in person. Section 583 provides that if an action is not brought to trial within five years after answer it shall be dismissed. Held that, as defendants were not actors, their failure to file notice demanding appointment of an attorney did not preclude them claiming a dismissal for plaintiff's failure to bring the case to trial within five years.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.]

6. DISMISSAL AND NONSUIT — 60—INVOLUNTARY—GROUNDS.

In such case, the fact that one of defendant's counsel died within the five-year period and the other ceased to act will not excuse plaintiff from bringing the action to trial within that time, as he could have required defendants to appoint another attorney, or appear in person.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.]

7. QUIETING TITLE — 39—ACTIONS—CROSS-COMPLAINT.

In a suit to quiet title, judgment in defendant's favor protects him against any of plaintiff's claims, so a cross-complaint praying that title be adjudged in defendant is effective merely to prevent plaintiff from dismissing it before trial without the consent of defendant.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 80; Dec. Dig. § 39.]

8. DISMISSAL AND NONSUIT — 60—INVOLUNTARY—RIGHT TO DISMISS.

In a suit to quiet title, though defendant filed a cross-complaint asking that his title be adjudged good, the suit may be dismissed under Code Civ. Proc. § 583, for plaintiff's failure to bring it to trial within five years after answer, for the filing of the cross-complaint did not make defendant an actor, as it would give defendant no greater rights than he would have had under an answer denying plaintiff's title, but merely precluded plaintiff from dismissing without his consent.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140-152; Dec. Dig. § 60.]

9. MANDAMUS — 43—ISSUANCE OF WRIT—DISCRETION.

Where, under the statutes, defendant is entitled to dismissal of plaintiff's action for want of prosecution, mandamus to compel the lower court to order dismissal will not be denied on the ground that the writ is discretion-

ary, and will not be issued where it will cause injustice.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 88, 89; Dec. Dig. ¶43.]

10. *MANDAMUS* ¶180—RIGHT TO—REFUSAL.

Where one of several defendants defaulted, and the others were entitled to dismissal for want of prosecution, and the defendants who answered moved for a dismissal as to them, their application for a writ of mandamus to compel the trial court to order dismissal will not be denied under the rule that a petitioner for mandamus is concluded by the terms of the alternative writ, and, as the alternative writ prayed a dismissal of "the action," it was not wholly authorized.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 401-405; Dec. Dig. ¶180.]

11. *MANDAMUS* ¶180—RIGHT TO—RULES.

The rule that where an alternative writ is awarded for a purpose, partly proper and partly improper, the court will not grant peremptory mandamus, is not an iron-bound one, but is to be applied with principles of justice.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 401-405; Dec. Dig. ¶180.]

In Bank. Original application for mandamus by John Larkin, as administrator of the estate of Alexander Hulsey, deceased, and others, against the Superior Court of the County of Shasta. Petition granted.

W. D. Tillotson, of Redding (Carr & Kennedy, of Redding, of counsel), for petitioners. Chenoweth & Leininger, of Redding, and Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondent.

ANGELLIOTTI, C. J. This is an original application to this court for a writ of mandate to compel respondent to dismiss an action pending therein, instituted by the Potosi Land & Mining Company, a corporation, against a former administrator of the said estate of Alexander Hulsey, N. L. Peterson, James E. Lutman, the Shasta Dredging Company, a corporation, and certain fictitious defendants. The action was one by the plaintiff therein to quiet its alleged title to certain land in Shasta county. The action was commenced May 6, 1907, and summons was served during that year on all the above-named defendants. No appearance was ever made by the Shasta Dredging Company, and it must be accepted as a fact from the record before us that the plaintiff is entitled to a default judgment against that defendant. The other defendants filed their answer on June 30, 1909, denying plaintiff's alleged title, claiming title in themselves, and praying for a judgment establishing and quieting their title to said land. The action has never been tried. On November 3, 1915, these petitioners, being all of the defendants except the Shasta Dredging Company, gave notice of a motion in the superior court for the dismissal of said action as to them, on the ground that the same had not been brought to trial within five years after they had filed their answer. The motion thus noticed was duly heard and denied by the superior court,

and this proceeding was then instituted to compel the dismissal asked.

[1-3] Petitioners' motion in the superior court and their proceeding here are based on the second paragraph of section 583, Code of Civil Procedure, enacted in 1905. The section is as follows:

"The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial with five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

It is obvious, from a mere reading of the second paragraph of this section, that a dismissal is mandatory in any case where the facts bring it within its provisions. It was so declared in *Romero v. Snyder*, 167 Cal. 216, 138 Pac. 1002.

Various reasons are urged why this law has no application here.

As we have said, the answer of these petitioners was filed June 30, 1909. The following facts are alleged in the answer of respondent, and are not disputed by petitioners: On November 20, 1909, the court ordered that on November 27, 1909, the time of trial should be fixed. The minutes of the court show that on November 27, 1909, the parties appeared in open court by their respective counsel and stipulated that the trial should be fixed for April 11, 1910, and the court so ordered; that on April 11, 1910, with the same procedure, the trial was continued to June 29, 1910; and that on June 29, 1910, with the same procedure, the trial was continued to September 19, 1910. Nothing further appears with reference to the proposed trial of the action, other than that after November 3, 1915, more than five years after the date to which it had last been continued, the action was set for trial on December 20, 1915. No stipulation in writing relative to time or continuance of trial was ever made "in writing," unless an agreement of counsel for the respective parties made in open court and entered on the minutes satisfies the provision of the section in this regard.

We are satisfied that there is no force in the suggestion that "the parties" can be said to have stipulated within the meaning of the section only when they personally do so. It is clear that a stipulation by respective counsel for the parties would be a stipulation of the parties. Whether they can be said to "have stipulated in writing" within the meaning of the section, when they have simply orally agreed in open court and their agreement is entered on the minutes, is a more serious question. However, we regard

this question as of minor importance in view of the fact that we are satisfied that no stipulation of the character described, either oral or written, was ever made. This point, not suggested in the oral argument, has been forcibly made in petitioners' brief filed since, and to their contention we can see no good answer. The stipulations shown by the minutes were, first, one fixing as the time for trial a date within one year from the filing of the answer, and, second, two continuing the trial, the later one carrying it to a date within 15 months after the filing of the answer. The statute says that the court must dismiss the action "unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." This seems to us to say very clearly that unless the parties have, in effect at least, stipulated in writing that the action need not be brought to trial within five years from the date of the filing of the answer, it must be dismissed at the expiration of such five years, if not "brought to trial" within that time. A stipulation in terms waiving the benefit of this section, or one in terms providing that the time fixed by the section within which trial must be had shall be extended indefinitely or for a definite time, or a series of stipulations continuing the trial to a date beyond the five-year period, might any of them suffice as an answer to a motion to dismiss, and constitute a stipulation in writing that the time (the five-year period) shall be extended. But no such effect can fairly be given to a stipulation fixing a trial date within one year of the filing of the answer, or to two others continuing the trial date to a time within fifteen months of such filing. There is nothing in this that can fairly be taken as indicating any consent on the part of the defendants that the five-year period shall be extended by as much as a single minute, or as intimating to plaintiff that any such extension would be permitted. It is a stipulation in writing extending the five-year period that the statute provides for, and without such a stipulation, certainly in the absence of some element of estoppel, there can be no effective answer to a motion to dismiss, if the action has not been "brought to trial" within such period. The language of the statute is so plain in this regard that no other intent can be attributed to the Legislature. We are not concerned here with the exact meaning of the term "brought to trial," for it is manifest that with whatever liberality we construe it in favor of plaintiff here, this action was not brought to trial within five years of the date of the filing of the answer.

[4] It appears that the former administrator of the estate of Hulsey, the original defendant administrator, died in February, 1915, and that petitioner Larkin was not appointed administrator until October 30, 1915,

and was not substituted herein as a party until November 2, 1915. All this, however, was after the expiration of the five-year period, and cannot by any possibility affect the determination of this proceeding.

[5] It further appears that one Mr. Isaacs was the original attorney for plaintiff, that he died June 8, 1911, and that from June 8, 1911, to October 19, 1915, plaintiff had no attorney in the action. No notice was served on plaintiff requiring it to appoint another attorney in place of Mr. Isaacs or to appear in person, until September 23, 1915. It is claimed that, under these circumstances, the running of the five-year period was suspended from June 8, 1911, to September 23, 1915. This contention is based on section 286, Code of Civil Procedure, which provides that:

"When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

Clearly this section has no application here. It means no more than it plainly says, viz., that no proceedings may be had against him, no judgment or order or other step in the action taken, until he appoints an attorney, unless the prescribed notice be first given. The mere running of this five-year period, which had commenced to run prior to the death of Mr. Isaacs, was not a "proceeding" had against the plaintiff, even under the very liberal definition given that term as used in section 473, Code of Civil Procedure, in *Stonesifer v. Kilburn*, 94 Cal. 43, 29 Pac. 332. A good illustration of what is meant by the term "proceedings," as here used, is the dismissal sought by motion in the superior court in this very case, prior to the making of which motion the defendants gave the notice contemplated by the section. It must be confessed that the opinion of the District Court of Appeal of the Second District, in *Troy Laundry, etc., Co. v. Drivers, etc., Co.*, 13 Cal. App. 115, 109 Pac. 36, supports the claim of respondent as to the effect of section 286 in this regard, but we are satisfied that the views there expressed are erroneous. No petition for a hearing of that matter by this court was ever presented, and the opinion therein has never received our approval. The court might well have refused to dismiss the appeal there involved in the exercise of a wise discretion, thus reaching the same result that it did reach, but to hold that the death of the appellant's attorney during the time allowed for the filing of the opening brief ipso facto extended the time for the filing of such brief is not warranted by anything said in section 286, Code of Civil Procedure, or by any other rule of law of which we are aware.

[6] The original attorneys of the petitioners as defendants, in said action, were the firm of Reed & Dozier. According to the an-

swer, Mr. Reed died shortly after the death of Mr. Isaacs, and Mr. Dozier in December, 1908, or thereabouts, removed his office from Redding to San Francisco and ceased to act as attorney for any of said defendants. Even assuming that for a portion of the five-year period there was no acting attorney of record for any of the defendants, we cannot see that such fact avails plaintiff in that action at all. The plaintiff could nevertheless have brought the case to trial, resorting to the procedure contemplated by section 286, Code of Civil Procedure, which we have just referred to.

We see no force whatever in the claim that, under the circumstances of this case, petitioners are estopped to claim that the action should be dismissed.

[7, 8] Respondent urges as material the fact that the action was one to quiet title, and that the defendants in their answer set up their own alleged title, and asked that they be adjudged the owners. Reliance is placed upon what is said in the opinion of the District Court of Appeal of the First District in *Hickman v. Lynch*, 149 Pac. 997, to the effect that, upon the filing of a cross-complaint by a defendant, the defendant became an aggressive and interested actor in the presentation of at least one phase of the case, and was therefore charged in part with the duty of bringing the case on for trial. The court therefore held that section 583, Code of Civil Procedure, had no application. That action was one for the recovery of money, in which the defendants, some two years and a half after the filing of the answer, had obtained leave to file and had filed a cross-complaint. Whatever may be said as to the correctness of the views of the District Court of Appeal as applied to such a case as the one before it, it is clear that they have no application here. While it is settled in this state that, in an action to quiet title, a defendant called upon by plaintiffs' action to quiet title to land to set up his own claim of title may file a cross-complaint setting up his own alleged ownership and asking that he be adjudged the owner, or may do the same thing in his answer, ordinarily no such practice is essential to his protection, as a conclusion against the plaintiff upon the issues raised by the complaint and answer fully determines the title as between the parties, and protects the defendant against any claim of the plaintiff as to title as fully as an affirmative decree in his favor would do. There is nothing before us to indicate or suggest that the action here involved is out of the ordinary in this regard. The principal object of such a practice would appear to be to prevent a plaintiff from dismissing his action before trial without the consent of the defendant. Subdivision 1, § 581, Code Civ. Proc. See *Islais, etc., Water Co. v. Allen*, 132 Cal. 432, 64 Pac. 713. What a defendant so situated is doing is really and

substantially purely defensive. Brought into court by the plaintiff to defend his alleged title, he is simply defending it. It would seem unreasonable to hold that simply by reason of the fact that a defendant, whose alleged title is thus assailed by a plaintiff, asks for a decree adjudging that it is good as against such plaintiff, becomes an actor in the case in the sense that any duty devolves on him to bring the plaintiff's asserted claim to trial. We do not think that section 583, Code of Civil Procedure, should be so construed.

[9] It is urged that the issuance of a writ of mandate is not a matter of right, but a matter of discretion, and should never issue where it will work injustice or operate harshly or where it will not promote substantial justice. If we assume all this to be true, we still have no basis on which to hold that the dismissal of the action here involved will have any such effect. As has been said, as to the matter of discretion in such cases, "where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled as a matter of right to the writ," and a court cannot lawfully refuse it. *Gay v. Torrance*, 145 Cal. 144, 148, 78 Pac. 540. This, in view of what we have said, is such a case.

[10, 11] It is suggested that in no event can the action be dismissed as to the Shasta Dredging Company, and that as petitioners sought a dismissal of "the action," and as the alternative writ heretofore issued required a dismissal of "the action," a writ should not issue requiring a dismissal of the action only as to the petitioners here. The rule invoked is that a petitioner for such a writ is concluded by the terms of the alternative writ, and that, where the alternative writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by a peremptory mandamus as to that which is proper, but will give judgment for the respondent. *Gay v. Torrance*, *supra*. A ruling in favor of respondent on this point would be of little avail to plaintiff in the action, as what we have already said makes it manifest that the superior court would be compelled to dismiss the action as to these petitioners, either on its own motion or their motion hereafter made. But we think the rule invoked should not be applied under such circumstances as appear here. No such point is made by anything alleged in the answer of respondent. The motion for dismissal already made in the superior court was, as appears from the notice of motion annexed to the petition, simply for the dismissal of the action "as to these defendants," *viz.*, the petitioners here. In the light of all the circumstances, the proceedings here, including the alternative writ, may fairly be regarded as simply looking to the dismissal there sought,

a dismissal of the action as to the petitioners, the only thing in which petitioners appear to have any beneficial interest. It may properly be added that the rule invoked is not an iron-bound one, to be enforced by a court regardless of circumstances, but is one to be applied in consonance with principles of fairness and justice.

What we have said disposes of the many points made by learned counsel for respondent. We see no answer to the claim that in view of the provisions of section 583, Code of Civil Procedure, the superior court is without authority to take any course in the action referred to, so far as petitioners are concerned, except to order the action dismissed as to them.

Let a peremptory writ of mandamus issue requiring respondent to dismiss, as to the petitioners, the action referred to.

We concur: SLOSS, J.; MELVIN, J.; HENSHAW, J.; LAWLOR, J.; SHAW, J.

(171 Cal. 672)

RECLAMATION DIST. NO. 1500 v. SUPERIOR COURT IN AND FOR SUTTER COUNTY et al. (Sac. 2361.)

(Supreme Court of California. Jan. 14, 1916.)

1. DRAINS ⇐17 — RECLAMATION DISTRICT — OFFICERS—DUTY.

The imposition on reclamation district No. 1500 of the duty of building a levee by its creative act (St. 1913, p. 130) is an imposition of such duty on its directing officers, since a corporation, either public or private, can act only through officers.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 12; Dec. Dig. ⇐17.]

2. INJUNCTION ⇐85 — "OFFICER OF THE LAW" — RECLAMATION DISTRICT.

Such officers are "officers of the law" within the meaning of Civ. Code, § 3423, subd. 4, forbidding the issuance of an injunction to prevent the execution of a public statute by officers of the law for the public benefit.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⇐85.]

For other definitions, see Words and Phrases, First Series, Officer of the Law.]

3. DRAINS ⇐6 — RECLAMATION STATUTE — PUBLIC BENEFIT—PRESUMPTIONS.

The building of the levee by such officers as directed by such reclamation act is for the public benefit, since, if the act is valid, its provisions must be deemed to have been enacted for the public benefit.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 2; Dec. Dig. ⇐6.]

4. CONSTITUTIONAL LAW ⇐38—STATUTES—CONFLICT WITH CONSTITUTION.

An act of the Legislature which is in conflict with the Constitution is utterly void, having no force or legal existence.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. ⇐38.]

5. INJUNCTION ⇐85—PUBLIC OFFICERS EXECUTING PUBLIC STATUTES—CONSTRUCTION.

The provisions of Civ. Code, § 3423, subd. 4, prohibiting injunctions against the execution of public statutes by public officers, refer

solely to injunctions against the execution of valid statutes.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⇐85.]

6. STATUTES ⇐105—ACTS EXPRESSING SUBJECT IN TITLE—CONSTRUCTION.

Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, is to be liberally construed to effect its object of preventing the passage of acts bearing deceitful or misleading titles.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. ⇐105.]

7. STATUTES ⇐123 — EXPRESSION OF SUBJECT IN TITLE.

The title of the act creating reclamation district No. 1500, and prescribing its duties (St. 1913, p. 130), was "An act creating a reclamation district, * * * providing for the management and control thereof. * * *

One of the provisions of the act was that the district construct a levee along a certain described line. Held, that such provision was not invalid as in conflict with Const. art. 4, § 24, providing that the subject of a legislative act be expressed in its title, since, the building of levees being a usual method of accomplishing reclamation, the provision therefor was sufficiently expressed as a detail incident to the general purpose of reclamation set out in such title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 176-183; Dec. Dig. ⇐123.]

8. DRAINS ⇐2 — RECLAMATION DISTRICT — LEVEE—FIXING LOCATION.

It is no objection to the provision of such act for the building of a levee on a certain line therein specified that the location of levees is committed to the board of trustees by Pol. Code, § 3454, relating to reclamation districts, since in passing such reclamation act the Legislature was not bound to follow the procedure laid down in the general law governing reclamation districts.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17; Dec. Dig. ⇐2.]

9. EMINENT DOMAIN ⇐31 — RECLAMATION DISTRICT — DAMAGING COUNTY PROPERTY WITHOUT COMPENSATION — VALIDITY OF STATUTE.

The act creating reclamation district No. 1500 (St. 1913, p. 130) and providing for the building of a levee is not violative of Const. art. 1, § 14, prohibiting the taking or damaging of private property without compensation, in that such levee will destroy or damage county roads, bridges, and buildings by inundation, since such structures are not private property of the county, but are held by it on behalf of the state for governmental purposes; the county having no proprietary interest therein as against the state.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 77; Dec. Dig. ⇐31.]

10. COUNTIES ⇐24—PROPERTY—LEGISLATIVE CONTROL—COMPENSATION.

In the absence of constitutional restrictions, the Legislature has full control of the property held by the counties as agencies of the state, and may dispose thereof without the consent of or compensation to the counties.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. ⇐24.]

11. PROHIBITION ⇐9—SCOPE OF WRIT.

The writ of prohibition will not issue to restrain mere errors by the court below; its office being to prevent acts in excess of jurisdiction only.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 35; Dec. Dig. ⇐9.]

12. CONSTITUTIONAL LAW — PREVENTING EXECUTION OF PUBLIC STATUTES.

Civ. Code § 3423, subd. 4, forbidding the issuance of injunctions to prevent the execution of public statutes by public officers, is not a legislative invasion of the functions of the judicial department of the government, since such subdivision simply enunciates an old and generally recognized rule of equity jurisdiction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 58-69, 71, 80, 81, 83; Dec. Dig. —55.]

13. PROHIBITION — EXCEEDING JURISDICTION—ADEQUATE REMEDY AT LAW.

The writ of prohibition will not issue to restrain an act in excess of the jurisdiction of the court below where there is a plain, speedy, and adequate remedy in the ordinary course of law.

[Ed. Note.—For other cases, see Prohibition; Cent. Dig. §§ 4-19; Dec. Dig. —3.]

14. PROHIBITION — RECLAMATION DISTRICT—BUILDING LEVEE—INJUNCTION EXCEEDING JURISDICTION—ADEQUATE REMEDY AT LAW.

Where, in an action brought by a county to enjoin the construction by the officers of a reclamation district of the levee provided for by its creative act (St. 1913, p. 130), the superior court of Sutter county, in excess of its jurisdiction, issued a temporary injunction and set the cause for trial, the writ of prohibition will issue to prohibit the further prosecution of the action, since, being prevented by the temporary injunction from performing its duties under such creative act during the pendency of such action, the reclamation district is without adequate remedy at law.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. —10.]

In Bank. Application by Reclamation District No. 1500 for a writ of prohibition against the Superior Court in and for the County of Sutter, State of California, and others, to prohibit further proceedings in an action for an injunction instituted by the County of Sutter against petitioner. Respondents' demurrer to the petition overruled, and writ issued as prayed.

A. C. Huston and Harry L. Huston, both of Woodland, and Devlin & Devlin, of Sacramento, for petitioner. Arthur Coats, of Yuba City, W. H. Carlin, of Marysville, and Lawrence Schillig and M. E. Sanborn, both of Yuba City, for respondents.

SLOSS, J. The petitioner has applied to this court for a writ prohibiting the respondents from taking any further proceedings in an action instituted in the superior court of Sutter county.

The action in question was instituted by the county of Sutter as plaintiff against reclamation district No. 1500, the petitioner herein, its trustees, and other parties for the purpose of obtaining an injunction restraining said defendants from constructing certain levees or completing their construction. The complaint alleged that the construction of such levees would, at times of high water, flood a large tract of land which, under natural conditions, was not subject to inundation, and would destroy or injure the coun-

ty courthouse, jail, hall of records, and grounds of Sutter county, as well as numerous bridges and many miles of highway belonging to said county. The petitioner herein and its trustees appeared in said action and objected to the issuance of any injunction upon the grounds that are now relied upon as justifying the writ of prohibition here sought. Notwithstanding their objections, the superior court issued a temporary injunction restraining the construction of the greater part of the levee work described in the complaint, and thereafter set the cause for trial. The petitioner now seeks to prohibit the further prosecution of the action, contending that the superior court is without jurisdiction to grant the relief sought therein.

Reclamation district No. 1500 was created by an act of the Legislature approved April 30, 1913. Stats. 1913, p. 130. By section 1 of the act a reclamation district, to be known as reclamation district No. 1500, was created, and its boundaries were described. The same section contains the following provision:

"It shall be the duty of said reclamation district No. 1500 to construct a levee, forming the south side of Tisdale by-pass, and a portion of the westerly side of the Sutter basin by-pass, the center line of which levee shall be substantially along the following lines, the same having been approved by the state reclamation board March 31st, 1913: [Here follows a description of the line of the levee.]"

The Tisdale by-pass mentioned in the act forms the northerly boundary of district No. 1500. The described levee line along a "portion of the westerly side of the Sutter basin by-pass" is the easterly boundary of the district. This portion at its southerly end touches the left bank of the Sacramento river at a point known as Wild Irishman Bend, and the act declares:

"It shall be the duty of said reclamation district No. 1500 to continue the construction of a levee along the left bank of the Sacramento river, or adjacent thereto, from the said Wild Irishman Bend, upstream, to the place of beginning."

The Sacramento river, from said "place of beginning" on the Tisdale by-pass to Wild Irishman Bend, forms the westerly and southerly boundaries of the district, so that the levees described in the act would completely enclose the said district. The portion of the work sought to be enjoined is that bordering on the Tisdale by-pass and the Sutter basin by-pass. Section 2 of the act provides for the management and control of the district in accordance with the provisions of the Political Code, names five trustees who are to hold until the election and qualification of their successors, and declares that the district shall have the powers conferred by law upon reclamation and swamp land districts and certain other powers. The remaining sections of the act have no bearing upon the questions here involved.

The property which, as the complaint in the injunction suit alleges, will be damaged by the construction of the levee is not within the boundaries of reclamation district No. 1500. The petitioner's contention that the superior court is exceeding its jurisdiction in undertaking to restrain the acts complained of in the action pending before it is based upon the provisions of sections 3423 of the Civil Code and 526 of the Code of Civil Procedure. Each of these sections declares that:

"An injunction cannot be granted: * * * (4) To prevent the execution of a public statute by officers of the law for the public benefit."

The construction of the levee in question is, by the act creating the district, made the duty of the district, and it is contended that an injunction which restrains the performance of this duty comes directly within the terms of the Code sections cited.

[1-3] It will not be questioned that the act which creates reclamation district No. 1500 is a public statute. It is equally clear that the construction of the levees designated in the act constitutes the execution of such public statute. The injunction complained of restrains the district and its trustees from proceeding with the erection of such levees. The statute does not in terms impose the duty of building the levees upon the trustees. Such construction is declared to be the duty of the district. But, since a corporation, public or private, can act only through its officers or agents, the statutory imposition of a duty upon the district necessarily imposes the duty upon the directing officers of the district. We need not therefore inquire whether the reclamation district, as such, may be regarded as an "officer of the law" within the meaning of section 3423 of the Civil Code. It is enough if the trustees who are parties defendant in the injunction suit answer that description. The officers of an irrigation district have been held to be public officers of the state (Re Madera Irrigation District, 92 Cal. 296, 322, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106), and the trustees of the reclamation district created by the act of 1913 occupy an analogous position. They are officers of the law within the meaning of the Code section under discussion. That section declares that an injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit. If the statute creating reclamation district No. 1500 is valid at all, its provisions must be deemed to have been enacted for the public benefit. *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207; *Heffner v. Case and Morgan Counties*, 193 Ill. 439, 450, 62 N. E. 201, 58 L. R. A. 353.

[4, 5] The argument, in any case, against the validity of an injunction issued to restrain the execution of a statute, rests, of course, on the premise that the statute in

question is a valid exercise of the legislative power. An act of the Legislature which is in conflict with the Constitution is no statute at all. It "is utterly void, has no force or legal existence. * * *" *Wheeler v. Herbert*, 152 Cal. 224, 228, 92 Pac. 353. The provisions of section 3423, subd. 4, of the Civil Code "refer solely to injunctions against the execution of valid statutes." *Wheeler v. Herbert*, supra.

[8, 7] The respondents attack the validity of the act creating reclamation district No. 1500, and the soundness of their contentions in this regard must be examined. The title of the act is as follows:

"An act creating a reclamation district to be called and known as 'reclamation district No. 1500,' providing for the management and control thereof and dissolving all levee districts, swamp land districts, and reclamation districts, lying wholly within the boundaries of said reclamation district No. 1500, providing for the liquidation and winding up of said dissolved districts, and excluding from any levee district, swamp land district and reclamation district any land lying within the boundaries of said reclamation district No. 1500."

The main contention of the parties attacking the validity of the law is that the provision making it the duty of the district to construct certain levees deals with a subject which is not suggested by the title of the act, and that this provision, therefore, must fall because of the terms of article 4, § 24, of the Constitution. That section reads:

"Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title."

The constitutional provision respecting the titles of acts has frequently been the subject of construction by this court. It is thoroughly settled that the provision is to be liberally construed with a view to effecting the object of the provision, viz., to prevent the passage of acts bearing deceitful and misleading titles. *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251.

"It is not necessary that the title of an act should embrace an abstract or catalogue of its contents." *Abeel v. Clark*, 84 Cal. 226, 229, 24 Pac. 383.

"When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents." *Ex parte Liddell*, 93 Cal. at page 637, 29 Pac. 251; *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207.

The title of the present act states, among other things, that it is an act creating a reclamation district and providing for the management and control thereof. These words indicate plainly that the act is designed to erect a district for the purpose of reclaiming lands lying within its borders, and to prescribe the mode of managing and controlling such districts. Lands may be reclaimed by protecting them from overflow; and the most usual method of accomplishing this result is to surround the lands with

levees. How, then, can it be argued that a provision that protective levees shall be constructed along the boundary of the proposed reclamation district is not within the scope or the purposes contemplated in the creation of the district, or that such provision is not suggested by the title of an act which declares that its purpose is the creation, management, and control of such reclamation district? It is true that the act contains provisions relating to certain levee work beyond the boundaries of the district, but this work is not involved in the injunction suit. If the provision requiring this exterior construction is invalid—we are not to be understood as intimating that it is—the county of Sutter is not claiming to be affected by it, and is in no position to attack it.

[8] One ground of objection urged by respondents is that while, under the provisions of the Political Code relative to reclamation districts, the location of the levees and other details of the plans of reclamation are committed to the board of trustees (Pol. Code, § 3454), the present act by its own terms provides for the location of the levees. But since, as is well settled, districts of this kind may be created by special act (People v. Levee District, 131 Cal. 30, 63 Pac. 676; People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207), the Legislature in passing such act is not bound to follow the procedure laid down in the general law governing reclamation districts. It may adopt such procedure as it deems necessary or expedient, and there can be no constitutional objection to a location in the act itself of the lines of the proposed levees.

The petition herein refers to other acts of the Legislature (and an act of Congress) which contemplate the formation and adoption of a plan for the general control of flood conditions in the Sacramento valley under the joint direction of the federal and state governments. These acts are pointed to as indicating the reason for the direction in the present act that the levees be located as they are; such location being a part of the general plan referred to. We do not find it necessary to refer in greater detail to these matters, for the reason that, as already stated, we think it entirely within the power of the Legislature, in creating a reclamation district by special act, to define the manner and plan by which the contemplated reclamation work shall be carried out. It becomes unnecessary, therefore, to consider the question whether the other acts referred to, i. e., the one creating the reclamation board (Stats. 1911, Special Session, p. 117) and the one approving the plan of the California debris commission (Stats. 1913, p. 252), are open to attack as containing an unconstitutional delegation of power by the Legislature.

[9, 10] But the respondents argue that the action is one to restrain the commission of

acts which will constitute a taking of the property of Sutter county, the plaintiff in the injunction suit, and that any statute which purports to authorize such taking without compensation is a violation of familiar constitutional restrictions. Const. art. 1 § 14. *Payne v. English*, 79 Cal. 540, 21 Pac. 952, was an action to enjoin the harbor commissioners of San Francisco from entering upon certain land claimed by the plaintiff and erecting a wharf thereon. The defendants objected to the issuance of an injunction upon the ground that they were authorized by statute to construct wharves, and that subdivision 4 of section 3423 of the Civil Code prevented the issuance of an injunction against the execution of a public statute. To this contention the court responded briefly:

"There is no public statute, or other law, which authorized defendants to take plaintiffs' land, at least without proceedings under the power of eminent domain."

See, also, *Pierce v. City of Los Angeles*, 159 Cal. 516, 114 Pac. 818.

The constitutional provision above referred to declares that "private property shall not be taken or damaged for public use without just compensation having been first made to * * * the owner." The public building, roads, and bridges of a county are not the private property of the county in such sense as to authorize the county to object to the taking or damaging thereof by the state for public purposes. The counties are governmental agencies of the state (County of San Mateo v. Coburn, 130 Cal. 631, 63 Pac. 78, 621), and the property intrusted to their governmental management is public property. The proprietary interest in all such property belongs to the public, and, if there be a legal title in the county, it is a title held in trust for the whole public. *Board of Education v. Martin*, 92 Cal. 209, 28 Pac. 799; *People v. Holladay*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; *Heffner v. Cass and Morgan Counties*, 193 Ill. 439, 62 N. E. 201, 58 L. R. A. 353. In the absence of constitutional restrictions, the Legislature has full control of the property held by the counties as agencies of the state, and may dispose of that property without the consent of the county or without compensating it. *City of Edwarsville v. County of Madison*, 251 Ill. 265, 96 N. E. 238, 37 L. R. A. (N. S.) 101. Upon analogous principles it has been established by a long line of decisions, in this state as well as elsewhere, that, except as restrained by constitutional limitations, the Legislature may alter the boundaries and extent of counties at will, may consolidate two or more into one, or divide and create new counties out of the territory of counties already existent.

"Upon the creation of a new county out of the territory of another, the Legislature, in the absence of constitutional restrictions, may make such provision with reference to the public property and debts, or their division, as to it may seem just. * * *" *Los Angeles County v.*

Orange County, 97 Cal. 329, 32 Pac. 316; Orange County v. Los Angeles County, 114 Cal. 390, 46 Pac. 173; Tulare County v. Kings County, 117 Cal. 195, 49 Pac. 8; Colusa County v. Glenn County, 124 Cal. 498, 57 Pac. 477; Riverside County v. San Bernardino County, 134 Cal. 517, 68 Pac. 788; Laramie County v. Albany County, 92 U. S. 307, 23 L. Ed. 552.

So, too, this court has held that the Legislature may transfer the property of one reclamation district (Rec. Dist. v. Birks, 159 Cal. 233, 113 Pac. 170) or one school district (Pass School Dist. v. Hollywood City School Dist., 156 Cal. 416, 105 Pac. 122, 26 L. R. A. [N. S.] 485, 20 Ann. Cas. 87) to another without compensation. All of these rulings are founded upon the proposition that the county (or reclamation or school district) is a mere political agency of the state, that it holds its property on behalf of the state for governmental purposes, and that it has no private proprietary interest in such property as against the state. Applying the doctrine to the present case, it is clear that, if the building of the levees contemplated by the act creating the petitioner will or may injure or destroy buildings, roads, and bridges of the county of Sutter, the results will merely be an injury to or destruction of public property in the making of a public improvement authorized by the state itself. The state, damaging or taking its own property, is not required to provide compensation under the constitutional provision relative to eminent domain.

These views are in no wise inconsistent with the recognition of a sufficient title in the counties to justify their maintaining actions against private persons or corporations injuring roads or other public property. That such actions may be maintained is the full extent of the holding in cases like *Sierra County v. Butler*, 136 Cal. 547, 69 Pac. 418, and *Yuba County v. Min. Co.*, 141 Cal. 360, 74 Pac. 1049, cited by respondents. Nor is there any conflict between our present holding and the decision in *Grogan v. San Francisco*, 18 Cal. 615, where the court was considering the status of land held by the municipality in its proprietary right. We are here dealing only with property held by a county in its governmental capacity for public purposes.

[11] The act being constitutional, and the injunction sought being one which contravenes the prohibition of section 3423 of the Civil Code, there still remains the question whether the superior court, in entertaining the application for such injunction, is exceeding its jurisdiction, and thus laying the foundation for a writ of prohibition. Such writ will not go to restrain mere errors by the court below. It is only an excess of jurisdiction which may be reached in this manner. This court has held, in *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145, that a writ of prohibition would issue to arrest the action of a superior court which was un-

dertaking to enjoin an action pending in another court in violation of the first subdivision of section 3423 of the Civil Code. In *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225, a similar writ was based on the seventh subdivision of section 3423, which provides that an injunction cannot be granted "to prevent a legislative act by a municipal corporation."

[12] Section 3423 of the Civil Code does not in all of its provisions establish new rules for the granting or denying of preventive relief in equity. Some of the subdivisions are merely declaratory of principles which, in the absence of statute, were and are generally held to govern courts of chancery in determining what causes are proper subjects of equitable cognizance. Subdivision 1 is more than declaratory. It establishes a rule; it limits the right to issue injunctions as that right was understood in the English and American court before the adoption of our Codes. The Constitution of this state gives to the superior courts original jurisdiction "in all cases in equity." To the argument that this jurisdiction could not be limited by statute this court said in *Spreckels v. Hawaiian, etc., Co.*, 117 Cal. 377, 49 Pac. 353, and in *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145, that subdivision 1 of section 3423 was an exercise of the legislative power to define the rights of persons. It did not limit the power of courts of equity to issue an injunction wherever the complaint was entitled thereto, but so operated on the complainant as to take away his right in certain cases to this form of relief. In the *Wright Case*, where, as we have said, a writ of prohibition was issued, the court held that the superior court was without jurisdiction to issue an injunction in a case in which such relief is forbidden by subdivision 1 of section 3423. The dissenting opinion of Shaw, J., took the ground that if, as the court held, the subdivision merely regulates the rights of persons, the issuance of a writ of injunction contrary to the statutory declaration is an erroneous determination that a cause of action exists, rather than an excess of jurisdiction. Whatever force this criticism may have, it is not applicable to the provision of subdivision 4 of section 3423. For here, in the subdivision declaring that injunction does not lie to restrain the execution of a legislative act by public officials, we have the enunciation of an old and generally recognized rule of equity jurisdiction.

This rule, like that of subdivision 7, which was involved in *Glide v. Superior Court*, supra, has its underlying basis in the division of the activities of government into three separate and independent departments, each of which is, in the exercise of its own peculiar functions, free from the control of either of the others. 5 Pom. Eq. Jur. § 327. The power to enjoin officers from enforcing a

statute, even where the statute was claimed to be unconstitutional, has been denied in some cases. *Kneedler v. Lane*, 45 Pa. 238; *Thompson v. Com'rs*, 2 Abb. Prac. (N. Y.) 248. This court has not carried the doctrine so far. The prohibition against enjoining the execution of statutes has been held to apply only to valid statutes. *Wheeler v. Herbert*, 152 Cal. 224, 92 Pac. 353. But, at least as so limited, the rule is generally recognized. In *So. Or. Co. v. Quine*, 70 Or. 63, 139 Pac. 332, the court said:

"We think the law is fixed beyond cavil that courts of equity have no power by injunction to restrain a public officer from performing an official act that he is required by valid law to perform. It is not sufficient to clothe the court with jurisdiction to say simply that, unless the court extends its restraining hand, hardships will follow, or irreparable damage will ensue, because the officer delegated to execute such law may act unwisely or injuriously to the party seeking relief. The acts must be such as are without the sanction of a sound law."

See, also, *So. Min. Co. v. Lowe*, 105 Ga. 352, 31 S. E. 191; *Mendenhall v. Denham*, 35 Fla. 250, 17 South. 561; *Sup. of Greenville v. Seymour*, 22 N. J. Eq. 458.

[13, 14] Even though the lower tribunal is about to exceed its jurisdiction, the writ of prohibition will not lie where there is "a plain, speedy and adequate remedy in the ordinary course of law." Code Civ. Proc. § 1103. It is true that in the case at bar the petitioner might by appeal review the correctness of any judgment or order enjoining it, but we do not think that such appeal would, under the circumstances here described, be an adequate remedy. *Glide v. Sup. Ct.*, supra. To say nothing of the burden and expense of a trial of issues which, as we have seen, are not properly triable in the superior court, it may be observed that the preliminary injunction already issued ties the hands of the petitioner, and that an appeal from such injunction would not affect its operative force pending the appeal. If the petitioner is entitled to proceed with the work of building the levees which the statute commands it to build, an appeal would obviously not give adequate relief.

We have considered this proceeding as if it had been submitted upon an agreed statement of facts. The respondents have demurred to the petition, and have also filed an answer. For the reasons hereinbefore stated, the demurrer should be overruled. The answer does not raise any issue which we regard as material. There is therefore no occasion for the determination of any issue of fact, and the application should be finally disposed of at this time.

It is ordered that a peremptory writ of prohibition issue as prayed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; HENSHAW, J.; LAW-LOR, J.

(171 Cal. 689)

CHINO LAND & WATER CO. v. HAMAKER et al. (L. A. 4343.)

(Supreme Court of California. Jan. 14, 1916.)

APPEAL AND ERROR—1127—MOTION TO AFFIRM—ADVANCING HEARING.

Where it would amount to an advancement of the hearing of the appeal without good reason therefor, motion to affirm, on the ground that inspection of the record discloses that, in view of a recent federal Supreme Court decision, there must be an affirmance, consideration of which would necessarily involve a full consideration of the record and briefs as to the merits, will be denied as unfair to other litigants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4432-4440; Dec. Dig. 1127.]

In Bank. Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Four actions, all by the Chino Land & Water Company; two against C. R. Hamaker and others, one against H. L. Moss and others, and the other against John K. Chalmers and others. From adverse judgments, defendants appeal. Motion to affirm denied.

Kimball Fletcher and Wm. A. Gaines, both of Los Angeles, and D. J. Hinkley, for appellants. O'Melveny, Stevens & Milliken and Walter K. Tuller, all of Los Angeles, for respondent.

ANGELLOTTI, C. J. Plaintiff and respondent Chino Land & Water Company, a corporation, has made a motion that this court affirm the judgment in each of the above-entitled cases, which are presented upon a single transcript, upon the ground substantially that an inspection of the record discloses that, in view of a certain recent decision of the United States Supreme Court, the judgments of the lower court must be affirmed. This motion is made long before the appeals are reached in regular order for hearing in this court, the real purpose of the motion being, of course, to advance the hearing of the appeals in this court over many other appeals preceding them on our calendar, when there is in fact no good reason for such advancement. It is apparent that this is not a proper case for such action as is desired. Mere consideration of the motion necessarily involves a full examination of the record and briefs of counsel as to the merits of the appeal, precisely the same examination we would be compelled to make upon the hearing of the appeals on their merits when the cases are regularly reached for hearing. Such a course on our part in the matter of these appeals would be unfair to other litigants in this court whose appeals are entitled to priority in the matter of hearing, and would establish a precedent that would operate greatly to their disadvantage, for we would be confronted with many such motions, the mere consideration of which would occupy much time that should be devoted to the consideration of earlier cases.

As we have suggested, the effect of such a practice would simply be to advance causes for hearing in preference to other causes, where no good reason for advancement exists, simply on the ground that it is asserted that the appeal is clearly without merit.

The motion is denied.

We concur: SLOSS, J.; MELVIN, J.; SHAW, J.; HENSHAW, J.; LAWLOR, J.

(171 Cal. 668)

TEAGUE v. HALL. (L. A. 3482.)

(Supreme Court of California. Jan. 13, 1916.)

1. FRAUD — 22 — RELIANCE ON REPRESENTATIONS — DUTY TO INVESTIGATE.

The purchaser of citrus nurseries, induced to buy by the vendor's false representations that the nurseries contained 85,000 budded trees, could recover damages for the deceit practiced upon him, although he had an opportunity, and did not avail himself thereof, to make independent investigation of the truth of the representations, since one may act upon a positive representation of fact notwithstanding the means of knowledge are open to him.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19-23; Dec. Dig. — 22.]

2. APPEAL AND ERROR — 1064 — PREJUDICIAL ERROR — INSTRUCTION.

In an action for deceit by the purchaser of citrus nurseries, induced to buy by the misrepresentations of the vendor that the nurseries contained 85,000 budded trees, an instruction that it was necessary for plaintiff's recovery for him to show that he had no independent knowledge of his own as to the number of budded trees, nor the means at hand to acquire such knowledge, or, having the means, was prevented by defendant from availing himself of them, and that matters equally within the knowledge or means of knowledge of both parties furnished no ground for relief, was prejudicially erroneous, since, under plaintiff's testimony that it would have taken a week to count the trees, the jury might have concluded, if properly instructed that failure to avail of a means of knowledge is not necessarily a bar to recovery, that the purchaser was justified in relying on the vendor's positive representation of the number of trees without verifying it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. — 1064.]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by R. M. Teague against W. G. Hall. From a judgment for defendant and an order denying his motion for new trial, plaintiff appeals. Judgment and order reversed.

J. Vincent Hannon, of Los Angeles, for appellant. S. V. Landt, of Los Angeles, for respondent.

SLOSS, J. Action to recover damages for deceit. The defendant, Hall, had established citrus nurseries upon two tracts of land held by him under lease. One was known as the Keim nursery, and the other as the Yost nursery. On March 28, 1909, the parties entered into a contract whereby Hall sold to Teague all of his interest in these two nurseries in

consideration of the sum of \$37,000, \$500 of this sum to be paid by the conveyance of a certain lot, and the balance to be paid in gold coin in certain installments running over a period of a year and a half or thereabouts. Under the contract Hall reserved the right to take 4,000 lemon trees from the Yost nursery. The contract contained this clause:

"It is understood that there is now in round numbers 80,000 number of budded trees upon the land described in the Keim lease and 25,000 of budded stock on the Yost lease."

It is not claimed that the clause last quoted constituted a warranty. The complaint alleged, however, that at the time of the execution of the contract the defendant, for the purpose of inducing the plaintiff to enter into it, falsely represented that the respective nurseries contained the number of budded trees mentioned in the contract, to wit, 80,000 in the Keim nursery and 25,000 in the Yost nursery, and that plaintiff, who had no knowledge of the number of trees in the nurseries or either of them, entered into the contract relying on said representations. It was alleged further that plaintiff subsequently discovered that there were not over 65,346 budded trees in the two nurseries, and that he had been damaged in the sum of \$12,000, for which he prayed judgment. At the time of his discovery of the facts plaintiff had paid the defendant \$34,000 of the contract price.

The defendant, in his answer, admitted the making of the contract and the payment of the \$34,000 thereunder. He denied all the material allegations regarding fraud. By counterclaim he sought to recover the balance of \$3,000 due under the terms of the agreement.

The action was tried before a jury, which returned a verdict in favor of the defendant for \$3,000. Judgment was entered thereon. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. On the material issues raised, viz., whether the defendant made the representations alleged, whether plaintiff relied upon them, whether they were, in fact, false, the evidence was conflicting. This court could not have said that a verdict either way was without substantial and adequate support.

[1] The main ground urged for reversal is founded on the instructions given by the court with relation to the plaintiff's duty to show that he was, in fact, deceived by the alleged misrepresentations. In this connection the court said to the jury:

"In order that the plaintiff may recover it is necessary that he show to the jury by a preponderance of the evidence: First, that Teague had no independent knowledge of his own as to the number of budded trees and did not have the means at hand to acquire such knowledge, or having the means at hand, was prevented by defendant from availing himself of them."

And further, on the same subject:

"Matters equally within the knowledge or means of knowledge of both parties furnish no

ground for relief, unless in the latter case the one party is prevented by the act of another from using his means of knowledge. It is a general principle that, if the means of knowledge be at hand and equally available to both parties, and the subject-matter be open to inspection of both alike, and there be no fiduciary and no confidential relations, and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentation of the other party."

The rule thus laid down is not qualified by any other instruction.

We think it must be held that the court erred in directing the jury, as it did, in effect, that a party who has relied upon a misrepresentation made by another and has suffered injury thereby is precluded from recovering, if he had an opportunity, and did not avail himself thereof, to test the truth of the representations by independent investigation. Some of the earlier cases state the rule in this broad way, but, as Mr. Bigelow says in his work on Fraud (Volume 1, p. 523):

"The proposition has now become very widely accepted at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him. * * *"

Similarly, in *Pomeroy, Equity Jurisprudence*, § 896, it is said that:

"Whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination or of sources of information is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact."

[2] This view of the law has been repeatedly declared in the decisions in this state. In *Ruhl v. Mott*, 120 Cal. 676, 53 Pac. 307, the court says:

"It is true that where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty in law is devolved upon him to employ such means of knowledge."

The same doctrine is declared in *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404; *Morris v. Courtney*, 120 Cal. 63, 52 Pac. 129; *Dow v. Swain*, 125 Cal. 674, pp. 683, 684, 58 Pac. 271; *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509, 512, 137 Pac. 240; *Eichelberger v. Mills L. & W. Co.*, 9 Cal. App. 628, 100 Pac. 117.

The nursery involved in the sale by defendant to plaintiff contained both budded and unbudded trees. The alleged misrepresentation referred only to the number of budded

trees. The exact or even the approximate number of such trees could have been ascertained only by some form of computation or count. Under the instructions of the court the jury would naturally understand that if the plaintiff had an opportunity to make such a count, and did not do so, he would be precluded from complaining of any misrepresentations, although he may, in fact, have relied upon them. The plaintiff testified, and the jury had the right to believe, that it would have taken a week to count the trees. The jury, accepting this evidence, might well have concluded, if instructed in accordance with the authorities above cited, that the plaintiff was justified in relying on defendant's positive representation (if he made one), without taking the time to verify its truth. But, under the instructions which were given, it is quite possible that the jury, while believing that the plaintiff had made the representation as alleged, that it was false, and that the plaintiff had relied and acted upon it to his injury, nevertheless denied him recovery because they believed that he had had an opportunity to count the trees before making the contract, and had not availed himself of such opportunity. In this state of the case the error in the instructions cannot be treated as one which was not productive of prejudice.

The plaintiff also assigns as error certain rulings in the admission and rejection of evidence. No authorities are cited in support of his contentions in this regard, and we do not find in such rulings any substantial ground for complaint.

The judgment and the order appealed from are reversed.

We concur: SHAW, J.; LAWLOR, J.

(71 Cal. 541)

PIERCE v. WORKS, Judge of Superior Court (L. A. 4369.)

(Supreme Court of California. Jan. 14, 1916.)

1. APPEAL AND ERROR ~~660~~—PRESUMPTION—CORRECTION OF RECORD.

On an original petition for a writ of mandate directing a judge of the superior court to certify a transcript of proceedings alleged to have been prepared according to Code Civ. Proc. § 953a, for use on an appeal from an order granting a motion for a change of venue, where the opposing attorneys had objected solely on the ground that it was not a transcript contemplated by the statute and suggested corrections to which petitioner's counsel and the judge agreed, whereupon the transcript was amended accordingly, it would be presumed that the proposed transcript was correct and contained all matters essential to a proper determination of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2829, 2844-2847; Dec. Dig. ~~660~~.]

2. APPEAL AND ERROR ~~597~~—TRANSCRIPT—STATEMENT OF COURT.

Under Code Civ. Proc. § 953a, authorizing an appellant, by notice to the clerk, to require a transcript of the testimony and proceedings at the trial to be prepared, and requiring the reporter's transcript of his stenographic report

including copies of all writings offered or received in evidence and all matters required by the notice, it was not necessary, on appeal from an order granting a change of venue where the only evidence was the files and records of the action and such indorsements of admission of service and filing as were found thereon, that the transcript contain the statements of the court at the hearing of the motion therefor or the objection of the counsel to the granting thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2627-2638; Dec. Dig. § 597.]

3. APPEAL AND ERROR § 395—UNDERTAKING—STATUTE.

Under Code Civ. Proc. § 953b, requiring the party appealing under section 953a on a transcript of the testimony in lieu of a bill of exceptions, to file an undertaking in an amount fixed by the clerk to pay the clerk the cost of preparing the transcript; and allowing the appellant to personally arrange with the stenographic reporter for his compensation, where it appeared that such undertaking was waived by the clerk, as it might be, the mere failure to give such undertaking was no objection to the certification of a transcript prepared and delivered by the clerk to the judge for settlement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2058, 2064-2070, 2085, 2086, 3127; Dec. Dig. § 395.]

4. APPEAL AND ERROR § 553—TRANSCRIPT OF TESTIMONY—STATUTE.

Code Civ. Proc. § 953a, authorizes an appellant, in lieu of a bill of exceptions, and on notice to the clerk, to require the preparation of a transcript of the testimony and proceedings at the trial, and requires the reporter to prepare a transcript of his stenographic report, including copies of all writings offered or received in evidence and all other matters required by the notice, and that, if the judgment or order appealed from is not included in a judgment roll, the appellant shall specify the papers to be included in the transcript. Section 953b requires an undertaking to pay the cost of the transcript, and section 953c requires the clerk to transmit the prepared record on appeal. *Held*, that the statute authorizes such a transcript on appeal from an order granting a change of venue when the proceedings at the hearing were not taken down by a stenographic reporter, and the evidence submitted consisted only of the files and records of the action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.]

In Bank. Original petition by Christine Pierce against Hon. Lewis R. Works, Judge of the Superior Court of the County of Los Angeles, for a writ of mandate directing respondent to certify a transcript of proceedings for use on appeal from an order granting a motion for a change of venue. Peremptory writ of mandate issued.

Riddle & Cheroske, of Los Angeles, for petitioner. Robert M. Clarke, of Los Angeles, and John J. Squier, of Santa Barbara, for respondent.

ANGELLOTTI, C. J. This is an original application to this court for a writ of mandate directing respondent to certify a transcript of proceedings claimed to have been prepared in accord with the provisions of section 953a, Code of Civil Procedure, for use

on an appeal from an order granting a motion for change of place of trial from Los Angeles county to Santa Barbara county of an action brought by petitioner against A. M., Sallie Belle and Edith Pierce. Respondent judge declined to certify the same on the ground, expressed in writing, "that it is not such a statement or transcript as is contemplated by section 953a, Code of Civil Procedure." Although this was the only ground of refusal, and apparently, as indicated by the petition and answer, the only ground of objection to certification urged by opposing counsel before respondent, some other objections are urged by the answer of respondent filed herein. We think, however, that there is no force in any of the other objections, in view of the admitted facts.

[1] Although it is alleged in the answer that the proposed transcript was not certified by the clerk or any one else as containing true or correct copies of the original documents, papers, files, and records, it further appears that the opposing attorneys made no objection on any such ground, objecting simply that it was not such a transcript as was contemplated by section 953a, Code of Civil Procedure, and it further appears from the petition and answer that such attorneys suggested various corrections, to all of which petitioner's counsel and the judge agreed, and that the transcript was amended accordingly. So that it is fairly to be presumed from the pleadings here that the proposed transcript is absolutely correct and contained all matters essential to a proper determination of the appeal, and no suggestion is made to the contrary.

[2] It is further alleged in the answer that the proposed transcript does not contain the statements of the court made at the hearing of the motion for change of place of trial or the objections of counsel for plaintiff to the granting of the same. We cannot see any necessity for the incorporation of these matters in such a case as this, an appeal from an order granting a change of place of trial to the county of the defendant's alleged residence, where the only evidence was the files and records of the action, and such indorsements of admission of service and filing as there were thereon. There is no suggestion that the incorporation of any of such matters is essential to the protection of any right of any party. If neither party desires the insertion of such a matter, and it is not essential to a proper determination of the appeal, the statute does not require it to be inserted.

[3] It is further alleged that the undertaking provided for by section 953b, Code of Civil Procedure, was not filed with the clerk. This is the undertaking in an amount to be fixed by the clerk to secure to that officer the cost of preparing the transcript. Obviously this was enacted solely for the protection of

the clerk and stenographer, and, as amended in 1915, the party, instead of furnishing the undertaking, may arrange personally with the stenographic reporter for his compensation. According to the undenied allegations of the petition, it clearly appears that the giving of any undertaking was waived by the clerk, as it might be in such a case as this. Mere failure to give such an undertaking cannot be urged as a good ground of objection to the certification of a transcript in fact prepared and delivered by the clerk to the judge for settlement.

[4] The remaining question presented by this proceeding is whether the provisions of sections 953a, 953b, and 953c, Code of Civil Procedure, providing a record on appeal in lieu of the ordinary bill of exceptions, authorize such a record in a matter like the one here involved, when the proceedings at the hearing have not been taken down by a stenographic reporter, and the evidence submitted to the court consisted entirely of the files and records of the action.

The order appealed from is, of course, one not included in a judgment roll. It is an appealable order made before trial and judgment, to the review of which by an appellate court prior to the enactment of the sections referred to, it was essential that the evidence, upon which the motion therefor was heard, in whatever form it was received, should be incorporated in a bill of exceptions and properly authenticated by the trial judge. See *Hibernia Sav. & Loan Soc. v. Doran*, 161 Cal. 118, 118 Pac. 526. This was true, although the evidence consisted only of the records and files of the action, including the papers presented and filed in support of the motion. Such papers could not be effectually certified to the appellate court by the clerk of the trial court. *Hibernia Sav. & Loan Soc. v. Doran*, supra. Section 953a purports to provide a method of preparation of record to which a party appealing "from any judgment, order or decree of the superior court" may resort "in lieu of preparing and settling a bill of exceptions," and under which, of course, he may bring to the appellate court anything he might properly include in a bill of exceptions. It is true, of course, that as to parol evidence, and as to writings merely offered or received in evidence at a trial, as distinguished from papers, records, and files in the cause, the section contemplates that there shall have been a phonographic report of the proceedings, and it may be that as to such matters there can be no record prepared under the section in the absence of such a phonographic report. Such was the situation in *Allen v. Conrey*, 22 Cal. App. 409, 134 Pac. 730, relied on by respondent, and we are not called upon here to dispute the correctness of the decision given therein. But, if there was no such evidence to report, and consequently no office for a stenographic reporter to perform, if the only

matters considered on the hearing of the motion were the pleadings, papers, records, and files in the cause, as is always the case on a motion heard and determined solely on affidavits and the record and files of the action, we can see no reason why it should not be held that section 953a fully covers the matter. The section provides that:

"If the judgment, order or decree appealed from be not included in a judgment roll, the party desiring to appeal shall on the filing of said notice specify therein such of the pleadings, papers, records and files in said cause as he desires to have incorporated in said transcript in addition to the matters hereinbefore required (the stenographic reporter's report of the trial including therein copies of all writings offered or received in evidence and all other matters and things required by the notice) and the same shall be included."

In *Going v. Guy*, 166 Cal. 279, 135 Pac. 1128 (decided by this court in bank October 4, 1913), this provision was held applicable on an appeal from an order confirming a sale of real estate in a probate matter; the appellants having requested a transcript containing copies of the petition for sale, the order of sale, the return of sale, the notice of hearing of the return, the bid received, and the order confirming the sale. In that case there was a stenographic reporter, who furnished a transcript of the testimony and proceedings at the hearing, but such transcript contained none of these papers. Such copies, prepared by some one whose identity was not disclosed, were delivered bound together and certified by the county clerk to be correct, to the judge, with the reporter's transcript, and, while certifying the latter, he refused to certify the former. It was admitted that the papers were true copies of the originals. The provisions of section 953a were fully discussed, and it was held that thereunder, especially in view of the paragraph we have quoted, the appellant was entitled to have such papers inserted in the transcript, and that it was the duty of the judge to authenticate the same. It was held, as is well settled, that the clerk's duty of authentication is limited to papers which constitute a judgment roll, and that the judge is not required to authenticate such papers (*Christensen Lumber Co. v. Seawell*, 157 Cal. 405, 108 Pac. 276; *Knoch v. Haizlip*, 163 Cal. 20, 124 Pac. 997; *Totten v. Barlow*, 165 Cal. 378, 132 Pac. 749), but that as to all other papers and records in the action it is the duty of the judge to make the authentication. See, also, *Totten v. Barlow*, supra. It was further said substantially that it was of no moment who did the typewriting, and that, "if the papers were correctly set forth in the certified transcript presented to the judge, as is conceded, he should have certified thereto, regardless of the identity of the person who copied them." That such papers as make up the proposed transcript in this case may be included in such a transcript was declared in *Hibernia Sav. & Loan Soc. v. Doran*, supra. If this be correct, as to which we

have no doubt, in view of what is said in *Going v. Guy*, supra, we can conceive of no possible reason why such a transcript may not consist exclusively of such papers, authenticated by the judge, in a case where the same constitute all the matters material to a proper determination of the appeal. The mere fact that there was no office for a stenographer to perform at the hearing of the motion, and that consequently there was no stenographic reporter present, certainly should not be held to preclude the bringing to an appellate court in this way of all papers, records, and files essential to a proper determination of the appeal, where the statute authorizes, as we must hold it does, the inclusion of the same in such a transcript. We think it clear that petitioner is entitled to the relief sought.

Let a peremptory writ of mandate issue in accord with the prayer of the petition.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.; LAWLOR, J.

(171 Cal. 750)

In re WHITNEY'S ESTATE.
LANDERS et al. v. WHITNEY.
(S. F. 7240.)

(Supreme Court of California. Jan. 20, 1916.
Rehearing Denied Feb. 17, 1916.)

1. WILLS §6—PROPERTY DISPOSED OF—COMMUNITY PROPERTY.

A husband cannot, by his will, dispose of the wife's right to one-half of the community property should she survive him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 5-10; Dec. Dig. §6.]

2. EXECUTORS AND ADMINISTRATORS §176—FAMILY ALLOWANCE.

A widow's claim to a family allowance is strongly favored.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 661-666; Dec. Dig. §176.]

3. EXECUTORS AND ADMINISTRATORS §174—FAMILY ALLOWANCE.

The rights of testamentary disposition, and of beneficiaries to take under a will, being statutory, are subject to the power of the court to make provision for the support of the widow and children out of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 653, 654; Dec. Dig. §174.]

4. EXECUTORS AND ADMINISTRATORS §181—FAMILY ALLOWANCE—WHEN ORDERED—SPECIFIC DEVISE.

A family allowance, being analogous to a probate homestead, may be ordered even out of property specifically devised.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685; Dec. Dig. §181.]

5. WILLS §781—ELECTION—FAMILY ALLOWANCE.

A will may be drawn so as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2013-2017; Dec. Dig. §781.]

6. EXECUTORS AND ADMINISTRATORS §185—FAMILY ALLOWANCE—WAIVER.

The wife may, by an agreement, surrender the privilege of applying for a family allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. §185.]

7. EXECUTORS AND ADMINISTRATORS §185—FAMILY ALLOWANCE—WAIVER—CONSTRUCTION.

The right of a widow to a family allowance will not be held to have been surrendered by an agreement between the spouses except by clear and explicit language.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. §185.]

8. EXECUTORS AND ADMINISTRATORS §185—FAMILY ALLOWANCE—WAIVER—CONSTRUCTION.

Where the wife of the testator by an instrument concurrent with the will waived all her claims to her share of community property and "any and all other claims" upon the estate disposed of, the waiver, though in words broad enough to waive her right to the family allowance to which she was entitled by statute, must be construed with the will the purpose of which as declared by the testator was to dispose only of the community property, so that in fact the waiver did not waive her family allowance, and the general words being subject to the limitation of the specific words of the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 695; Dec. Dig. §185.]

9. COURTS §89 — JUDGMENTS IN OTHER CAUSES—CONCLUSIVENESS.

Decisions on the interpretation of written instruments have limited value when applied to the construction of documents embodying different language.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. §89.]

10. WILLS §782—ELECTION—FAMILY ALLOWANCE—ESTATES CREATED.

To put the widow to an election between her legal estate and that granted by a will, it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. §782.]

11. WILLS §782—ELECTION—FAMILY ALLOWANCE.

The mere fact that a legacy to the wife provides for payments at stated periods beginning from the testator's death does not deprive her of the right to a family allowance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. §782.]

12. EXECUTORS AND ADMINISTRATORS §186—FAMILY ALLOWANCE.

The fact that the will disposes specifically of the entire estate does not in and of itself destroy the widow's right to claim a family allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 669, 696; Dec. Dig. §186.]

Department 1. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceeding by Lucy A. Whitney, for a family allowance in her behalf, against John Landers and others, as executors of the will of Joel Parker Whitney, deceased. From an

order making the allowance, the executors appeal. Affirmed.

Corbet & Selby, of San Francisco, for appellants. Cushing & Cushing, of San Francisco (Erwin E. Richter, of San Francisco, of counsel), for respondent. W. T. Plunkett, of San Francisco, for legatee Helen Beryl Wheeler. Jas. P. Sweeney, of San Francisco, for legatee Parker Whitney.

SLOSS, J. The executors of the will of Joel Parker Whitney, deceased, appeal from an order granting to the widow of the decedent a family allowance of \$1,200 per month during the administration of the estate, the payments to date from the day of the decedent's death.

Joel Parker Whitney died on the 17th day of January, 1913. The will was admitted to probate and the appellants were appointed executors thereof on the 28th day of March, 1913. An inventory and appraisement, showing the value of the estate to be \$847,821.15, were returned on the 13th day of June, 1913. The widow's petition for family allowance was filed on June 10, 1914. The surviving heirs of the decedent were his widow, the respondent herein, and three adult children, Parker Whitney, Vincent Whitney, and Helen Beryl Wheeler. The testator owned certain dwelling houses and fishing camps in the state of Maine. A large amount of property in this state, originally owned by him, he had conveyed to a corporation known as the Whitney Estate Company, and the bulk of his estate consists of the shares of stock in this corporation. Included in the property of the Whitney Estate Company was a ranch in Placer county.

By the will the decedent gave to his widow the property in Maine, together with his books, silverware, pictures, furniture, and other articles of personal use. Certain minor legacies were given to various persons named, and the residue of the estate, including all of the testator's shares of stock in the Whitney Estate Company, was given to the executors as trustees. The executors thus named were Vincent Whitney, the testator's son, William J. Downing, and Frank Miller. The trustees were directed to pay to the widow \$1,200 per month during her life. These payments had been made to, and accepted by, her up to the time of the proceedings here under review. The widow was given the right to occupy the houses on the ranch in Placer county, and the personal articles in such houses were bequeathed to her. The corpus of the trust estate was to be kept intact until the testator's son Vincent should reach the age of 35 years (or until his death if he should die before reaching such age). During this period each of the three children was to be paid the sum of \$3,600 per year. Upon the arrival of Vincent Whitney at the age of 35 years, the trust fund was to be divided or distributed into three

equal parts, all of which were to be subject to the provision for the benefit of the wife. One of these parts was to be transferred to Vincent Whitney, the second to be held in trust for the benefit of Parker Whitney and his issue as provided in the will, and the third to be held in trust for the benefit of his daughter Helen Beryl and her issue as provided. The further details of these trusts and of the provisions made in the event of Vincent's death before reaching the age of 35 years need not here be stated.

The preamble of the will ran as follows:

"Be it remembered that I, Joel Parker Whitney, * * * do make this my last will and testament hereby intending to dispose of all of my property of whatever kind or description, whether now or hereafter acquired, and intending hereby, with the written consent and acceptance of my wife Lucy, to dispose of any community property we may have, in the state of California or elsewhere if any such there be, including her share thereof as well as my own, and hereby revoking all other wills and codicils by me at any time made."

At the time of the execution of the will the testator's wife, Lucy A. Whitney, signed an instrument which was annexed to the will. This instrument, which the court below finds to have been executed at the request of the decedent, was in the following words:

"I, Lucy A. Whitney, wife of the said Joel Parker Whitney, do hereby certify and declare, that I have read the whole of the foregoing will of my said husband, and fully understand the same, clearly understanding that my said husband by his said will, disposes not only of all his individual property, but also all of our community property, in case there is any such, including my half thereof as well as his own, and I hereby elect to accept and acquiesce in the provisions of the said will, and hereby waive all claims to my share of any community property, and any and all other claims that I may have upon any of the estate disposed of by the said will, being fully convinced in my own mind of the reasonable and proper character of the said will, and the wisdom of its provisions, and hereby accepting such of the said provisions as apply to or concern me.

"Witness my hand and seal at San Francisco, Calif. in the state of California this eighth day of May A. D. 1909.

"Lucy A. Whitney. [Seal]"

Attached to this instrument was the following attestation clause, signed by the witnesses to the execution of the will:

"On this eighth day of May, 1909, at San Francisco in the state of California, Lucy A. Whitney, wife of Joel Parker Whitney, executed the foregoing writing in our presence, declaring that she did so freely and voluntarily in token of her assent to the will of her husband and her waiver of all rights inconsistent with said will."

The testator made two codicils modifying the provisions of his will. The first of these, executed on April 5, 1911, revoked the appointment of W. J. Downing as executor and trustee and substituted John Landers in his place. It also altered other provisions relative to said Downing. The second codicil, executed on May 15, 1912, designated Parker Whitney as executor and trustee in place of Frank Miller, and made other changes which

have no bearing upon the questions here to be discussed. To the second of these codicils there was attached an instrument, executed by the testator's wife, Lucy A. Whitney, which was substantially in the same terms as the writing signed by her at the time of the making of the original will.

It is not questioned that the condition of the estate authorized the making of a family allowance; it is not suggested that the amount allowed to the widow was in any way unreasonable. The main contention of the appellants is that Mrs. Whitney was barred of the right to ask for a family allowance by reason of the writing executed by her at the time of the making of the will.

The soundness of this claim involves an inquiry into the true meaning and intent of the writing. It is of no great consequence whether the instrument be viewed from the standpoint of contract, of waiver, or of estoppel. In any aspect its operative effect, as against the right here claimed by the widow, must depend upon an interpretation of its terms. The important inquiry must be whether the words of waiver were intended to cover a possible claim for family allowance. In the paper Mrs. Whitney declared that she waived all claims to her share of the community property and any and all other claims that she might have upon any of the estate disposed of by the said will. It may readily be conceded that the general language "any and all other claims," etc., would be sufficient, standing by themselves, to cover a claim for family allowance. But the paper is to be read as a whole, in the light of surrounding circumstances and of the other elements of the transaction of which it formed a part. The paper signed by Mrs. Whitney was attached to the will, and it evidently was the paper referred to in the preamble of the will as "the written consent and acceptance of my wife Lucy." We have no doubt that, as is urged by the appellants themselves, the will and this waiver are to be read together. Such a reading clearly shows what the husband and wife had in mind and what they were undertaking to deal with in the drafting and execution of the two documents. The will itself begins with the declaration that the testator intends to dispose of all of his property, including any community property which he and his wife may have acquired.

[1] The husband could not, of course, without the consent of the wife, make a will which would effectively dispose of her right to succeed to one-half of the community property if she should survive him. He declares therefore that it is his intent, with her "written consent and acceptance," to dispose of her share of the community property as well as his own. The purpose of the writing which the wife was to sign and which she did in fact sign, is here clearly declared. That purpose was to enable the husband to exer-

cise a right of disposition over the whole of the community property. The same view of the purpose and scope of the documents is disclosed by the recitals in the paper signed by Mrs. Whitney. After stating that she has read the will and fully understands it, she recites her clear understanding that her husband by his will "disposes not only of all his individual property, but also all of our community property, in case there is any such, including my half thereof as well as his own." After making these recitals, the wife goes on to state that she elects to accept and acquiesce in the provisions of the will and that she waives certain rights, as above set forth. As bearing on the intent of the parties, attention may also be directed to the attestation clause, in which the witnesses certify that Mrs. Whitney declared that she executed the writing "in token of her assent to the will of her husband and her waiver of all rights inconsistent with said will."

[2-7] The widow's claim to a family allowance is strongly favored in our law. In *re Lux*, 100 Cal. 603, 35 Pac. 341; *Estate of Welsh*, 106 Cal. 427, 432, 39 Pac. 805; *Estate of Cowell*, 164 Cal. 636, 642, 130 Pac. 209. The right of testamentary disposition, and the right of beneficiaries to take under the will, are alike statutory, and are both subject to the power of the court having jurisdiction of the estate to make a provision for the support of the widow (or minor children) out of the estate. *Estate of Bump*, 152 Cal. 274, 92 Pac. 643. A family allowance is, in this respect, analogous to a probate homestead, which, as has been held, may be ordered even out of property specifically devised. *Estate of Huelsman*, 127 Cal. 275, 59 Pac. 776; *Estate of Gray*, 159 Cal. 159, 112 Pac. 890. A will may, of course, be so drawn as to put the widow to her election between taking the benefits given her by the testator and claiming her right of family allowance. So, too, the wife may, by agreement, surrender the privilege of applying for an allowance. Whether the right to demand an allowance is inconsistent with the will, or has been surrendered, is a question of interpretation of the will or the contract. In the case of a contract, we think the right should not be held to have been surrendered by an agreement between the spouses "except by clear and explicit language." This was the rule of construction applied by this court to an antenuptial agreement which, as was claimed, barred the wife's right to select a homestead out of the separate property of the husband while both spouses were living. *Warner v. Warner*, 144 Cal. 615, 78 Pac. 24. In reason, the same principle should apply to the matter under consideration in this case.

[8] Here, then, we see that the parties executed writings in which they declared plainly that they were making arrangements and stipulations for the purpose of enabling the husband to dispose of the entire community

property and of binding the wife to assent to such disposition. The husband was asserting his intention to devise and bequeath the half of the community property which would pass to his wife if she survived him. She was consenting to such disposition and waiving her right to object thereto, or, as was said by the attestation clause, she was waiving her rights "inconsistent with said will." The language used should be interpreted in view of this general purpose and intent, and should not be held to surrender other and different rights unless language clearly and expressly declaring such intent was used. Under all the circumstances, we think the general language "any and all other claims, etc.," should be construed in the light of the apparent purpose of the agreement and limited to the particular words which preceded. In *Mahaffy v. Mahaffy*, 63 Iowa, 55, 18 N. W. 685, an antenuptial contract had been made, the prospective husband agreeing that a certain sum should be paid to his wife in case she survived him, "the same to be her dower and portion in full of my said estate, and in lieu and stead of any dower or rights of inheritance therein, given or created by operation of law." The wife, in consideration of the payment, agreed and bound herself "to receive and accept the said sum in full payment, and in entire and complete satisfaction of all my rights of dower and inheritance as the widow and heir of the party of the first part in his said estate, both real and personal, and I hereby now renounce, and relinquish all claim, right, title and interest therein by reason of the said relation of wife or widow of the said Mahaffy." Upon the death of the husband, the right of the wife to continue in possession of the homestead was opposed by reason of the words of renunciation and relinquishment above quoted. The court, in denying the validity of this claim, said:

"The clause in question ought, we think, to be construed with reference to the clauses which precede it, and the sense in which the words are used is also to be determined very largely by these preceding clauses. The language used in that portion of the contract which contains the covenant of William Mahaffy shows unmistakably, we think, that the benefit or advantage for which he was contracting was the relinquishment by defendant of the right to take any interest in his estate by inheritance, and the sum of money which he agreed should be paid her out of his estate was to be paid solely as consideration for such relinquishment by her. There is nothing in the language of this covenant, nor in her agreement to accept the money in satisfaction of her right of dower or inheritance, which by any possible construction can be made to cover or include any other right or interests in the estate, except the one named in express terms by each of the parties. The parties, then, by unmistakable language, indicated the subject-matter of their contract. They have identified the particular right or interest in the estate, which was the subject of their agreement. And this is followed by the general terms of the clause in question. The general language of this clause must be held to relate to rights and interests of the same nature and description with those that have been already mentioned. The clause is in the nature of a 'sweeping

clause,' and its use and object was to guard against accidental omissions; and the rule of construction in such cases is that the 'general words are restrained by the subject-matter.'"

The language just quoted may very fitly be applied to the question before us. The rule that general words are to be qualified by particular recitals has often been declared, particularly in cases of releases. *Texas & P. R. Co. v. Dashiell*, 198 U. S. 523, 25 Sup. Ct. 737, 49 L. Ed. 1150; *U. P. R. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; *Bassett v. Laurence*, 193 Ill. 494, 61 N. E. 1098; *Van Slyke v. Van Slyke*, 80 N. J. Law, 352, 78 Atl. 179, 31 L. R. A. (N. S.) 778, Ann. Cas. 1912A, 498. The same theory underlies the provision of our Civil Code (section 1648) that:

"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

There is nothing in the various decisions of this court cited by the appellants which is in conflict with the views we have expressed. In *Re Noah*, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829, the denial of the widow's right to a family allowance was really based upon the ground that she "did not constitute the immediate family of the deceased." This was also the basis of the decision in *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358, where the wife had obtained an order setting apart a homestead to her. The fact that the wife was not a member of the family of the husband at the time of his death was one of the grounds, though not, it is true, the only ground, of the decision in *Estate of Yoell*, 164 Cal. 540, 129 Pac. 999, a case strongly relied upon by the appellants. But if we go beyond this and look to the language of the agreement made by the wife in these various cases, we find that in each instance the words were such as to clearly import an intention to surrender the very right which was afterwards claimed. In the *Noah Case* the spouses had made a separation agreement by which the wife, in consideration of the payment of \$10,500 by the husband, agreed not to demand any alimony or support from him, and that the \$10,500 should be in full satisfaction of "all her marital claims." In *Wickersham v. Comerford*, supra, there was a separation agreement by which the wife agreed that she relinquished all right to the separate property of the husband "as his wife in law or equity or by descent." In the *Yoell Case*, supra, the agreement (also made in view of a contemplated separation) declared that the execution and consummation of the agreement was intended to be a full, complete, and final adjustment of all the property rights of the parties, who agreed that neither would at any time "assert any right, interest or title as heir at law of the other to any property devised or bequeathed by such will or as against the estate of the other, should the other die intestate and all claim as such heir or as surviving husband and wife respectively and all right to contest, or oppose the last

will of the other is hereby expressly waived." In the case before us there was no such explicit language. There was no specific reference to "marital rights" or to "or right as wife in law or equity or by descent" or to "all claim as heir or as surviving husband or wife." Besides, in each of these cases the court was construing a separation agreement, the very purpose of which was to make a final and complete adjustment of the mutual relations and rights of the parties with reference to property. The language of the agreement might very properly be construed, in case of doubt, in a way which would tend to carry out this purpose. Here, however, we have a case of a man and woman living together as husband and wife until the death of the former. The scope and purpose of their contract (if the papers in question are to be viewed as a contract) was entirely different from that of a separation agreement.

A case of different character from those just discussed is *Estate of Lufkin*, 131 Cal. 291, 63 Pac. 469, relied on by the appellants. Here there was no agreement by the husband and wife, the sole question being whether a bequest to the wife was so made that its acceptance would preclude an application for a family allowance. By the provision in question the testator gave to his wife the sum of \$1,000 "on the payment of which \$1,000 she relinquish all further claim to my estate." It was held that the term "claim" was broad enough to include the right of the widow to an allowance from the estate of the testator, and that it, "where a different intention is not manifested by the context," must be so construed. The intention to use it as including such claim was held by the court to be manifest from the circumstances of the case, it appearing that there was nothing but the claim for family allowance to which the term could be made to apply. The decision supports the conclusion (conceded in the earlier part of this opinion) that the words "any and all other claims," etc., contained in the writing signed by Mrs. Whitney, would, standing alone, cover a claim for family allowance. But the inquiry must go further than this. We are to decide, not the independent meaning of these words, but their meaning in the connection in which they are found, and under the circumstances surrounding their use. In *Estate of Lufkin* it was held that the surrounding circumstances indicated that the word "claim" was used in such manner as to include a claim for family allowance. Here, for the reasons which we have already elaborated, we conclude that the word was not used in this sense.

The appellants refer to a number of decisions from other states which, as they claim, support their contention that the widow by her writing barred herself of the right of a family allowance. Appeal of Cowles, 74 Conn. 24, 49 Atl. 195; *Paine et al. v. Hollister*, 139 Mass. 144, 29 N. E. 541; *Pavlicek v. Roessler*, 222 Ill. 83, 78 N. E. 11; *Rieger v. Schaible*, 81

Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700; *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801; Appeal of Staub, 66 Conn. 127, 33 Atl. 615. We shall not undertake to review these cases at length. One and all, they dealt with antenuptial agreements, and in each instance the language which was held to bar the right of the widow differed from that found in the paper signed by Mrs. Whitney.

[9] As this court has had occasion to say repeatedly, decisions on the interpretation of written instruments have but limited value when applied to the construction of documents embodying different language. To a great extent each writing must be viewed by itself, and the intent of the parties must be ascertained from a study of the particular terms employed, read in the light of the underlying purpose of the transaction and the circumstances under which it was made. So reading the paper before us, we do not find in the authorities cited any reason to adopt an interpretation other than the one given by the court below.

[10] There is no occasion to consider at length the claim that, by accepting the benefit given her by the will, the widow has made an election to claim no family allowance, or that she is thereby estopped to claim such allowance. These contentions rest upon the premise that the receipt of an allowance is inconsistent with the provisions made for the wife in the will. There is no such inconsistency. To put the widow to her election "it must clearly and unequivocally appear that the provision made by the will was intended to be in lieu of such rights as are given by the law." *Estate of Cowell*, 164 Cal. 636, 642, 130 Pac. 209. The will shows plainly that the testator intended to require the widow to elect between taking under the will and taking one-half of the community property, but there is nothing to indicate an intention to put her to an election so far as family allowance is concerned.

[11] The fact that the legacy to the wife takes the form of a provision for payments at stated periods, beginning from the testator's death, does not deprive her of the right to a family allowance. In this respect the case is precisely similar to *Estate of Cowell*, supra. We see no force in the claim that the granting of a family allowance would operate to defeat the will.

[12] Assuming, as claimed by the appellants, that the will disposes specifically of the entire estate, this does not, in and of itself, destroy the right to claim an allowance. Such right stands on the same footing as her right to a homestead which, as we have seen, may be set apart by the probate court out of property specifically devised. There is therefore no room for the application of the doctrine of election or that of estoppel.

The order is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(171 Cal. 731)

TILTON v. DECKER et al. (L. A. 3496.)

(Supreme Court of California. Jan. 18, 1916.)

1. EVIDENCE — 32 — JUDICIAL NOTICE — ORDINANCES.

Generally a court of record does not take judicial notice of municipal ordinances, and they must, where a necessary part of the case, be proven; but as judicial notice presupposes the absence of evidence, the rule does not apply where a deed by the board of public works is prima facie evidence of the regularity of the proceedings on which it is based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 42; Dec. Dig. — 32.]

2. MUNICIPAL CORPORATIONS — 582 — VALIDITY.

Under Street Opening Act (St. 1903, p. 384) § 29, declaring that the deed is prima facie evidence of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee, the deed of the board of public works reciting the adoption of the requisite ordinances is sufficient evidence to warrant a finding that all of the preliminary steps in the street opening proceedings have been taken, hence independent proof of the adoption of several street opening ordinances is unnecessary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. — 582.]

3. QUIETING TITLE — 35 — ACTIONS — PLEADINGS.

Where the validity of defendant's mortgage depended on title acquired by the mortgagor through a street opening proceeding by a city, which divested plaintiff's title, a general averment of the title in the mortgagor is sufficient without pleading the source.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. — 35.]

4. MUNICIPAL CORPORATIONS — 582 — STREETS — PROCEEDINGS FOR OPENING — AFFIDAVITS OF DILIGENCE.

Under Street Opening Act, § 28, requiring the purchaser before he may obtain a deed to serve upon the owner of the property and occupants, if it be occupied, a written notice setting forth various matters, and to file with the street superintendent an affidavit showing that notice has been given, or if not served that due diligence was used to find the owner, an affidavit that the purchaser had inquired of neighbors nearest the property as to the whereabouts of the person whose name was given on the assessment rolls as owner, the property being unoccupied, that he had searched the city and telephone directories seeking to ascertain the address and whereabouts of the named person and knew of no other place or person where he could learn the address of such owner, when taken together is sufficient to show due diligence, though not averring the years for which the directories searched were issued.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. — 582.]

5. MUNICIPAL CORPORATIONS — 582 — STREET OPENING — AFFIDAVITS.

In such case the street superintendent or those succeeding to the duties of his office are first called upon to determine the sufficiency of their affidavit, and to execute a deed upon such determination.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. — 582.]

6. MUNICIPAL CORPORATIONS — 486 — STREET OPENING PROCEEDING — PUBLICATION — "TEN DAYS."

Street Opening Act, § 18, requires that after the assessment for the street opening is written and filed with the city council, the council shall give notice by publication for at least 10 days. An affidavit of publication stated that notice was published for 10 consecutive days, Sundays excepted, commencing on the 8th day of October and ending on the 18th day. October 9th and 16th were both Sundays, and therefore there had been only 9 publications. *Held*, that the expression "publication for 10 days" does not require any specific number of publications, but merely designates a period of time in which publication is to be made, so the intervening Sundays are properly counted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1084–1090, 1161; Dec. Dig. — 486.]

7. TRIAL — 105 — ADMISSION OF EVIDENCE — FAILURE TO OBJECT — STREET OPENING ACT.

Where the certificate of sale required by the Street Opening Act to be executed by the street superintendent is admitted in evidence without objection, its insufficiency may be reached by an attack on the findings, notwithstanding the deed itself furnishes prima facie evidence of regularity of prior proceedings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260–266; Dec. Dig. — 105.]

8. MUNICIPAL CORPORATIONS — 577 — STREET OPENINGS — CERTIFICATE — SUFFICIENCY.

Street Opening Act, § 26, requires the street superintendent to execute a certificate of sale, setting forth the time when the purchaser will be entitled to a deed, while sections 27 and 28, respectively, declare that redemption may be made at any time prior to the delivery of the deed, and that the deed shall be executed at any time after the expiration of 12 months after the date of sale, if the purchaser is given 30 days' notice. A certificate of sale recited that the purchaser would on proper application be entitled to a deed at any time after the expiration of 12 months, unless the property be sooner redeemed. *Held*, that the certificate is sufficient, for the word "sooner" may be construed as referring to the date when the purchaser would be entitled to a deed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1292; Dec. Dig. — 577.]

9. MUNICIPAL CORPORATIONS — 582 — OPENING OF STREETS — SPECIAL ASSESSMENTS.

Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the form of the instrument which is to divest title, such form must be followed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. — 582.]

10. MUNICIPAL CORPORATIONS — 582 — STREETS — OPENING — DEEDS.

Under Street Opening Act, § 28, declaring that there shall be recited in the deed substantially the matters contained in the certificate, the deed is valid, though it did not recite with the detail of the certificate, the time when the purchaser would be entitled to a deed, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1299, 1300; Dec. Dig. — 582.]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Annie L. Tilton against Mrs. F. J. Decker and others. From a judgment for

defendant Russek, plaintiff appeals. Affirmed.

W. G. Van Pelt, of Los Angeles, for appellant. Frederick A. Preston, of Los Angeles, for respondent.

SLOSS, J. Plaintiff sued to quiet title to a lot in the city of Los Angeles. There were four defendants named in the complaint. Two defaulted. The third, Louis, answered, but did not appear at the trial nor introduce any evidence, and judgment was entered against him. The fourth, Russek, answered, denying the allegations of the complaint, and filed a cross-complaint alleging that Mrs. Decker (one of the defaulting defendants) was the owner of the property on September 20, 1911, on which date she had executed a mortgage upon the property, and that Russek had become the owner of said mortgage. The court found that the plaintiff was the owner of the property subject to the lien of Russek's mortgage. The plaintiff appeals from the part of the judgment in favor of Russek, and brings up the evidence by means of a bill of exceptions.

At the trial it was admitted that the plaintiff was the owner of the land, except so far as her title may have been divested by virtue of a deed executed by the board of public works of the city of Los Angeles to one Warden, pursuant to proceedings for the opening of an alley under the "Street Opening Act of 1903." Stats. 1903, p. 376. The respondent's mortgage was given by a successor in interest of Warden. The correctness of the judgment turns upon the validity of the sale and deed under the street opening proceedings.

The appellant attacks these proceedings in the following particulars:

[1, 2] 1. The deed from the board of public works recites the passage by the city council of Los Angeles of two ordinances, the one declaring the intention of the mayor and council to open the alley in question, the other ordering the improvement to be made. Plaintiff objected to the admission of the deed in the absence of pleading and independent proof of the adoption of these ordinances.

The defendant offered in evidence the ordinance first referred to in the deed, i. e., the one declaring the intention of the city council to order the work done, but there was no proof of the ordinance ordering the work done. We do not think the proof of this ordinance was essential to the admissibility of the deed or to the making of a prima facie case by the defendant. Under section 29 of the Street Opening Act the deed is prima facie evidence "of the truth of all matters recited therein, and of the regularity of all proceedings prior to the execution thereof, and of title in the grantee." The deed itself is therefore sufficient evidence to warrant a finding that all the preliminary

steps in the proceedings have been taken. The power of the Legislature to make the deed prima facie evidence of such preliminary steps is well settled by our decisions. *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *Clarke v. Mead*, 102 Cal. 516, 36 Pac. 862. The appellant argues that courts of record do not take judicial notice of municipal ordinances, and that such ordinances must, where they are a necessary part of the case, be proven. This is no doubt the general rule. *Ex parte Davis*, 115 Cal. 447, 47 Pac. 258; *City of Tulare v. Hevren*, 126 Cal. 229, 58 Pac. 530. But we have here no question of taking judicial notice of the ordinances. The term "judicial notice" presupposes the absence of evidence. Under the act, the deed furnishes prima facie evidence of the regularity of all proceedings prior to its execution. Those proceedings include the passage of the ordinance. Prima facie proof of the passage of such ordinance was therefore made by the introduction of the deed, and the court was not asked to take judicial notice of anything.

In *Metteer v. Smith*, 156 Cal. 574, 105 Pac. 735, relied on by appellant, it was held that a tax deed issued on a sale of property for delinquent city taxes was not admissible in evidence without proof of the passage of an ordinance recited in the deed. The precise nature of the ordinance referred to is not disclosed by the opinion. If the passage of the ordinance was a step in the process of assessment, of equalization or of the levy of taxes, it is not easy to see why such ordinance was not sufficiently proven, in view of the provision of section 3786 of the Political Code (made applicable to the proceedings in question by section 871 of the Municipal Incorporation Act [St. 1905, p. 89]), that the deed is prima facie evidence, that (1) the property was assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law. Be this as it may, the provisions of section 3786 of the Political Code are not so broad as those of section 29 of the "Street Opening Act of 1903," which, as we have said, makes the deed prima facie evidence of the regularity of all proceedings prior to the execution thereof, and of title in the grantee. This language includes city ordinances as well as any other intervening steps.

[3] There is no force in the contention that the respondent was bound to set up the ordinances in his answer. If he had undertaken to plead a title derived under a delinquent sale, he would have been required to allege every proceeding essential to the validity of such sale. *Himmelman v. Danos*, 35 Cal. 449; *Russell v. Mann*, 22 Cal. 131. But here the respondent's answer and cross-complaint alleged merely that, at the time of the execution of the mortgage owned by him, the mortgagor Decker was the owner in fee and entitled to the possession of the property.

The source of Decker's title was not pleaded. A general allegation of ownership of real property is all that is required, and under such allegation any proof tending to establish the title alleged is admissible.

[4] 2. Under section 28 of the act, the purchaser must, at least 30 days before he applies for a deed, serve on the owner of the property, and the occupant thereof, if it be occupied, a written notice setting forth various matters. If the owner "cannot be found, after due diligence," the notice must be posted upon the property. "The person applying for a deed must file with the street superintendent an affidavit or affidavits showing that notice of such application has been given, * * *" and if the notice was not served on the owner of the property personally, that due diligence was used to find such owner. There was no personal service in this case. It is claimed that the affidavit filed by the purchaser was insufficient to show that due diligence had been used to ascertain the whereabouts of the owner.

The declarations of the affiant in this regard were:

That he had "inquired of Miss Nelson at 857 East Adams street and of the occupants of 848 East Adams street for the address or whereabouts of Annie L. Tilton, or Annie L. Tilden, or the owner of said property, and said persons were unable to give any information relative to the whereabouts of said person, said persons being the neighbors nearest said property.

"That the name of Annie L. Tilden is given on the assessment roll as the owner of said property.

"That he has searched the city directory and the telephone directories, seeking to ascertain the address and whereabouts of the said Annie L. Tilton, or Annie L. Tilden, and to find the same affiant has been wholly unable, and that he knows of no other place or person where he could learn the address or whereabouts of said persons.

"That the property is vacant and unoccupied."

In *Hennessy v. Hall*, 14 Cal. App. 759, 762, 113 Pac. 350, 352, the court said:

That "to warrant the execution of a deed to the purchaser and foreclose the owner's right of redemption upon such constructive service, an affidavit must be filed showing, not merely stating, that due diligence was used to find the owner."

In other words, the affidavit must set forth evidentiary facts which justify the conclusion that due diligence was used. In this respect the requirement of the statute is not unlike that of section 412 of the Code of Civil Procedure, authorizing service of summons by publication when the person to be served "cannot after due diligence be found within the state * * *" and this fact appears by affidavit to the satisfaction of the court or a judge thereof." In order to justify publication of summons "the affidavit must show two facts, viz., the exercise of due diligence to find the defendant within the state, and a failure to find him after the exercise of such diligence." *Rue v. Quinn*, 137 Cal. 651, 66 Pac. 216, 70 Pac. 732. An affidavit which merely states these "ultimate facts," or con-

clusions in the language of the statute, is not adequate. *Ricketson v. Richardson*, 26 Cal. 149. But if the evidentiary facts set forth in the affidavit have a "legal tendency" to show the ultimate facts, the order for publication is sufficiently supported. *Rue v. Quinn*, supra; *People v. Wrin*, 143 Cal. 11, 76 Pac. 646; *People v. Norris*, 144 Cal. 422, 77 Pac. 998; *Sharp v. Sallsbury*, 144 Cal. 721, 78 Pac. 282; *Shepard v. Mace*, 148 Cal. 270, 82 Pac. 1046; *Roberts v. Jacob*, 154 Cal. 307, 97 Pac. 671. In all of these cases the court upheld orders based on affidavits which, in their statement of facts tending to show the exercise of due diligence, were not materially stronger than the one here involved. The property in question is an unoccupied city lot. The affidavit states that the affiant made inquiry of persons residing at two certain addresses. It is true, as claimed by the appellant, that it does not appear how near these places were to the property in question. But it is stated that the occupants of these places were "the neighbors nearest said property." The statement of the affidavit that search had been made of "the city directory and the telephone directories" is not very satisfactory, in view of the omission to specify the years for which such directories were issued. But taking the whole affidavit together, we think it cannot be said that it is lacking in the allegation of facts tending to prove due diligence in seeking to ascertain the whereabouts of the owner. It is not unreasonable to say that the persons living nearest an unoccupied city lot are likely to know who owns the lot and where he is to be found. The affidavit held insufficient in *Hennessy v. Hall*, supra, was decidedly weaker than the one now before us. It appeared that the person whom the affiant had sought to locate was not the owner of the property at the time of the search, but had parted with all interest therein nearly 4 years before.

It is sought to distinguish *Rue v. Quinn*, supra, and similar cases, on the ground that in ordering a publication of summons the court or judge passes upon the sufficiency of the affidavit. The requisite facts must "appear by affidavit to the satisfaction of the court or * * * judge." Code Civ. Proc. § 412. The finding (implied in the making of the order) that a sufficient showing has been made will be sustained if the facts alleged in the affidavit justify a finding either way. *Bender v. Hutton*, 160 Cal. 372, 117 Pac. 322.

[5] The Street Opening Act, however, does not in terms empower any one to find the existence of the facts which are to be "shown" by the affidavit. The street superintendent (or, in the city of Los Angeles, the board of public works, which has, by charter provision, succeeded to the duties of such superintendent), is to execute the deed after the filing with him of the prescribed affidavit. He is therefore called upon to determine, in the

first instance, whether the affidavit shows the requisite facts. But, conceding that no particular weight is to be given to his action in accepting the affidavit and executing a deed, the sufficiency of the affidavit must necessarily be a subject for determination by any court in which the validity of the proceedings is put in issue. In the present case the lower court has, by finding in favor of the respondent, ruled that the affidavit was sufficient. We cannot overturn this conclusion. Whether we could sustain a holding to the contrary is a question that is not presented.

[6] 3. Section 18 of the act requires that after the assessment is completed and filed with the city council, the council shall give notice of such filing "by publication for at least ten days in a daily newspaper published and circulated in the city. * * *" The affidavit of publication states that the notice was published for "ten consecutive days (Sundays excepted), commencing on the 8th day of October, 1909, and ending on the 18th day of October, 1909, both days inclusive, and as often during said period as said newspaper was issued, to wit, daily." October 9 and 16, 1909, were Sundays, and there had, therefore, been only 9 publications. This is claimed to be insufficient under the statute.

The expression "publication for ten days," found in section 22 of the act, does not require any specific number of publications. It designates a period of time during which the publication is to be made. The intervening Sundays are properly counted as a part of this period. *Taylor v. Palmer*, 31 Cal. 240; *Cal. Imp. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802. A paper published only 6 days of the week is a "daily newspaper" (*Richardson v. Tobin*, 45 Cal. 30), and a publication for the required period in every issue of such a paper is a compliance with the statute (*Cal. Imp. Co. v. Reynolds*, supra).

[7] 4. Under section 26 the street superintendent must execute a certificate of sale setting forth " * * * the time when the purchaser will be entitled to a deed." Under section 27 redemption may be made at any time prior to the execution and delivery of a deed therefor. The deed is to be executed (section 28) at any time after the expiration of 12 months from the date of sale, if the purchaser has given 30 days' notice, as required by said section 28, of the time when he will apply for a deed. The certificate of sale in this case stated that:

"The purchaser or his assignee will be entitled to a deed of said property at any time after the expiration of 12 months from the said date of sale, upon giving notice of application therefor as provided by law, unless said property shall be sooner redeemed."

This, it is claimed, does not comply with the requirement of section 26.

It is questionable whether the alleged defect in the certificate may be complained of by the appellant. The certificate was admitted in evidence without objection. It was

not necessary to the defendant's case, the deed itself furnishing prima facie evidence of the regularity of the prior proceedings. But since the certificate was in fact introduced, its insufficiency might have been reached by an attack on the findings. The specifications of insufficiency are, however, so limited as to exclude such attack.

[8] But, in any view, we think the certificate did recite correctly the time when the purchaser would be entitled to a deed. Under the act the deed is to issue at any time after the expiration of 12 months from the date of sale if the purchaser has complied with the provisions of the section and the property has not been redeemed. The purchaser is therefore entitled to a deed at any time after the expiration of 12 months upon giving the proper notice, unless said property is redeemed prior to the delivery of such deed. If we interpret the word "sooner" in the recital to refer to the date when the purchaser will be entitled to a deed—a perfectly permissible construction—the recital is in exact conformity with the provision of the law.

[9, 10] 5. The deed recites that the certificate set forth various matters, including "the time when the purchaser would be entitled to a deed." It did not repeat in detail the recital of the certificate setting forth the time when the purchaser would be entitled to a deed. It is claimed that such recital was necessary under the provision of section 28 that there shall be recited in the deed "substantially the matters contained in the certificate." Assessments for street improvements, like tax proceedings, are in invitum, and where the statute prescribes the form of the instrument which is to divest the title of the owner, such form must be followed. A want of the recitals required by law will make the deed void. *Grimm v. O'Connell*, 54 Cal. 522; *Simmons v. McCarthy*, 118 Cal. 622, 50 Pac. 761; *Baird v. Monroe*, 150 Cal. 560, 564, 89 Pac. 352. "It is not for the court to inquire whether the required recitals are of material facts. * * *" *Baird v. Monroe*, supra.

The statute does not specify, in terms, the precise recitals to be contained in the deed. It merely calls, by reference, for "substantially the matters recited in the certificate." The particular recital here involved relates to the happening, in terms of futurity, of an event which is to occur after the issuance of the certificate, but will have taken place when the deed is executed. Of a somewhat similar provision in section 3786 of the Political Code this court said (*Hewes v. McLellan*, 80 Cal. 393, 395, 22 Pac. 287, 288):

"The requirement of the Code that the deed shall recite when the purchaser will be entitled to it is absurd, and results from the general provision that it shall contain the recitals contained in the certificate, which was enacted no doubt without observing that one at least of the recitals proper in the certificate would be entirely improper and useless in the deed as the recital of a fact. We think, therefore, that it was suf-

sufficient that the deed recited the fact that this statement was contained in the certificate."

Under the case just cited it would clearly have been sufficient if the deed had repeated the recital of the certificate. It did not do this, merely reciting, as has already been stated, that the certificate set forth "the time when the purchaser would be entitled to a deed." We think, however, that the reasoning in *Hewes v. McLellan* justifies the conclusion that this was a substantial compliance with the statute, in view, especially, of the rather indefinite language ("substantially the matters contained in the certificate") in which section 28 defines the necessary recitals in the deed. For the purposes of the particular recital here in question, we hold that every demand of the law, reasonably construed, is fully satisfied by such a deed as the one before us.

The judgment is affirmed.

We concur: SHAW, J.; LAWLOR, J.

(171 Cal. 706)

MARIN WATER & POWER CO. v. RAILROAD COMMISSION OF STATE OF CALIFORNIA. (S. F. 7451.)

(Supreme Court of California. Jan. 17, 1916. Rehearing Denied Feb. 16, 1916.)

1. EMINENT DOMAIN § 71—REGULATION AS TO PUBLIC UTILITIES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 12, § 23, gives the Railroad Commission such jurisdiction to regulate public utilities, etc., as shall be conferred by the Legislature, and declares the legislative power to confer jurisdiction on the commission plenary. Section 22 declares the authority of the Legislature to give the commission such powers to be unlimited by any provision of the Constitution. Section 14, art. 1, provides that, when private property is taken for public use, the owner's compensation shall be fixed by a jury, unless a jury is waived. Article 12, § 23a (adopted November 3, 1914), declares the commission to have such power to fix the compensation to be paid for property of any public utility acquired by certain public corporations as the Legislature may confer upon it, and that the legislative power shall be plenary. *Held*, that Public Utilities Act (St. 1911, Ex. Sess. p. 18) § 47, as amended (St. 1913, p. 684), empowering the commission on petition of any water district intending to take by eminent domain the property of any existing public utility to fix the compensation, is valid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 180-187; Dec. Dig. § 71.]

2. EMINENT DOMAIN § 262—REGULATION OF PUBLIC UTILITIES—REVIEW OF PROCEEDINGS—WAIVER—EFFECT.

Public Utilities Act, § 47, as amended in 1913, valid after Const. art. 12, § 23a (adopted November 3, 1914), gave the Railroad Commission power to fix the compensation payable to the owner of any public utility property taken by a municipal water district, etc., in eminent domain proceedings, and section 70 provided that, if the owner whose property is sought to be taken does not file an acceptance of the compensation fixed by the commission, the corporation seeking to condemn must commence an eminent domain proceeding, in which the compensation so fixed shall be conclusive. On a proceeding in certiorari or review instituted under sec-

tion 47 as amended it appeared that the evidence had been taken before the Constitution had confirmed the amendment to that section, and that the matter had been submitted and the commission's decision made after such confirmation, and that the petitioner had waived any objection which might have been urged before such amendment. *Held*, that the court would consider the case on the theory that the commission, from the beginning, was authorized to entertain the proceeding.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.]

3. CONSTITUTIONAL LAW § 62 — "JUDICIAL POWER" — DELEGATION — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Public Utilities Act, § 47, as amended in 1913, authorizing the Railroad Commission to fix compensation to be paid owners of public utility property condemned by a municipal water district, etc., the commission is given judicial powers, as its determination in eminent domain proceedings establishes the right to the owners to receive and the obligation of the public corporation to pay some fixed compensation for the property taken; "judicial power" being the power to determine what shall be adjudged or decreed between the parties and with whom is the right of the case; determination of the rights of the individual under the existing laws; the ascertainment of existing rights; the determination of controversies between parties; the power to investigate, declare, and enforce liabilities as they stand on present or past facts and under the laws supposed already to exist.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. § 62.]

For other definitions, see Words and Phrases, First and Second Series, Judicial Power.]

4. EMINENT DOMAIN § 264 — REVIEW—CERTIORARI—WRIT—SCOPE—STATUTE.

Const. art. 6, § 4, gives the Supreme Court power to issue writs of certiorari. Code Civ. Proc. § 1068, provides that the writ of review may be granted when an inferior board, etc., has exceeded its jurisdiction, and there is no appeal or any adequate remedy. Public Utilities Act, § 47, as amended in 1913, gives the Railroad Commission judicial powers in fixing compensation in eminent domain proceedings, and section 67 provides that the review shall extend only to the question whether the commission has legally pursued its authority, and excludes from review questions of fact. *Held* that, when a finding or conclusion of fact is based on uncontradicted evidence, its accuracy is usually a mere question of law reviewable if it goes to the jurisdiction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 688, 689; Dec. Dig. § 264.]

5. EMINENT DOMAIN § 231—RAILROAD COMMISSION—POWER TO CALL WITNESSES—EXAMINATION—JUDICIAL TRIBUNALS.

In a proceeding under Public Utilities Act, § 47, as amended in 1913, to have the Railroad Commission fix the compensation of lands, rights, etc., of a public utility intended to be acquired by eminent domain by a public water district, the commission, as a judicial tribunal, had power to call and examine witnesses in furtherance of justice and against the will of either party.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585-589; Dec. Dig. § 231.]

6. EMINENT DOMAIN § 231—RAILROAD COMMISSION—POWERS—RECEIVING TESTIMONY.

In such proceeding the Railroad Commission, after such witness was examined and cross-examined as to his knowledge on the subject, he having viewed and examined all the prop-

erty carefully and made exhaustive inquiries regarding the previous sales of similar property in the vicinity, and of the different uses to which the properties in question were adapted, did not exceed its authority in considering his testimony, together with other evidence bearing on the question of use and value.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585-589; Dec. Dig. ☞ 231.]

7. EMINENT DOMAIN ☞ 231—COMPENSATION—EVIDENCE—METHOD OF VALUATION.

In such proceeding, where it appeared that the land belonging to the public utility from which water might be obtained was so situated that the annual rainfall thereon might be conveniently collected, stored on the land, and thence distributed to consumers, and there was evidence as to the average rainfall upon such lands, the quantity which could be annually collected and stored, and the selling price, a witness' method of valuing the land without giving the advantage of water storage a separate value, but merely adding it to the land value and reporting it all as one item, where the commission gave additional value to the land on such ground, the refusal to require the witness to state its separate value or to give it a separate value, while erroneous, did not deprive the commission of jurisdiction or make its award invalid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585-589; Dec. Dig. ☞ 231.]

8. EMINENT DOMAIN ☞ 234—WATER RIGHTS—ELEMENTS OF DAMAGES.

In such proceeding the claim that by means of additional dams the amount of water stored on the land annually could be greatly increased, that such possibilities increased the value of the property, and that the commission allowed nothing therefor was not sustained by a record showing that, while the commission refused to make a separate statement of the value of such possibilities, it did allow a value for the potential storage of storm water on the land by giving the land a present additional value because of such fact.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 592-600, 608; Dec. Dig. ☞ 234.]

9. EMINENT DOMAIN ☞ 231—COMPENSATION—VALUE—METHOD.

In such proceeding the valuation of the property by the commission, corresponding with the values fixed by a certain witness called by the commission, who had been examined and cross-examined by the parties, was proper, as the commission was not bound to limit itself to the testimony of witnesses offered by the parties, but might take the other evidence produced at the hearing.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585-589; Dec. Dig. ☞ 231.]

10. EMINENT DOMAIN ☞ 231—PROPERTY OF WATER AND POWER COMPANY—METHOD OF COMPENSATION—IRREGULARITY—PUBLIC UTILITY ACT.

Under Public Utility Act, § 47, as amended in 1913, requiring the Railroad Commission to fix the compensation to be paid for property of a public utility in accordance with section 70, which provides that it shall file its findings of fact upon all matters as to which evidence was introduced which in its judgment had any bearing on the value of the property, the commission's failure to find separately the value of each separate parcel of the property, while an irregularity, did not cause a loss of jurisdiction or make the proceeding void, as, when a court of limited jurisdiction has acquired jurisdiction

of the parties and the subject-matter, the same presumptions as to subsequent proceedings apply as with respect to courts of general jurisdiction, and subsequent irregularities do not make its judgments void.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585-589; Dec. Dig. ☞ 231.]

In Bank. Proceeding in certiorari or review by the Marin Water & Power Company, instituted under the provisions of the Public Utilities Act as amended in 1913, against the Railroad Commission of the State of California. Proceedings and determination of the Commission affirmed.

Lilienthal, McKinstry & Raymond, of San Francisco, for petitioner. Douglas Brookman, of San Francisco (Max Thelen, of San Francisco, of counsel), for respondent.

SHAW, J. This is a proceeding in certiorari or review, instituted under the provisions of section 47 of the Public Utilities Act as amended in 1913 (Stats. 1913, p. 684), and of section 67 of said act.

Section 47 originally gave the Railroad Commission power to ascertain the value of the property of public utilities and to make revaluations thereof from time to time, but for purposes of regulation only. The amendment of 1913 empowers the commission, on petition of any county, municipal corporation, or municipal water district which intends to acquire, under eminent domain proceedings, or otherwise, the property of any existing public utility, or any part or portion thereof, to fix and determine the just compensation to be paid for such property in such condemnation proceedings. The commission is also empowered to fix and determine such value upon the filing of a petition stating that such county, municipal corporation, or district intends to submit to the voters thereof a proposition to acquire the property of any existing public utility or any part thereof.

On May 20, 1914, the Marin municipal water district, a public corporation created under the act of May 1, 1911, and the amendment of December 24, 1911 (Stats. 1911, p. 1290; Spec. Sess. 1911, p. 92), filed with the commission a petition under the provisions of section 47, asking the commission to fix and determine the compensation to be paid by said district for all the lands, property, and rights of the petitioner, Marin Water & Power Company, connected with its business of selling water for domestic and other uses in Marin county. Such proceedings were had thereon that the commission heard the evidence of the respective parties and made a final determination as to the value of the property in question, which decision became final on May 10, 1915. This proceeding was begun within the time allowed by the Public Utilities Act for the review of said decision.

[1] At the time of the enactment of the amendment of section 47 aforesaid, and at the time of the filing of the petition to the Railroad Commission and the hearing of the evidence thereon, the Constitution, by section 23, art. 12, provided that:

"The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by the public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Section 22 of the article also provided that the authority of the Legislature to give the commission powers of the same kind or different from those conferred upon it therein "is expressly declared to be plenary and unlimited by any provision of this Constitution." Section 14 of article 1 provides that, when private property is taken for public use, the compensation to the owner shall be fixed by a jury, unless a jury is waived. So far as private property belonging to public utilities is concerned, this statute purports to abrogate the guaranty of section 14. The proposition that the above clauses of sections 22 and 23 were intended to authorize the Legislature, by the simple device of giving additional powers to the Railroad Commission, to nullify all the other constitutional guaranties for the protection of persons and property is certainly startling. It may well be doubted if the people understood that they were thus investing the Legislature with all the powers of state. If this proposition arose, the question whether the rule of ejusdem generis would require a different construction would be presented. But after the enactment of said amendment to section 47 the Constitution itself was amended by the adoption on November 3, 1914, of section 23a of article 12, declaring that the Railroad Commission should have such power to fix the just compensation to be paid for the property of any public utility, when it is sought to be acquired by any of the public corporations above named, as the Legislature should confer upon it, that "the right of the Legislature to confer such powers upon the Railroad Commission is hereby declared to be plenary and to be unlimited by any provision of this Constitution," and that "all acts of the Legislature heretofore adopted, which are in accordance herewith, are hereby confirmed and declared valid." This, of course, removes all doubt of the present validity of the said amendment of section 47.

[2] The proceedings here under review were begun, it must be noted, and substantially all the evidence was taken therein, before the Constitution had confirmed said amendment to section 47. But the matter was submitted to the commission, and the decision was made thereon after said confirmation. In this condition of the case the peti-

tioner now expressly waives any objection that might be urged because of the enactment of said amendment of section 47 before the amendment of the Constitution. This, of course, includes all objections on the ground that the proceeding was begun and the evidence taken therein before the commission was authorized to act in such matters, if such objection would otherwise lie. We have no doubt that the petitioner may effectually waive a matter of that character. As this would make the adjudication of the commission valid, so far as such objections are concerned, it is unnecessary for us here to express any opinion as to the soundness of the objections, or as to the effect, in this particular, of the several amendments to the Constitution above mentioned. We proceed, therefore, to consider the case upon the theory that the commission, from the beginning, had lawful authority to entertain the proceeding.

Section 47 of the Public Utilities Act, as amended, after giving to the Railroad Commission power to "fix and determine the just compensation that should be paid to the owner" of the public utility property, the procedure to be as provided in section 70 of the act, also provides that, if the owner whose property is thus sought does not, within 20 days after the commission has certified its findings as to such compensation, file with the commission an agreement to accept for the property the amount so fixed, the public corporation at whose instance such compensation was fixed must, within 60 days after the filing of such findings, commence a proceeding in eminent domain for the condemnation of such property for its use. Similar provisions are made for the case where the public corporation in its petition states its intention to submit such proposition to the voters. It further provides that the compensation so fixed by the commission shall be conclusive as to the amount to be allowed for the property in the proceeding in eminent domain begun pursuant thereto, leaving the court therein to decide only the remaining material issues.

[3] The first proposition to which the petitioner here directs our attention is that, in making this determination as to compensation, the commission exercises judicial power. To this counsel for the other parties and for the commission make no answer. They apparently concede it. We have no doubt that this is correct. The judicial function is to "declare the law and define the rights of the parties under it." *Frasher v. Rader*, 124 Cal. 133, 56 Pac. 797. To determine "what shall be adjudged or decreed between the parties, and with whom is the right of the case, is judicial action." *Rhode Island v. Massachusetts*, 37 U. S. (12 Pet.) 718, 9 L. Ed. 1233. "A determination of the rights of an individual under the existing laws" is an exercise of judicial power. *Quinchard v. Board*, 113 Cal. 669, 45 Pac. 856. An essen-

tial element of judicial power, distinguishing it from legislative power, is that it requires "the ascertainment of existing rights." *People ex rel. Dean v. Board of Supr's of Contra Costa County*, 122 Cal. 424, 56 Pac. 131. "It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties." *Title, etc., Co. v. Kerrigan*, 150 Cal. 319, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, 11 Ann. Cas. 465. See, also, *Robinson v. Kerrigan*, 151 Cal. 47, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; *Sinking Fund Cases*, 99 U. S. 761, 25 L. Ed. 504; 23 Cyc. 1620. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end." *Prentiss v. Atlantic, etc., Co.*, 211 U. S. 226, 29 Sup. Ct. 67, 53 L. Ed. 150. "The Legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character; but, when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." *Monongahela Navigation Co. v. United States*, 148 U. S. 327, 13 Sup. Ct. 622, 37 L. Ed. 463. In the present case a controversy exists between the public corporation desiring the property and the private owners thereof conducting the public utility concerning the compensation to be paid to such owners for the property when it is taken by the public corporation. The initiation of the proceeding before the commission necessarily raises that controversy, if it did not exist before, and presents it for decision. Its determination establishes the right and obligation of the parties, respectively, in the expected action in eminent domain, the right of the owners to receive and the obligation of the public corporation to pay the sum fixed as compensation for the property if it is taken. It comprises an essential part of the action; it conclusively determines one of the facts to be determined therein for the purposes of that action. It is, to that extent, as much an exercise of judicial power, as above defined, as is the judgment of the court in the action to condemn the property.

[4] The functions of the commission being judicial, the Supreme Court would have had jurisdiction in certiorari to review its final decision in the proceedings without the express grant of such jurisdiction in the act itself. Const. art. 6, § 4; Code Civ. Proc. § 1068. The jurisdiction derived from the Constitution and from the Code of Civil Procedure, under the well-established rules, could extend only to the inquiry whether the com-

mission had exceeded its authority. Section 47, however, refers to section 67 of the Public Utilities Act.

Section 67 provides that the review thereby authorized shall not extend further than to determine whether the commission "has regularly pursued its authority," but adds that the review may include the question whether the decision of the commission "violates any right of the petitioner under the Constitutions" of California and the United States, respectively. In view of our conclusions on the merits presently to be considered, we find it unnecessary to determine or discuss the question whether this additional clause enlarges our powers in certiorari, upon which the court has hitherto been equally divided. See *Pacific T. & T. Co. v. Eshleman*, 166 Cal. 651 and 692, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, for the opposing views on this point. There is also a provision excluding questions of fact from review. Notwithstanding this, however, the law remains that, when a finding or conclusion of fact is based on uncontradicted evidence, its accuracy usually becomes a mere question of law, and in that event the question may be reviewed if it goes to the jurisdiction. With this preliminary statement we proceed to consider the objections to the proceedings.

[5] At the hearing objection was made to the action of the commission in calling W. N. Wells to testify as a witness on the subject of the values of the several properties. He was sworn and testified at the instance and request of the commission and against the will of the Marin Water & Power Company. It is now conceded that judicial tribunals have power to call and examine witnesses in furtherance of justice and against the will of either party. No authorities are cited in the briefs, but we find that the following sanction the practice: 1 *Roscoe, Cr. Ev.* 139 (8th Ed.) 210; *Selph v. State*, 22 Fla. 543; *Clark v. Commonwealth*, 90 Va. 368, 18 S. E. 440; *Hill v. Commonwealth*, 88 Va. 639, 14 S. E. 330, 29 Am. St. Rep. 744; *O'Connor v. National Ice Co.*, 4 N. Y. Supp. 537; *Hurd v. Lill*, 26 Ill. 497. From these it is clear that the calling of Wells and his examination as a witness was within the discretion of the commission.

[6] It is also contended that Wells was an incompetent witness on the subject, and hence that the commission went beyond its power in considering his testimony. We think he was shown to be competent. He was regularly examined and cross-examined at great length as to his knowledge of the subject. His testimony showed that for the purpose of forming an opinion as to its value he had viewed and examined all the property with care and had made exhaustive inquiries regarding the previous sales of property of similar character in the vicinity and of the different uses to which the properties in question were adapted. He appears to have fol-

lowed substantially the same course in arriving at his opinions that was adopted for that purpose by the expert value witnesses called by the petitioner. See *Spring V. W. W. v. Drinkhouse*, 92 Cal. 535, 28 Pac. 681; *Vallejo, etc., Co. v. Reed Orchard Co.*, 169 Cal. 574, 147 Pac. 252. In our opinion, the commission did not exceed its authority in considering the testimony of such a witness together with the other evidence produced before it bearing on the question of use and value. In view of these conclusions, we find it unnecessary to consider how far the commission is bound by the rules of evidence and procedure in courts of law. It did not, in these particulars, transgress those rules.

[7] The principal objection to the testimony of Wells relates to his method of valuing the lands belonging to the petitioner from which water could be obtained. These lands are mountainous, and so situated that the annual rainfall thereon may be conveniently collected, stored on the land, and thence distributed and sold to consumers. There was evidence tending to show the average annual rainfall upon these lands, the quantity thereof that could be annually collected and stored, and the selling price paid by the consumers. Wells did not give this advantage of water storage a separate value, but merely added it to the land value and reported it all as one item. The commission appears to have believed that separate values could not be given to the land and water respectively, basing its opinion upon the proposition that water which falls upon the ground as rain and runs off into the reservoir as surface water does not constitute a legal water right. We think this is no reason for saying that the two elements of value could not be separately estimated, or that there is any distinction in this respect between the added value to the land by reason of the water privilege from this cause and the added value which land may have by reason of a riparian right or a right appurtenant in a stream. Whether it is properly a water right or not is immaterial. The fact that water can annually be obtained therefrom for sale is the material element for consideration. Both the commission and the witness, however, did consider this element and gave the land additional value on that account. There can be no doubt that this element of the value of land is as much the property of the landowner as any other element which gives it value. So far as the commission appears to have held that it was not a property right, it was in error, but, inasmuch as it did give the additional value to the land, it is immaterial whether the commission, in allowing this element of value, styled it a technical water right, or a mere advantage of water storage giving additional value to the land. The refusal to give it a separate value would not deprive the commission of jurisdiction or make its award invalid.

[8] The company claims that by means of additional dams the amount of water stored on its land annually could be greatly increased, that these possibilities of future advantage largely increased the value of the property, and that the commission did not allow anything therefor. We do not think this claim is sustained by the record. The commission refused to make a separate statement of the value of these future possibilities, but it appears that it did allow a value for the potential storage of storm water on the land by giving it a present additional value because of that fact. Although the expert witnesses for the petitioner adopted a different method, they practically arrived at the same result. They estimated the run-off and storage and probable expense of storage, distribution, and sale, the probable selling price, capitalized the net profit, and added the present value of the result to the value of the land as estimated apart from its value for water. While the values were larger than those given by the commission, the principle is the same in either case if the valuation is honestly made.

[9] It appears from the record that the witnesses for the municipal water district fixed certain values for the property in controversy, that the witnesses for the power company also fixed certain somewhat different values therefor, and that the value as fixed by the commission falls below that fixed by the witnesses on either side, and corresponds more nearly to the values fixed by the witness Wells. This, they say, is a decision outside of the issues, upon evidence which neither party offered, and is upon a controversy which neither party submitted to the commission for its consideration. We do not so understand the law. Wells testified in the presence of the parties, and was duly examined and cross-examined by them. As heretofore stated, this constituted legal evidence upon the issue as to the value of the property in controversy. The commission was not bound to limit itself to the testimony of the witnesses offered by the respective parties, but had the power to take the other evidence produced at the hearing. We need not inquire concerning the additional point that the commission claimed that, under section 70 aforesaid, it was "empowered to resort to any other source of information available," including evidence not introduced at the hearing. Some remarks in its opinion indicate that the commission may believe that it has that power. But it did not exercise it in this proceeding. It considered only the evidence actually produced.

It is not to be supposed, from what has been said, that the objections we have considered would, if well taken, operate to avoid the award of compensation. It may be that they are matters not going to the jurisdiction, and hence not reviewable in certiorari. We have preferred to consider them

on their merits. As we find them not well taken, the question whether or not they would invalidate the proceeding becomes immaterial.

[10] Further objection is made on the ground that the commission did not find separately the value of each separate parcel of the property of the water company. Section 47 requires the commission to "proceed to fix and determine the just compensation * * * in the manner and in accordance with the provisions of section 70." Section 70 provides that it "shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have any bearing on the value of the property." Evidence was given showing separately the value of the respective parcels. Section 47 also provides that after the filing of the petition, and before payment of the compensation fixed, the commission may be required to find the amount of an alleged unreasonable depreciation in value, to be deducted from the compensation allowed; also that it may be called on to fix the amount the owner may have had to expend to preserve the property after the final judgment of condemnation and before payment; to the end that the owner may be reimbursed such amount. In fixing these amounts it might be found convenient to have the parcels separately valued. But, however, this may be, we do not think the failure to make such detailed findings causes a loss of jurisdiction or makes the proceeding void. It is admitted that the commission acquired full jurisdiction. When once it is made to appear that a court of limited jurisdiction has acquired jurisdiction of the parties and of the subject-matter, the same presumptions as to subsequent proceedings apply as with respect to courts of general jurisdiction, and subsequent irregularities do not make its judgments void. *Van Fleet on Collateral Attack*, § 806; *Long v. Burnett*, 13 Iowa, 28, 81 Am. Dec. 420. In such a case "jurisdiction cannot be lost by the erroneous exercise of the power conferred." *Brown on Jur.* § 25. Section 70 leaves it to the discretion of the commission to determine whether or not it will make detailed findings. It is not declared to be mandatory. At most, the making of a general finding is but an irregularity. If the parties have any remedy when injured by such failure, it is by mandamus, not certiorari. It does not go to the jurisdiction.

If the undisputed evidence had shown that the property had a special additional value, as, for example, that by reason of the situation and topography of a parcel of the land a quantity of water could be annually caught, stored thereon, and sold at a profit, and that the commission had refused to allow such value, as a part of the compensation fixed,

it may be conceded that this would have been a deprivation of property without due process of law, a disregard of the petitioner's right to just compensation, and therefore a violation of both the federal and state Constitutions. *Appleby v. Buffalo*, 221 U. S. 524, 31 Sup. Ct. 699, 55 L. Ed. 838; *Chicago, etc., Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Davidson v. New Orleans*, 90 U. S. 102, 24 L. Ed. 616; *Backus v. Fort St., etc., Co.*, 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; *McGovern v. New York*, 229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391. We do not find that the commission did thus refuse to allow an undisputed value, and therefore the argument founded on the above-stated proposition must fail.

With respect to the contention that the commission did not allow the value of the water in storage at the time of the award, it is sufficient to say that our attention has not been directed to any evidence of such value, nor of the quantity in storage. It is difficult to see how it could be valued, under the circumstances. It was the store for daily use, and the quantity would change from day to day. The time when the water district would take possession of the plant could not be foretold. It seems difficult to fix such compensation except by finding the value per gallon and directing a measurement at the time of the transfer of possession. But this question is not now before us, and we express no opinion regarding it.

The proceedings and determination of the Railroad Commission are affirmed.

We concur: SLOSS, J.; HENSHAW, J.; MELVIN, J.; LAWLOR, J.

The CHIEF JUSTICE took no part in the consideration of this cause, and does not participate in the decision.

(29 Cal. A. 158)

BANK OF BAKERSFIELD v. CONNER
et al. (Civ. 1769.)

(District Court of Appeal, Second District, California. Dec. 13, 1915. Rehearing Denied by Supreme Court Feb. 10, 1916.)

1. PAYMENT ~~6~~22—CHECK—PERFORMANCE OF CONTRACT—"CERTIFICATE OF STOCK."

A contract for the purchase of shares of stock in a bank which acted as the seller's agent in the transaction provided that upon payment to such agent payment would be deemed sufficiently made, and when payment was due the buyer delivered to the bank, payable to it or bearer, a certified check for the price, which on the same day was delivered by the bank without indorsement to the seller. *Held*, in an action on the check, that it was given in payment, and not in tender of payment, and that the maker was liable thereon because he became the owner of the shares upon their identification and payment, and was entitled to compel delivery of a certificate therefor; a "certificate

of stock" not being the stock itself, but merely evidence of its title.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 87, 88; Dec. Dig. ¶22.]

For other definitions, see *Words and Phrases*, First and Second Series, *Certificate of Stock*.]

2. EVIDENCE ¶459 — PARTIES TO CHECK — PAROL EVIDENCE.

Where, under a contract of sale of stock, a bank is agent for the seller to receive payment, and a certified check for the price, payable to it or bearer, is delivered to it by the buyer and received by it as such payment, parol evidence is inadmissible in an action on the check to show that the word "bearer" was left therein by mistake and that the check was intended for the bank itself and not for the seller.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. ¶459.]

3. CORPORATIONS ¶121 — TRANSFER OF SHARES—ACTIONS—EVIDENCE.

In such a case, evidence of the bank's delivery of the check to the seller is admissible.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 504, 505; Dec. Dig. ¶121.]

4. APPEAL AND ERROR ¶1050—PREJUDICIAL ERROR.

The admission of such evidence, if erroneous for immateriality, is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. ¶1050.]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Bank of Bakersfield against Sarah L. Conner, as executrix of the last will of C. L. Conner, deceased, and G. J. Planz, to determine their rights to a sum of money deposited with it, and for which the executrix held Planz's certified check. Defendants were required to interplead, and, from a judgment for the executrix and an order denying Planz's motion for a new trial, he appeals. Affirmed.

E. L. Foster, of Bakersfield, for appellant. C. C. Cowgill, of Sonoma, and Peter A. Breen, of San Francisco, for respondent.

CONREY, P. J. On July 21, 1910, the defendant G. J. Planz drew his check upon the Bank of Bakersfield for the sum of \$3,799.66 and caused it to be certified by that bank. The check was payable to the Kern Valley Bank or bearer. Immediately thereafter defendant Planz delivered the check to the Kern Valley Bank, and on the same day the cashier of that bank delivered the check, without indorsement, to C. L. Conner. Conner died at some time between September, 1910, and March, 1911, and the check in question came into the possession of the defendant Sarah L. Conner as executrix of his last will and testament. The plaintiff, the Bank of Bakersfield, filed its complaint herein showing that it holds and has in its possession money deposited with it by defendant Planz sufficient to pay said check; but also that the defendant Planz gave notice and instruction to the plaintiff to refuse payment of the check, and that the defendant Conner

as executrix has demanded payment thereof. The defendants were required to interplead herein for the determination of their adverse claims in the premises. A judgment having been entered in favor of the executrix, the defendant Planz has appealed therefrom and also from an order denying his motion for a new trial.

On July 21, 1908, an agreement in writing was entered into between C. L. Conner and one H. A. Blodget, whereby, in consideration of the sum of \$5 in hand paid, Conner agreed to sell and deliver to Blodget, his nominee or assigns, 50 shares of the capital stock of the Kern Valley Bank, a corporation, upon the payment of the sum of \$3,799.66 on or before July 21, 1909. It was agreed that upon payment to Conner on or before July 21, 1909, of the sum of \$281.45, the time for payment of said larger sum should thereby be extended to, and the delivery of said stock extended to, July 21, 1910. It was agreed:

"That payment shall be deemed to be sufficiently made to said C. L. Conner by payment to the Kern Valley Bank for account of C. L. Conner of either of the sums above specified. And the said fifty (50) shares of said stock of the said Kern Valley Bank shall, upon payment made as hereinbefore provided, be delivered, on demand, to the said H. A. Blodget, his nominee or assignee, together with all dividends that may be declared and paid on said shares of stock during the life of this agreement."

On July 21, 1909, Blodget paid the sum required for extending the time of final payment to July 21, 1910, and on July 19, 1910, sold, assigned, and transferred to G. J. Planz "all my right, title and interest in and to the within and foregoing contract and the capital stock of the Kern Valley Bank, viz., fifty (50) shares thereof, therein described." Thereafter Planz delivered his certified check as hereinabove stated.

[1] The court found that said check was paid to the Kern Valley Bank for the account of C. L. Conner and was accepted by that bank for the account of C. L. Conner as and in full payment of the purchase price of said 50 shares of stock. Under his specifications of insufficiency of the evidence to justify the findings, appellant claims that the evidence does not show his delivery of the check for the account of Conner or as payment on the contract, but claims that it was merely a tender of payment conditioned upon delivery of the shares of stock. In our opinion, the evidence fully justifies the finding as made. In his testimony defendant Planz himself said:

"On July 21, 1910, under the contract, * * * I gave the Kern Valley Bank \$3,799.66. I paid it with my certified check on the Bank of Bakersfield."

He further testified that on July 23, 1910, he demanded of Conner a transfer of the 50 shares of stock, and that Conner refused this demand and said that, if Planz would deliver back to the Kern Valley Bank the receipt

which that bank gave him, they would give him the money back or the check. On August 6, 1910, Planz filed a complaint in the superior court of Kern county against Conner and the Kern Valley Bank to enforce his demand for delivery to Planz of the 50 shares of stock to which he claimed to be entitled under the agreement with Blodget which had been assigned to him. In that complaint, verified under his oath, the plaintiff therein said that he had made the before-mentioned payment of \$3,799.66 to the Kern Valley Bank for the account of C. L. Conner, and that "the said Kern Valley Bank, a corporation, received the sum of money for the account of C. L. Conner and now has the said sum of money in its possession and under its control for the account of C. L. Conner." The same statement was repeated in an amended complaint. To that complaint a demurrer was filed, and it appears that the action was pending without any other proceedings having been had therein at the time of the trial of the case now before us.

[2] Defendant Planz in his answer states that the certified check was by mistake made out to bearer. At the trial he was asked to state why the word "bearer" was left on the check, or whether he intended that it should be left on the check at the time when he made it. The court sustained an objection that the question was irrelevant, incompetent, and immaterial and an attempt to vary the terms of the written instrument by parol in the absence of any appropriate pleadings for reforming the instrument. It is now urged on this appeal that this ruling was erroneous, because it prevented appellant from showing that he was paying the money to the Kern Valley Bank and to no other person, and from showing that he had intended to strike out by drawing a line through the word "bearer." We think that the ruling was correct. Under the contract the Kern Valley Bank was agent of Conner for the purpose of receiving payment of the sum specified in the check. It is not claimed that the bank was aware of any mistake in the check or informed that it did not fully express the intention of the maker. Whether made payable to the order of the Kern Valley Bank or made payable to that bank or bearer, it was equally capable of being received and used for the purposes of the transaction.

The specifications of insufficiency of the evidence, although not in the usual form and in some instances perhaps not legally sufficient, will be considered as sufficient to raise the only other important question in the case, which is whether the evidence justified the court in finding that Conner was the owner of the check, and that it is now the property of the defendant Sarah L. Conner as executrix, etc. On this phase of the case, it seems to us that appellant is relying upon propositions which are not applicable to the

case as made by the record. He refers us to authorities holding that refusal to perform a contract constitutes a rescission. Assuming that in some instances this principle would be applicable, we have here a case in which the purchaser, even though he had a right to claim a rescission, elected to continue his demand for performance of the contract and bring an action for that purpose. Therefore appellant is unable to recall the payment made by him, even if, as he contends, under the terms of the contract the obligation of the seller to deliver the goods and of the buyer to pay the price were concurrent conditions. The shares of stock were identified the price agreed upon was paid, and thereby Planz became the real owner of the shares. He was in a position which entitled him to compel the delivery to him of a certificate of stock. Certificates of corporation stock, it should be remembered, are not the shares, but are merely evidence of title.

[3, 4] Exception is taken to the court's ruling in allowing the cashier of the Kern Valley Bank to testify that on the same day when the certified check was received at that bank he delivered it to C. L. Conner. If this evidence was immaterial, the only reason would be that payment had been completed when the check came into the hands of the bank as Conner's agent. We see no error in the ruling, and at all events it would be without prejudice to any right of appellant.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 131)

KEITH v. HAMMEL, Sheriff. (Civ. 1578.)
(District Court of Appeal, Second District, California. Dec. 7, 1915.)

1. MANDAMUS \S 154—SUFFICIENCY OF PETITION—FEES OF COUNTY OFFICER.

A taxpayer's petition against the sheriff of a county for a writ of mandamus to compel the sheriff's payment into the county treasury of all fees collected by him as sheriff during three or four months, notwithstanding its insufficiency as to mileage, etc., claimed by the sheriff under the county charter and Pol. Code, \S 4290, yet in view of other fees which the sheriff must collect and pay into the county treasury under sections 4300b and 4300c and its allegation that the sheriff had collected and appropriated to his own use \$3,000 in fees belonging to the county, was good as against a general demurrer.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 296-316; Dec. Dig. \S 154.]

2. SHERIFFS AND CONSTABLES \S 71 — ACTION AGAINST—PARTY PLAINTIFF—TAXPAYER—STATUTE.

Code Civ. Proc. \S 526a, permits a taxpayer's action against public officers to restrain certain described illegal expenditures of county funds, not to affect any right of action in favor of a county or any public officer; Pol. Code, \S 4041, subd. 16, gives boards of supervisors jurisdiction to direct the prosecution of all suits in which the county is a party; Los Angeles County Charter (St. 1913, p. 1490), \S 21, declares that the county council shall have exclusive

charge of all civil actions in which the county or its officers are concerned as parties, and section 10 gives the board of supervisors the jurisdiction granted by the laws of the state. *Held*, that any right of action against the sheriff to compel him to pay into the county treasury fees collected by him during a certain time was a right of action in the county to be prosecuted by it as a party plaintiff, and that a taxpayer could not maintain an action or proceeding without showing that the county officers controlling matters of county litigation had refused to commence or prosecute such action.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 98; Dec. Dig. § 71.]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Mandamus by D. E. Keith against W. A. Hammel, Sheriff of Los Angeles County. Judgment for defendant, and petitioner appeals. Affirmed.

William H. Fuller, of Los Angeles, for appellant. Leon F. Moss, of Los Angeles, for respondent.

CONREY, P. J. Mandamus. The petitioner, a resident property owner and taxpayer in the county of Los Angeles, filed his petition in the superior court against the sheriff of Los Angeles county for a writ of mandamus to compel the respondent to pay into the county treasury all fees collected by him as such sheriff between the 2d day of June, 1913, and the 31st day of October, 1913, for the performance of official duties pertaining to that office. A demurrer to the petition for want of facts sufficient to constitute any ground for the relief demanded was sustained, and judgment was entered in favor of respondent. From that judgment the petitioner appeals.

Two principal objections among those relied upon by the respondent will be considered. These are: First, upon the merits, that the facts alleged do not show that the sheriff has received and retained any fees which he is under obligation to pay over to the county. Second, respondent claims that petitioner has not stated facts sufficient to establish his right to maintain the action, even though the demanded right exists in favor of the county.

[1] The petition is so framed as to indicate that the pleader was intending to enforce the payment to the county of mileage and other compensation claimed by the sheriff under the charter of Los Angeles county and section 4290 of the Political Code. The claim of the sheriff that he was entitled to retain such moneys for his own use was determined in his favor on appeal to this court in *Los Angeles County v. Hammel*, 26 Cal. App. 580, 147 Pac. 983. Appellant now concedes the points which were involved in that appeal, but he contends that since there are other fees provided by law which the sheriff of Los Angeles county must collect and pay into the county treasury (Pol. Code, §§ 4300b, 4300c), the petition herein is nevertheless

broad enough to include those fees. Treating many of his allegations as surplusage irrelevant to his real case, he now says that the case includes and was intended to include all moneys collected by the sheriff in his official capacity. The petition states that the respondent as sheriff, between the dates specified, "collected and received and appropriated to his own use, the sum of \$3,000 as fees belonging to Los Angeles county for the performance of his services as sheriff of Los Angeles county during said time." This appears to be sufficient, and the allegation is good as against a general demurrer.

[2] The law concerning the right of a taxpayer to maintain actions and proceedings to enforce public rights and protect public interests, has been a subject of discussion in many decisions, but is also to some extent affected by statutory declaration. Section 526a, Code of Civil Procedure, provides for the maintenance of a taxpayer's action against public officers to obtain a judgment restraining and preventing certain described illegal expenditures, etc., of county or municipal funds. It also says:

"This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer."

The charter of Los Angeles county, in section 21 thereof (Stats. 1913, p. 1490), declares that:

"The county counsel * * * shall have exclusive charge and control of all civil actions and proceedings in which the county, or any officer thereof, is concerned or is a party."

Section 10 of the charter states that the board of supervisors shall have all the jurisdiction and power "which are now or which may hereafter be granted by the Constitution and laws of the state of California, or by this charter." Under section 4041 of the Political Code, subdivision 16, boards of supervisors are given jurisdiction and power to direct and control the prosecution and defense of all suits to which the county is a party. The general effect of these provisions of charter and statute seems to be, not only that the conduct of actions in which the county is a party is committed to the charge and control of public officers, but it further appears to be the intention (in harmony with long-established principles) that the county shall be a party to actions and proceedings wherein the county "is concerned." From the many decisions of the courts of this and other states dealing with this subject, we derive the principle that in the conduct of the ordinary business of a county or city, where the care and protection of the rights of the corporation have been committed to public officers, the primary right goes with the duty belonging to those officers to control the ordinary business of the corporation without the interference of private citizens, even though they be taxpayers. The exceptions which have been permitted usually arise in those situations where an officer is threatening to

act in excess of his authority, or refuses to perform an official duty, and there is no other officer or official body empowered to act on behalf of the public or of the corporation, to enforce their rights in the matter, or where it appears that the officers empowered to act refuse to perform their duty in that respect. Instances which illustrate the subject may be given, such as *Hyatt v. Allen*, 54 Cal. 353, mandamus by a taxpayer within an assessment district to compel county assessor to assess property subject to assessment; *Eby v. School Trustees*, 87 Cal. 166, 25 Pac. 240, mandamus to compel board of school trustees to comply with instructions of electors as to location of schoolhouse site; *Frederick v. City of San Luis Obispo*, 118 Cal. 391, 50 Pac. 661, mandamus to require board of trustees to call an election on question of disincorporation of the city. All of these cases had to do with extraordinary situations, and not with the conduct of the ordinary business of the corporation. In *Maxwell v. Board of Supervisors*, 53 Cal. 359, petitioner was permitted to maintain a proceeding for writ of review to the board of supervisors to review its action in entering into a contract for printing. This related to a matter within the ordinary scope of the business of the corporation, but the recalcitrant body was the controlling board of officers of the county, and the taxpayer's right in such a case is one arising out of the necessity of the situation and is recognized for that reason. The principle which should control is very fully stated in *Dunn v. Long Beach Land & Water Co.*, 114 Cal. 605, 46 Pac. 607, wherein a resident of and property owner and taxpayer in the city of Long Beach sought to have canceled a certain judgment affecting the title to a street and to quiet the title of the city to the street. It was held, not only that the complaint did not state facts sufficient to constitute a cause of action, but also that the facts were not sufficient to justify the plaintiff in bringing the action. The court said:

"The rule is that the municipality, through its governing body, has control of the property and general supervision over the ordinary business of the corporation; and there would be utter confusion in such matters if every citizen and taxpayer had the general right to control the judgment of such body or usurp the office. Where the thing in question is within the discretion of such body to do or not to do, the general rule is that then neither by mandamus, quo warranto, or other judicial proceeding, can either the state or a private citizen question the action or nonaction of such body; nor in such cases can a private citizen rightfully undertake to do that which he thinks such body ought to do. It is only where performance of the thing requested is enjoined as a duty upon said governing body that such performance can be compelled, or that a private citizen can step into the place of such body and himself perform it. If, therefore, in the case at bar it was not a duty enjoined upon the board of trustees of the city of Long Beach to bring an action similar to this present action brought by appellant, then we need not discuss the general subject of the right of

private citizens to maintain actions concerning municipal affairs—which right is founded to a great extent upon necessity, and the want of any other proper party plaintiff. And the proposition that it was a duty enjoined upon said trustees to bring such an action cannot be maintained."

Then, after further discussion and decision that there was no cause of action stated, the opinion closes as follows:

"It cannot be rightfully said, * * * that the trustees now in office are not exercising a wise discretion by refusing, at the present time, to commence unnecessary and hazardous litigation."

In the case at bar we are not called upon to consider whether the officers of Los Angeles county are exercising a wise discretion by refusing to commence an action against the sheriff to recover fees unlawfully retained by him, since there is no intimation that they have refused or neglected anything in that respect. The case to which we have referred (*County of Los Angeles v. Hammel*) shows that the officers of the county were diligent in seeking to recover from this same sheriff another class of funds to which they claimed that the county was legally entitled. If there is any further right of action against the sheriff, it is a right of action of the county which should be prosecuted by the county as a party plaintiff. In order to justify the petitioner in maintaining an action or proceeding, we think that it would be necessary for him to show that the officers who control those matters of litigation in which the county of Los Angeles is concerned have refused to commence or prosecute proceedings for the protection of the county's interests in this matter. In *Burr v. Board of Supervisors of Sacramento County*, 96 Cal. 210, 31 Pac. 38, it was held that where by statute it is made the duty of the district attorney to institute suit in the name of the county for the recovery of money paid out without authority of law, the statute affords a plain, speedy, and adequate remedy available to taxpayers by complaint to the district attorney, and that "to say the least," the interest of a taxpayer does not entitle him to bring suit in his own name until the district attorney has refused to perform the duty so enjoined on him.

The judgment is affirmed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 126)

NOLTE v. NOLTE. (Civ. 1539.)

(District Court of Appeal, Second District, California. Dec. 7, 1915.)

1. APPEAL AND ERROR §713—CONSIDERATION OF AFFIDAVIT—STATUTE.

Under Code Civ. Proc. § 951, providing that on appeal from an order the appellant must furnish the court with a copy of the notice of appeal and of the papers used on the hearing below, where an affidavit came into the transcript under certificate describing it as part of the judgment roll, which it was not, nor a paper used in connection with the order from

which the appeal was taken, the court could not take cognizance of its contents.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2379, 2463, 2645, 2956, 2957; Dec. Dig. § 718.]

2. APPEAL AND ERROR § 935 — PRESUMPTIONS FAVORING COURT BELOW.

On appeal from an order vacating a final decree from which no appeal was taken, it will be assumed that the trial court had before it facts sufficient to authorize the vacating order to the full extent that the order could legally be made under any circumstances.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3783-3786; Dec. Dig. § 935.]

3. JUDGMENT § 273 — ENTRY NUNC PRO TUNC.

Where a judgment has been rendered, and its entry omitted, it may be subsequently entered, and, if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.]

4. DIVORCE § 170—ENTRY OF FINAL DECREE—STATUTES.

Civ. Code, § 131, provides that in divorce actions, if the court determines that divorce should be granted, an interlocutory judgment must be entered declaring that the party for whom the court decides is entitled to divorce, and from such interlocutory judgment an appeal may be taken within six months after its entry as if it were final. Section 132 provides that, when one year has expired after the entry, the court may enter final judgment, but that, if any appeal is taken from the interlocutory judgment, or motion for new trial made, final judgment shall not be entered until such motion or appeal has been disposed of, and not then if the motion has been granted or judgment reversed. *Held* that, where a divorce case was submitted for decision June 28, 1909, and an interlocutory decree signed a year later, with an order "that the foregoing decree be entered nunc pro tunc as of June 28, 1909," which was done July 5, 1910, a final decree signed July 1, 1910, and entered July 6th, purporting to be based upon the interlocutory decree, was properly vacated, as entered within a week after actual entry of the interlocutory decree, while the statute prohibits entry until expiration of a year.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 552, 553; Dec. Dig. § 170.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by A. Nolte against Barbara Nolte. From an order vacating a final decree for plaintiff, he appeals. Order affirmed.

H. H. Appel and E. J. Dennison, both of Los Angeles, for appellant. Charles W. Hoag, of Los Angeles, for respondent.

CONREY, P. J. Appeal by the plaintiff from an order vacating a final decree of divorce. On the 28th day of June, 1909, the case was tried and submitted to the court for decision. On June 28, 1910, an interlocutory decree was signed, together with an order "that the foregoing decree be entered nunc pro tunc as of June 28, 1909." This decree was entered July 5, 1910, as of June 28, 1909. On July 1, 1910, a final decree of divorce, purporting to be based upon such interlocutory decree entered nunc pro tunc as aforesaid, was signed

by the judge. This decree was entered July 6, 1910. On the 12th day of November, 1912, the court, upon its own motion, entered an order setting aside and vacating said final decree "because it was entered within a week after the actual entry of interlocutory decree of divorce." It is from this last-mentioned order that the appeal is taken.

[1, 2] We find in the transcript an affidavit made by the plaintiff's attorney and sworn to on July 1, 1910, which the appellant claims contains a statement of the facts which led the court to make its order for nunc pro tunc entry of the interlocutory decree. This affidavit comes into the transcript under a certificate describing it as part of the judgment roll. As it is not part of the judgment roll, and does not appear to have been one of the papers used in connection with the order from which the appeal is taken, we find no legal ground for taking cognizance of the contents of such affidavit. Code Civ. Proc. § 951. But this defect is immaterial, since facts sufficient to satisfy the court may have existed and may have been shown to the court; and, since no appeal appears to have been taken from the judgment, it will be assumed that the court had before it facts sufficient to authorize such order to the full extent that the order could legally be made under any circumstances. Therefore if, as counsel claims, an interlocutory decree in like form as the one that was entered in 1910 had been signed on June 28, 1909, by the judge who tried the case, and had been delivered to the clerk for filing, and if without filing or entry of such decree the same was lost by the clerk, these would be circumstances strongly appealing to the court in the exercise of its judgment favorably to the request of the plaintiff that the decree be entered as of the date of trial.

[3] It is well established that, where a judgment has been rendered and its entry omitted, it may be subsequently entered, and, if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made. *In re Skerrett*, 80 Cal. 62, 22 Pac. 85; *Fox v. Hale*, 108 Cal. 480, 41 Pac. 328; *Marshall v. Taylor*, 97 Cal. 426, 32 Pac. 615; and many other cases.

[4] The order setting aside the final decree is not necessarily based upon lack of authority of the court to enter its interlocutory decree nunc pro tunc as of the date when it was rendered, but is based upon the ground that the court has no power to enter a final decree until the expiration of one year after the actual entry of the interlocutory decree.

"When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, * * * but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been grant-

ed or judgment reversed. * * * Civ. Code, § 132.

During the period of time covered by the proceedings under review herein it was provided in section 131 of the Civil Code that from an interlocutory judgment in a divorce action "an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final." In *Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083, it was held that the time allowed for an appeal commences to run from the time of the actual entry of the judgment. The court said:

"It hardly requires argument or authority to establish the proposition that a court cannot by antedating an order, or the entry of it, cut off the right of a party to move for a new trial, to move to set the judgment aside, or to appeal. These rights, given by the Code of Civil Procedure, cannot be lost to a party by such action, whether the effect was designed or not. The test as to whether the period in which the party must act in order to get relief from an order or judgment against him must be whether he could have obtained the desired relief (on a proper showing) before the nunc pro tunc order was made."

In *Baum v. Roper*, 1 Cal. App. 435, 82 Pac. 390, it was said that, while it is true that an appeal will not lie from a judgment until it has been entered, the judgment in either respects gets its force and vitality from its rendition, and not from its entry; that the rendition of the judgment is the judicial act of the court, and its entry is the ministerial act of the clerk. So it was held in *Los Angeles County Bank v. Raynor*, 61 Cal. 145, that it was not necessary that the judgment should have been entered when the execution was issued.

"The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (Code Civ. Proc. § 681), or in which the judgment may be enforced (Code Civ. Proc. § 685), and the other for the purpose of creating a lien by the judgment upon the real property of the debtor (Code Civ. Proc. § 671)."

The effect of these decisions is that, while the power of a court over its records, in order to make them speak the truth, is fully recognized, and for that purpose errors or omissions in the entry of judgments may in some instances be corrected by entering them as of the date when rendered, the full effect of the nunc pro tunc order is limited so as to prevent results not contemplated by the law. There seems to be no reason why such limitation should not apply to the established time when the right to a final judgment of divorce will accrue, in the same manner that it applies to the time when an appeal may be taken, or to any other of the instances above noted. We do not doubt that these were the considerations which led the Supreme Court to hold, in *Grannis v. Superior Court*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23, that:

The provisions of sections 131 and 132 of the Civil Code, "interpreted in the light of the previous legislation and decisions and the purpose to be accomplished by the law, are clearly to be understood as a limitation on the power of the court in the matter, and as intended to forbid the entry of a final judgment until after the prescribed period. The law can only be made effectual for the accomplishment of its object by holding that any final judgment purporting to grant the divorce is absolutely void if thus prematurely entered."

While in that case the court was not considering the power to make a nunc pro tunc entry of a decree, or the limitations on the effect of such entry, we are satisfied that the interpretation there placed upon the Code provisions necessarily leads to the conclusion that a final decree of divorce could not be entered until one year after the actual entry of the interlocutory decree. The language of section 131 contemplates that a final decree shall not be entered until after expiration of the time in which an appeal may be taken from the interlocutory decree, nor during the pendency of such appeal if taken. As we have seen, the entry of the interlocutory decree nunc pro tunc as of an earlier date does not affect the time prescribed within which an appeal may be taken. The result is that in this case, as in the *Grannis* case:

"The judgment in question being wholly void as a final judgment granting an immediate divorce, it was within the power of the superior court at any time, on motion of either party, or of its own motion, to declare it null in so far as it purported to be of such effect."

That we have correctly understood the intended effect of the Supreme Court's decision in the *Grannis* Case, further appears from the fact that on the same date, in *Claudius v. Melvin*, 146 Cal. 257, 79 Pac. 897, the same court said:

"We think the defendant is correct in the position that the year which must elapse before final judgment can be given begins to run from the time of the actual entry of the interlocutory judgment, and not from any theoretical nunc pro tunc date of entry."

The order is affirmed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 169)

PEOPLE v. DYE. (Cr. 318.)

(District Court of Appeal, Third District, California. Dec. 14, 1915. Rehearing Denied by Supreme Court Jan. 10, 1916.)

1. EMBEZZLEMENT § 4 — LARCENY § 15 — WHAT CONSTITUTES.

"Embezzlement" occurs when the possession of property has been acquired lawfully and bona fide, and is afterwards fraudulently appropriated, the gist of the offense being the breach of trust; while, if a bailee acquires property with intent to steal it at the time of the acquisition, he is guilty of "larceny."

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 1; Dec. Dig. § 4; *Larceny*, Cent. Dig. §§ 39-42; Dec. Dig. § 15.

For other definitions, see *Words and Phrases*, First and Second Series, *Embezzlement*; *Larceny*.]

2. LARCENY \Leftrightarrow 15—POSSESSION—WHAT CONSTITUTES.

Where one desiring to take a hot bath similar to a Turkish bath hung his clothing on a nail or hook in the room where he undressed, and the proprietor of the bath did not at that time take charge of the clothing or the money therein, no relation of bailor and bailee was created, so the proprietor's subsequent appropriation of the money constituted larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39-42; Dec. Dig. \Leftrightarrow 15.]

3. LARCENY \Leftrightarrow 15—POSSESSION—WHAT CONSTITUTES.

In such case the fact that the bather trusted the proprietor did not render him a bailee, and the proprietor's subsequent appropriation of the property was larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 39-42; Dec. Dig. \Leftrightarrow 15.]

4. CRIMINAL LAW \Leftrightarrow 406—EVIDENCE—ADMISSIONS.

A statement by accused in the district attorney's office concerning the charge that he had robbed one who took a bath in his establishment, consisting of a denial of the charge, is admissible without showing that it was voluntarily made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. \Leftrightarrow 406.]

5. CRIMINAL LAW \Leftrightarrow 518—EVIDENCE—CONFESSIONS.

Where before accused made any statement he was informed that he did not have to make any statement, any statement that he made concerning the charge is admissible in evidence against him, notwithstanding a confession, to be admissible, must not have been extracted by any sort of threats or violence nor obtained by promises.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1157-1162; Dec. Dig. \Leftrightarrow 518.]

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

G. B. Dye was convicted of grand larceny, and he appeals. Affirmed.

Ralph W. Smith, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was, jointly with one L. S. Purdy, charged with the crime of grand larceny, and upon his trial was convicted, and by the judgment of the court sentenced to six years' imprisonment in the state prison at Folsom. Defendant appealed from the judgment and from the order denying his motion for a new trial. The charge was that defendant, on the — day of January, 1915, did "willfully, unlawfully, and feloniously steal, take, and carry away certain personal property, to wit, one \$100 bill of currency, one \$20 bill of currency, and three \$10 bills of currency, * * * being then and there of the personal property of one S. V. Halstead, and not the property of said defendant, contrary," etc.

It is earnestly contended that, if any crime was committed, it was embezzlement, and not larceny; that defendant's motion that the court instruct the jury at the close of plaintiff's evidence to acquit defendant should

have been granted because of a fatal variance between the evidence and the charge in the information. To pass upon the merit of this contention requires an examination of what occurred after Halstead went to defendant's place of business.

It appeared from the testimony of the prosecuting witness, Halstead, that he came to Sacramento from San Francisco on Sunday, January 3, 1915, and stopped at the Western Hotel on his way to Nevada City, where he resided and pursued the profession of mining engineer:

He "was suffering from a severe cold and a congestion of the breast." Monday morning, January 4th, he met a stranger at the hotel of whom he inquired whether "he knew if there was a system of Turkish baths, a good system of Turkish baths, in the city. He said, 'Yes.' He says, 'I know of something that is better than the ordinary Turkish bath.' He then spoke of the Hygienic Institute at 327½ K street, or 527½. And he said, 'I have a pamphlet in my pocket describing it,' and he handed it to me, and I was impressed with it, and I says, 'I believe I will go there now.' He says, 'It is very near here, on the same street,' and I immediately went over; I went to this place, called at the office, and Dr. Dye was in."

This was in the forenoon. Halstead described his condition and was examined by defendant. "He took some instruments and sounded me, and he says, 'Your chest is badly congested.'" Halstead told him he was anxious to get to his home in Nevada City and wanted to know if he could get away that night, but was told by defendant: "I wouldn't dare let you out before to-morrow night; I can get you away to-morrow night." Halstead asked what it would cost him and was told that the fee would be \$10, and if he would put it up he would give him the treatment at once. Halstead testified:

"I had in my inside vest pocket \$140 in bills. I had a \$5 gold piece in my left outside vest pocket, and I had some \$5 or \$6 in silver in my pants pocket. One bill was a \$100 bill, United States currency bill, and two \$20 bills. I pulled out one \$20 bill and handed it to him. He says: 'I will have to go down and get this changed. I will be right up.' A few minutes after he had gone, Mr. Purdy came into the room, and he says: 'You are Mr. Halstead?' I says, 'Yes.' 'Well, Mr. Halstead, we are going to give you a treatment in the bake oven.' Dr. Dye had spoken about what the process was before. He says, 'Just come in this room and undress,' and I did so, and, while undressing, Dr. Dye came in. I took off everything, and either Dr. Dye or Dr. Purdy took my clothes and hung them up. Mr. Jones: Hung them up where? A. On a peg or a nail or a hook in the room where I undressed. Q. They were both present at that time? A. They were both present at that time; yes, sir. Q. Now, to go back a minute. When you took out your money and gave the \$20 bill to Dr. Dye, from where did you take that \$20 bill? A. From my inside vest pocket. Q. Did you take any other money out—any other bills—at that time? A. No. Q. Do you know of your own knowledge whether he saw the other bills in your pocket at that time? A. Not up to the time that I had taken off my clothes. I don't remember whether he looked into my clothes to see what was in there. I told him what I had—that I had— Q. (interrupting). You told Dr. Dye? A. Yes. Q.

What did you tell him you had? A. I told him that I had \$150—that was including the \$20 that he had taken down to get changed—and he says, 'That will be all right,' he says, 'It is here in your clothes,' he says, 'Everything will be all right, Mr. Halstead.' Q. Go ahead. A. After I took the bath, or while lying in this bath, he brought some kind of liquid—I don't know what it was—that I took through a glass tube. * * * I took it through a glass tube while lying on my back. And after I got out of the bath I was feeling very weak. He assisted me into a back room of his office and put me to bed. He went out of the room, after covering me up, and came in with some liquid in a glass, and I am not sure whether it was a tablet or a capsule that he had, and he said: 'Take this.' I asked him—I remember asking him—if that was an opiate. He said: 'No.' He says: 'It is a purgative.' He says: 'I want to bring you around just as quickly as I can.' Very soon after that I went off into a sleep or a stupor. I don't remember just when I awakened. When I did, I was suffering great pain. And he brought in something else in a glass and told me to take that. Q. When you gave him the \$20 bill, did he give you any change? A. No. Q. What did he say about changing it, if anything? A. He never referred to having changed it at all. Q. Well, did he leave the room to go out to change it—anything of that kind? A. Yes; when I gave him the \$20 bill, he went out of the room immediately. He said: 'I will go and get it changed and be right back.' Q. When he came back, was anything said about the change? A. No. Q. When you took your clothes off, they were hung up there in the closet? A. Yes, sir; not in a closet; in the room in which I undressed. Q. Did you authorize him, Purdy, or anybody else, to take the money out of your clothes and take care of it, or anything of that kind? A. No, sir. Q. Did you authorize anybody, Purdy or Dye, to take charge of your money in any way? A. Not at all. Q. You just took your clothes off with the money in and left it there? A. Yes, sir. Q. Now, what else occurred that night? A. Well, I don't remember how often he came into the room, or how often he gave me something from a glass. Once or twice I know, having rapped or called, he came in and I asked him for water—some water; I was very thirsty; and I think once he brought me in some water; and I know that the second or third time he gave me some sort of medicine from a glass. Once it was a dark color, and another time it was apparently of a clear color. Q. Did he give you any liquor? A. I don't remember whether he gave me any liquor that night or not. I think it was the next day that I was suffering, and I asked him what that was, whether it was brandy or whisky, and he says: 'It is a stimulant.' I believe, as I remember, that he said that it was brandy and peppermint. Whether there was anything else in it or not, I don't know. He said: 'I want you to take what I give you.' He says, 'I want to bring you around as quickly as I can.' Q. Well, how were you the next day? A. Well, the next night I was feeling worse than I did the night before. Q. How long were you kept there? A. From Monday morning until Friday, the following Friday night, before I got out. * * * Q. Now, when you were put to bed, what clothes did you have? A. My undershirt. Q. Were you given your clothes afterwards? A. Not until the following Wednesday or Thursday. I had asked often if he wouldn't bring my clothes in. Mr. Smith: Your honor, do I understand that you ruled that all this testimony is admissible to prove larceny? The Court: I just ruled on one question that you objected to. Mr. Smith: I object to this character of examination. It is not any proof of larceny in any way; it is irrelevant, immaterial, and incompetent so far as the issue in this case is concerned. I ask that it be stricken out, and that the prosecution be instructed not to proceed

further along this line. The Court: The objection is overruled. Mr. Jones: The acts that I expect to prove will show larceny. The Court: I have overruled the objection. Mr. Jones: Go ahead, Mr. Halstead. State what you said to Mr. Dye about your clothes. A. I asked him to bring my clothes in, that I had occasion to get up out of the bed, and that every time I would do so I took a chill. I asked him the first night if he wouldn't bring my clothes into the room. I don't remember whether he said he would or not, but he did not do so; and almost every time he would come in I would ask him to bring in my clothes. I think it was either a Wednesday or a Thursday that he just brought my pants in—no other clothes. I asked him then for the rest of my clothes, and he said that I couldn't dress anyway, and he didn't want me to go out in the condition that I was in; that I must not leave my room. It was on a Friday—rather it was on a Thursday—that I began to get suspicious that something was wrong, because he had refused to bring my clothes in to me, and I told him on a Friday, I says: 'Doctor, I want you to bring my clothes in. I am going to dress. There is no use of my staying here. I will die in here. I am going to get out of here.' And he said something like this: 'Now, don't get excited; don't get excited.' He says: 'I am going to look after you; you are all right.' I had previously asked him if my money was all right. He says: 'Yes; your money and your clothes—everything is all right. Don't feel alarmed about anything.' 'Well,' I says, 'I want you to bring my clothes in to me.' He says, 'I will,' and he went out—he went out and came back in a few minutes, and he says: 'Purdy has gone out, and has the key of the room in which your clothes are located. I will have to wait until he returns. As soon as he gets back I will bring your clothes in to you.' He went out and probably a half an hour or longer had elapsed when I got up. I was feeling very bad and desperate. I put on my pants, and I went out into the hall and went toward his office door. I took hold of the knob of the door; I believe I rapped first; then I took hold of the knob of the door, and it opened. It was perhaps after 7 o'clock, because the lights I know in the streets were burning, and the light was shining in my room, and the second door from his office was open. That is where I had undressed, and I went in there, and I found my clothes hanging up, and my shoes and stockings were down on the floor. Q. The same room where you went to undress? A. In the same room, and the clothes were apparently just where he had hung them when I undressed. I put on my clothes—dressed—and was sitting in his office chair when he came in shortly afterwards. Q. Wait a minute. You put on your clothes and your vest. State as to whether or no you examined them to see whether your money was there. A. I did. Q. Was your money there? A. No. Q. Was any of it there? A. Nothing at all. Q. The last time you saw the currency that you spoke about, where was it? A. In my inside vest pocket. Q. Inside vest pocket; and the gold was where? A. The gold was in my outside vest pocket. Q. And where was your coin—silver? A. In my pants pocket. Q. Now, you looked through all those pockets, did you? A. Yes, sir. Q. And none of it was there? A. None of it was there. Q. You dressed and you went in your room? A. No; I don't remember whether I went into my room. I sat in his chair in the office. While sitting there, he came in and seemed very much surprised to see me there. Q. What was said? A. 'Well,' he says, 'here you are.' I says: 'Yes; and I have found my clothes; they were not locked up; they were right where they were left when I was taken out of the room.' I says: 'Doctor, where is my money?' And he never answered. I asked him two or three times; he stood there. I says: 'Where is my money?' 'Now,' he says, 'never mind anything about

that.' He says: 'Don't get excited.' He had often used that expression: 'Don't get excited.' He says: 'Now that you have got your clothes on, perhaps it is better for you to come out and get some fresh air.' 'Well,' I says, 'I want my money.' 'Well,' he says, 'you will have your money.' He says: 'Don't feel alarmed; you will have your money. Come outside and get some fresh air, and perhaps you will be able to eat something.' I went out with him, and we crossed over to the Thomas Café and sat down, and he says: 'Now, order anything that you want.' * * * Q. Well, where did you sleep that night? A. Back in his place; not in the room that we slept in the night before or at the time that I went there. Q. When you came out of the Thomas Café—you said you had nothing in there but a glass of beer? A. That was all. Q. Now, when you came out of there, did he give you any money? A. Yes, sir. Q. How much? A. I think it was \$3. Q. He gave you \$3? A. Yes. Q. How came he to give you that? A. I asked him for the money, and he says: 'I haven't much money with me now.' He says: 'I will get your money.' 'Well,' I says, 'I haven't any money at all; I have got nothing.' And he pulled out some money in his hand and handed me \$3, and he says: 'That will do you now.' And he says: 'I will have all your money back to you.' Q. Well, you slept in his room that night, did you? A. Yes; not in the same room that I had been sleeping in. * * * Q. What conversation, if any, did you have with him the next day in regard to your money? A. It was during the next day that he admitted that he had taken my money. Q. Well, don't say 'he admitted.' Tell just what the language was and how he came to say it, and the conversation that was had between you. A. Well, those were the words that he used. He says: 'I must admit that I have taken your money.' Those were the words he used. Q. What did he say he had done with it? A. He didn't say what he had done with it. Q. What explanation did he give, if any, for not giving it to you? A. Well, I don't remember that he gave any reason for it at all. He said that he would get it and return it to me."

It appeared that Halstead remained there until the following Monday, when both defendant and Purdy were arrested, and Halstead left the place; that defendant admitted that he had taken his money and used it; that a week or two later, and while he was under arrest, defendant paid back \$100 to Halstead. On cross-examination Halstead testified that after giving defendant a \$20 bill the latter said he would get it changed, and left Halstead for that avowed purpose, and while defendant was away Purdy took him into a room adjoining the "bake oven" and told him to disrobe, and that while doing so, or as he was about to do so, defendant returned, and both defendant and Purdy assisted him in disrobing.

"Q. While you were disrobing you said you had valuables in your clothes? A. Either when I was disrobing or after I had disrobed, and he had taken that, I told him, and he said that would be all right; 'everything will be secure and safe.' Q. Was it not while you were taking off your clothes and handed your vest to Dr. Dye? A. I don't remember at just what time during my undressing that I said that, or if it was after I had undressed. It was before I went into the bath. * * * I was impressed that the place was reputable and genuine, and Dr. Dye impressed me very much, and I hadn't the least doubt in the world but that everything was all right and safe, and no question oc-

curred to me at all. Q. The question of a breach of trust had never occurred to you? A. No. Q. You went there, and you might say trusted your life and what you had to Dr. Dye? A. Yes, sir. Q. And you trusted what you had to him? A. Yes. Q. You did not see him put your clothes in a locker of any kind, did you, or trunk or anything? A. No. Q. They were just hung on a nail? A. Hung on a nail or hook; yes. I think in the corner between the doors of the two rooms. Q. Your vest with the valuables was hung with the other clothes? A. I believe they were at the time all hung together."

He testified that he expected to be in the room there until the next day, and that no room was designated for him to occupy after leaving the bath.

"Q. After you had taken your bath, you did not expect to return to this room? A. Well, I hadn't thought anything about it at all where I would be placed."

He testified that defendant did not give him the change, but kept the \$20 bill.

"Q. Did you not say you had trusted everything to his hands? A. I may have. I naturally would do so, because I think I remember his asking me if I had any doubts about anything being not right. I told him I had no reason for any doubt at all. Q. You trusted everything to him? A. I had confidence in the place and in him, or I would not submit to the treatment or trust him with what I had. Q. And you did trust your clothing and your money and your person to Dr. Dye? A. Yes."

He testified that, "with the exception of his pants," he did not see his clothes from Monday until Friday.

"Q. You turned your clothing and your money over to the care and custody of the defendant? A. Why, certainly. Q. And trusted implicitly in him? A. That my money would be there when I would come out, of course. Q. You gave him possession of your money and your clothing? A. I gave him possession of my clothing with money in it, and told him that my money was in my clothing, and he said it would be all right; it would be there when I came out. Q. And you expected him to look after your money and your clothing, did you not, Mr. Halstead? A. Why, certainly. Q. And keep it safely for you? A. Why, I expected just the same as any clothes. I couldn't think of anything else."

On re-examination in chief he testified:

"Q. Now, you took your vest off, and you simply handed your vest to one of these gentlemen to hang up, or hung it up yourself? A. I didn't hang it up myself. Q. You handed it to one of them? A. Yes, sir. Q. You left it there as you would if you had taken off your clothes and was going to take a bath? A. Yes, sir. Q. There was nothing said at that time about them taking care of your money as distinct from your clothes? A. No; no. Q. You simply left your clothes there as you would anywhere when you disrobed? A. Yes, sir. Q. You are sure you did not take out the money and hand it to him, and put it specially in his charge, or anything of that kind? A. No; I did not. Q. You went and took your bath? A. Yes, sir. Q. You frequently asked him for your clothes? A. Yes. Q. And he put you off? A. Yes."

The district attorney dismissed the information as to Purdy and called him as a witness. He testified that he assisted Dye in disrobing Halstead and in giving him the bath. He testified:

That he hung up part of Halstead's clothes, and Dye "hung the rest of them," and that he (Purdy) put the patient in the bake oven. "Q.

Was anything said at the time in regard to any money? A. Not to my knowledge." That the first he heard of any money was the following Friday, when he met Dye in the office. "I asked him if he had this man's money, and, if he had it, he better pay it back; that he would only get us in trouble. * * * Q. What did he say? A. He said that he had that all fixed up. He said everything was all right."

He further testified that he saw Dye have a \$100 bill on Tuesday and asked him where he got it, and that Dye pointed in the direction of the treatment room.

Gertrude Walker, who kept the rooming house where defendant had his institute, testified that defendant showed her a \$100 bill on Tuesday or Wednesday following the day Halstead came to the place. It is not necessary to state the evidence further as to defendant's having Halstead's money. He admitted it to Attorney Crowley, who was Halstead's attorney, but claimed that Halstead loaned it to him, which the latter testified was untrue. The question urged is that the evidence failed to establish larceny.

[1] The court correctly instructed the jury as follows:

"Embezzlement is when the possession of the property has been acquired lawfully and bona fide, and afterwards fraudulently appropriated. The gist of the offense of embezzlement is the breach of trust reposed in the agent, employé, or bailee by his principal, employer, or bailor. The crime may be in general terms defined to be the fraudulent conversion of another's personal property by one to whom it has been intrusted. When a bailee of property obtains possession of it from the owner with the intention of stealing it, and carries out that intent, he is guilty of larceny; but, where the intent to steal did not exist at the time of taking possession of the property by the bailee, but was conceived afterwards, it is embezzlement."

"In the case of grand larceny the taking must be with a felonious intent, as heretofore stated, but in embezzlement the original taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted."

[2, 3] We are of the opinion that at the time Halstead disrobed for his bath and his clothing was "hung up on pegs or hooks" in the dressing room adjoining the so-called bake oven the possession was not taken by defendant, nor in the sense of being intrusted to him by Halstead did he become a bailee. In fact, the clothing seems not to have been removed, except that the trousers were late in the week brought to Halstead, and he found his coat and vest where they had been placed when he entered the room to take his bath. Defendant was told at the time Halstead was undressing that his money was in his clothing, and defendant's subsequent conduct justified the jury in inferring that he formed the intent to take that money and appropriate it to his own use—in short, to steal it—when he was helping to undress Halstead. But, if this intent was formed the next day (and there was evidence that he had the money on Tuesday), the felonious taking would constitute larceny, for the reason that Halstead's property had not been placed in his custody and keeping.

Halstead testified that he did not authorize Purdy or Dye to take charge of his money; that "he just took off his clothes with the money in and left it there." He was not told how long he would have to remain in the bath or when he was to be taken from there. *People v. Montaral*, 120 Cal. 691, 53 Pac. 355. He testified that he had no reason to distrust defendant, and that he trusted everything to him. Naturally he so felt, or, as he testified, he "would not have been there." We do not think that these expressions of confidence in defendant must necessarily be construed as having clothed defendant with the authority of a bailee in the sense that he could not be held guilty of larceny for having feloniously taken and appropriated his patient's money.

It is urged that the court erred in admitting the statement of the defendant taken in the district attorney's office by the chief deputy, Mr. Jones, and his stenographer. On January 11th, one week after Halstead went to these baths, defendant was arrested and taken first to his own office, and then to the office of the chief of police, and thence to the district attorney's office. When arrested he was told that: "It is relative to a fellow from Nevada. Probably you know about it." This occurred on the street where he was arrested. Nothing further was said until he was taken to his office.

"When he got up to the office he stated: 'I haven't any of this man's money. What are they trying to rib up on me now? Some more ribbing?' He says: 'All I had of this man's money was \$20.' He says: 'I don't know anything about his money.' It was along those lines. Q. He said that voluntarily before you had said anything to him? A. Yes, sir. Q. You did not tell him before that that any statement that he made would be used against him? A. He was pacing up and down in the room, and he seemed to be excited and very nervous, and he was talking at random, there in the room before us. Q. Well, you did not tell him or you did not advise him of any rights, did you, before that—before making that statement? A. I hadn't asked him anything relative to it. Q. Just volunteered this statement? A. Yes."

Defendant moved that this testimony be stricken out because he was not advised of his rights. The motion was denied. Defendant was then taken to the district attorney's office, where he made a statement which was taken down by the court stenographer and was offered and admitted in evidence. Defendant objected that "he was not advised of his rights prior to the making of the statement," or "that it would be used against him on the trial, he was not properly informed." The preliminary questions were as follows:

"By Mr. Jones: Mr. Dye, this is the district attorney's office. A. Yes, sir. Q. This is Mr. Carragher, the deputy district attorney. A. Yes, sir. Q. And my name is Jones. I am chief deputy district attorney. A. Yes, sir. Q. This is Mr. Warren Doan, the shorthand reporter, and you know the officer. A. Yes, sir; I have had a sad experience with the officer. Q. We brought you here to have a talk with you. A. Yes, sir. Q. I do not want you to feel that you are under any restraint or that there are

any threats made against you or any promises made to you. A. Yes, sir. Q. There is a serious charge made against you, and we want to hear your statement if you have any to make. A. Well, what was the charge? Q. The charge is that you took \$150 or thereabouts from a man by the name of Halstead."

Then follows the statement. Defendant stated the history of Halstead's coming to his place of business, his experiences while there, and his departure from the place. It is not necessary to set out this statement. In the main it disputes Halstead's story; is a justification for what was done in treating him; denies that Halstead had the money he claims he had; and states that all the money he (defendant) got was the \$20 bill and a \$1 bill. The statement was in no sense a confession of guilt, but was, in fact, an assertion of innocence.

Section 1824, Penal Code, has no application. *People v. Panagolt*, 25 Cal. App. 158, 143 Pac. 70. So far as the record shows, defendant made no objection to giving his connection with the transaction. There was, in our opinion, no violation of his constitutional rights in reading the statement to the jury. In *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042, relied upon by defendant, O'Bryan was arrested on suspicion, and was held in custody in the county jail. "He was taken before the grand jury which was investigating the offense, and sworn to testify. He was not informed of his constitutional right to decline to be a witness against himself, nor was he warned that his statements might be used against him." In that case the court said:

"The Constitution protects a person from being compelled to be a witness against himself. If at the time he appears no accusation, formal or informal, has been made against him, he does not, in testifying, become a witness against himself. Or if, even though charged with crime, he voluntarily gives evidence against himself, his rights are not infringed by the use of such evidence thereafter. These distinctions are well illustrated by a series of New York cases"—citing the cases.

In the case here defendant did not testify; he made certain extrajudicial statements, and, under the circumstances disclosed, we think they were voluntarily made. But, if there was error in admitting the statement, we are satisfied from an examination of the entire record that the result was just, and would have been reached if the error had not been committed. Const. art. 6, § 4½; *People v. O'Bryan*, supra.

Error is assigned because of alleged misconduct of the deputy district attorney. In addressing the jury he said:

"Gentlemen of the jury, let me call your attention to one thing; the punishment for embezzlement is exactly the same as the punishment for grand larceny. Mr. Smith: We object to that statement, if your honor please, and ask that the jury be instructed not to consider it. The Court: Yes; the jury cannot consider that. Gentlemen of the jury, you will not consider that statement of the district attorney."

The district attorney overstepped the boundary of his privilege in addressing the

jury, for the question of punishment was of no concern to them, and, as the principal defense was that there was a fatal variance between the proofs and the charge, the statement, unchallenged, might have had some influence to defendant's prejudice. We must assume, however, that the jury obeyed the direction of the court and did not consider the statement.

The judgment and order are affirmed.

HART, J. I concur in the judgment and in all that is said by the Presiding Justice concerning the effect of the evidence and the justification of the verdict of conviction under the proofs. But I do not think it is necessary to invoke article 6, § 4½, of the Constitution to uphold the court's ruling in admitting in evidence the extrajudicial statement of the defendant when in the office of the district attorney. The application of said section of the Constitution in a case presupposes either error in the ruling as to which it is invoked or a doubt in the mind of the reviewing court as to the correctness of the ruling.

[4] In the first place, the statement of the defendant in the district attorney's office is not a confession. On the contrary, it involved an explicit and direct denial of guilt of the crime charged or of any crime in connection with the defendant's transaction with the prosecuting witness. It was therefore unnecessary to show, preliminary to the admission of the statement, that it was voluntarily made or not made under the inducement of hope or fear. *Greenleaf on Evidence*, § 213.

[5] In the second place, I am clearly of the opinion that, had the defendant confessed that he committed the crime of larceny against the prosecuting witness under the circumstances characterizing the making of the statement which was allowed to go to the jury over his objection, we would be required to hold that it was voluntarily made. Before being questioned as to his connection with the alleged crime, the defendant was informed by the deputy district attorney that he was then in the presence of the officers of the law, including an officer who would probably have something to do with the presentation of the case against him at the trial. He was further sufficiently given to understand that he was not compelled to make a statement or "under any restraint or that there are any threats made against you or any promises made to you." This warning, I think, was sufficient to apprise the defendant of his right not to make a statement if he so elected, and that he would be shown no favor if he did make one. Of course, a confession, to be admissible as proof of guilt, must not have been "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exercise of any improper influence." 3 *Russell on Crimes* (6th Ed.) 478. But, as our

Supreme Court declared in the case of the *People v. Siemsen*, 153 Cal. 387, 394, 95 Pac. 863:

"Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it, and a considerable measure of discretion must be allowed that court in determining it."

See, also, *People v. Miller*, 135 Cal. 69, 67 Pac. 12; *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; *People v. Fox Burns*, 149 Pac. 605.

Obviously there must be some showing that the confession was freely and voluntarily made and without any previous inducement or offer of leniency in punishment or by reason of any intimidation or threat. *People v. Miller*, supra. And that there was such a showing in this case I am, as before suggested, thoroughly persuaded.

As I understand the object of section 4½ of article 6 of the Constitution, it is to be applied only where manifest error has been committed and a review of the whole record, including the evidence, does not justify the conclusion that a miscarriage of justice will be the inevitable result of such error, if the judgment should be affirmed.

I concur: BURNETT, J.

(29 Cal. A. 136)

LAPIQUE v. MORRISON. (Civ. 1543.)

(District Court of Appeal, Second District, California. Dec. 8, 1915.)

1. EASEMENTS §18—WAY BY NECESSITY—WHEN ALLOWED.

If a landowner has access to his property over a hill route, though it be rough and difficult for transportation, but not shown incapable of development to a practical grade and width by even a considerable expenditure of money and labor, he cannot support a claim to a right of way by necessity over the lands of another on the ground that it is necessary to the reasonable use and enjoyment of his lands, for such right can only be claimed where the way furnishes the only access to the claimant's property.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. §18.]

2. EASEMENTS §7—WAY BY PRESCRIPTION—ADVERSE USER.

If a way to which a right is claimed by prescription is plowed by the owner of the land and obstructed by him for his farm purposes during the time of prescription the claim cannot be supported.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 16-19, 27, 33; Dec. Dig. §7.]

3. EASEMENTS §36—WAY BY PRESCRIPTION—BURDEN OF PROOF.

The claimant of a right of way by prescription must prove a five years' continuous and uninterrupted use and enjoyment of the way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. §36.]

4. EASEMENTS §2—WAY BY PRESCRIPTION—PARTIES—UNITED STATES.

If land over which a right of way by prescription is claimed is owned by the United States during part of the time of enjoyment of the way, the time of prescription to support the

claim cannot commence to run until after title of the United States to the land is divested, for an adverse possession cannot operate as against the United States or the state.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 3; Dec. Dig. §2.]

5. EASEMENTS §8—WAY BY PRESCRIPTION—ADVERSE USER—NOTICE.

A claim to a right of way by prescription cannot be supported where claimant's use of the way has been allowed by the landowner as a matter of accommodation only on account of the nature of the country and the practices of travel therein, and the claimant's conduct in the use of the way has not been such as to put the landowner upon notice of an adverse user.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 27-33; Dec. Dig. §8.]

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Pierre Agoure against Alonzo Morrison to enjoin an interference with plaintiff's use of an alleged right of way and to quiet his interest therein. After trial and judgment in favor of plaintiff, John Lapique was substituted as plaintiff because of an assignment to him of Agoure's interest in the action. From a judgment for the plaintiff and an order denying a new trial, defendant appeals. Reversed.

Kendrick & Ardis, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondent.

JAMES, J. This action was commenced by Pierre Agoure, who claimed the right to the use of a right of way for road purposes across the land of defendant. By the allegations of the complaint facts are alleged which support both a cause of action to assert the right in the plaintiff as of necessity to the use of the road, as well as the right by adverse user; at least, such is the general complexion of the allegations contained in the complaint. In the prayer it is demanded that defendant be enjoined from interfering with the plaintiff's use of the alleged right of way, and also that the interest of plaintiff therein be quieted as against the defendant. After trial was had and judgment in favor of the plaintiff, an order was made substituting the respondent herein as party plaintiff, the order of the court in that behalf reciting that it appeared that the estate, right, title, and interest in the action had been assigned by the plaintiff to the respondent. No point is made as to the regularity of this order. We think the assignability of the cause of action in this particular case might well be questioned, but as the point is not raised we are not called upon to determine that matter. However, we think that the judgment and order denying the defendant a new trial, both of which were appealed from, must be reversed. The evidence is not sufficient to support either.

[1] In the first place, the findings of the court are not such as to establish facts in support of the claim that the right of way existed in Agoure's favor as of necessity. The only suggestion in that direction is the statement in the findings that the roadway "is necessary to the reasonable enjoyment and use of plaintiff's said lands." It is well established that a right of way by necessity can only be claimed and held where it furnishes the only way by which access may be had to the property of the claimant.

"The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. It will not exist where a man can get to his property through his own land. That the way over his own land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only where there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way." *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879.

The relation of grantor and grantee did not exist as between Agoure and this defendant, but even though such had been their relation, the facts found by the court do not establish the most material thing, to wit, that the plaintiff could not obtain access to his property except by use of the right of way claimed. Turning to the evidence, we find that the facts shown do not establish any such condition. It appears that for many years prior to the year 1903, Agoure and other persons had driven across the land now owned by the defendant in order to reach a certain tract composed of 15,000 acres held by Agoure. All of this land was in a hilly region, and it was more convenient for Agoure to cross the land of defendant and the former occupants thereof than it was to travel in a different direction. There was direct testimony of a hill route leading out from Agoure's land to the county road, which, however, it was stated was so rough as to make it difficult to transport any load thereacross. But it was nowhere shown that by the expenditure of some money and labor—perhaps a considerable amount of both—this hill route could not have been converted into a roadway of practicable grade and width. So it is very clear that no ground existed upon which Agoure or the plaintiff could assert legal necessity for the right of way as claimed.

[2,3] It appears that the plaintiff relied further, and the trial judge evidently sustained his claim in that regard, upon the fact that he had made use of the road for a long period of years. The court found that the right of way had been used for a period of more than five years prior to the commencement of the action. Easement rights may be so acquired, but where they are asserted the party claiming them must prove an uninterrupted use of the right of way.

[4] Title to the land now owned by the de-

fendant was held by the government of the United States up to the year 1903, when a patent was issued by which such title was divested. Since the year 1903, the evidence showed that this roadway had been plowed over and grain had grown up at times in the tracks. There was testimony for the defendant, which was uncontradicted, that haystacks had been placed across the roadway subsequent to the year 1903. The period included within that which will give title by adverse possession cannot commence to run at any time as against the ownership of the United States or of the state. *O'Connor v. Fogle*, 63 Cal. 11. So, under the facts disclosed by the record, no claim by adverse user could have been raised prior to the year 1903, nor until five years had elapsed after issuance of patent to the defendant's land. During this latter period, we think the evidence clearly shows that the use which Agoure made of the right of way was not continuous and uninterrupted; it was more in the nature of a user by permission.

[5] The country there was largely open and uncultivated. It was hilly land, as above stated, and persons generally having occasion to travel in that region adopted whatever route might appear to be the shortest, which they were allowed to do as a matter of accommodation by the landowners. The defendant could hardly have been placed upon notice, under the circumstances, that Agoure expected, because of the permission accorded him, to base a claim to easement rights in the roadway, for his general conduct was not such as to indicate his determination so to do. If he had intended to insist upon such a claim, his acts, as they are generally described by the testimony, and considering the practice adopted by travelers in that sparsely settled country, do not sufficiently so indicate. On this point, see *Clarke v. Clarke*, 133 Cal. 670, 66 Pac. 10.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

(29 Cal. A. 139)

COMMINS v. GUARANTY OIL CO.
(Civ. 1762.)

(District Court of Appeal, Second District, California. Dec. 8, 1915. Rehearing Denied by Supreme Court Feb. 5, 1916.)

1. APPEAL AND ERROR—123—"FINAL JUDGMENT"—ESSENTIALS.

A judgment of nonsuit for plaintiff's failure to prove a sufficient case, when entered in the court's minutes, need not be followed by a judgment of dismissal to make it a "final judgment," within Code Civ. Proc. § 939, providing for appeals, for such a judgment of nonsuit in itself constitutes a dismissal of the action, under Code Civ. Proc. § 581, subd. 5, providing for dismissal of actions or entry of nonsuits, and directing that a dismissal when entered upon the

court's minutes upon plaintiff's failure to prove a sufficient case is effective for all purposes.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 875-881; Dec. Dig. ☞ 123.]

For other definitions, see *Words and Phrases*, First and Second Series, Final Judgment.]

2. LANDLORD AND TENANT ☞ 130—COVENANT OF QUIET POSSESSION—BREACH.

Where a lessee relies upon an agreement in the lease that the lessor will protect him against any claims arising as to the ownership of the premises which the lessor holds under a contract of purchase, and no misrepresentations are shown to have been made by the lessor as to the nature of his title, the commencement of a suit by the owner of the paramount title to quiet its title as against the contract of purchase because of default in payment of installments does not constitute an eviction of the lessee, that operates as a breach of the covenant of quiet possession.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 470-481; Dec. Dig. ☞ 130.]

3. MINES AND MINERALS ☞ 56 — LEASE — FORM—DESIGNATION BY PARTIES.

An agreement between the holder of land under a contract of purchase and a second party, providing that the second party shall take possession of the land and develop oil thereon, rendering to the other a portion of the product in payment of its use, is a lease, irrespective of its form or the designation given it by the parties.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 166; Dec. Dig. ☞ 56.]

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Thomas Commins, trustee of the Canadian Crude Oil Company, Limited, bankrupt, against the Guaranty Oil Company, for damages for breach of contract. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Collier & Clark, of Los Angeles, for appellant. Weaver, McCracken & McKee, of Los Angeles, for respondent.

JAMES, J. The plaintiff in this action, at the conclusion of the testimony introduced in support of his main case, was nonsuited. An appeal was taken from the order granting the motion of nonsuit, the record of which order or judgment appeared only in the minutes of the court.

[1] It is first claimed by the respondent that the order granting the motion for a nonsuit, not being followed by a formal judgment of dismissal, was not a final judgment in the sense that that term is used in section 939, Code of Civil Procedure, providing for appeals. Section 581, Code of Civil Procedure, provides that:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases: * * * 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * * The dismissals mentioned in subdivisions * * * 5 of this section must be made by orders of the court entered upon the minutes thereof, and are effective for all purposes when so entered. * * *"

In the case of *Kimple v. Conway*, 69 Cal. 71, 10 Pac. 189, it was held that no appeal was allowed from an order granting a motion for a nonsuit, nor from a judgment of nonsuit. In that case, however, it was not finally affirmed that a judgment of nonsuit might not, by being entered in the judgment book, become a final judgment from which an appeal might be taken. However, at the time that decision was rendered section 581 did not contain the provision which was inserted in 1897 making an entry upon the minutes of the court of the orders or judgments sufficient for all purposes. It would seem under the present state of the law that none of the orders or judgments provided to be made by section 581, Code of Civil Procedure, need be entered in the judgment book at all or appear in any record except that containing the minutes of the court. This conclusion is sustained by the decisions of *Matthal v. Kennedy*, 148 Cal. 699, 84 Pac. 37, and *Pacific Paving Co. v. Vizelech*, 141 Cal. 4, 74 Pac. 352. We do not believe that a formal judgment of dismissal must follow the order or judgment of nonsuit, for the judgment of nonsuit in itself constitutes a dismissal of the action. It seems clearly to have been so considered in defining it in section 581, Code of Civil Procedure, which refers particularly to dismissals or the discontinuing of actions.

[2] The motion for a judgment of nonsuit was properly granted, in our opinion, because the plaintiff's evidence did not establish his right to the relief sought. Thomas Commins, the plaintiff, appears as the trustee of the Canadian Crude Oil Company, a bankrupt, and hereinafter, for brevity's sake, we will refer to that corporation as the plaintiff. The evidence introduced on behalf of the plaintiff showed that the defendant, in April, 1911, entered into an agreement with the plaintiff whereby the defendant let to the plaintiff, for a period of 20 years, 20 acres of land in Kern county, Cal. Conditions of the agreement of lease provided that the plaintiff should develop oil on the land and render unto the defendant a certain proportion of the gross amount of the product in payment for such use. The plaintiff took possession of the land, proceeded with the work of developing oil thereon, and continued in that possession until November 1, 1911, when it abandoned the property. The abandonment was made because of an alleged eviction suffered at the hands of the owner of paramount title. This suit was brought to recover as damages all of the money expended upon the property (amounting to more than \$35,000), together with other sums claimed to have been laid out incidental to the making of the contract engagement. The evidence showed that about the middle of the year 1910 the defendant had, contracted with the Lucky Boy Oil Company to purchase

a large tract of land from the latter, of which the 20 acres so leased to plaintiff were a part; that the contract of purchase provided for installment payments to be made; that, prior to the making of the lease to plaintiff, defendant was in default under its contract of purchase; and that in June following the making of the plaintiff's lease, the Lucky Boy Oil Company brought a suit to quiet its title as against the contract of purchase held by the defendant. What became of this suit to quiet title cannot be told from the record.

It is suggested in respondent's brief that it was dismissed, but the testimony of the attorney for the Lucky Boy Oil Company was to the effect that at the time of this trial the action was still pending and untried. It is the contention of the plaintiff that the evidence was sufficient to show that it entered upon the property under a covenant of quiet possession, and that when the action to quiet title was commenced, and it was made to appear that the Lucky Boy Oil Company possessed the paramount title and right to possession, an eviction was worked which entitled plaintiff to its damages. Very important to a consideration of this question is a certain term of the lease made by the defendant to the plaintiff. It was therein provided as follows:

"The first party [the defendant] agrees to protect the second party against the claims of any party or parties, should any contests ever arise as to the ownership of the same."

By this term in the agreement it may be assumed that the parties considered the matter of possible claims or contests arising to disturb the possession of the lessee. Nowhere in the complaint is it stated or intimated that any fraud was practiced upon the plaintiff by the defendant, and the evidence does not show that any false representations were made as to the quality of defendant's title to the land. The situation was, as expressed by the evidence, that the plaintiff was willing to accept the lease made to it by the defendant, resting for its security upon that term of the agreement which made the lessor bound to protect the lessee in possession against the claims of other persons. Clearly it would seem to follow by every fair inference that the plaintiff was not relying upon any implied covenants, but rather upon the specific and express terms of the agreement held by it. Under such a condition of the contract and the evidence, was the plaintiff justified in vacating the property after suit was brought to quiet title and assert the claim that it was evicted thereby? We think not. It is not shown but that the defendant at the time of this trial still possessed at least an equitable interest in the land, and it was not shown that it would not or could not in some way protect the possession of its tenant. This possession had not been the subject of direct attack or interference,

for it was shown that, notwithstanding the suit to quiet title of the Lucky Boy Oil Company was brought in June, 1911, the plaintiff remained in possession and continued to operate the property until November of the same year. One of its managing officers, when asked whether it was not a fact that work was stopped because of the lack of funds, responded in the affirmative. There are authorities holding that, even conceding an eviction of the tenant might have followed the bringing of the action to quiet title by the owner of the paramount title, the right to take advantage of such eviction might be waived by the tenant remaining in possession. However, our conclusions do not involve any application of the holding made by such decisions.

[3] Respondent has all along contended that the agreement, which we have called a lease, did not amount to such; but we think that it should properly be so termed. Any matter of mere form or designation which the parties may give to a document will not change its legal effect. In order that plaintiff might make a case sufficient against a motion for judgment of nonsuit, we think that it should have shown a breach of the express term of the contract which bound the defendant to protect it in possession. It voluntarily gave up possession, abandoned the property, and did that, too, without there being any judgment declaring the rights of the Lucky Boy Oil Company or foreclosing the interest of the defendant.

The view we have taken of the main question makes it unnecessary to consider or discuss the objections urged as to the admission and rejection of testimony.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(79 Or. 384)

LESLIE v. McNEIL et ux.

(Supreme Court of Oregon. Feb. 8, 1916.)

ATTACHMENT \Leftrightarrow 209—AFFIDAVIT FOR PUBLICATION—SUFFICIENCY.

An affidavit for publication of summons in a suit in which an attachment is levied on land must allege that the defendant has property within the state; and, it failing to contain such an averment, the court does not acquire jurisdiction, and any judgment based thereon is void.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 675-687, 690, 691; Dec. Dig. \Leftrightarrow 209.]

Department 2. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by G. W. Leslie against J. D. McNeil and wife. Defendants' objections to the confirmation of a sale of attached land were sustained, and plaintiff appeals. Affirmed.

Plaintiff began an action for the recovery of money by filing a complaint and placing in the hands of the sheriff a summons to be forwarded to the sheriff of Harney county,

where defendants then resided, and a writ of attachment was issued and a levy made thereunder by the sheriff of Coos county upon certain real property. The summons was subsequently served upon the defendants personally in Harney county, and they appeared specially by a motion to quash the service of summons which motion was allowed. Thereafter an alias summons was issued and placed in the hands of the sheriff of Coos county for service, and by him returned "Not found." This was followed by the filing of an affidavit for publication of the summons, since in the meanwhile the defendants had removed to Texas. The affidavit contains, among others, the following allegation:

"That at the time said summons and also said alias summons was in the hands of the sheriff for Coos county, Oregon, for service, there was at each of said times a writ of attachment issued in this cause and in the hands of said sheriff for service, and that immediately upon the receipt of each of said writs of attachment the sheriff for Coos county, Oregon, did then and there execute the same and attach certain real property situated in Coos county, Oregon, which property the said sheriff now holds under and by virtue of said writ."

Thereafter an order was made and entered directing the publication of the summons, and as a result of such publication a judgment was entered upon the default of the defendants, which contained the following clause:

"It further appearing to the court that there being certain real property attached in this cause belonging to the defendants situated in Coos county, Oregon, it is therefore ordered and adjudged that said real property be sold as provided by statute and the proceeds thereof be applied upon this judgment."

Afterward the property was sold under the judgment and plaintiff moved for a confirmation of the sale, whereupon the defendants appeared specially and filed objections to the confirmation thereof. Upon a hearing the objections were sustained, and the motion for confirmation denied and plaintiff appeals.

Edward H. Joehnk, of Marshfield (Geo. Watkins, of Marshfield, on the brief), for appellant. H. G. Hoy, of Marshfield (I. N. Miller, of Marshfield, on the brief), for respondents.

BENSON, J. (after stating the facts as above). We find it necessary to consider but one of the several questions presented, and that is the sufficiency of the affidavit for publication of summons. It will be noted that this affidavit does not anywhere allege that either of the defendants has any property within the state of Oregon. The paragraph quoted in the above statement is the only reference to property that is to be found in the entire document. It is not even alleged that the sheriff has attached property belonging to the defendants, but simply that the officer did attach "certain real property situated in Coos county, Oregon." This court has

held that the affidavit for publication of summons must allege that the defendant has property within the state, and it failing to contain such an averment the court does not acquire any jurisdiction, and any judgment based thereon is void. *Colburn v. Barrett*, 21 Or. 27, 26 Pac. 1008.

It follows that the judgment must be affirmed; and it is so ordered.

MOORE, C. J., and BEAN and HARRIS, JJ., concur.

(80 Or. 160)

JOHNSON v. McKENZIE.

(Supreme Court of Oregon. Feb. 8, 1916.)

1. MORTGAGES \Leftrightarrow 32—TRANSACTIONS CONSTITUTING—DEED.

Where a loan broker who secured a loan to enable plaintiff to erect a building on a lot took a conveyance of the premises under an agreement that the building should be completed, sold and the proceeds divided, and it appeared that the loan broker was not liable for any sums advanced to plaintiff and that at the time of the conveyance there was no pre-existing debt due the broker, the transaction, though the broker deemed it his duty to protect the lender, some of the proceeds of the loan having been diverted from the agreed purpose, cannot be construed as a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. \Leftrightarrow 32.]

For other definitions, see *Words and Phrases*, First and Second Series, *Mortgage*.]

2. TRUSTS \Leftrightarrow 17, 18—DECLARATION OF TRUST—NECESSITY.

Under L. O. L. § 804, declaring that no interest in real property other than a lease for a term not exceeding one year, nor any trust or power, can be created or declared otherwise than by operation of law or by a conveyance or other instrument in writing, no trust can arise in moneys realized from the sale of land held under a parol trust, where, after the sale, there was no declaration of trust, the parol trust being invalid.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 15-24; Dec. Dig. \Leftrightarrow 17, 18.]

Department 1. Appeal from Circuit Court, Multnomah County; George N. Davis, Judge.

Action by Florence Johnson, formerly Florence Smith, against J. H. McKenzie. From a judgment for defendant, plaintiff appeals. Affirmed.

John C. Shillock, of Portland, for appellant. Milton Reed Klepper, of Portland (J. L. Conley, of Portland, on the brief), for respondent.

MOORE, C. J. This is an appeal by the plaintiff from a decree dismissing her suit for an accounting. The testimony shows that for some time prior to the fall of 1909, the plaintiff, Florence Johnson, then Mrs. Smith, and her father, H. H. Bean, had been buying lots in Portland, Or., putting up buildings thereon with money obtained from the defendant, J. H. McKenzie, a broker, selling the real property thus improved, and, from the proceeds, paying the sums borrowed. The plaintiff had a contract to purchase lot 8 in

block 12 in Merlow, an addition to that city, and applied to the defendant to secure for her a loan of \$2,000, with which to erect a two-story house on the premises. He procured that sum from C. C. Marton, for which service the plaintiff promised to pay 2 per cent. for negotiating the loan and one-half of 1 per cent. for paying out the money for labor employed upon and material used in putting up the dwelling. From the sum loaned the defendant paid, on December 11, 1909, \$595.90, the remainder due to the Portland Trust Company, the owner in fee of the lot, which conveyed it to the plaintiff, who thereupon executed to Marton a mortgage of the premises. The plaintiff's father, who was superintending the construction of the building upon the lot, suddenly died February 16, 1910, but prior thereto the defendant advanced to him, from the loan, \$1,000. Between the time of Mr. Bean's death and April 28, 1910, the defendant gave the plaintiff \$85.40, paid for labor and material \$240.71, charged as commissions \$40 and \$10, respectively, for securing the loan and disbursing the money, paid \$15 for an abstract of the title to the lot, expended \$4 in connection with the making of the mortgage, and \$16 for insurance on the building, or \$2,007.01, that sum being \$7.01 more than the loan. When the plaintiff's father died the house was unfinished, and on June 9, 1910, for the express consideration of \$100, she executed to the defendant a quitclaim deed of the lot, which was not filed for record until September 14, 1910, in consequence of a mistake in the sealed instrument. The defendant, between June 13, 1910, and August 15th thereafter, paid out from his own money \$1,061.07 in completing the dwelling. He, on October 5, 1910, agreed in writing to sell and convey to Elizabeth A. Mack the real property described, for which she stipulated to give \$3,950, and then paid \$100, which latter sum was given a broker for negotiating a sale of the premises. Mrs. Mack assumed the payment of the mortgage, then amounting to \$2,052, agreed to pay Norman Bean, the plaintiff's brother, \$135 for labor performed upon the dwelling, and executed promissory notes for \$1,663, payable in installments to the defendant who, by indorsement, converted them into cash, making a profit of \$601.93 on the sale of the lot.

The complaint substantially charges that in March, 1910, the plaintiff and the defendant entered into an agreement whereby he stipulated to furnish money enough to complete the house, and in consideration thereof she engaged to convey to him the lot which he was to sell and from the proceeds pay the indebtedness against the property, the expenses incurred in completing the building, retain a reasonable sum as commission for his services and pay over the remainder to her; that pursuant to that agreement she executed a deed of the real property to the

defendant, who, complying with the terms of the contract, furnished the money to complete the building and sold and conveyed the premises, but upon plaintiff's demand refused to account to her for any of the profits, and that \$50 is a reasonable sum for his services. The material allegations of the plaintiff's primary pleading are controverted by the answer which for a separate defense asserts that the title to the lot was absolutely conveyed to the defendant who, by a parol agreement, stipulated to relieve the plaintiff of all liability to the mortgagee and on account of outstanding obligations for labor employed upon the building and material furnished for its construction, the terms of which agreement he had fully performed.

No written note or memorandum, signed by the defendant, was offered in evidence to establish a declaration of any beneficial interest in the real property alleged to have been held by him in trust for the plaintiff. Her testimony, which is corroborated by that of her witnesses, conforms to the allegations of the complaint. A fair consideration of that testimony tends to prove an agreement by the parties for a joint adventure, whereby the lot was conveyed to defendant in order that he might furnish the money necessary to finish the building, sell the real property, and divide the proceeds. After her father's death the plaintiff paid \$10 for paint used on the building, expended \$90 which she procured from her mother in paying for labor employed on the dwelling, and in July, 1911, she also paid Ward Bros. \$146.36 for material that went into the structure. The latter payment was made long after she executed her deed to the defendant. She also exercised a supervision over the finishing of the house and assisted in making a sale of the premises to Mrs. Mack.

A witness testified that the defendant informed him the quitclaim deed was executed by the plaintiff pursuant to an agreement that she was to have six months within which to redeem the property; but not having done so, all her interest in and right to the premises were extinguished.

So far as can be discovered from a careful examination of the testimony, there was no debt due or owing from the plaintiff to the defendant when she executed to him a deed for the lot. The defendant testified that \$500 of the money obtained from Mr. Marton and advanced to Mr. Bean was expended by the latter in preparing a basement on another lot, upon which no building was erected by reason of the sudden death of the plaintiff's father. The defendant may have considered a moral obligation rested upon him to see that the sum so diverted was restored to the building for the erection of which the money was borrowed, thereby augmenting the security upon the faith of which the mortgagee evidently relied when he made the loan.

[1] The evidence shows the plaintiff paid

\$150 on the purchase of the lot, and had also discharged a few small installments of the consideration, prior to December 11, 1909, and was then owing \$595.90 when the real property was conveyed to her by the Portland Trust Company. It is reasonable to suppose the value of the unimproved lot could not have been regarded as adequate security for a loan of \$2,000, either by the defendant or Mr. Marton, but that said sum was to be expended in erecting a building on the premises. Whether the defendant believed he should protect the interests of the mortgagee is only conjectural, but be that as it may, there was no debt, so far as can be determined from the testimony, due from the plaintiff to the defendant by reason of the money, which he asserts, but she denies, her father diverted, so that her conveyance of the lot could be regarded as a mortgage, though in form a quitclaim deed. Thus no unextinguished pre-existing debt remained and no new debt was intended to be created when the conveyance was given, and for these reasons the deed was not designed as security, and cannot be declared in effect a mortgage. *Grover v. Hawthorne Estate*, 62 Or. 77, 114 Pac. 472, 121 Pac. 808.

[2] The complaint does not aver nor does the plaintiff's testimony show that after selling the real property and obtaining the consideration for it, the defendant, pursuant to the oral agreement, or otherwise, declared a trust as to the money in plaintiff's favor. There was therefore a failure to establish an express trust in the real property. *L. O. L. § 804*; *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296; *Barger v. Barger*, 30 Or. 268, 47 Pac. 702; *Parrish v. Parrish*, 33 Or. 487, 54 Pac. 352; *Richmond v. Bloch*, 36 Or. 590, 60 Pac. 385. Though a different rule may obtain in other jurisdictions, the principle is settled in Oregon that a parol trust in a sum of money, obtained from the sale of land which was made pursuant to an oral agreement to hold the fund for the beneficiary, can arise only by a specific declaration of the trustee to that effect and made after the sale. *Cooper v. Thomason*, supra; *Martin v. Martin*, 43 Or. 119, 72 Pac. 639. In the absence of an averment of that kind substantiated by adequate proof, the trial court committed no error in denying the relief sought.

The decree is therefore affirmed.

BURNETT, HARRIS, and McBRIDE, JJ., concur.

(79 Or. 155)

STANSBERRY et al. v. FIRST METHODIST EPISCOPAL CHURCH et al.

(Supreme Court of Oregon. Feb. 1, 1916.)

1. DEDICATION — 12 — PAROL DEDICATION — PROVISIONAL CONSTITUTION — TITLE.

There could be no binding parol dedication of land to a charitable purpose by one holding

the land under the provisional Constitution of Oregon, and before securing a donation certificate under the Donation Law enacted by Congress on September 27, 1850 (9 Stat. 496, c. 76), since the claimant had no title to such land.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 6, 7; Dec. Dig. —12.]

2. ESTOPPEL — 37 — DEEDS — AFTER-ACQUIRED PROPERTY — QUITCLAIM.

Where the claimant of land under the provisional Constitution entered into an oral agreement to convey it before the passage of Donation Act Cong. Sept. 27, 1850, section 4 of which provided that all future contracts of persons entitled to the benefit of the act for the sale of land before receiving a patent should be void, which agreement was evidenced by a quitclaim deed executed after the passage of the act and void thereunder, was enforceable against such claimant or his heirs after the receipt by him of a donation certificate under the act, though the issuance of such certificate or a patent thereon did not of itself pass title to the proposed grantee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 91-98; Dec. Dig. —37.]

3. DEEDS — 95 — RECITAL OF PURPOSE — "ETC."

The use of the abbreviation "etc.," following the recital of the purpose of a deed, if it is to be accorded any meaning at all, signifies "and other like purposes."

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 238, 241-254; Dec. Dig. —95.]

For other definitions, see Words and Phrases, First and Second Series, Etc.]

4. RELIGIOUS SOCIETIES — 17 — CONVEYANCE FOR CHURCH PURPOSE — "PERPETUAL TRUST" — TRUST.

For a conveyance to create a perpetual trust by the expression of the purpose for which the deed is given, it is necessary that an exclusive purpose be specified and appropriate language used to express or import a perpetual use of the land for such purpose, such as, that it shall be used for the purpose "only" or "forever" or "for no other purpose."

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 109, 110; Dec. Dig. —17.]

5. RELIGIOUS SOCIETIES — 17 — CONVEYANCE FOR CHURCH PURPOSES — TRUST.

Where a deed recited that the land conveyed was "for the purpose of a parsonage, church, etc.," such recital did not create a trust compelling the use of the land conveyed for such purposes only, since such recital did no more than to express the motive of the grantor, or announce the intention of the grantee, and was not appropriate for the creation of such a trust.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 109, 110; Dec. Dig. —17.]

6. DEEDS — 124 — CONSTRUCTION — RESTRICTIONS.

Under the policy of the law favoring the vesting of estates, all doubts in a deed conveying a fee, should as a rule be resolved in favor of a free user of the property and against the restrictions.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. —124.]

7. RELIGIOUS SOCIETIES — 18 — CONVEYANCE FOR CHURCH PURPOSES — LENGTH OF USER.

Where a deed recited that the land conveyed was to be used for a church and parsonage, and the consideration partially was that the grantee was to so use the land, a user in conformity for more than 60 years, fully satis-

fied such obligation under the rule that long-continued use operates as full payment.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. ¶ 18.]

In Banc. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by S. A. Stansbery and others against the First Methodist Episcopal Church, a corporation, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This suit involves lot No. 8, the north half of lot No. 7, the west 20 feet of lot 1, and the west 20 feet of the north half of lot 2, in block 23, of the city of Portland, Or. The property is located at the corner of Third and Taylor streets, and is commonly known as the Taylor Street Church. The plaintiffs are members of the First Methodist Episcopal Church of Portland, and the defendants are the First Methodist Episcopal Church, a corporation, the trustees of the corporation and the pastor of the church. The persons and bodies vested with authority according to the laws of Methodism are: The general conference, the annual conference, the quarterly conference, the official board, the trustees, the bishop, the district superintendent, and the pastor. The general conference is the supreme lawmaking body and enacts the laws, rules, and regulations for the Methodist Episcopal Church; the annual conference is next in point of authority; the quarterly conference is the governing body for a church; the official board with certain limitations takes the place of the quarterly conference during the interim between sessions of the latter body. The personnel of the official board and the quarterly conference is the same. The trustees hold the property for the society. The general conference selects and assigns the bishops who are vested with power to consolidate societies, fix the boundaries of districts, and make appointments of preachers. The district superintendent "presides over the quarterly conference when present." Upon the consolidation of two or more societies "the duty and responsibility of regulating the place where the principal activities of the church should take place and the public worship should be conducted" are imposed "upon the quarterly conference with the consent of the pastor." The plaintiffs are seeking to enjoin the defendants from closing the "church edifice at the corner of Third and Taylor streets, and from preventing the plaintiffs and the other members of the said congregation from entering the same and holding religious services therein, and that they be enjoined from selling, leasing, or otherwise disposing of, or using the said property, except for a house of public worship, or from otherwise or in any other manner diverting the said property from the uses to which it was dedicated and for which it is held in trust by the said defendants."

A Methodist mission church was established in 1848, and for a number of years was the only Methodist church in Portland. On November 5, 1850, Daniel H. Lownsdale, Stephen Coffin, and William W. Chapman executed and delivered to James H. Wilbur, the pastor of the church, a writing as follows:

"This indenture made and entered into this 5th day of November, A. D. 1850, between Stephen Coffin, Daniel H. Lownsdale, and William W. Chapman, proprietors of Portland, Washington county, Oregon territory, of the first part, and James H. Wilbur, trustee of the Methodist Episcopal Church of the same place, of the other part, witnesseth, the party of the first part for and in consideration of the sum of one dollar and divers other good causes to them, there and thereunto moving doth release, confirm and quitclaim unto the said party of the second part the following described town property in the said town of Portland, to wit: Lots Nos. one (1), two (2), six (6), seven (7) and eight (8), in block No. twenty-three (23), in the said town for the purpose of a parsonage, church, etc. And the party of the first part covenants to and with the party of the second part that if at any time thereafter they or either of them shall obtain a fee-simple title to said property from the United States, they will convey the same to the party of the second part by deed of general warranty. In testimony the party of the first part have hereunto set our hands and seals the day and year aforesaid."

The five lots cover a little more than the north half of block 23; block 23 is bounded on the east by Second street, on the north by Taylor street and on the west by Third street. On March 11, 1852, Daniel H. Lownsdale filed on land, including block 23, under the terms of the Act of Congress of September 27, 1850, commonly called the donation law. On September 10, 1853, James H. Wilbur assigned all his interest in the lots by making the following writing:

"I hereby relinquish, assign, make over and convey all my right, title and interest to the within described lots to Clinton Kelly, A. A. Durham, Perry Prettyman, Albert Kelly, John D. Dickenson, Samuel Nelson and P. G. Buchanan, trustees of the church property within described in the city of Portland, Oregon territory."

On October 17, 1860, a donation certificate was issued to Daniel H. Lownsdale reciting that he was entitled to a patent, but a patent was not issued until June 6, 1865, being subsequent to his death, which occurred in May, 1862. On June 1, 1867, the trustees of the church filed articles of incorporation, which recited:

That the name assumed by the corporation is the "First Methodist Episcopal Church in Portland, Oregon," and that the object "of this corporation shall be to continue the church organizations on lots Nos. 1, 2, 7, and 8 in block 23 in the city of Portland, to erect a meeting house thereon, and to hold said premises in trust, that they shall be used, kept, maintained and disposed of as a place of divine worship for the use of the ministry and memberships of the Methodist Episcopal Church in the United States of America, subject to the discipline, usage and ministerial opportunity of said church as from time to time authorized and declared by the General Conference of said church, and the annual conference in whose hands the said prem-

ises are situated. Provided however that the trustees of said house and premises shall at all times permit such ministers and preachers belonging to the Methodist Episcopal Church as shall from time to time be duly authorized by the General Conference of the ministers of said church or by the annual conference, to preach and expound God's Holy Word and to execute the discipline of the church and to administer the sacrament therein, according to the usages of the church."

On April 15, 1870, James H. Wilbur and wife executed and delivered to the "trustees of the Methodist Episcopal Church in Portland" a deed confirming the instrument signed September 10, 1853, by James H. Wilbur. On September 20, 1873, the heirs of Daniel H. Lownsdale conveyed "all of the northerly half (being 100 feet by 200) of block numbered twenty-three (23) as designated upon the maps or plats of said city in common use," upon the express condition that the land shall not be divided into different parcels, but shall be forever used as a site for a Methodist church building, with Sunday school room, a parsonage, and never as a site for two or more distinct church buildings or for any secular purposes; and it was provided that if any of the conditions be broken the property should revert to the heirs who were to have the right to enter and take possession of the land. In 1877 and 1878, for the aggregate sum of \$1,000, the heirs of Daniel H. Lownsdale quitclaimed to the board of trustees of the First Methodist Episcopal Church all their right, title, and interest in lots 1, 2, 7, and 8 in block 23. On April 4, 1884, the "Grace Methodist Episcopal Church in Portland, Oregon," was organized and incorporated. On March 6, 1888, "for the purpose of enlarging and better defining the objects, undertakings, purposes and powers of said corporate trustees, * * * and in some respects to change the objects, undertakings and purposes set forth in the articles of incorporation of said Methodist Episcopal Church in Portland, Oregon, filed May 31, 1867," the trustees of the First Methodist Episcopal Church filed supplemental articles of incorporation which recite that:

"It is the intention and purpose of this corporation to perpetually maintain a Methodist Episcopal Church on" the land now owned at Third and Taylor streets; that "the corporation shall have full power to sell and convey by warranty deed when so authorized by the quarterly conference of the said First M. E. Church in Portland, Oregon, any property belonging to said church, and held in trust by said corporate trustees, except" the property at Third and Taylor streets, which "shall not be sold or conveyed by said trustees or their successors, unless such power and authority be given them by filing other and additional supplemental articles of incorporation granting such authority in accordance with the discipline of said church."

The First Methodist Episcopal Church at Third and Taylor streets and the Grace Methodist Episcopal Church at Twelfth street continued as separate societies until the meeting of the annual conference held in September, 1912, at Ashland, Oregon, when the two churches were united and consolidat-

ed under the name of First Methodist Episcopal Church, by order of Richard J. Cooke, a bishop of the Methodist Episcopal Church of the United States of America presiding at the annual conference of 1912. The order of consolidation had been preceded by the appointment of committees by the two churches, conferences of the committees, reports from these conferences favoring a union of the two churches, giving notice of the proposed union to members of both churches, and adoption by the quarterly conference of each church of the reports recommending a union. Soon after the order of consolidation, the property owned by the Grace Methodist Episcopal Church was transferred to the First Methodist Episcopal Church, and the former ceased to exist as an organization. The church building at the corner of Twelfth and Taylor streets, formerly known as Grace Church, was closed, and the combined congregation worshipped at Third and Taylor where all the church activities were conducted for a time; at the end of a few months the principal services were transferred to the Twelfth street church; and after a short period the Third and Taylor street building was made the principal place of worship, only to be followed by a second transfer to Twelfth and Taylor.

The quarterly conference of the First Methodist Episcopal Church at a meeting held on October 13, 1913, authorized the trustees "to arrange for the holding of our chief services at Twelfth and Taylor streets," and also to arrange "for the conduct of such services at Third and Taylor streets as may be necessary in order to comply with the law with reference to the use of said property for church purposes." Complying with the order given by the quarterly conference, the trustees determined that:

"Beginning with Sunday morning October 19, 1913, we hold our services at Twelfth and Taylor street, and that our regular services thereafter shall be held at Twelfth and Taylor street, and also, until further plans are made, we arrange to hold a mid-week prayer service each week and a preaching service each Sunday evening at Third and Taylor street."

A part of the congregation who had been worshipping at the Third street church declined to go to Twelfth street when the first transfer was made, and a like result followed the second transfer. Referring to the plan "to provide services at Third and Taylor streets for Sunday evening and for prayer meeting on Thursday night," complaint was made to the quarterly conference that "certain brethren did not see fit to conform to that action and have held services in the morning." Acting on "reports to the effect that the people worshipping at Third and Taylor were organizing Ladies' Aid Societies and were considering the employment of a deaconess, etc., Bishop Cooke requested the district superintendent to officially notify the people that no such organizations can be effected excepting under the authority of

the official board, and with the approval of the pastor." On January 6, 1914, a petition was presented to the quarterly conference requesting that body to "recommend the restoration of the services and self-government of the church at Third and Taylor streets upon a satisfactory basis, the details of which shall be outlined by our resident bishop." Many earnest but unavailing attempts were made by all parties concerned to adjust the differences arising out of the consolidation of the two church organizations and the transfer of the "chief activities" to Twelfth street. The building at Third and Taylor streets was finally closed and locked, the plaintiffs were not permitted to conduct services in the building, and then this suit was commenced. The decree of the trial court was for the defendants, and the plaintiffs appealed.

Martin L. Pipes, of Portland (John M. Pipes, George A. Pipes, and Sinnott & Adams, all of Portland, on the brief), for appellants. John B. Cleland, of Portland (E. A. Baker, of Portland, on the brief), for respondents.

HARRIS, J. (after stating the facts as above). Summarizing the detailed statement already made, the case presented here is one where a society of Methodists established a mission church in 1848, constructed a house of worship at the corner of Third and Taylor streets in 1850, and was incorporated in 1867 as the "First Methodist Episcopal Church in Portland, Oregon"; in 1884 the "Grace Methodist Episcopal Church of Portland, Oregon," was organized, and its house of worship was located at Twelfth and Taylor streets; each society was a constituent body of the Methodist Episcopal Church of the United States of America, and was subject to the customs, usages, and discipline of Methodism; the two societies continued to exist separately until 1912, when they were regularly and by order of competent ecclesiastical authority consolidated, and the Grace Methodist Episcopal Church was merged into the First Methodist Episcopal Church, the former ceasing to exist, and the property owned by it being transferred to the latter; all the church activities were transferred to Twelfth street, the building at Third street was closed, and services were not permitted to be held in that building; a number of the members of the First Methodist Episcopal Church as it existed prior to the consolidation of the two churches and who had worshipped at Third street refused to go to Twelfth street; the plaintiffs claim that the building at Third street cannot be lawfully closed, and they therefore are attempting to enjoin the defendants from closing the building.

The substance of the argument made for plaintiffs in an able brief filed by erudite counsel is: That the realty was conveyed to James H. Wilbur, as trustee of the First

Methodist Episcopal Church, burdened with a trust which required that the land shall be used perpetually "for the purpose of a personage, church, etc."; and that the plaintiffs, who are members of the church and beneficiaries of the trust, are entitled to have the trust enforced by a court of equity. The contention of plaintiffs is founded upon the claim that the title which the defendant church holds to the land is in its final analysis traceable to Daniel H. Lownsdale. The defendants deny that the property is held subject to any trust, and they also take the position that the corporation traces its title to the land to the heirs of Daniel H. Lownsdale, and not to the ancestor; and that no estate was passed or created by the writing signed by Lownsdale, Coffin, and Chapman on November 5, 1850, because neither one of them possessed any title to the land at that time.

Before attempting to state our conclusions, it may be of interest to call attention to the customs prevailing in 1850 and the regulations observed at that time concerning lands. On July 5, 1843, the inhabitants of Oregon, assembled in mass meeting held at Champoolck, agreed to adopt certain laws and regulations "until such time as the United States of America extend their jurisdiction over us," and article 8 of the regulations provided for the election of a recorder who was required to "record all boundaries of land presented for that purpose." On July 2, 1845, the legislative committee adopted, and on July 26, 1845, the people ratified at the polls, certain "rules and regulations, until such time as the United States of America extend their jurisdiction over us." Article 3 of "the rules and regulations," which were adopted in 1845 and are historically known as the provisional Constitution of Oregon, permitted a person to establish a claim to land by designating the extent of his claim by natural boundaries or marks at the corners and upon the line of the claim, and recording the extent and boundaries of the claim in the office of the territorial recorder. Citizens of the United States and those of Great Britain held joint possession of the country under a treaty between the two nations of October 20, 1818, which was continued in force by the convention of August 6, 1827. The line dividing our possessions and those of Great Britain west of the Rocky Mountains was concluded on June 15, 1846, when what is now Oregon was definitely brought within the domain of the United States. On August 14, 1848, Congress passed an act to establish the territorial government of Oregon, in which the laws then existing under the provisional government were continued and declared to be operative, but by the terms of section 14 of the act "all laws heretofore passed in said territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and

are hereby declared to be, null and void." Act Aug. 14, 1848, c. 177, 9 U. S. Statutes at Large, 323. Congress did not pass any law permitting the acquirement of title to lands in Oregon territory until September 27, 1850, when the Donation Law (Act Sept. 27, 1850, c. 76, 9 Stat. 496) was enacted. *Lownsdale v. Parrish*, 62 U. S. (21 How.) 290, 16 L. Ed. 80. Section 4 of the Donation Law, as originally enacted, expressly provided that:

"All future contracts, by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void." 1 L. O. L. p. 48.

It will be noted that the rules of the provisional government permitted the occupancy of lands upon compliance with certain regulations; the territorial act of 1848 expressly declared that laws previously passed in the territory affecting lands were void; and no rule affecting title to lands and possessing the compelling force of a law was passed until the enactment of the Donation Law on September 27, 1850, and that act rendered void all future contracts if made "before he or they have received a patent therefor"; and therefore neither *Lownsdale* nor either of his associates owned any title to the land in 1850, although they asserted and exercised the right of possession according to the then recognized and prevailing customs of the country. Although not until September 27, 1850, was any law in existence which permitted the acquirement of title, and while contracts made after September 27, 1850, and before patent was received, were prohibited by the Donation Law as first enacted, nevertheless, conveyances and contracts to convey made before September 27, 1850, were enforced by the courts against grantors who subsequently obtained title under the Donation Law. *Lamb v. Davenport*, 18 Wall. 307, 21 L. Ed. 759; *Stark v. Starr*, 94 U. S. 477, 24 L. Ed. 276; *Parker v. Rogers*, 8 Or. 184, 189.

Daniel H. Lownsdale filed on the land under the provisions of the Donation Law on March 11, 1852, and on October 17, 1860, he received a donation certificate which recited that he was entitled to a patent and, as stated in *Barney v. Dolph*, 97 U. S. 652, 24 L. Ed. 1063:

"When the right to a patent once becomes vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued." *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829; *Quinn v. Ladd*, 37 Or. 261, 59 Pac. 457.

The moment the beneficial title was vested in Daniel H. Lownsdale on October 17, 1860, when the donation certificate was issued to him, a contract for a conveyance of the land, if made by him before September 27, 1850, when the Donation Law was passed, could have been enforced so as to secure the transfer of an after-acquired title, even though a United States patent did not issue until

June 6, 1865, or about 3 years after the death of Daniel H. Lownsdale, which occurred in May, 1862.

Daniel H. Lownsdale never signed any contract or conveyance affecting the land in dispute, except the instrument dated November 5, 1850, quitclaiming five lots to James H. Wilbur as trustee; and the defendants argue that this writing was void because it was a future contract prohibited by the express terms of the Donation Law. The plaintiffs answer the defendants by contending that the evidence shows that prior to September 27, 1850, the grantors orally dedicated the land for "the purpose of a parsonage, church, etc."; and also that the evidence leads to the necessary inference that James H. Wilbur and the grantors made an oral agreement prior to September 27, 1850, the terms of which were afterwards reduced to writing on November 5, 1850, and that therefore the agreement was not a future contract within the meaning of the Donation Law.

[1] Considering the acts done prior to September 27, 1850, in connection with any asserted technical parcel dedication, as ruled in *Carter v. Portland*, 4 Or. 340, 344, they "could not in this case be admitted to establish a dedication." Prior to September 27, 1850, neither Lownsdale nor his associates "had any title to or interest in the land whatever," except a possessory right which was recognized only by the usages and customs of the country. *Lownsdale v. Parrish*, 62 U. S. 290, 293, 16 L. Ed. 80; *Leland v. Portland*, 2 Or. 47, 49.

It is fair to assume that some kind of an understanding was had before September 27, 1850, but there is no evidence of the terms of an oral agreement, unless it be said that the writing of November 5, 1850, furnishes the evidence. John Flynn, a Methodist minister, known to pioneer history as Father Flynn and 98 years of age at the time of the trial, testified that he met James H. Wilbur, who was also known as Father Wilbur, in Portland on September 19, 1850, and that Father Wilbur was at that time constructing a church on the land described in the writing of November 5, 1850; that the building was not finished until some day in the following October when the structure was dedicated by a Congregational minister preaching in the morning, Father Flynn preaching in the afternoon, and Father Wilbur in the evening. It is reasonable to conclude therefore that some oral agreement was entered into before commencing the construction of the building, and, if that conclusion is correct, it necessarily follows that the agreement was prior to September 27, 1850, and consequently not prohibited by the Donation Law. There is also in evidence an old map, known as the Brady map, which was made some time in 1850 from the field notes of a survey made in the spring of that year. References to this map

appear in *Carter v. Portland*, 4 Or. 340, 344; *Lownsdale v. Portland*, 1 Or. 397, 408, Fed. Cas. No. 8579; *Deady's Rep.* 39, 47; *Portland v. Whittle*, 3 Or. 126 (note); *Leland v. Portland*, 2 Or. 47; *Lang v. Portland*, 75 Or. 385, 147 Pac. 378. A number of blocks which are now used for public purposes are colored on this map; the north half of block 23, including lots 1, 2, 7, and 8, but not including lot 6, is colored, and plaintiffs rely upon this circumstance in aid of the contention urged by them. Even though it be assumed that Lownsdale and his associates recognized this map before September 27, 1850, that fact would not operate as a dedication because they did not own any land to dedicate. *Lownsdale v. Parrish*, *supra*; *Carter v. Portland*, *supra*. The map may, however, be considered in connection with the claim that an oral agreement was made before September 27, 1850, and that the terms of the agreement appear in the writing of November 5, 1850.

[2] For the purpose of this discussion we shall assume, but do not decide, that an oral agreement was made prior to September 27, 1850, and that the instrument of November 5, 1850, serves as a memorial of that agreement. The immediate effect of the writing was to pass to Wilbur as trustee the right of possession only. The covenant to deliver a warranty deed when Lownsdale obtained a fee-simple title from the United States was one which could have been enforced against him when he received the donation certificate on October 17, 1860, or the heirs could have been compelled to carry out the covenant after 1862, when the ancestor died. The making of an agreement before September 27, 1850, and the subsequent issuance of a donation certificate or patent did not of themselves and by their own force pass any title to James H. Wilbur, trustee, or his successor the First Methodist Episcopal Church, although the agreement, certificate, and patent made Lownsdale or his heirs liable to pass the title according to the terms of the agreement if the trustee or his successor wished to enforce the obligation. The defendant corporation does not claim title from Daniel H. Lownsdale, but it asserts that it derived its title from the heirs as owners, and not as mere conduits. If the heirs were conduits only, then it is because of an agreement to convey by their ancestor at a time when he had no title to the land. The conveyance signed by the heirs on September 20, 1873, was made upon defined conditions subsequent; but, by the terms of the deeds made in 1877 and 1878, those conditions subsequent were abolished, and the heirs completely relinquished all their interest to the First Methodist Episcopal Church, and therefore, if the heirs be considered as owners and not as conduits of the title, the land passed to the defendant corporation without the burden of any trust.

While it is doubtful whether the writing

of November 5, 1850, considered as an agreement made before September 27, 1850, even though it was followed by a user of the land, had the effect of impressing the realty with a trust which the heirs in conjunction with Wilbur or his successors could not revoke, nevertheless we shall assume, but do not decide, that the writing of November 5, 1850, exerts the same effect that would have resulted if, after he received his donation certificate, Lownsdale had made a warranty deed describing the same land, stating the same consideration, and containing the same recital: "For the purpose of a parsonage, church, etc.," found in the writing of November 5, 1850.

In passing, it may be of interest to note how the property has been used since 1850. The church, as erected in 1850, faced Taylor street; in about 1860 it was enlarged by a cross-addition on the rear, and in 1869 was moved so as to face Second street, the present brick church having been completed. After the old church was moved to Second street, on lots 1 and 2, it was rented for secular purposes. In 1851 James H. Wilbur sold lot 6, and afterwards the title was quieted in a suit against the heirs and administrator of Daniel H. Lownsdale. On April 26, 1892, the First Methodist Episcopal Church conveyed a part of lots 1 and 2 "to the A. O. U. Temple Association" so that the land first described herein is all that remains of the five lots described in the writing of November 5, 1850. The sum of \$1,000, which was paid to the Lownsdale heirs for the deeds made in 1877 and 1878, was borrowed by the First Methodist Episcopal Church from Father Wilbur. A part, but not all, of the land has been used for church purposes since 1850, until a short time before the commencement of this suit. It is a significant circumstance that James H. Wilbur, one of the four men who knew the terms of any agreement made before September 27, 1850, and who undoubtedly knew the meaning intended by the words found in the writing of November 5, 1850, sold lot 6 as early as 1851 without any protest or objection so far as shown by the evidence; and it was James H. Wilbur, too, who furnished the money to procure the deeds from the Lownsdale heirs.

[3] We now come to a consideration of the meaning and legal effect of the words "for the purpose of a parsonage, church, etc.," appearing in the instrument of November 5, 1850. The quoted language is important because it is the very basis of the contention made by plaintiffs. If the abbreviation, "etc.," is to be accorded any meaning at all, it signifies "and other like purposes." *Naylor v. McCulloch*, 54 Or. 305, 103 Pac. 68. Conveyances containing words relating to a specified use of the land transferred may, according to their legal effect, be divided into four classes: (1) Where a condition subsequent is created, as in *Seack v. Jakel*, 71 Or. 35, 141 Pac. 211, L. R. A. 1915A, 679; *School Dist.*

No. 21 v. Wallowa County, 71 Or. 337, 142 Pac. 320; (2) where a conditional limitation is prescribed, examples appearing in *Reformed Dutch Church v. Harder*, 34 N. Y. St. Rep. 645, 58 Hun. 605, 12 N. Y. Supp. 297; *Henderson v. Hunter*, 59 Pa. 335; (3) where a trust is declared, illustrations being found in *Alden v. St. Peter's Parish*, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232; *Sohler v. Trinity Church*, 109 Mass. 1; *Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 118, 55 Am. St. Rep. 594; *Brown v. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376; and (4) where the motive of the grantor is announced or the intention of the grantee is revealed, without stating a condition, or prescribing a limitation, or creating a trust, or imposing an obligation of any kind. *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364, 3 Ann. Cas. 86, typifies the fourth class of cases. The plaintiffs do not contend that the instant case presents either a condition subsequent or a conditional limitation; but the question for decision is whether the conveyance falls in the third or in the fourth class of cases.

[4] Upon an examination of the numerous adjudications, including the citations relied upon by plaintiffs, it will be found that as a general rule where a conveyance is held to create a trust, of a kind which a court of equity will preserve and continue, the language of the deed not only specifies the purpose for which the land is to be used, but also expressly states, for example, that the realty shall be used for the purpose "only," or "forever," or "for no other purpose," or shall be held "in trust" for a defined purpose. The contention of plaintiffs is that the land itself must be used for a specified purpose, and that it must be so used perpetually. The plaintiffs cannot prevail, unless the deed (1) specifies a purpose which is exclusive, and (2) by appropriate language expresses or imports a perpetual use of the land itself for that exclusive purpose. No words indicating permanency appear in the instrument of November 5, 1850; the writing does not say that the land is conveyed for the purpose of a church and parsonage "only" or "forever" or "none other" or "no other" or "for no other purpose," and therefore the instant case is not analogous to *Raley v. Umatilla County*, 15 Or. 172, 13 Pac. 890, 3 Am. St. Rep. 142; nor like *Albany College v. Monteith*, 64 Or. 356, 130 Pac. 633; and is easily distinguishable from *Nelson v. Monitor Congregational Church*, 74 Or. 162, 145 Pac. 37.

[5] The conveyance here does no more than to state that the realty is transferred "for the purpose of a parsonage, church, etc.," without indicating how long that user shall continue. In *Supervisors of Warren Co. v. Patterson*, 56 Ill. 111, land had been conveyed "for courthouse and other county buildings"; a suit was commenced to enjoin a sale of the land; and, quoting at length from the opinion, the court said:

"The only remaining question is, as to the effect of the clause in the contract to convey the block, and which, it is not denied, is also contained in the deed executed by Collins. The deed conveys the absolute fee, without any conditions or restrictions whatsoever. The power of alienation is not limited or confined in any way. Had the grantors in the deed imposed as a condition of the sale, that the block should be used for county buildings and for no other purpose, they, perhaps, might invoke the power of a court of chancery to restrain a threatened sale of it, but the facts show that the grantors received the price demanded for the property, abating nothing, on the ground that the purchase was made for the purpose of erecting upon it county buildings, and it was quite immaterial to them to what purpose the block would be devoted, they having received full price for it. It, no doubt, was the intention of appellants, when the purchase was made, to devote it as expressed in the deed, but that formed no part of the consideration, nor was it the inducement to the grant. Subsequent events may have admonished those authorities, that the financial condition of the county did not justify an expenditure such as contemplated when the purchase was made, and that the best interests of the county required a sale of the property. We fail to see anything in the transaction to take from them the power expressly conferred upon them by statute, to sell the land. There is no covenant in the deed that the land shall be devoted to a particular purpose, but by its terms the county became possessed of an absolute estate in fee simple to the land, uncontrolled by any condition, restriction, limitation or reservation, whatever. If A. buys a lot of ground of B., and it is declared in the deed that he purchases it as a site for a mill or other operative establishment, the fee being conveyed to him, he has the undoubted right to dispose of it without carrying out his intention. But if a grant be made by A. to B., on condition B. erects on the land granted a certain structure, and he fails so to do, the land might revert to the grantor. But it is needless further to argue the case. Here was an unqualified sale of the fee in this block; it became vested in the county, and appellants, as their lawful agents, have full right and authority to sell it, and should not have been enjoined from so doing."

It appears from the quotation that the grantors were paid money for the land, and that the conveyance was not a gift. The same rule, however, was applied without any modification to a case where the deed was quite like the one here. In *Downen v. Rayburn*, supra, the deed made on July 28, 1856, recited that William R. Downen and wife, "for and in consideration of the sum of one dollar," sold to the trustees of the Industry Congregation of the Cumberland Presbyterian Church a parcel of land "to be used for a church location"; a church was erected and remained on the land until 1904, when it was removed. In 1901 the land was conveyed to Rayburn. The land had not been used for church purposes for several years prior to the transfer to Rayburn. It will be noticed that in *Downen v. Rayburn*, the consideration expressed is "the sum of one dollar," and in the instant case it is "the sum of one dollar and divers other good causes"; and yet when speaking of the words "to be used as a church location" the court says:

"There is nothing in the words in question to indicate that the premises conveyed were to be used as a church location for any particular length of time."

The doctrine was reaffirmed in *Walker v. I. C. R. R. Co.*, 215 Ill. 610, 74 N. E. 812, and in *Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268. Other authorities give support to the principle announced in the Illinois cases. *Beach v. Haynes*, 12 Vt. 16; *Fuquay's Heirs v. Trustees of Hopkins Academy*, 58 S. W. 814, 22 Ky. Law Rep. 744; 2 Devlin on Deeds (3d Ed.) p. 1829. See, also, *Fussell v. Hail*, 134 Ill. App. 620, 636; *Rankin R. B. Church v. Edwards*, 204 Pa. 216, 53 Atl. 770; *Cushman v. Church of the Good Shepherd*, 14 Pa. Co. Ct. 26; *Hardy v. Wiley*, 87 Va. 125, 12 S. E. 233; *City of Huron v. Wilcox*, 17 S. D. 625, 98 N. W. 88, 106 Am. St. Rep. 788; *Fitzgerald v. Modoc Co.*, 164 Cal. 493, 129 Pac. 794, 44 L. R. A. (N. S.) 1229; and the note to *Doan v. Vestry of the Parish of the Ascension* as reported in 7 L. R. A. (N. S.) 1119. The language employed in the instrument of November 5, 1850, does no more than to express the motive of the grantors or to announce the intention of the grantee; the words used are not appropriate for the creation of a charitable trust so as to require the land to be used for all time for church and parsonage purposes only.

[6] Words indicating an exclusive purpose and signifying permanency must appear in order perpetually to fetter upon the land the burden of an exclusive use, and sound reason underlies and gives stability to the rule. The law not only favors the vesting of estates, but when the fee is conveyed all doubts should, as a rule, be resolved in favor of a free use of the property and against restrictions. *McElroy v. Pope*, 153 Ky. 108, 154 S. W. 903, 44 L. R. A. (N. S.) 1220; *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391; *Adams v. First Baptist Church*, 148 Mich. 140, 111 N. W. 757, 11 L. R. A. (N. S.) 509, 12 Ann. Cas. 224, citing *Downen v. Rayburn*, supra. It was appropriately said in *Griffits v. Cope*, 17 Pa. 96:

"There is a very palpable distinction between a gift of land from motives of charity, and a dedication of land to charitable uses; and there are most intrusive reasons giving a judicial bias in favor of satisfying the motive without establishing a perpetual dedication. Our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraints upon alienation. And it seems unreasonable to suppose that a deviser even means that his heirs shall get back the land in such cases, except when he says so; or that, amidst the rapidly changing opinions of society, he means that his opinions shall be imbibed by others just as he left them, and shall forever withstand the changes necessarily incident to the progress of society; or that he means that no change in the number, circumstances, and habits of the people shall ever justify any sort of conversion of the gift. It would seem contrary to public policy to favor a construction that would give to a man, who died a hundred or a thousand years ago, the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied. When we look at the varied institutions of the last few centuries, and at the constant and rapid changes which are going on in the circumstances, habits, opinions, and institutions of our own age, we see how

unreasonable are many perpetual dedications of land, and how much caution there should be in implying an intention to create perpetuities."

We are not unmindful of the statement in *Chapman v. Wilbur*, 4 Or. 362, 364, that "the grant here was an absolute grant to the defendant in trust for a certain purpose specified"; but that remark was obiter dictum, because the case was decided and ended the very moment the court determined that the deed did not contain a condition subsequent.

[7] The writing of 1850 presents itself in yet another aspect. The conveyance signed by *Lownsdale*, *Coffin*, and *Chapman* may or may not have been a donation; any conclusion that it was a pure gift must rest upon remote inferences. Borrowing the language used by counsel for plaintiff during the trial, one of the motives inducing the transfer may have been "for the purpose also of promoting his enterprise of selling lots" and "it was good business for them to do that." If it be conceded that the transfer was made in consideration of the grantee using the land for "the purpose of a parsonage, church, etc.," then the price for the deed has been paid and the obligation fully satisfied by using the land for church and parsonage purposes for more than 60 years, because the rule is firmly established that a long-continued use operates as full payment. *Sumner v. Darnell*, 128 Ind. 33, 27 N. E. 162, 13 L. R. A. 173; *Jeffersonville, M. & L. R. R. Co. v. Barbour*, 89 Ind. 375; *Hunt v. Beeson*, 18 Ind. 380; *Higbee v. Rodeman*, 129 Ind. 244, 28 N. E. 442; *Mead v. Ballard*, 7 Wall. 290, 19 L. Ed. 190. The conveyance of November 5, 1850, contains nothing which will now prevent the First Methodist Episcopal Church from leasing, selling, or otherwise disposing of the land at Third and Taylor streets.

It will be recalled that the supplemental articles of incorporation, which were filed in 1888, purport to restrict the right of the trustees to sell the property at Third and Taylor streets by declaring that the land "shall not be sold or conveyed by said trustees or their successors, unless such power and authority be given them by filing other and additional supplemental articles of incorporation granting such authority in accordance with the discipline of said church." The brief filed for plaintiffs refers to the supplemental articles of incorporation, but no point is made concerning their legal effect. The whole argument dealing with the character of the estate created by the writing of November 5, 1850. The defendants contend that the supplemental articles have no binding effect because there was no statute which provided for filing supplemental articles until 1891, when what is now section 6808, L. O. L., was enacted. The brief for defendants does not argue that the supplemental articles are not binding if properly filed. The record, however, does not present a situation which requires a determination of the legal effect of the articles filed in 1888. The sup-

plemental articles go no further than to declare that the trustees cannot sell or convey the land at Third and Taylor. There was no intention existing at the time of the commencement of this suit to sell the land, and for that reason we do not now attempt to ascertain the effect which results from filing the supplemental articles. It is true that nearly every motion or resolution passed and nearly every step taken, whether by the board of trustees or the official board or the quarterly conference, contemplated either a sale or a lease or a mortgage of all or a part of the Third street property; but it is also true that all previous plans were rescinded when the quarterly conference adopted the Loveland resolutions on April 6, 1914. Article 3 of the so-called articles of consolidation signed by the joint committee of the two churches stipulates that the church building for the consolidated organization shall be located at Twelfth and Taylor streets; and article 4 provides:

"That the old church property, corner of Third and Taylor streets, be kept separate and leased or improved so as to be made as productive as possible, the entire net revenue from this property to be used under the direction of the board of trustees of the consolidated church for church purposes. After five years' time, from date of consolidation, unless the consolidated church requires the full income in payment of its improvement obligations, the board of trustees are directed to distribute at least half of the net income for city church extension and other missionary or charitable work in the Methodist Episcopal Church."

The Loveland resolutions reaffirm the original articles of consolidation and provide for the selection of trustees to whom the land at Third and Taylor streets shall be conveyed "to be perpetually held in trust by said trustees for the support of Methodist City Church Extension in the city of Portland, the revenue from same to be expended according to article 4 of the original agreement of consolidation, which agreement was dated July 30, 1912, and signed by the joint committees of the two churches in interest." Trustees were chosen and a deed was executed, but the deed was annulled by order of the quarterly conference because of the commencement of this suit. It must be admitted that the deed itself is perhaps broader than the resolutions authorizing its execution, and contains a provision which contemplates the possibility of a sale by the trustees; but such sale can be made "only upon written application to the quarterly conference of said First Methodist Episcopal Church in Portland, Oregon, and an order made by said quarterly conference for the sale thereof, a majority of the members of the quarterly conference concurring, and the pastor and district superintendent of this district consenting thereto." The trustees who had been selected pursuant to the Loveland resolutions had not applied for permission to sell the property, nor had the quarterly conference

granted or even planned to grant permission to sell, and therefore we are not now called upon to adjudicate any questions arising out of the supplemental articles of incorporation.

While our conclusions result in an affirmation of the decree, we think that it will be just and fair for the litigants to pay their own disbursements. Around the old Taylor Street Church cling recollections which cover most of life's journey and sound every note in the gamut of human sentiment for some of those who worshipped there so long; and this in part accounts for the earnest contentions made by plaintiffs. Furthermore, even after the consolidation of the two societies the church authorities in various ways acted upon the assumption that the land at Third street was burdened with a trust; the condition of the title to the land was not free from doubts; and in view of all the circumstances surrounding the parties we think it is equitable that the decree be without costs or disbursements in this court.

The decree of the circuit court is affirmed, but without judgment for costs and disbursements in this court.

EAKIN, J., not sitting.

(79 Or. 424)

STEVENS et al. v. TAYLOR, County Treasurer, et al.

(Supreme Court of Oregon. Feb. 8, 1916.)

MUNICIPAL CORPORATIONS \S 958—TAXATION — LEGISLATIVE POWER — AMENDMENT OF CHARTER.

Under a town charter (Sp. Laws 1893, p. 253, \S 50, art. 1), providing that the common council might levy and collect taxes not to exceed one-half of 1 per cent., except as otherwise provided in the act, upon all real and personal property, an amendment by the common council "to levy, assess and collect taxes not to exceed (1) per cent. except as otherwise provided and ect," was so indefinite as to be unenforceable without inserting after the words "except as otherwise provided," the clause, "in this charter," and further excluding the word and abbreviation "and ect"; and hence was too vague and doubtful to authorize a levy of taxes beyond the original charter limitation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. $\S\S$ 2023-2037; Dec. Dig. \S 958.]

Department 2. Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Suit by Welby Stevens and others against S. W. Taylor, Treasurer of Lane County, Or., J. C. Parker, Sheriff of Lane County, Or., and the Town of Springfield. Decree for plaintiffs, and defendants appeal.

This is a suit to enjoin the collection of a part of the taxes attempted to be levied by the town of Springfield, Or. The complaint alleges the corporate capacity of the town and of Lane county, of which it forms a part; that the defendants S. W. Taylor and J. C. Parker are, respectively, the treasurer and sheriff of that county; describes the various

lots owned by the several plaintiffs in that town, and avers, in effect, that on November 26, 1913, the town attempted to levy a tax, for the different funds for the ensuing year of 15 mills as follows: General, 5; sinking, 5; light and water, 3.6; band, .4; and street improvement, 1—and thereupon endeavored to certify such pretended levy to the county clerk of that county; that by its charter the town is prohibited from levying or collecting more than 5 mills for general purposes, and has no right to levy or collect taxes for the fund of light and water, or for band; that in pursuance of such notice there was entered on the tax roll of that county what purported to be a tax of that town of 15 mills on every dollar of the assessed valuation of the taxable property therein; that the tax roll containing such entries was placed in the hands of the county treasurer for collection; that the sums so entered on the roll as charges against such assessable property are illegal, as to the attempted levy of a fund for light and water, and for a band; that each of the plaintiffs has paid all the taxes so extended, except as to the funds last mentioned; that unless enjoined, the county treasurer and the sheriff will attempt to collect such invalid taxes as delinquent; and that by reason of the entry thereof on the tax roll a cloud is thereby cast upon the title of the several parcels of real property so owned by the plaintiffs in that town. The answer denies the material averments of the complaint, and for a further defense alleges, in substance, that the common council of the town of Springfield prepared and adopted amendments to the municipal charter, which alterations were submitted to the legal voters of the town at a regular election held therein December 3, 1906, at which such amendments were ratified by a majority of all the votes cast thereon, whereby the charter was duly amended and the town was thereupon authorized to levy a general fund tax of 10 mills upon the assessed valuation of all the taxable property therein, and that a copy of the official records of the town, relating to such amendments, is made a part of this answer and marked "Exhibit A"; and that pursuant to such authorization the town has usually levied a general fund tax of more than 5 mills, setting forth the levies of all funds for the years 1906 to 1913, both included. A copy of the records of the meeting of the common council of Springfield, held November 19, 1906, as far as important herein is as follows:

"The following amendment was drafted for the purpose of amending: * * * Chapter 8, section (50), article (1) of the charter of the town of Springfield be amended so as to read: 'To levy, assess and collect taxes not to exceed (1) per cent. except as otherwise provided and ect.'"

A demurrer to the separate answer, on the ground that it did not state facts sufficient to constitute a defense to the suit, was sustained. A stipulation, signed by counsel and ad-

mitting some of the averments of the complaint, was filed, and, based thereon, the plaintiffs rested their cause. Thereupon the defendants' counsel moved for a nonsuit on the ground that no evidence had been offered by the plaintiffs tending to show that the items of the tax, undertaken to be levied, were in violation of the provisions of the charter. This motion was denied, whereupon the defendants' counsel offered testimony tending to establish the remaining controverted averments of the answer. Most of such testimony was rejected, and, a decree having been rendered, granting the relief prayed for in the complaint, the defendants appeal.

John H. Bower, of Eugene (S. P. Ness, of Eugene, on the brief), for appellants. Helmus W. Thompson, of Eugene (Thompson & Hardy, of Eugene, on the brief), for respondents.

MOORE, C. J. (after stating the facts as above.) A charter, granted by the Legislative Assembly to the town of Springfield, was filed in the office of the secretary of state February 10, 1893. Laws Or. 1893, pp. 245-277. The clauses of such act are consecutively numbered from 1 to 142. It will be kept in mind that the answer avers the common council of the town of Springfield prepared and submitted to the qualified electors of that municipality an alteration of its fundamental law, as follows:

"Chapter 8, section (50), article (1) of the charter of the town of Springfield be amended so as to read: 'To levy, assess and collect taxes not to exceed (1) per cent, except as otherwise provided and ect.'"

Section 50 of the charter, granted by the Legislative Assembly, is not found in chapter 8 thereof, but in the preceding chapter. Article 1 of section 50 of the legislative charter reads:

"The common council shall have power and authority within the corporate limits of the town of Springfield: 1. To levy, assess, and collect taxes not to exceed one half of one per cent, except as otherwise provided in this act, upon all tangible property, both real and personal property, within the corporate limits of said town, and all goods, wares, and merchandise kept for sale in said town, by whomsoever owned, but no notes, accounts, credits, or bills receivable shall be taxed."

Whether or not the reference in the proposed amendment to chapter 8 of the charter should be eliminated and the attempted alteration limited to an amendment of article 1 of section 50 of the organic law of the municipality it is not necessary to determine. The contemplated change is so indefinite that it cannot be enforced with certainty without first inserting after the words, "except as otherwise provided," the clause, "in this charter," and further excluding the word and abbreviation, "and ect."

The exercise by a municipal corporation of legislative authority to levy taxes is a proceeding in invitum, to enforce which the provision of the charter, expressly granting the

power, is the limit of the exaction. Corbett v. City of Portland, 31 Or. 407, 414, 48 Pac. 428, 429. In deciding that case Mr. Justice Bean, speaking for the court, says:

"The principle is universal that whenever a municipality or other governmental agency of a state seeks to impose the burden of taxation upon a citizen or upon his property, it must be able to show the grant of such power by express words or necessary implication. No doubtful inference from other powers granted or from obscure provisions of the law, nor mere matter of convenience, or even necessity, will answer the purpose. The grant relied upon must be evident and unmistakable, and all doubts will be resolved against its exercise, and in favor of the taxpayer."

An examination of the language, employed in the proposed amendment of section 50 of the charter (Laws Or. 1893, p. 253), shows it is too vague and dubious to authorize a levy of the taxes to which exceptions have been urged in this suit.

Other objections and exceptions to the rulings of the court are insisted upon by defendants' counsel. A careful examination of them induces the conclusion that they are without merit. The decree should be affirmed; and it is so ordered.

BEAN, BENSON, and McBRIDE, JJ., concur

(79 Or. 182)

MOWREY v. BOUTON et al.

(Supreme Court of Oregon. Feb. 8, 1916.)

1. APPEAL AND ERROR \S 692 — RECORD — QUESTIONS PRESENTED FOR REVIEW.

Where the bill of exceptions did not disclose any answer to a question objected to, the appellate court cannot determine whether defendant was injured by the overruling of the objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. \S 692.]

2. APPEAL AND ERROR \S 692—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—OFFERS OF PROOF.

The sustaining of objections to questions asked by appellant presents nothing for review where there was a failure to inform the court as to what the answers were expected to disclose, and the question did not indicate the replies anticipated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905-2909; Dec. Dig. \S 692.]

In Banc. Appeal from Circuit Court, Multnomah County; Geo. N. Davis, Judge.

Action by A. M. Mowrey against E. F. Bouton and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action for damages for fraudulent representations whereby it is alleged that plaintiff was induced to purchase shares of stock in a corporation which was insolvent, and whose stock was worthless. Upon a trial there was a verdict and judgment for defendants, from which plaintiff appeals.

Percy C. Stroud, of St. Johns, H. E. Collier, of Portland, and F. W. Tempes, of Vancouver, Wash., for appellant. Frederic H. Whitfield, of Portland, and Geo. B. Simpson, of Vancouver, Wash., for respondents.

BENSON, J. The assignments of error, of which there are six, are not at all satisfactory, being vague and indefinite, but we have examined the bill of exceptions with great care and shall consider them as fully as may be necessary to a determination of the question presented.

[1] The second assignment complains of the action of the court in permitting the defendants to ask the following question of the plaintiff upon cross-examination:

"You were offered a chance, were you not, after they finally forced it into bankruptcy, to go in with the other members of the company and buy up the assets?"

If this question was ever answered, the bill of exceptions does not disclose the fact, so we are unable to say whether or not plaintiff was injured by the ruling of the court.

[2] As to the other assignments, it is sufficient to say that they all attack the rulings of the court in sustaining objections to questions asked by plaintiff, and in every instance there was a failure upon the part of counsel to inform the court as to what the answer was expected to disclose, and the questions themselves do not indicate the reply to be anticipated. This court has held in a number of cases beginning with Kelley v. Highfield, 15 Or. 277, 14 Pac. 744, that to make such exceptions available the bill of exceptions must show what it was expected to prove by the answer to the question.

The judgment of the trial court is therefore affirmed.

(79 Or. 430)

HUMPHRY v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. Feb. 8, 1916.)

1. APPEAL AND ERROR \S 544 — NECESSITY — BILL OF EXCEPTIONS.

Where no bill of exceptions was obtained, the only question for review is whether the findings support the judgment notwithstanding a transcript of the entire testimony was brought up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. \S 544.]

2. CONSTITUTIONAL LAW \S 321—MUNICIPAL CORPORATIONS \S 756—REMEDIES—INJURIES TO PERSONS ON STREETS—LIABILITY OF MUNICIPALITY.

Notwithstanding Const. art. 1, § 10, declares that a right of action to recover damages for an injury sustained cannot be abridged by legislation so as to deprive the injured party of all remedy, the Portland city charter (Special Laws 1903, p. 3), declaring that the city shall not be liable for injuries received from unsafe sidewalks, but imposing duty to keep sidewalks in repair and liability for injuries from defects on the abutting owner, and providing methods for enforcement of repair of sidewalks by city officials, is valid; the duty of maintaining walks in

repair not being a hazardous undertaking which the city could not impose on abutting owners.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 950, 952-955; Dec. Dig. ¶¶ 321; Municipal Corporations, Cent. Dig. § 1588; Dec. Dig. ¶ 756.]

3. MUNICIPAL CORPORATIONS ¶755—SIDEWALKS—DUTY TO MAINTAIN.

In the absence of statute, a city is liable to a person injured upon a defective walk, the repair of which it is incumbent upon the city to keep up, if the city have the means of performing that duty or is granted the right of taxation to perform it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1587, 1589, 1590; Dec. Dig. ¶ 755.]

4. MUNICIPAL CORPORATIONS ¶745½—INJURIES TO PERSONS ON STREET—LIABILITY OF MUNICIPALITY—"GOVERNMENTAL DUTY."

Though the Portland city charter required the city engineer to compel abutting owners to keep sidewalks in repair, that duty is a governmental rather than a corporate duty, the sidewalks as part of the highway being opened and improved for the benefit of all the public, so that the city is not, on the engineer's default, liable under the rule of respondent superior.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1568, 1569; Dec. Dig. ¶ 745½.]

For other definitions, see Words and Phrases, Second Series, Governmental Duty.]

5. MUNICIPAL CORPORATIONS ¶762—SIDEWALKS—LIABILITY OF ENGINEER.

As the Portland city charter imposed on the city engineer the duty of notifying abutting owners to repair defective walks to file an affidavit with the auditor, who should thereupon mail notice to the owner, and to make repairs in case of the owner's default, the city engineer, though he posted notice is liable for injuries caused by a defective sidewalk, where the owner having defaulted, never having received notice by mail, though there was no money available for repair of the sidewalk; as in such case he might have discontinued the use of the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1605-1611; Dec. Dig. ¶ 762.]

6. MUNICIPAL CORPORATIONS ¶808—DEFECTIVE SIDEWALKS.

Failure of city auditor to mail a notice to an abutting owner of the defective condition of a sidewalk in front of her premises as required by city charter relieves her from liability for resulting injuries to a pedestrian.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1684-1687, 1690-1694; Dec. Dig. ¶ 808.]

7. DISMISSAL AND NONSUIT ¶42—EFFECT OF DISMISSAL.

Where on trial plaintiff dismissed as to part of the defendants, such dismissal exonerates them from liability.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 75-83; Dec. Dig. ¶ 42.]

Bean, J., dissenting.

In Banc. Appeal from Circuit Court, Multnomah County; Henry L. Benson, Judge.

Action by Anna Humphry against the City of Portland, a municipal corporation, George L. Baker and others, and T. M. Hurlburt. From a judgment against the City and for the other defendants, the City appeals. Reversed, and cause remanded for new trial as to defendant Hurlburt.

This action was commenced February 11, 1913, by Anna Humphry against the city of Portland, the then members of the common council, the mayor and the engineer of that city, and Mary J. Reece, now Mrs. Frederickson, to recover damages for a personal injury. The facts are that on July 17, 1912, at about 9 o'clock in the evening, as the plaintiff and her husband were passing along a wooden sidewalk in front of and adjoining upon Mrs. Frederickson's premises, Mr. Humphry stepped on the end of a plank in the walk, causing the other end to rise and strike his wife, breaking in several places the bones of her right leg below the knee, from the effect of which fracture the limb has been shortened.

The pleadings set forth the provisions of the charter hereinafter quoted, and after the issues were joined the action was dismissed as to the mayor and councilmen, upon the motion of their attorney. Thereupon the cause was tried, without the intervention of a jury, and from the testimony given the court made findings of fact in substance as follows: (1) That the city of Portland is a municipal corporation, that the city engineer had been duly appointed, and was legally qualified and acting at the time of the accident, and that Mrs. Frederickson was the owner in fee and in the possession of the lots, particularly describing them, in front of which was the defective sidewalk that caused the injury; (2) that the city of Portland, by the terms of its charter, has exclusive control over the sidewalks, and before any property owner is allowed to repair such walk he must secure a permit from the city engineer; (3) that from January, 1912, to July of that year the wooden sidewalk in front of Mrs. Frederickson's lots was defective and in a dangerous condition for pedestrians, which fact was then well known by the city engineer, but no repairs were made to the walk within those months; (4) that it is incumbent upon the city of Portland to keep the sidewalks in front of each lot in good repair and in a reasonably safe condition, but the city negligently failed to perform that duty; (5) that in January, 1912, the city engineer caused to be posted on Mrs. Frederickson's lot the necessary notice requiring the owner, agent, or occupant of the premises immediately to repair the sidewalk in front thereof, and thereupon filed with the city auditor an affidavit of such posting, but no notice to repair was sent or mailed to Mrs. Frederickson, who did not know of the defective condition of the walk; (6) that from January, 1912, to and including July of that year the city engineer was not supplied by the city of Portland with sufficient men, material, money, or means to repair the sidewalks then in use, and had during that time only one crew of men, which was wholly inadequate to make

repairs to the sidewalks then in need thereof; (7) that on July 17, 1912, while the plaintiff was walking along the sidewalk in front of the designated lot, she was, without fault on her part, violently thrown by a loose plank in the walk, and, falling, sustained a permanent injury, which hurt resulted from the negligence of the city of Portland, whereby the plaintiff sustained damages in the sum of \$3,000; (8) and that on November 18, 1912, the city of Portland and the members of its council were notified of the plaintiff's claim for damages, as required by the municipal charter, and more than 60 days elapsed before this action was commenced.

Based on these findings, the court deduced conclusions of law to the effect: (1) That, as it was incumbent upon the city of Portland to keep in a reasonably safe condition and state of repair the sidewalk in front of the designated lot, and since the municipality had failed to perform that duty, in consequence of which negligence the plaintiff was injured to the extent of \$3,000, she was entitled to a judgment against the city for that sum; (2) that the plaintiff was not entitled to a judgment against the city engineer; (3) and that she had no right to a judgment against Mrs. Frederickson. Predicated upon these findings judgment was rendered in accordance therewith against the city alone, and it appeals.

W. P. La Roche and Henry A. Davie, both of Portland, for appellant. H. B. Beckett, of Portland (Wilbur, Spencer & Beckett and J. C. Simmons, all of Portland, on the brief), for respondent Humphry. B. S. Pague, of Portland, for respondent Reece. Hurlburt & Layton, of Portland, for respondent Hurlburt.

MOORE, C. J. (after stating the facts as above). [1] Though a complete transcript of the entire testimony received at the trial has been brought up, no bill of exceptions was obtained, and in the absence thereof the only question to be considered is whether or not the findings of fact support the judgment. *Allen v. Leavens*, 26 Or. 164, 37 Pac. 488, 26 L. R. A. 620, 46 Am. St. Rep. 618; *Miller v. Head Camp*, 45 Or. 192, 77 Pac. 83; *Lewis v. Clark*, 66 Or. 461, 134 Pac. 1194.

[2, 3] It becomes important to set forth some of the clauses of the charter of the city of Portland in force when the injury occurred, as found in the Special Laws of Oregon 1903, p. 3 and following. These provisions, as far as material herein, read:

"No recourse shall be had against the city for damage or loss to person or property suffered or sustained by reason of the defective condition of any sidewalk; * * * nor shall there be any recourse against the city for want of repair of any sidewalk; * * * nor shall there be any recourse against the city for damage to person or property suffered or sustained by reason of accident on sidewalk; * * * but in such case the person or persons on whom the law may have imposed the obligation to repair such defect in the sidewalk, * * * and also the officer

or officers through whose official negligence such defect remains unrepaired shall be jointly and severally liable to the party injured for the damage sustained." Section 8.

"It is hereby made the duty of all owners of land adjoining any street in the city of Portland to construct, reconstruct, and maintain in good repair, the sidewalks in front of said lands. * * * If the owner of any lot or part thereof, or parcel of land, shall suffer any sidewalk along the same to become out of repair, it shall be the duty of the city engineer to post a notice on the adjacent property, headed 'Notice to Repair Sidewalk,' in letters not less than one inch in length, and said notice shall in legible characters direct the owner, agent, or occupant of said property immediately to repair the same in a good and substantial manner, and the city engineer shall file with the auditor an affidavit of the posting of such notice, stating the date when and the place where the same was posted. The auditor shall, upon receiving the affidavits of the city engineer, send by mail a notice to repair said sidewalk to the owner (if known) of such property, or to the agent (if known) of the owner, and directed to the post office address of such owner or agent, when such post office address is known to the auditor, and if such post office address be unknown to the auditor, such notice shall be directed to such owner or agent at Portland, Oregon." Section 384.

"The owner, agent, or occupant, before making said repairs, shall obtain from the city engineer a permit so to do, * * * and the owner, agent, or occupant shall make said repairs within twenty days from the date of posting said notice. If the owner, agent, or occupant of any such lot or part thereof, or parcel of land, shall fail, neglect, or refuse to make the sidewalk repairs within the time designated, the city engineer shall make the same, and keep an accurate account of the cost of the labor and materials in making the repairs in front of each lot or parcel of land, and shall report monthly to the executive board, the cost of such repairs, and a description of the lot or part thereof, or parcel of land, fronting on the sidewalk upon which such repairs are made." Section 385.

"The executive board shall exercise the same general authority and supervision over sidewalk repairs that it shall have in the matter of street improvements; it shall inspect the reports of sidewalk repairs, and the cost thereof, made by the city engineer, and if it deems the same to be reasonable, it shall approve the same and transmit them to the council. The council shall, at least once each year, by ordinance, assess upon each of the lots or parts thereof, or parcels of land fronting upon sidewalks, which have been so repaired, the cost of making such repairs as approved by the executive board. * * * Section 386.

"Moneys to repair sidewalks when the repair shall be made by the city engineer under this charter, may, at the discretion of the council, be advanced from the street repair fund, to be reimbursed by the special assessment when collected." Section 387.

"It is not only the duty of all owners of land within the city to keep in repair all sidewalks constructed or existing in front of, along, or abutting upon their respective lots or parts thereof, and parcels of land, but such owners are hereby declared to be liable for all damages to whomsoever resulting, arising from their fault or negligence in failing to put any such sidewalk in repair, after the owner or agent thereof has been notified as provided in this charter so to do; and no action shall be maintained against the city of Portland by any person injured through or by means of any defect in any sidewalk." Section 388.

It is contended by defendant's counsel that, the charter having imposed the duty to keep sidewalks in repair upon the abutting own

ers, the common council, and the city engineer, and exempted the municipality from all liability to any person for an injury suffered in consequence of a defective sidewalk, an error was committed in rendering judgment against the city. In support of the principle thus asserted it is argued that, in the absence of a statute imposing the accountability, a municipal corporation, as an agency of the state for governmental purposes, is not liable in damages to a party who sustains an injury by reason of a defective sidewalk, and that article 1, § 10, of the Constitution of Oregon, declaring that "every man shall have remedy by due course of law for injury done him in his person, property or reputation," has no application to an action of this kind, since at the common law no remedy against a municipal corporation to recover damages for a personal injury caused by a defective highway existed.

A noted author, in discussing the question of unsafe highways as arranged by the decisions on this subject by courts in the United States, remarks:

"The cases may be grouped into the following classes: First. Where neither chartered cities nor counties or other quasi corporations are held to an implied civil liability. Only a few states have adopted this extreme view of exempting cities from liability in this respect. Second. Where the reverse is held, and both chartered cities and counties are alike considered to be impliedly liable for their neglect of the duty in question. This doctrine prevails in a small number of states. Third. Where municipal corporations proper, such as chartered cities, are held to an implied civil liability for damages caused to travelers for defective and unsafe streets under their control, but denying that such a liability attaches to counties or other quasi corporations as respects highways and bridges under their charge. This distinction has received judicial sanction in a large majority of the states, where the legislation is silent in respect of corporate liability." Dillon, *Mun. Corp.* (4th Ed.) § 999.

The third class thus specified has been adopted in Oregon. Thus in *Templeton v. Linn County*, 22 Or. 313, 29 Pac. 795, 15 L. R. A. 730, it was held by a majority of the court that at common law a county was not liable for an injury resulting from a defect of its highways. In a very able dissenting opinion, however, Mr. Justice Lord maintained that upon the organization of a county a duty devolved upon it to keep the highways within its borders in repair, to perform which obligation the quasi corporation was empowered to levy and collect taxes; that a breach of that duty necessarily imposed upon the county a liability for the resulting damages to recover which the common law supplied a remedy, whether or not it was expressly given by statute; and that article 1, § 10, of the Organic Law of the state, placed it beyond the power of the Legislature to take away remedies that existed when the Constitution was adopted. At its next session, after that decision was rendered, the Legislative assembly enacted a statute pro-

viding for the recovery from counties of a limited sum as compensatory damages by persons injured in consequence of defective roads or bridges. *McFerren v. Umatilla County*, 27 Or. 311, 40 Pac. 1013. Another act is now in force giving greater compensation in such cases. L. O. L. § 6375.

In *Mattson v. Astoria*, 39 Or. 577, 580, 65 Pac. 1066, 87 Am. St. Rep. 687, a municipal charter having provided that "neither the city of Astoria nor any member of the council thereof shall in any manner be held liable for any damages resulting from a defective condition of any street, alley, or highway thereof," it was determined, in construing such excerpt, that while it was within the power of the Legislature to exempt a city from liability for damages sustained in consequence of an unsafe street, a party injured by reason of the defect might proceed personally against the officer to whom the charter delegated the duty of repairing the highway, and by whose negligence the injury resulted, notwithstanding such attempted exoneration from liability.

In *Batdorf v. Oregon City*, 53 Or. 402, 405, 100 Pac. 937, 938, 18 Ann. Cas. 287, it is said:

"Though there is a conflict of judicial utterance as to the common-law liability of a city for a failure to keep a street in repair, the weight of authority supports the principle that, when a charter invests a municipal corporation with exclusive control over the streets within its limits, and authorizes it to employ the means necessary to improve and maintain such highways, a duty to the public arises by implication of law to keep the streets that have been opened for travel in a reasonably safe condition; and for any injury that may result from a failure to discharge such obligation the city, without any statutory provision to that effect, must respond in damages."

In referring to what is now section 358, L. O. L., it is further observed:

"Our statute re-enacts this rule of the common law, and authorizes the maintenance of an action against any city in its corporate capacity for an injury to the rights of a party arising from some act or omission of the municipality."

See the notes to this case in 18 Ann. Cas. 287.

In *Pullen v. Eugene*, 146 Pac. 822, and *Id.*, 147 Pac. 768, in construing a provision of a municipal charter which declared, "The city of Eugene shall not in any event be liable in damages to any person for an injury caused by any defect or dangerous place at or in any sidewalk, * * * unless the mayor, chairman of the street committee, or street commissioner shall have had actual notice of such defect or dangerous place, and a reasonable time thereafter in which to repair or remove such defect or dangerous place before the happening of such accident or injury, and in no case shall more than \$100.00 be recovered as damages from the city for any such accident or injury," it was held that, if a recovery of more than \$100 for any injury resulting from a defective sidewalk was undertaken, the action must

be against the city officers by whose neglect the defect continued.

As tending to show the liability of a municipal corporation to a person who has sustained an injury by reason of an unsafe street, see the notes to the cases of *Browning v. City of Springfield*, 63 Am. Dec. 345; *Godard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 373; *Sundell v. Tintah*, Ann. Cas. 1913C, 1311. By analogy and based on the doctrine asserted by Judge Deady in *Eastman v. Clackamas County* (C. O.) 32 Fed. 24, and recognized by Mr. Justice Lord in *Templeton v. Linn County*, 22 Or. 313, 321, 29 Pac. 795, 15 L. R. A. 730, we conclude a municipal corporation, in the absence of any statute governing the matter, is liable to a person sustaining an injury from a defective street or sidewalk, the repair of which it is incumbent upon the city to keep up, if it have the means of performing that duty or is granted the right of taxation or given the power of levying a special assessment for that purpose, and we adhere to the rule, heretofore asserted, that under article 1, § 10, of the Constitution of Oregon, a right of action to recover damages for an injury thus sustained cannot be so abridged by legislation as to deprive the injured party of all remedy. It is conceded, however, that by proper enactment the liability thus imposed upon a municipal corporation may be shifted to its officers or agents.

It is contended by plaintiff's counsel that the rule announced in *Pullen v. Eugene* is not controlling herein. In support of the principle so asserted reliance is had upon the case of *McAllister v. Albany*, 18 Or. 426, 23 Pac. 845, where it was ruled that a municipal corporation could not escape liability for a personal injury by letting to a contractor any work the performance of which was intrinsically dangerous. The rule there recognized is analogous to the doctrine of the continued liability of a contractor to respond in damages for an injury resulting from letting to an independent contractor any work the performance of which is necessarily hazardous. Thus in *Winniford v. MacLeod*, 68 Or. 301, 306, 136 Pac. 25, 27, Mr. Justice Burnett, discussing this subject, says:

"The general rule is that, where work is committed in all its details to a contractor, and he is responsible to his employer, not for details, but only for a finished result, the former alone is answerable for injury happening to third parties in the prosecution of the work. There are exceptions to this rule. The employer must also respond if the manner provided for carrying out the contract is in itself dangerous, or if the project is manifestly dangerous to others, and an injury ensues on account of either the method prescribed or the nature of the undertaking itself."

See, also, *Dibert v. Gleblach*, 74 Or. 64, 144 Pac. 1184.

In the case at bar it is difficult to see how the repair of a sidewalk involved any work the performance of which was so intrinsically dangerous as to render the city liable for

the resulting damages, notwithstanding the exemption clause of the charter.

The facts involved in the case of *McAllister v. Albany*, supra, are thus stated in the opinion:

"This is an action to recover damages for injuries sustained by the plaintiff in consequence of a ditch dug across a certain street of said city for the construction of a sewer being left open and without lights or guards, and into which the plaintiff drove his team and seriously injured himself and team."

In commenting upon the discretion of local authorities, a text-writer observes:

"Whether this right of municipal corporations to construct drains and sewers shall be exercised in any particular case or not, as well as the manner in which it shall be exercised, must be determined by the corporation, and not by the courts. When, however, the corporation has ordered the construction of a sewer, and has entered upon the prosecution of the work, its duty becomes ministerial, and, 'where a judicial duty ends and ministerial duty begins, their [there] immunity ceases, and liability attaches.'" *Elliot, Roads & Streets* (3d Ed.) § 560.

To the same effect see, also, 28 Cyc. 1315.

It will thus be seen that, if the injury complained of in *McAllister v. Albany*, supra, had resulted from the negligence of that defendant, and not from the carelessness of an independent contractor, it is quite probable a judgment might have been rendered against the city upon the facts so stated. But, however this may be, the principle there recognized, or the rule which possibly might have been enforced therein, cannot be invoked to govern the decision in the case at bar.

[4] It is maintained by plaintiff's counsel that, the obligation to repair sidewalks having been imposed by the charter upon the city engineer, he is to be regarded, not as an independent public officer, but as the agent of the municipality, and for any failure to perform that duty, whereby an injury has been sustained by another, the city is liable for the ensuing damages, and hence the judgment should be affirmed. It has been held by some courts that, where the duty rests upon a city to keep its streets in a safe condition for public use, and the officer who is required to perform that obligation falls in this particular, whereby injury results, a recovery may be had against the city for the damages suffered, upon the principle of respondeat superior. *Conrad v. Trustees*, 16 N. Y. 158; *Hall v. City of Austin*, 73 Minn. 134, 75 N. W. 1121; *Ehrgott v. Mayor*, etc., 96 N. Y. 264, 48 Am. Rep. 622; *Missano v. Mayor*, etc., 160 N. Y. 123, 54 N. E. 744; *Normile v. City of Ballard*, 33 Wash. 369, 74 Pac. 506.

A well-recognized distinction exists between a quasi corporation, such as a county, and a municipal corporation, such as a city. In respect to the liability of each to persons injured by neglect of duty by the agents or officers of either. *Dillon, Mun. Corp.* (4th Ed.) §§ 26, 963. Whatever the rule may be in other states, it has been repeatedly held in Oregon that a municipal corporation, in performing the duties imposed upon or delegat-

ed to it, exercises a private, proprietary function for the benefit of its inhabitants alone, and known as a ministerial duty, and also discharges a governmental obligation, in the performance of which it acts as an agent of the state and for the entire public, and when a city, incorporated village, or town is employing the latter power in good faith, it is exempt from liability for damages; but, when performing the former function, the rule of respondeat superior governs in respect to an injury occasioned by the negligence of the officers and agents of the municipal corporation. *Esberg Cigar Co. v. Portland*, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; *Shipley v. Hachenev*, 34 Or. 303, 55 Pac. 971; *Wagner v. Portland*, 40 Or. 390, 60 Pac. 985, 67 Pac. 300; *Pacific Paper Co. v. Portland*, 68 Or. 120, 135 Pac. 871; *Blake-McFall Co. v. Portland*, 68 Or. 126, 135 Pac. 873; *Coleman v. La Grande*, 73 Or. 521, 144 Pac. 468.

In *Dyer v. Danbury*, 85 Conn. 128, 81 Atl. 958, 39 L. R. A. (N. S.) 405, Ann. Cas. 1913A, 784, 786, Mr. Justice Thayer, in distinguishing between governmental duties enjoined upon a municipal corporation and ministerial obligations performed by it, says:

"For the nonperformance or misperformance of a merely governmental duty imposed upon a city or town it is not liable in damages unless a right of action against it is given by statute. * * * Where, however, some special power or privilege out of which grow public duties, primarily for the benefit of its own citizens, is granted to a municipality at its request, or where with its consent some special duty not belonging to it under the general laws is imposed upon it, the case is different. In such cases the municipality is in a sense performing a private duty, and, although no liability for damages is imposed by statute for negligence in the performance of such duties, the municipality is nevertheless liable for it."

County roads and city streets and sidewalks, when once constructed, are for the benefit of all people who may have occasion to travel or pass along or across such highways, the duty to repair which is also imposed upon the municipal corporation for the benefit of the entire public, and not for the sole advantage of the citizens residing in the immediate neighborhood specially benefited thereby. A distinguished author, commenting upon this legal principle, remarks:

"It cannot be justly said that the regulation and control of highways is not a governmental matter, for it was so in the earliest years of the common law, and, indeed, long before the common law took form and force." *Elliott, Roads & Streets* (3d Ed.) § 496.

"Where a public corporation," says this text-writer in another section of the work mentioned, "is selected and employed as an agent of the state to perform a duty pertaining to purely state affairs, whether it be a city or a county, it cannot be liable to private action. The reason for this is not far to seek. In discharging such a state duty it stands in the place of the state as its instrument or agent." *Id.* § 538.

McQuillin, in his work on *Municipal Corporations* (section 2721), in discussing this subject, asserts:

"On the theory that the repair and regulation of streets is a governmental duty, it is expressly held that the municipality is not liable for defective streets at common law in Arkansas, California, Connecticut, Maine, Massachusetts, Michigan, New Jersey, Rhode Island, South Carolina, and Vermont."

See, also, *Id.* § 2623.

The rule thus asserted, though in conflict with some judicial expression upon the subject, is supported by the great weight of authority.

The principle so adverted to is not in conflict with the opinion on rehearing in the case of *Giacconi v. Astoria*, 60 Or. 12, 113 Pac. 855, 118 Pac. 180, though the writer did not concur therein. In that case in opening a new street an embankment of earth slid down upon the plaintiff's land, causing injury, and it was ruled that the city by reason of the negligence of its officers was liable for the resulting damages. The dedication of streets, as evidenced by a duly recorded plat, and the sale of lots in accordance therewith, does not require the immediate opening of any of the highways until in the discretion of the local authorities it is determined that the interests of the public demand such improvements should be made. *Elliott, Roads & Streets* (3d Ed.) §§ 129, 570. In another section of his work this author, in speaking of the liability of a municipal corporation for negligence, says:

"Outside of the New England states and those states which follow the New England rule, the doctrine is that there is a liability for a failure to exercise ordinary care and skill in making the improvement; for, once the ministerial act is undertaken, such reasonable care and skill must be exercised as will not only make the highway safe for passage, but will prevent injury to adjoining property." *Id.* § 580.

When a street has once been opened and improved so as to be turned over to the state to be used by the public generally, the cost of repairing such highway is usually payable out of the general fund, and the municipality is not generally authorized to make a special assessment against abutting property to defray the expense incurred therefor. *Id.* § 647. When a street is being originally opened, and before it is theoretically surrendered to the state, the obligation to complete the highway is only ministerial, in the exercise of which engagement the city is held responsible in damages for the negligence of its officers and agents on the ground that the right of the public to the use of the street has not attached. When, however, a street is once completed and devoted to its intended use, the duty thereafter to keep it reasonably safe devolves upon the municipal corporation to see that the highway, until it is legally discontinued, remains in a suitable condition for travel. It is incumbent, therefore, upon a city to keep its improved streets in reasonable repair, and in discharging that obligation the municipal corporation necessarily exercises a governmental duty for the benefit of the general public. *Id.* § 803. It

will thus be seen that the prevailing opinion in the case of *Glaconi v. Astoria*, supra, does not lack the support of reason or authority.

In the case at bar, however, the street had been opened and improved, and the sidewalk, which necessarily constitutes a part of the highway for the accommodation of pedestrians, had been put down, but was out of repair, so that the restoration thereof was a governmental duty enjoined upon the city for the benefit of the public in general. In failing to discharge that obligation the city engineer omitted the performance of a governmental duty by reason whereof the city of Portland is not liable for the damages which resulted from the injury.

[6] It will be remembered the court found that it was the lack of money which prevented the city engineer from making the necessary repairs. A text-writer, in discussing this subject, asserts:

"The want of funds, and of power to raise money to enforce contributions of labor, or to assess the expense of repair upon abutters, is a good defense to a charge of negligence for non-repair, provided it is shown that all the funds applicable to such use, and all means of raising more, have been exhausted. But want of funds is not available as a defense to a charge of negligence in not erecting barriers on a dangerous street, or not closing the street altogether, when necessary." *Shearman & Red. Neg.* (6th Ed.) § 374.

It will be observed, from the excerpt quoted, that a greater degree of effort for the repair of a street or sidewalk is demanded from municipal officers than is evidenced by the finding referred to, which is insufficient to relieve the city engineer from liability.

[6] The failure of the city auditor to mail to Mrs. Frederickson a notice of the defective condition of the walk in front of her premises as found by the court, exonerates her from accountability for any part of the damages which the plaintiff sustained.

[7] At the trial of this cause the action, by consent of counsel for the respective parties, was dismissed as to the defendants Geo. L. Baker, John H. Burgard, Ralph C. Clyde, Will H. Daly, Geo. D. Dunning, J. J. Jennings, Allen R. Joy, James Maguire, R. E. Menefee, Tom. N. Monks, John Montag, Wm. Schmeer, H. N. Wallace, Frank E. Watkins, and F. L. Wilhelm, who at the time of the plaintiff's injury composed the common council of the city of Portland, and as to A. G. Rushlight, who then was its mayor. This voluntary discharge necessarily releases each of these parties from any and all liability on account of the negligence set forth in the complaint.

The findings of fact, when tested by the provision of the charter, do not uphold the conclusions of law predicated thereon, except in respect to Mrs. Frederickson. The judgment is therefore reversed, and the cause remanded for a new trial as to the defendant T. M. Hurlburt, who at the time the plaintiff was hurt was the city engineer, and for such

further proceedings as may be necessary not inconsistent with this opinion.

BENSON and EAKIN, JJ., took no part in the consideration of this cause. HARRIS, J., concurs in the result. BEAN, J., dissents.

(79 Or. 184)

CARSON et al. v. SCHULDERMAN,
Corp. Com'r.

(Supreme Court of Oregon. Feb. 8, 1916.)

1. MANDAMUS \S 88 — FILING ARTICLES — CHARITABLE AND BENEVOLENT CORPORATIONS — STATUTE.

L. O. L. § 6679, provides that three or more persons desiring to incorporate themselves to engage in any lawful business may do so in the manner provided by the act, which provides for the incorporation of religious, charitable, and other societies not for profit, but makes no provision for such associations issuing shares or having capital stock. Section 6684, providing for the payment of organization fees according to the amount of capital stock, excepts corporations formed for religious or charitable purposes from any fee except an organization tax of \$5. Plaintiffs, the devisees of realty in trust to erect and maintain a free home for wayward girls and to incorporate with a capital stock not to exceed the reasonable value of the property devised, were directed to subscribe to all the capital stock, organize the corporation, and convey the realty to it in consideration of all the shares of its capital stock to be held by them in trust. The corporation was empowered to borrow not more than \$75,000 on its note secured on the land conveyed to it to be used in maintaining the home, and was required after three years from the testator's death to transfer all the capital stock in equal parts to the different Churches of Christ Scientist in Portland chartered by the Mother Church for their use, free of any trust, except a suggestion to continue the home. Held, on mandamus by the trustees to compel the corporation commissioner to file the articles of a proposed corporation with a capital stock of \$350,000 to manage and improve the realty and to carry out the testator's plan, that the design of the corporation was charitable and benevolent, authorized by L. O. L. tit. 44, c. 5, and that the commissioner must file the articles on payment of a fee of \$5.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. \S 88.]

2. TRUSTS \S 160 — FAILURE OF TRUSTEE — POWER OF COURT.

In such case, if there were no Churches of Christ Scientist in Portland qualified to take the reversion of the stock as provided in the will, the courts would not allow the trust to fail for want of a trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 204, 207, 208; Dec. Dig. \S 160.]

3. CHARITIES \S 20 — CONSTRUCTION — TRUSTEES.

In such case the reference to the Mother Church of Boston did not intend that there should be any legal connection between the churches in Portland and the Mother Church, but that there should be such recognition by the Mother Church of the churches designated to take under the will as would make it impossible for any seceding organization not recognized by the Mother Church to claim an interest in the bequest, and it was not necessary that such relation should appear in the articles of incorporation of the Portland churches, if that fact was made to appear otherwise.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 18-33; Dec. Dig. \S 20.]

In Banc. Original mandamus by Jessie M. Carson and others against H. J. Schulderman, as Corporation Commissioner of the State of Oregon. Writ issued.

This is a proceeding by mandamus to compel defendant as corporation commissioner to file the articles of a proposed corporation designated as the "E. Henry Wemme Endowment Fund." The proposed articles are as follows:

"Know all men by these presents that we, Jessie M. Carson, H. A. Weis, and J. J. Cole, all of the city of Portland, county of Multnomah, state of Oregon, have associated ourselves for the purpose of forming a corporation under the laws of the state of Oregon, and to that end to make and subscribe, in triplicate, the following articles of incorporation: Article I. The name assumed by this corporation, and by which it shall be known, is 'E. Henry Wemme Endowment Fund.' Article II. The principal office and place of business of this corporation shall be in the city of Portland, county of Multnomah, state of Oregon. Article III. The capital stock of this corporation shall be three hundred and fifty thousand dollars (\$350,000), divided into three hundred and fifty (350) shares, of the par value of one thousand dollars (\$1,000) each. Article IV. The duration of this corporation shall be perpetual. Article V. 1. The business in which this corporation proposes to engage is that of buying, owing, holding, managing, improving, mortgaging and leasing the following described real property, to wit: Lots one (1), four (4), five (5), and eight (8) in block fifty-three (53) in Couch's addition to the city of Portland; and also lots one (1) and four (4), and the south twenty (20) feet of lot five (5), in block nine (9) of Couch's addition to the city of Portland, and the south one hundred and twenty (120) feet of block seventy-two (72) in East Portland, now a part of Portland, and all now being in the city of Portland, Multnomah county, state of Oregon. 2. To buy, own, hold, mortgage, lease, improve, and sell real estate as may be necessary in carrying out the enterprise for the carrying out of which this corporation is formed, and to lease property to third persons, firms, or corporations. 3. To purchase a suitable site for, erect, equip, maintain, and conduct a maternity home or lying-in hospital for the accommodation, care, and keeping of unfortunate and wayward girls, without charge therefor, in the city of Portland, Multnomah county, state of Oregon, which home or hospital shall be known as the White Shield, of Portland, Oregon. 4. To issue the promissory note of the corporation and secure the payment of the same by mortgage or pledge of any or all property belonging to the corporation, and generally to do anything necessary, proper, or convenient in carrying out any of the enterprises hereinbefore mentioned. In witness whereof we have hereunto set our hands and seals this 27th day of September, A. D. 1915."

This corporation was formed pursuant to the terms of the will of E. Henry Wemme, deceased, whereby he bequeathed certain property to the plaintiffs herein in trust for the purpose of erecting and maintaining a maternity home for unfortunate, wayward girls in the city of Portland, to be conducted without cost to the objects of testator's bounty. It was provided that the trustees immediately after the death of the testator should form a corporation with perpetual duration, to be named the "E. Henry Wemme Endowment Fund," with a capital stock not to exceed the reasonable value of the proper-

ty devised; that the trustees should subscribe for all the capital stock of the corporation, and should complete the corporation and convey to it the devised property, taking in payment therefor all the shares of the capital stock which should be issued to them jointly in one certificate to be held in trust for the purposes indicated. It was provided that the corporation should have the right to borrow not to exceed \$75,000, and to give a note therefor to be secured upon certain tracts of the property conveyed to it, and that after securing this money it should proceed to purchase a site for a maternity home for wayward girls and to build and equip it, and use the rents, issues, and profits of the bequeathed property in maintaining it and caring and providing a home for the inmates thereof without expense to them. It was provided that three years after the testator's death the trustees should divide and transfer all the capital stock of the corporation in equal parts to the different Churches of Christ Scientist of Portland, Or., authorized and chartered by the head Church of Christ Scientist, known as the Mother Church, for their own use and benefit, without any charge or trust whatever reserved to testator's estate. Then follows this clause:

"I hope, however, this is not directory, but merely a suggestion, that the maternity home constructed as hereinbefore provided shall be continued by said corporation, E. Henry Wemme Endowment Fund, perpetually, and forever, but I do not make this binding upon said Church of Christ Scientist, or upon said E. Henry Wemme Endowment Fund, a corporation, for the reason that I have implicit faith and confidence in the Church of Christ Scientist, and believe that they will be perpetual, and I realize the inability of one now living to determine what in the future might be the greatest need and benefit to suffering humanity, and therefore I have given absolutely and without reservation all of the stock of said corporation of E. Henry Wemme Endowment Fund to said Church of Christ Scientist believing that they will expend the rents, issues, and profits and all the proceeds of the said E. Henry Wemme Endowment Fund in a manner so as to create the greatest relief for the greatest number of suffering humanity."

The plaintiffs tendered to the corporation commissioner the articles set forth in this statement, together with a fee of \$5, and demanded that they be filed as the articles of a charitable corporation, and that defendant issue a certificate of incorporation upon said articles. Defendant took the ground that the articles indicated the corporation was a business corporation organized for profit, and therefore liable to pay an organization fee provided for in section 6684, L. O. L., amounting to \$60, and the estimated license fee provided by section 6707 for the remainder of the year ending June 30, 1916, and refused the articles or to issue certificate until such additional sums should be paid. Therefore plaintiffs sued out this writ.

Joseph & Haney, of Portland, for plaintiffs. Geo. M. Brown, Atty. Gen., and J. A. Benjamin, Asst. Atty. Gen., for defendant.

McBRIDE, J. (after stating the facts as above). [1] Section 6679, L. O. L., provides:

"Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act."

Chapter 5, title 44, L. O. L., provides for the incorporation of religious, literary, art, charitable, and other societies not carried on for the purpose of profit. This chapter makes no provision for such associations issuing shares or having capital stock. We think there is no doubt of the right of the trustees to incorporate under the provisions of section 6684. Under the will they could not incorporate in any other manner, and, if they could not do so under such section, the trust would possibly fail altogether. Building, maintaining, and carrying on an institution of the character mentioned is a "lawful enterprise, a business, or pursuit," irrespective of whether the parties incorporating engage in it for pleasure, profit, or charity. In the present instance the design of the corporation is purely charitable and benevolent. Its scope and articles are such as absolutely inhibit the idea of profit from any source. It is true that the fact that the corporation is one having capital stock is laid down by many authorities as the test whether or not the corporation is one organized for profit, but after all it is only evidence of that fact, and cannot be conclusive in a case where the articles themselves show that the whole capital and income of the property is to be devoted to charitable uses.

[2] Whether the Churches of Christ Scientist are qualified to take the reversion of the stock as provided in the will is a question that does not arise here. If there are none in Portland so qualified, the courts will not allow the trust to fail for want of a trustee.

[3] It is here stipulated, however, that the different Churches of Christ Scientist of Portland, Or., are religious bodies or associations organized and existing for the purpose of religious and educational work in said city; that the articles of incorporation of said Church of Christ Scientist do not show that said churches are charitable institutions or associations organized for charitable work; that the articles of incorporation of said churches show no legal affiliation with the Church of Christ Scientist incorporated under the laws of the state of Massachusetts and commonly known as the Mother Church of Boston, Mass. We take it that by the reference to the Mother Church of Boston it was not intended that there should be any legal connection between the churches in Portland and the Mother Church, but that there should be such recognition by the Mother Church of the churches designated to take under the will as would render it impossible for some seceding or unorthodox organization not recognized

by the Mother Church to claim an interest in the bequest. It is not necessary that such relation should appear in the articles of incorporation of the Portland churches if that fact is made to appear otherwise. We will not attempt in this proceeding to determine who shall take under the will, but merely whether the articles of incorporation show that the object of the incorporation is charitable, and not for profit. This is clearly shown, and, while it was entirely proper for the commissioner to require this matter to be determined by judicial proceedings, an order will be made requiring him to file the articles and issue the certificate of incorporation upon payment to him of the \$5 tendered.

EAKIN, J., took no part in the consideration of this case.

(79 Or. 367)

STATE v. WARE.

(Supreme Court of Oregon. Feb. 8, 1916.)

1. CONSTITUTIONAL LAW — 206 — PRIVILEGES AND IMMUNITIES — USURY LAW — POWER OF STATE.

Laws 1913, c. 278, regulating the business of loaning money or credit by persons other than national banks, licensed bankers, etc., requiring a license from the state banking board to engage in such business, and providing that no license shall be granted to any person not a bona fide resident of the state of Oregon, or to a corporation, etc., until such corporation, etc., appoints a resident agent to accept service, does not violate Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, or Const. U. S. Amend. 14, § 1, declaring that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, as the state in the exercise of its police power and for the protection of small borrowers may regulate the taking of excessive interest and confine the privilege to residents and those subject to its process.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648; Dec. Dig. — 206.]

2. CONSTITUTIONAL LAW — 208 — LICENSES — 7 — CLASS LEGISLATION — LOAN BUSINESS.

Laws 1913, c. 278, making it unlawful to engage in the business of making loans at more than 10 per cent. without first securing a license from the state banking board, and providing by section 2 that nothing therein should apply to the legitimate business of state and national banks, licensed bankers, trust companies, savings banks, building and loan associations, or real estate brokers, was not unconstitutional as discriminatory class legislation, as the classification need not be scientific or logically appropriate, and, if uniform within the class, and not arbitrary, is within the legislative discretion.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. — 208; Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. — 7.]

3. CRIMINAL LAW — 395 — EVIDENCE OBTAINED BY SEARCH.

In a criminal prosecution for violation of the statute making it unlawful to engage in the business of making loans at more than 10

per cent. without having first obtained a license from the state banking board, certain papers and correspondence seized by the officers in defendant's rooms were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 877; Dec. Dig. § 395.]

4. CRIMINAL LAW § 1206—REPEAL AND RE-ENACTMENT OF STATUTE—EFFECT.

Defendant was indicted, tried, convicted, and sentenced for a violation of Laws 1913, c. 278, making it an offense to engage in the business of making loans at more than 10 per cent. without having first obtained a license from the state banking board, and thereafter, and while his appeal was pending, the Legislature passed Laws 1915, c. 219, expressly repealing chapter 278, and re-enacting substantially the same provisions, but increasing the amount of the annual license fee from \$50 to \$100. *Held*, that the repeal and re-enactment did not necessitate the dismissal of the indictment and the discharge of the defendant, as every element of the law which he was charged with violating remained the law, and had never at any time since its first enactment, ceased to be the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206; Statutes, Cent. Dig. § 349.]

5. STATUTES § 121—TITLE—CONSTITUTIONAL PROVISIONS.

Laws 1913, c. 278, entitled an act "to regulate the business of loaning money or credit by persons, firms and corporations other than national banks, licensed bankers, trust companies," etc., naturally and logically connected the state banking board and the state examiner with the administration of such law, and its provision for the issuance of a license by the state banking board, etc., was therefore germane to its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174; Dec. Dig. § 121.]

Burnett and McBride, JJ., dissenting.

In Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

E. E. Ware was convicted of the statutory offense of engaging in the business of making loans at an interest greater than 10 per cent. without having first obtained a license from the state banking board, and he appeals. *Affirmed*.

The defendant was convicted of violating the provisions of chapter 278 of the Laws of 1913. The charging part of the indictment reads as follows:

"The said E. E. Ware, J. J. Wiesen, O. O. Grovier and J. Richards, on the 14th day of July, A. D. 1914, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully, knowingly and willfully engage in the business of making loans of money and of personal credit upon which the said defendants did then and there directly and indirectly charge and receive interest, discount and consideration greater than ten per cent. per annum without having first and theretofore obtained and procured license from the state banking board of the state of Oregon authorizing and permitting the said defendants to engage in the said business."

The defendant Ware was the only one arrested and tried. A demurrer to the indictment, for the reason that the facts therein stated do not constitute a crime, was overruled, and from the judgment of conviction the defendant Ware appeals.

G. E. Hamaker, of Portland, for appellant. Martin L. Pipes, of Portland (George A. Pipes, of Portland, on the brief), *amicus curiae*. George Mowry, Deputy Dist. Atty., of Portland (Walter H. Evans, Dist. Atty., and John A. Collier, Deputy Dist. Atty., both of Portland, and George M. Brown, Atty. Gen., on the brief), for the State.

BENSON, J. (after stating the facts as above). [1] The assignments of error are numerous; the first, third, seventh, and ninth being chiefly directed to the contention that the act under which the prosecution is maintained is unconstitutional and void. This contention is first raised in the demurrer to the indictment. The statute in controversy contains, *inter alia*, the following clause:

"No license shall be granted to any such person, firm or voluntary association unless said person and the members of any such firm or voluntary association shall be bona fide residents of the state of Oregon, and no license shall be issued to any joint stock company, incorporated society, or corporation unless and until such company, society or corporation shall, in writing and in due form, to be first approved by and filed with the state banking board, appoint an agent, resident in the state of Oregon, upon whom all judicial and other process of legal notice directed to such company, society or corporation may be served."

The question arises: Does this provision violate the spirit of article 4, § 2, of the Constitution of the United States wherein it is provided that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"

—or of Amend. 14, § 1, of the same document, wherein it declares that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Usury has been looked upon with disfavor for ages, and it has been uniformly held that the state may either regulate or absolutely prohibit the taking of usurious interest. It follows that no citizen has an inherent or common right to exact the same. This being true, the state has ample power to regulate the taking of excessive interest and confine the privilege to those whose residence within its borders renders them subject to its process. *State v. Catholic*, 75 Or. 367, 147 Pac. 372; *White v. Holman*, 44 Or. 180, 74 Pac. 933, 1 Ann. Cas. 843; *Sandys v. Williams*, 46 Or. 327, 80 Pac. 642. It is a fact of common knowledge that in the larger cities and towns there are men whose business it is to prey upon the necessities of the improvident and the unfortunate by lending money at exorbitant rates of interest with the effect that in many instances the borrower becomes the bond slave of the lender, if, indeed, he possesses enough character to prevent his desperation from driving him into overt acts of crime. These lendings and borrowings are usually so small in amount that the banking

institutions make no pretense of engaging in the business, and hence arises the duty of the state to protect the unfortunate victim of rapacity so far as it is practicable. It requires no argument to establish the truth that this is a proper exercise of the police power. The state owes a duty in this regard just as clearly as it does to protect the ignorant and the unwary from the machination of the confidence man or the extortion of the highwayman, and if the lender under such circumstances is a nonresident of the state he may work through devious methods to accomplish his purpose and laugh at the statutory efforts of law enforcement. We conclude that the statute under consideration is not subject to the objection suggested.

[2] We next consider the question as to whether or not the act is unconstitutional as being discriminatory class legislation. Section 8 thereof reads as follows:

"That nothing contained in this act shall be held to apply to the legitimate business of state and national banks, licensed bankers, trust companies, savings banks, building and loan associations, or real estate brokers."

Speaking of a somewhat similar statute, the United States Supreme Court, speaking by Mr. Justice McKenna, says:

"This contention attacks section 6 of the statute which exempts from its provisions certain banks, banking institutions and loan companies. It is urged that the provision is discriminatory and therefore denies to plaintiff the equal protection of the laws. We have declared so often the wide range of discretion which the Legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion. The legislation under review was directed at certain evils which had arisen, and the Legislature, considering them and from whence they arose, might have thought or discerned that they could not or would not arise from a greater freedom to the institutions mentioned than to individuals. This was the view that the Supreme Judicial Court took, and, we think, rightly took. The court said that the Legislature might have decided that the dangers which the statute was intended to prevent would not exist in any considerable degree in loans made by institutions which were under the supervision of bank commissioners, and 'believed rightly that the business done by them would not need regulation in the interest of employees or employers.' * * * But even if some degree of evil which the statute was intended to prevent could be ascribed to loans made by the exempted institutions, their exception would not make the law unconstitutional. Legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection provision of the Fourteenth Amendment to the Constitution of the United States." *Mutual Loan Co. v. Martell*, 222 U. S. 225, 235, 32 Sup. Ct. 74, 75 (56 L. Ed. 175, Ann. Cas. 1913B, 529).

We regard this quotation from the highest court of our country as a wise and correct declaration of the true doctrine of interpretation.

[3] We come then to a consideration of defendant's contention that the court erred in admitting in evidence certain papers and cor-

respondence which he claims were seized by the officers in his rooms, in violation of the constitutional guaranties against unreasonable searches. Whatever may be the rule in the federal courts, it has been repeatedly held in state courts that evidence thus obtained is not thereby rendered inadmissible. *State v. McDaniel*, 39 Or. 161, 65 Pac. 520; *State v. Wilkins*, 72 Or. 77, 142 Pac. 589; 1 Bishop's New Cr. Proc. § 211. In 1 Greenleaf on Ev. § 254, the rule is stated thus:

"It may be mentioned in this place, that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."

It is further complained that the court erred in permitting a cross-examination of the defendant upon matters upon which he was not questioned in his direct examination. We have examined the record very carefully, and while it is long and it is not necessary to set it out herein, we may say that we find the cross-examination of the defendant confined to matters germane to his direct testimony, and therefore proper.

[4] This brings us to a consideration of a question which was raised for the first time in the argument of the case in this court. The indictment, as has already been noted, was based upon chapter 278 of the Session Laws of 1913, and the trial, conviction, and sentence were all accomplished while that act was in force. Thereafter, and while the appeal herein was pending, the Legislative Assembly of 1915 passed a new statute, chapter 219, Session Laws of 1915, which expressly repeals chapter 278, supra. The later act, like the former, begins with the following words:

"That hereafter it shall be unlawful to engage in the business of making loans of money or of personal credit upon which there is, directly or indirectly, charged or received, interest, discount, or consideration greater than ten per cent. per annum, without first procuring a license as hereinafter provided."

The requirements as provided are identical in both laws, with the exception that in the earlier act, the annual license fee is \$50, while in the later one it is increased to \$100. The only other changes in the later act are directed to additional details as to the conduct of such business after a license has been procured. Both laws require the application for a license to be made to the state banking board and give such board power to reject such application upon proper notice and a public hearing "before issuing such license," so we are not left in doubt as to the authority which is to issue the same. In brief, as has already been observed, there is, up to the point of securing the license, absolutely no change in the later act, other than an increase in the amount of the annual fee to be

paid by the applicant, and, therefore, since the defendant never paid any fee nor secured any license, there is practically no change in the law so far as it affects this case. We are then to consider whether or not the repeal of the earlier act and simultaneous re-enactment of substantially the same provisions necessitates the dismissal of the indictment and discharge of the defendant. We are unable to find any good, practical reason for such a contention, since every element of the law with which the defendant is charged of violating, is still the law and has never at any moment since its first enactment in 1913 ceased to be the law. The only justification, then, for so holding must be found in precedent. In the case of *Steamship Company v. Joliffe*, 69 U. S. (2 Wall.) 450, 17 L. Ed. 805, we find the following language:

"The new act re-enacts substantially all the provisions of the original act, relating to pilots and pilot regulations for the harbor of San Francisco. It subjects the pilots to similar examinations; it requires like qualifications; it prescribes nearly the same fees for similar services; and it allows half pilotage fees under the same circumstances as provided in the original act. It appears to have been passed for the purpose of embracing within its provisions the ports of Mare Island and Benicia, as well as the port of San Francisco; of creating a board of pilot examiners for the three ports, in place of the board of pilot commissioners for the port of San Francisco alone, and of prohibiting the issue of licenses to any persons who were disloyal to the government of the United States. The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them. The observations of Mr. Chief Justice Shaw, in *Wright v. Oakley*, 5 Mete. (Mass.) 406, upon the construction of the Revised Statutes of Massachusetts, which in terms repealed the previous legislation of the state, may with propriety be applied to the case at bar. 'In construing the Revised Statutes and the connected acts of amendment and repeal, it is necessary to observe great caution to avoid giving an effect to these acts which was never contemplated by the Legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the Revised Statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the re-enactment of new ones.'"

The good practical sense of the above quotations seems to render further citation of authorities unnecessary, for both of the cited cases seem to be precisely in point and to furnish ample authority for the conclusion that the simultaneous repeal and re-enactment of the provisions under consideration do not constitute such a repeal as would be of any avail to the defendant herein, and it

may be added that this doctrine has been distinctly enunciated by this court in the cases of *Renshaw v. Lane County*, 49 Or. 526, 89 Pac. 147, and *Bayless v. Douglas County*, 57 Or. 301, 111 Pac. 384.

[5] Finally it has been urged that the title of chapter 278, supra, is so defective as to render the act void, and the case of *State v. Levy*, recently decided by this court and reported in 147 Pac. 919, is cited in support of this contention. A careful examination of the enactments discloses, however, that the citation does not support this theory. The title of the act in question reads as follows:

"To regulate the business of loaning money or credit by persons, firms, and corporations other than national banks, licensed bankers, trust companies, saving banks, building and loan associations, real estate brokers and pawnbrokers."

The regulation of the business as indicated would naturally and logically connect the state banking board and the state examiner with the management and conduct of administering such regulation, and the provisions are therefore germane to the title. In the case of *State v. Levy*, supra, there is no logical connection between the powers of a railroad commissioner and the duty of supervising the business of a commission merchant.

The conclusion is that there is no substantial error in the record, and the judgment of the lower court should be affirmed.

BURNETT and McBRIDE, JJ., dissent.
EAKIN, J., did not sit.

(79 Or. 191)

SABIN v. CHRISMAN, Sheriff, et al.

(Supreme Court of Oregon. Feb. 8, 1916.)

1. BANKRUPTCY §9—NATIONAL BANKRUPTCY ACT—EFFECT.

The national Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, suspended state laws concerning assignments for the benefit of creditors, leaving such assignments to be governed by the common law.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 7-9; Dec. Dig. §9.]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS §175—DESCRIPTION OF PROPERTY ASSIGNED—SUFFICIENCY.

An assignment for the benefit of creditors, reciting that the assignor was engaged in merchandise business at a named city, and, being unable to meet his obligations, transferred his assets for the benefit of his creditors consisting of a stock of general merchandise together with all fixtures used in and about the premises and accounts receivable, is sufficient to include a number of stores, the term "general merchandise" being comprehensive and including whatever is usually bought and sold in trade or market by merchants, and the sufficiency of the assignment is not affected because the goods were kept in two different stores, the assignee taking possession (citing Words and Phrases, Merchandise).

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 512-554; Dec. Dig. §175.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS ¶174—ACTIONS—EVIDENCE.

Whether the property in possession of the agent of an assignee for benefit of creditors was the property intended to be assigned *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 512; Dec. Dig. ¶174.]

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS ¶34 — VALIDITY — DELAYING OF CREDITORS.

There being no statute law governing assignments for benefit of creditors, a debtor may assign his property for the purpose of paying his debts, though the effect of such assignment may hinder and delay some creditors in the collection of their demands; it being sufficient if the transaction is fair and without fraud, the law requiring no more of a debtor unable to pay all of his creditors than that he devote all of his assets to such purpose.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 33, 36-61; Dec. Dig. ¶34.]

5. REPLEVIN ¶63 — ACTIONS — ANSWER—FRAUD.

Where defendant questioned the validity of an assignment for benefit of creditors, under which plaintiff in replevin claimed, on the ground of fraud, such fraud must be set up in the answer.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 225-238; Dec. Dig. ¶63.]

Department No. 1. Appeal from Circuit Court, Wasco County; W. L. Bradshaw, Judge.

Action by R. L. Sabin against Levi Chrisman, Sheriff of Wasco County, and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

One P. Perlman was engaged in business at The Dalles, Or., conducting two stores; one containing a stock of general merchandise, consisting of clothing, etc., and the other containing furniture, hardware stores, and goods of like character. Being unable to meet his obligations in the ordinary course of business, he made the following conveyance or bill of sale to R. L. Sabin:

"Know all men by these presents, that whereas, P. Perlman, engaged in mde. business at The Dalles, Oregon, party of the first part, is unable to meet his obligations in full in the ordinary course of business, and desires to transfer his assets in trust for the benefit, pro rata, of his creditors in order to avoid litigation and court proceedings: Now, therefore, in consideration of the premises and of the sum of one dollar (\$1.00) and other good and valuable considerations to him in hand paid by R. L. Sabin, of Portland, Oregon, party of the second part, the receipt whereof is hereby duly acknowledged, the said party of the first part does hereby sell, assign, set over, and transfer unto the said party of the second part all of the following described personal property, to wit: A stock of general merchandise located at The Dalles, Oregon, together with all fixtures used in and about said business. Also all accounts and bills receivable, due, and owing or to become due and owing to said party of the first part. To have and to hold all of the described personal property unto the said party of the second part, his representatives and assigns forever. This transfer is made nevertheless in trust for the uses and purposes following, to wit: (1) To take possession of all of said personal property. (2)

To insure the same against loss by fire. (3) To sell and dispose of said stock of merchandise at retail sales or in bulk as may to the said party of the second part seem most advantageous and to collect said notes and accounts by legal process or otherwise. (4) Out of the proceeds arising from said sales and collections to pay the actual and necessary expense incurred in carrying out this trust. (5) Out of the proceeds remaining after the payment of such expenses to pay all the creditors of said party of the first part in full, if sufficient funds be realized therefor, and if not then pro rata in accordance with the amounts of the respective claims and demands of said creditors and without preference except such as is fixed by law. (6) To return the overplus, if any there be, to the said party of the first part. In witness whereof the said party of the first part has hereunto set his hand at Portland, Oregon, this 15th day of August, 1914. P. Perlman."

Plaintiff, by his agent Foster, took possession of the stock of goods in both stores, and subsequently the sheriff, Levi Chrisman, acting upon an execution issued upon a judgment in favor of the Portland Association of Credit Men against P. Perlman, levied upon a number of stoves situated in the hardware store, and by arrangement with plaintiff's agent, who protested against the levy, left them in the store, but separate from other goods therein, in charge of one Fine, a clerk in the store, to hold for him as sheriff. The building, without any fault of the sheriff so far as appears, was burned, and the property so levied upon was destroyed. Thereupon the sheriff, against the protest of the agent of plaintiff, levied upon a sufficient quantity of dry goods in the general merchandise store to satisfy the exigency of his writ, and took them away and still holds them; and plaintiff brought this action of replevin, alleging the conveyance from Perlman to himself and his ownership of the property. Defendants answered denying plaintiff's ownership and right to possession, alleging that Perlman was the owner and justified under his writ. Upon the trial there was a directed verdict for defendants, and plaintiff appeals.

Sidney Telser, of Portland, for appellant. M. W. Seitz, of Portland (Seitz & Clark, of Portland, and J. W. Allen, of The Dalles, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1] The laws of this state concerning assignments for the benefit of creditors are suspended by the United States Bankruptcy Act. *Pelton v. Sheridan*, 74 Or. 176, 144 Pac. 410, 33 Am. Bankr. Rep. 472. This being the case, the sufficiency of the assignment must be judged by those rules of law generally in force in this country prior to the enactment of our state statutes.

[2, 3] Does the deed of assignment sufficiently describe the property? It appears that there were two stores operated by Perlman at The Dalles. The assignment, after reciting that the assignor is "engaged in merchandise business at The Dalles, Or., is un-

able to "meet his obligations in full in the ordinary course of business, and desires to transfer his assets in trust for the benefit, pro rata, of his creditors," does assign to R. L. Sabin as trustee, etc., "a stock of general merchandise located at The Dalles, Or., together with all fixtures used in and about said business; also, all accounts and bills receivable and owing or to become due and owing to the party of the first part." We think this is a sufficient identification of the property when it appears, as it does here, from plaintiff's testimony, that the agent of the assignee was in possession of both stores and protesting against a levy by the sheriff. "General merchandise" is a comprehensive term, and includes whatever is usually bought and sold in trade or market by merchants. It includes all those things which they sell either at wholesale or retail, as dry goods, hardware, groceries, drugs, etc. Words and Phrases, tit. Merchandise. So that whether Perlman's goods were stoves or stockings, furniture or furs, they are all equally comprehended in the term "merchandise"; and whether the stock was kept in one building in The Dalles or in two makes no difference, if, in fact, the assignee took possession of what was intended to be conveyed. In the case at bar, we think there was some evidence tending to show that the property in the possession of Foster, plaintiff's agent, was the property intended to be conveyed by the assignment, and that therefore that matter was a question of fact for the jury; and, unless there is found some other reason why the court should have taken the case from them, it committed error in so doing.

[4] In considering the questions raised upon this appeal, we must ignore our own statute concerning insolvency assignments and treat them as though they never existed, because, as decided in *Pelton v. Sheridan*, supra, such statutes are suspended and of no effect until the Congress of the United States shall have repealed the present Bankruptcy Law. Neither must we confuse an assignment of the character of that made in the instant case with those which stipulate for a final release when the proceeds of the assigned property shall have been exhausted, or with those in the nature of composition deeds which require the signatures of creditors before becoming effective. In the present suspended condition of our assignment law, we have no limitation upon the power of a debtor to assign his property for the purpose of paying his debts, or for the purpose of paying a particular debt where there are several beyond the general equitable requirement that the transaction must be fair, bona fide, and without fraud.

"It would seem," says Chief Justice Marshall, in *Sexton v. Wheaton*, 8 Wheat. (U. S.) 220, 5 L. Ed. 603, "to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid."

The right to transfer property is an incident naturally flowing from the right to acquire and hold it; this right being subject to the further restriction that assignments by a debtor of the whole or a greater part of his property should not be employed as a means of preserving it for his own use or benefit or of unduly protecting it from the remedies of his creditors. Burrill on Assignments, §§ 9, 13. The following excerpts from decisions upon this question are embodied in a note to the last section and give the general spirit of the decisions from which they are taken:

"Every debtor has a legal right to assign property for the security of the debts due him, and so far from such an act being reprehended by the law, it is justified and approved." Story, J., in *Brown v. Minturn*, 2 Gall. 557, 559 [Fed. Cas. No. 2,021]. General assignments are spoken of by the same judge as 'encouraged by the common law.' *Halsey v. Whitney*, 4 Mason, 206, 210 [Fed. Cas. No. 5,964]. See, also, *Bascom v. Rainwater*, 30 Mo. App. 483; *Bryce v. Foot*, 25 S. C. 467; *Hauselt v. Vilmar*, 76 N. Y. 630; *Barton v. Brent*, 87 Va. 385, 13 S. E. 29; *Hyde v. Weitzner*, 45 Minn. 35 [47 N. W. 311]. 'A conveyance in trust to pay debts is a valid conveyance founded on a good consideration.' Kent, C., in *Dey v. Dunham*, 2 Johns. Ch. [N. Y.] 182, 189. 'It is settled * * * that an insolvent debtor may, at any time, before his property becomes bound by any lien, assign it over to trustees, for the benefit of all his creditors, by an act made bona fide. The assignment is to be referred to an act of duty, attached to his character of debtor, to make the fund available for the whole body of the creditors.' Kent, C., in *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522, 529. 'The right of an insolvent debtor to make an assignment for the benefit of his creditors, before the property is bound by any lien, does not admit of question, provided it be bona fide.' 2 Tucker's Com. (443) 432. 'The right to make a general assignment of all a man's property results from that absolute ownership which every man claims over that which is his own.' Marshall, C. J., in *Brashear v. West*, 7 Pet. [U. S.] 608, 614 [8 L. Ed. 801]. *Garland, J.*, in *United States v. Bank of United States*, 8 Rob. (La.) 262, 404: 'I think * * * that where an assignment is for the benefit of all the creditors of the assignor, equally and ratably, it must command the sanction of every enlightened tribunal. * * * It is a practical enforcement of the maxim that "equality is equity."' Buckner, C., in *Robins v. Embry*, *Smedes & M. Ch.* [Miss.] 207, 258. See *Malcolm v. Hall*, 9 Gill [Md.] 177 [52 Am. Dec. 688]. And see the opinion of Bennett, J., in *Hall v. Denison*, 17 Vt. 310; and *Ewing, J.*, in *Vernon v. Morton*, 8 Dana [Ky.] 247, 251. Mr. Justice Field, in *Mayer v. Hellman*, 13 N. B. R. 440 [91 U. S. 496, 23 L. Ed. 377]: 'Whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding.' Mr. Justice Buchanan, in *State v. Bank of Maryland*, 6 Gill & J. 217 [26 Am. Dec. 561]: 'Equality is equity, and when a debtor makes a transfer of his property for the fair purpose of equal distribution among his creditors, he does an honest act, and discharges a moral duty.' See *Kalkman v. McElderry*, 16 Md. 60. Mr. Justice Bailey, in *Hoffman v. Mackall*, 5 Ohio St. 124 [64 Am. Dec. 637]; *Forbes v. Scannell*, 13 Cal. 242."

Section 146, *Freeman on Executions*, is to the same effect. He says:

"It seems to be unanimously conceded that an assignment to a trustee for the benefit of creditors, whether general or partial, is, in the ab-

sence of statutory prohibition, valid. It operates to withdraw the property from the reach of all liens and processes taking effect subsequently to the execution of the transfer. In other words, although such a transfer necessarily tends to hinder and delay creditors, by depriving them of the right to take the debtor's property in execution, and apply its proceeds to the payment of their debts, yet, as the creditor had the right to directly turn over his property to his creditors, in satisfaction of their demands, he is allowed to accomplish the same result through the intervention of a trustee. To deny the right to hinder creditors, in a certain sense, would be to deny the right to make an assignment for the benefit of creditors, for such assignment, if given any operation, must necessarily prevent some of the creditors from reaching under execution or attachment property which they could have reached but for such assignment. And the assignor may have foreseen and intended this result. He may have desired to prevent the sacrifice of his assets, which must inevitably attend their immediate seizure and sale under execution. To this extent he has the right to hinder his creditors, and the assignment is not rendered void thereby, provided the hindrance is only such as results from turning over the property in good faith, to be applied to the satisfaction of his debts. If, however, the hindering of creditors was the object rather than the incident of the assignment; if the assignment was resorted to as a mere device to gain time or to coerce the creditors, or some of them, into making some settlement of their claims, to which the assignor was not legally entitled—it is doubtless void. In the absence of any statutory inhibition, a debtor may prefer any one or more of his creditors, either by making payment of his liabilities to them or by turning over property to them to be held as security, or to be applied at once at an agreed value, or by means of a sale, to the extinction of the debt. In many of the states, statutes have been enacted forbidding preferences in assignments for the benefit of creditors; but, in the absence of such statutes, the preferring of any creditor or class of creditors, if free from any fraudulent intent, does not render the assignment fraudulent nor void. The fact that some of the creditors are preferred to others will doubtless cause an assignment to be viewed with suspicion, and may, when combined with other suspicious circumstances, produce the conviction that it was intended to defraud the other creditors. Of course, if any actual design to defraud taints the assignment, it is void. There are several things which, when connected with an assignment, are well-established badges of fraud, and some of which render the assignment fraudulent *per se*. The most prominent of these will now be mentioned. An assignment will not be allowed to withdraw property from the reach of the creditors, that it may, to any extent, be secured for the benefit of the assignor. He must part with all interest in the property, except his right to such surplus as may remain after satisfying the demands of his creditors. Hence, when it appears that the debtor has reserved some portion of the property, or some interest therein, for his own benefit; or that he stipulates for some benefit or advantage for himself or for his family, to be reserved out of the proceeds—it is evident that he thereby seeks to withdraw something of value from the reach of his creditors, and the assignment is fraudulent *per se*."

Nor is there any need of assent on the part of creditors to render the assignment valid:

"To the creation of a trust by deed in favor of any person, it is not necessary that the cestui que trust should either be a party or assent to it. It is clear that trusts may lawfully be created where there can be no present assent, for they may be in favor of persons not in existence. It is sufficient in general that in

such cases there is a competent grantor to convey and a competent grantee to take the property. As to trusts created for the benefit of creditors, and to which they are not, technically speaking, parties, if bona fide made, they are unquestionably valid, and pass a legal estate to the trustee. The sole question that can arise, independent of the bankrupt law, is whether the conveyance is bona fide or fraudulent." Bump on *Fraudulent Conveyances*, p. 324.

The same authority also observes:

"The creditors may reject the beneficiary interest given to them by the assignment, and, if they do, it falls to the ground, and becomes a resulting trust for the debtor. But if the trust is for their benefit, the law presumes their assent to it until the contrary is shown. Whether the beneficiaries in the trust deed are apprised of the conveyance or not is not material. When it comes to their knowledge they are entitled to accept or reject its provisions. An express avowal of that assent is not necessary to the operation of the assignment, for the deed is complete when executed by the parties to it. If an assent is expressly given, it operates retroactively to confirm the conveyance ab initio. Even without such assent the assignment will prevail over a subsequent execution or attachment. If one cestui qua trust renounces the trust, then it either inures solely to the benefit of the rest, or, if there are no others, it results to the debtor. But until the renunciation is made, or implied from circumstances, the trust continues."

The assent of creditors will be presumed unless they, by some affirmative act, signify their dissent, and in such case it would seem that such dissent does not render the conveyance void as to those not dissenting or even to render the property conveyed liable to a subsequent execution by a dissenting creditor. Nor is such an assignment, if honestly made, void for the reason that it tends to hinder and delay creditors in the collection of their demands. The reason for this rule is thus stated:

"Although the intent to deprive all or particular creditors of their lawful suits, and hinder and delay them in the recovery of their just demands, is confessed or proved, still the assignment, if by its terms all the property which it embraces must be applied ratably or otherwise to the payment of debts, is upheld as valid and effectual. The mere intent to avoid an execution or other legal process does not in point of law make it void. It may even be made on the same day that a verdict is rendered against the assignor, or the claim of the creditor assailing it may be specially in the contemplation of the debtor. It will not in such case be void, even as against the persons who are in fact very materially hindered and delayed, and were meant to be so. It is valid even against the creditors whom it deprives, and is intended to deprive of that full satisfaction of their debts which by their superior diligence in prosecuting their suits they would otherwise have certainly obtained. The explanation is that, although in these cases the intent to hinder and delay the creditors is manifest, it is just as certain that there is no intent to cheat or defraud them, and the reasonable construction of the statute is that it is only such a hindrance or delay as is intended to operate, or, if permitted, could operate as a fraud upon the creditors, that was meant to be prohibited. All the law can reasonably demand of a debtor is the faithful application of his entire property to the satisfaction of his debts, and where, by the terms of the assignment, this is secured, the hindrance or delay which they create, however they may operate to the prejudice of particular creditors,

are disregarded, since they are only the necessary means of accomplishing a justifiable and lawful end. They fail, it is true, within the words of the statute; but as they are free from the imputation of fraud, and produce no benefit to the debtor at the expense of the creditors, they are not embraced within its meaning, and are justly excluded from its operation. It makes no difference, therefore, that the debtor is in failing circumstances, that suits are threatened, that judgments exist against him, or that executions against him are momentarily expected. Under any or all of these contingencies he has the full and absolute right to dispose of his property for the payment of his debts. The fact therefore that the assignment is made for the purpose of avoiding the preference that might otherwise be obtained by legal process in a race of eager diligence by disappointed creditors does not make the assignment invalid. Such is generally the motive to the making of such an assignment."

Although the English and some American decisions support a contrary view, it is believed that the better considered American authorities support the doctrine announced in the excerpt last above quoted. *Hoffman v. Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637; *Nicholson v. Leavitt*, 6 N. Y. Super. Ct. 252; *Id.*, 6 N. Y. 510, 57 Am. Dec. 499; *Malcolm v. Hall*, 9 Gill (Md.) 177, 52 Am. Dec. 688; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; also, cases already cited from note to *Burrill* on Assignments, *supra*.

[5] No fraud or bad faith is alleged in the answer, and where, as in this case, plaintiff sets out in the complaint the sources of his title and alleges possession under it, it is necessary, if defendants wish to show fraud in the transactions, that they allege that fact in the answer. 20 Cyc. 748, and cases cited in note; *Seeleman v. Hoagland*, 19 Colo. 231, 34 Pac. 995. This case was tried before the opinion in *Pelton v. Sheridan* was rendered, and we think that the learned and experienced judge erred in taking it away from the jury.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MOORE, C. J., and BURNETT and BEAN, JJ., concur; BENSON, J., taking no part in the consideration of this case.

(52 Mont. 1)

FREEMAN v. CHICAGO, M. & ST. P. RY. CO. et al. (No. 3586.)

(Supreme Court of Montana. Jan. 24, 1916.)

1. CARRIERS — 316 — DERAILMENT — PRESUMPTION OF NEGLIGENCE.

As to a passenger injured when the car in which he is riding is derailed, the derailment raises a presumption of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1263, 1285-1294; Dec. Dig. — 316.]

2. CARRIERS — 320 — PASSENGERS — NEGLIGENCE — QUESTION FOR JURY.

Where the derailment of a train raises a presumption of negligence, the utmost effect of the carrier's evidence tending to show the contrary was to raise a question for the jury, in

view of Rev. Codes, § 8028, subd. 2, declaring that the jury are not bound to decide against a presumption or other evidence satisfying their minds.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. — 320.]

3. CARRIERS — 318 — PERSONAL INJURIES — SUFFICIENCY OF EVIDENCE — "WRIST-DROP."

Evidence in a passenger's action for personal injury when his train was derailed held to show a causal connection between the derailment and his wrist-drop and minor injuries and to establish liability for the damages appropriate thereto; the term "wrist-drop" meaning a form of paralysis of the hand and wrist resulting from an affection of the nerve which supplies the muscles of the forearm, wrist, and hand.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. — 318.]

4. NEGLIGENCE — 134 — EVIDENCE — SUFFICIENCY — CIVIL ACTION.

It is sufficient to make out a prima facie case if the plaintiff can show that the injury is more naturally to be attributed to the negligence alleged than to any other cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. — 134.]

5. DAMAGES — 62 — MITIGATION — OPERATION.

The rule that an injured person must use ordinary diligence to effect a cure and minimize the damages does not require an injured passenger, after one unsuccessful operation, to submit to a major operation and risk failure in that as well, in order that damages caused by the carrier's negligence may be reduced.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. — 62.]

Appeal from District Court, Meagher County; J. A. Matthews, Judge.

Action by Joseph H. Freeman against the Chicago, Milwaukee & St. Paul Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Shelton & Furman and A. J. Verheyen, all of Butte, and L. D. Glenn, of Harlowton, for appellants. Jones & Jones, of Harlowton, and Purcell & Horsky, of Helena, for respondent.

SANNER, J. The respondent, plaintiff below; brought this action to recover for personal injuries alleged to have been suffered by him while a passenger on one of the trains of the appellant railway company in consequence of the derailment thereof. The questions presented are whether negligence on the part of appellants was shown; whether such negligence was the proximate cause of the injuries complained of; whether the damages awarded are excessive; whether the verdict is contrary to law; and whether errors of law prejudicial to the appellants were committed at the trial.

[1, 2] 1. It is not disputed that the respondent was a passenger for hire, and that the car in which he rode was derailed. This raises a presumption of negligence. *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102

Pac. 988; *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867. If the evidence presented by appellants tended to show the contrary, its utmost effect was to raise a question for the jury. Rev. Codes, § 8028, subd. 2; 3 *Thompson on Negligence*, § 2773. Some contention is made that the presumption of negligence arising from the derailment is not available to respondent, because he presented evidence tending to show the cause of the derailment. The record does not show that the cause of the derailment was established. Hence the respondent was not, either as a matter of pleading (*Hoskins v. Northern Pac. Ry. Co.*, supra) or as a matter of proof (*Cassady v. Old Colony St. Ry.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285), deprived of the benefit of the presumption.

[3] 2. The derailment occurred on June 30, 1913, at Harlowton. The injuries imputed to it by the complaint are that the respondent was bruised, shocked, and wounded; that his right arm and right ankle were bruised and broken; that other injuries theretofore sustained by him and from which he was then recovering were greatly aggravated; that his injuries are permanent; and that, because of them, he has sustained great bodily and mental suffering, and is incapacitated for business. The evidence produced in his behalf tends to show these facts: He is a rancher, and at the time in question was 52 years old. On the preceding 16th of May he met with an accident which resulted in the breaking of his right arm above the elbow, and a "Pott's fracture" of the right ankle. For these he sought and received such medical treatment that at the time of the derailment he was in a fair way to complete recovery; his arm and ankle giving him no trouble. In the derailment he was thrown bodily against the side of the car, striking against his right elbow, and thereafter his elbow was found to be sore and discolored, his arm hurt, his ankle sprained, his head bruised, he suffered loss of sleep and much pain from both ankle and arm, and two or three weeks later began to lose control of his wrist and hand. This loss of control has since become total, showing an affection of the nerve which supplies the muscles of the forearm, wrist, and hand, creating a form of paralysis known to surgeons as "wrist-drop." The course of this nerve leads close to the elbow, and the condition of wrist-drop could have resulted, and it is reasonably probable that it did result, from the impact of the arm against the side of the car as stated above.

[4] A surgical examination of the respondent in October, 1913, disclosed that the nerve in question had become imbedded in a callous surrounding the point of the old fracture. No such condition was indicated in the middle of June, and was not probable as matters then stood. It could have been caused by excessive motion or too early use of the arm, but there is nothing to show that such was, or probably was, the cause. At the October

examination the surgeon dissected the nerve from the callous, the purpose being to allow the nerve to regenerate if it would, but the wrist-drop remains and will remain unless something further is done. We think this shows a causal connection between the derailment and the wrist-drop, as well as the minor injuries complained of, and to establish liability for the damages appropriate thereto. True, the evidence does not absolutely exclude the possibility of any other cause of the wrist-drop; but courts cannot attain to scientific demonstration, and the rule of absolute exclusion prevailing in criminal cases does not apply to civil actions. "It is sufficient to make out a prima facie case if the plaintiff can show that the injury is more naturally to be attributed to the negligence alleged than to any other cause." *Andree v. Anaconda C. Min. Co.*, 47 Mont. 554, 133 Pac. 1080.

[5] 3. We quite agree with counsel for appellants that, if we ignore the wrist-drop, the damages awarded would be grossly excessive. But the wrist-drop cannot be ignored, for it means the loss of the right hand; unless the respondent can be relieved, he is worse off than if he had suffered amputation. It is argued that this may not be considered, because Dr. Keistler believes that an operation will relieve him. So Dr. Keistler believed in October, when an operation was performed for that purpose without result; and he also says: "An operation at this time might produce complete recovery, and it might not." In any case the operation is not a simple one, but a "major operation, one that involves delicate structures and the import of which is more serious." We recognize the rule that an injured person must use ordinary diligence to effect a cure and thus to minimize the damages (*Tiggerman v. City of Butte*, 44 Mont. 138, 119 Pac. 477; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673); but it would be carrying this rule to an absurd extreme to hold that a man who has submitted to one operation, which failed, must take such chances with his life and his health as may be involved in a second, risking failure in that as well, in order that the damages caused by another's negligence may possibly be reduced (*Watson on Damages*, § 186; *Martin v. Pittsburgh Ry. Co.* [Pa.] 86 Atl. 299, 48 L. R. A. [N. S.] 115; *Blate v. Third Ave. Ry. Co.*, 44 App. Div. 163, 60 N. Y. Supp. 732; *McNamara v. Railway Co.*, 133 Mo. App. 645, 114 S. W. 50). So, considering the wrist-drop as well as the minor injuries sustained by the respondent, taking some cognizance of the pain and anguish necessarily entailed thereby, and noting the respondent's expectancy of life and his loss of earning capacity, in connection with the cost of an annuity to recoup the same, we cannot pronounce the award so excessive as to shock the conscience; we do not even think it should be scaled. *Lewis v. Northern Pac. Ry. Co.*, 36 Mont. 207, 92 Pac. 469; *White v. Chicago, etc., Ry. Co.*, 49 Mont. 419, 143 Pac. 561; *Mul-*

lery v. Great Northern Ry. Co., 50 Mont. 408, 148 Pac. 323.

4. It is suggested that the verdict is contrary to the court's instructions numbered 6, 7, 12, and 13, and therefore is against law. We find no argument specifically directed to this proposition, but careful consideration of it fails to disclose wherein such contrariety exists.

5. The other assignments of error are procedural, and none of them, in our opinion, command a reversal of this case.

The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(51 Mont. 565)

ALEXANDER v. GREAT NORTHERN RY. CO. (No. 3574.)

(Supreme Court of Montana. Jan. 20, 1916.)

1. COMMERCE \S 27—INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—PROOF.

Where the allegations of the complaint in an action for death of a railroad conductor from derailment of a car showed that the action was brought under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), proof that the company was engaged and decedent employed in interstate commerce at the time of the accident was indispensable to the right to recover under such act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. \S 27.]

2. COMMERCE \S 27—"INTERSTATE COMMERCE"—FEDERAL EMPLOYERS' LIABILITY ACT—NATURE OF EMPLOYMENT.

Where a railroad conductor was killed from derailment of a car while he was in charge of a work train operating over a branch line wholly within the state, and it appeared that his duty with the train was to load ties and take the loaded cars to some convenient siding on the branch line from which they would later be taken by other trains to defendant's tie-treating plant within the state, after which they would be transported and used in construction work on lines within or without the state as they might be needed, decedent was not employed in interstate commerce at the time of the accident, and hence the action was not sustainable under the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. \S 27.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. MASTER AND SERVANT \S 264—INJURY TO SERVANT—PLEADING—RECOVERY.

That the complaint in an action for the death of a railroad conductor from derailment of car declared under the federal Employers' Liability Act did not preclude recovery under the state law on sufficient pleadings and proof, where defendant, with knowledge of its right, did not ask for removal of the cause to the federal court, but, instead, submitted to the state court's jurisdiction by seeking a dismissal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. \S 264.]

4. MASTER AND SERVANT \S 112—SAFE PLACE TO WORK—INJURY TO RAILROAD CONDUCTOR—NEGLIGENCE—FAILURE TO FENCE TRACK.

The failure of a railroad company to fence its tracks may render it liable for the death of a conductor from the derailment of a car due to collision with a cow on the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218-223; Dec. Dig. \S 112.]

5. MASTER AND SERVANT \S 286—DEATH OF RAILROAD CONDUCTOR—FAILURE TO FENCE TRACK—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for the death of a railroad conductor from derailment of a car due to collision with cow on track, it appeared that defendant's track was not fenced, that cattle were permitted to run at large, that there was some public domain in the vicinity of the accident and an unobstructed access to defendant's right of way and track, and that cattle frequently came upon the track, and encounters between them and moving trains were not unusual, all of which defendant knew prior to the accident, the question whether defendant's failure to fence the track constituted actionable negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. \S 286.]

6. MASTER AND SERVANT \S 217—INJURY TO CONDUCTOR—ASSUMPTION OF RISK—BACKING OF TRAIN.

Evidence in such case that the train was backing, and that defendant's division superintendent had given oral instructions that trains should proceed with the engine foremost, did not preclude recovery on the ground that decedent had assumed the risk, where it did not appear that such instructions had been communicated to decedent, and it did appear that the backing of work trains was permitted by custom and defendant's general rules.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. \S 217.]

7. MASTER AND SERVANT \S 289—DEATH OF CONDUCTOR OF WORK TRAIN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where in an action for the death of a conductor of a work train from derailment of a car due to collision with a cow on the track while the train was being run with the cars in front of, and the tender behind, the engine, at a rate of 10 or 12 miles an hour, the evidence left it in doubt whether there would have been less danger if the tender had been in front, and the cars behind, and whether, if the danger would have been less, decedent knew thereof, and whether it would have been safer to have made the "flying switch" necessary to the transposition, decedent was not chargeable with contributory negligence as a matter of law in the selection of the more dangerous of two available methods of running the trains.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1080, 1090, 1092-1132; Dec. Dig. \S 289.]

8. MASTER AND SERVANT \S 240—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—CHOICE OF MORE DANGEROUS WAY.

While contributory negligence will be imputed as a matter of law to an employé who knowingly chooses an obviously dangerous way of performing his duty, instead of one which is safe, or less dangerous, unless his choice was justified by emergency, contributory negligence will not be imputed merely because of a mistake in judgment, as appears from after events, where he made such choice as a reasonably prudent

man might have made under all the known or obvious circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. ☞ 240.]

9. MASTER AND SERVANT ☞ 217—INJURY TO CONDUCTOR OF WORK TRAIN—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

Where the conductor of a work train was killed from derailment of a car, due to collision with a cow, the fact that decedent knew that the right of way was not fenced did not preclude recovery as a matter of law because of assumed risk, where it did not appear that he knew of the presence of cattle in the vicinity, or the likelihood of their entering on the track, though he might with reasonable care have discovered these things; it not being enough to make out a case of assumption of risk that the injured party knew of the things from which harm might come, but being essential that he appreciate the danger from which he suffered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. ☞ 217.]

10. TRIAL ☞ 140—QUESTION FOR JURY—CREDIBILITY OF WITNESS.

Where a witness on cross-examination made a material change in his testimony as to a statement made to him by a person since deceased, shortly before the occurrence of an accident, that he did not know whether his affidavit, made a few days after the accident, mentioned such statement, and where there was no other evidence as to the statement having been made by deceased, the question of his credibility was for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. ☞ 140.]

11. MASTER AND SERVANT ☞ 295—INJURY TO SERVANT—ASSUMPTION OF RISK—CHOICE OF WAYS—INSTRUCTIONS.

In an action for the death of the conductor of a work train, an instruction on assumption of risk based on the choice of ways was properly refused, where it permitted the decedent's choice of ways to be judged in the light of the event, and did not indicate that the choice must have been of a method obviously dangerous or more dangerous than its alternative.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. ☞ 295.]

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

Action by J. C. Alexander, administrator of the estate of John P. Hall, deceased, against the Great Northern Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, 149 Pac. 1080.

Noffsinger & Walchli, of Kallispell, and Veazey & Veazey, of Great Falls, for appellant. Logan & Child, of Kallispell, and Walsh, Nolan & Scallon, of Helena, for respondent.

SANNER, J. On October 11, 1911, John P. Hall, a conductor in the service of the Great Northern Railway Company, was killed near Batavia, in Flathead county, this state, as the result of a derailment of his caboose consequent upon a collision of his train with a cow. This action, brought to recover for his death, resulted in a verdict

against the company, upon which verdict judgment was duly entered. From that judgment, as well as from an order denying it a new trial, the company has appealed.

A reversal is sought upon four grounds, viz.: (1) The complaint alleges, but the proof does not establish, that Hall was employed in interstate commerce at the time of his death; (2) no actionable negligence on the part of the appellant is alleged or proved; (3) the evidence shows a clear case of assumed risk; and (4) substantial errors of law prejudicial to the appellant occurring at the trial.

[1, 2] 1. The allegations of the complaint stamp the case as brought under the provisions of the federal Employers' Liability Act, and, to maintain it as such, evidence that at the time concerned the company was engaged and the decedent was employed in interstate commerce was indispensable. North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. The facts established touching this phase of the case are: The defendant company is a common carrier whose main line extends from St. Paul, Minn., to Puget Sound, Wash., traversing this and other states. It owns and operates a branch line called the Marion branch, running from its main line at Columbia Falls through Kallispell, Batavia, and Kila to Marion, and from this branch a shorter branch or tributary connects Kallispell with Somers. This Marion branch, with its tributary, lies wholly within Montana, but it is the source as well as the ultimate destination of both interstate and intrastate traffic. The decedent was killed while in charge of one of defendant's work trains; his particular duty with such train being to load ties from various places along the branch where they had been left by the persons who had cut the same, and to take the cars so loaded to Kallispell or leave them at Kila or other convenient siding. From such places of deposit the ties would later be taken by other trains to the defendant's tie-treating plant at Somers, whence, after treatment to increase their durability, they would be sent to various points upon the main line or branches of the appellant or its affiliated companies within or without this state as might be required for construction, renewals, or repairs.

Did the work of the decedent constitute employment in interstate commerce? The answer may be found, we think, in the decisions of that great tribunal whose pronouncements are final in matters of this kind, and particularly in Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, cited by the respondent, where the following criterion is suggested:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected

therewith as to be part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

Interdependence to some extent pervades all activity, and it is true, for instance, that an interstate railroad cannot perform its functions without fuel or without ties; but this does not justify the inference that persons hired by it to mine coal or to cut ties are employed in interstate commerce. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; *Bravis v. Chicago, M. & St. P. Ry. Co.*, 217 Fed. 234, 133 C. C. A. 228. In the chain of events by which the standing timber should be connected with the appellant's roadbed the decedent was one step nearer to the latter than the man who furnished the ties; but considering that the decedent had nothing to do with the ties further than to load them upon cars, leaving the cars so loaded at convenient sidings to be removed by others, that the ties so loaded were not to be marketed or used, but were to be taken to Somers and made ready for use, that no one knew when, where or how they would ultimately be used, and that, so far as exigency or duty is shown, the appellant's interstate commerce might go on unaffected whether these ties were gathered or not, the connection of his work with such commerce still appears to have been rather remote. No case has been called to our attention which in its facts closely resembles the one at bar; but in *Illinois C. Ry. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, it was held that employment in interstate commerce was not shown where the fireman of a switch engine operating within the city of New Orleans was killed while moving cars loaded with intrastate freight, notwithstanding that his general duties had to do with cars of all classes, often commingling those loaded with interstate freight and those empty or loaded with freight of an intrastate character, or rapidly passing from one class to the other. Accepting this as authoritative, we are impelled to the view that the decedent was not at the time of his death employed in interstate commerce, and therefore the action was not sustained under the federal Employers' Liability Act.

[3] It does not follow from this however, that the appellant was or is entitled to a reversal. It is now settled that, where the complaint declares under the federal law, failure to sustain it under such law is not fatal, but recovery may still be had under the state law, if the pleadings and proof are sufficient under the state law. *Wabash R. Co. v. Hayes*, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226; *Jones v. C. & O. Ry. Co.*, 149 Ky. 566, 149 S. W. 951. We recall but one respect in which a defendant can be seriously prejudiced in such a situation, and that is where, by reason of diverse citizenship, removal of the cause to the federal

court might be in order. In such a situation, however, the defendant must assert its right, under penalty of waiver, by filing a petition to remove at the first opportunity. *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; *Kansas City, etc., Ry. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; *Golden v. Northern Pac. Ry. Co.*, 39 Mont. 435, 104 Pac. 549, 34 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886; *Dempster v. Oregon Short Line R. R. Co.*, 37 Mont. 335, 96 Pac. 717. This the appellant did not do; instead, and with the knowledge of its right to have the cause removed, it submitted to the jurisdiction of the state court in which the trial occurred, by seeking a dismissal for variance as well as for failure to show the breach by it of any legal duty to the decedent under either state or federal law.

[4, 5] 2. The negligence charged in the complaint is the failure of appellant to fence its track at and near the place where Hall was killed, and thus to exclude cattle, the presence of which upon the track was likely to cause derailment of its trains, and in permitting its trains to be run over said track while the same was so unfenced. The questions raised upon the pleadings and the evidence are whether, under any circumstances, a railway company can owe any duty to its train operatives to shield them from whatever danger the presence of cattle upon its track may cause, by fencing such track, and, if so, whether facts sufficient were made to appear in this case to establish *prima facie* the existence of such duty. The appellant vigorously denies that any such duty ever exists, while the respondent contends that such duty may exist, and in the present instance did exist, not in virtue of the fencing statute of this state (Rev. Codes, § 4308), which was enacted for the benefit of stock-owners (*Nixon v. Montana, etc., Ry. Co.*, 50 Mont. 95, 145 Pac. 8), but in virtue of appellant's common-law obligation to exercise ordinary care to furnish its employees with a reasonably safe place in which to work. As regards the general proposition, the authorities are by no means harmonious, but we think the better reasoning supports the respondent's position. Speaking broadly, the obligations of a railway to its employees are not different in principle from those of other masters to their servants, and when the place of work to which the servant is detailed is the track or roadway of the master, the duty to exercise reasonable diligence to keep it safe should and does arise. Indeed, little, if any, difficulty is found in the application of this rule where defects in the track or roadway or inanimate obstructions are involved, and we cannot see why any should arise from the mere fact that the obstruction is animate.

"Unless a railway track is fenced, cattle are liable to stray upon it from adjacent fields and commons; cattle upon a railway track are lia-

ble to get run over by trains notwithstanding the vigilance of the engineer and other trainmen; engines and trains are frequently derailed by running over cattle upon the track; in such derailments trainmen are frequently killed or injured. These propositions of fact, which are abundantly borne out by the judicial reports, argue a duty upon the part of railroad companies toward their own employes of fencing their tracks so as to keep out trespassing animals." 4 Thompson on Negligence, § 4319.

In *Donnegan v. Erhardt*, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, the New York Court of Appeals considering the case of a trainman who had been injured through the collision of his train with a horse, and whose judgment against the railroad company had been reversed by the General Term upon the ground that the only responsibility of a railroad company for defective fences is that mentioned in the statute, and that at common law, independently of statute, a railroad company would not have been liable for injuries sustained by him, said:

"We think the learned General Term fell into error. A railroad company, for the safety of its passengers as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid, and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find upon the facts of a case that it was the duty of a railroad company to fence its track to guard against such danger."

See, also, *Dickson v. Omaha & St. L. Ry. Co.*, 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429; *I. & G. N. Ry. Co. v. Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 439; *Fordyce et al. v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597; *Lackawanna, etc., Ry. Co. v. Chenewith*, 52 Pa. 382, 91 Am. Dec. 168; *Sullivan v. P. & R. Co.*, 30 Pa. 234, 72 Am. Dec. 698.

Nor are all the cases cited by appellant really opposed to this conclusion. Some of them are not in point, and in most of the others the judicial mind seems to have been occupied with the notion of absolute duty to fence independently of statute. To be sure, there is no such duty. Whether, in the absence of statute, a railway company ought to fence its tracks at all, and where it ought to fence, depends, so far as its employes are concerned, upon the existence of circumstances from which it may be said that without such precautions due care has not been exercised. In the present case, however, we know that cattle are permitted to run at large in this state. It is conceded that ap-

pellant's track is not and never has been fenced, and it is not disputed that fencing is the device commonly employed to effect the exclusion of cattle. There is evidence to show that some public domain exists in the neighborhood of the accident, and from it there is unobstructed access to the appellant's right of way and track; that cattle abound in the adjacent country and commonly run at large; that they frequent the vicinity of the accident attracted by the water supply; that they often come upon the track; that encounters between them and moving trains were not unusual; that they are, potentially at least, a source of danger to such trains; and that all this was known to the appellant prior to the time of the accident. Under such conditions the failure to fence so as to keep out cattle, the consequent straying of the cow upon the track, the consequent running over the cow while on the track, and the consequent derailment of decedent's train, resulting in his death, form a collection of facts which plainly constitute evidence of negligence, making a question for the determination of the jury.

[§] 3. It is contended that a case of assumed risk is shown in two respects. The first of these is "improper use of appliances or choice of ways," and it is based upon the fact that the train was backing at the time, coupled with the proposition that this is a forbidden, as well as a more dangerous, method of operation. As to the "forbidden" feature it will suffice to say that, though Mr. Smith, a witness for appellant and one of its division superintendents, testifies that, under the oral instructions given by him to the trainmasters for dissemination among trainmen, the decedent should have proceeded with the engine foremost, we fail to find any evidence of such instructions communicated to the decedent; that the imperative directions of the company to its employes touching the operation of trains are embodied in its published bulletins and rules, none of which were shown to have been contravened; that under the rules, according to Mr. Smith, "a work train has the right to run in both directions, * * * has the right to back up, with the cars in front of the engine when absolutely necessary; he has got to; you can't get away from that proposition." To this we may add that, according to some of the testimony, the train was being handled in the manner customary with work trains, and this, if true, tends to show that no such oral instructions existed, or that they were merely suggestive in character, or that their observance had been waived.

[7, §] Whether a recovery in this case was barred by the choice of a more dangerous way is another matter, and depends upon circumstances which we will now proceed to consider. The decedent and his crew, having at the close of the day of October 11th loaded all their available cars, found it necessary to procure more at Kalispell. For

that purpose they started eastward from Kila about 7:40 p. m. It was then dark. The train consisted of the caboose, two outfit cars in which the crew lived, and the engine with its tender. The caboose was at the easterly end of the train and the engine was at its westerly end, pushing it towards its destination. They proceeded at the rate of 10 or 12 miles an hour for some distance, until about a mile and a quarter west of Batavia they ran over a cow, causing the caboose to be derailed, and the conductor to be killed. The argument is that a derailment was more likely from running over a cow with the caboose ahead than if the tender had been ahead and the caboose behind; that such a transposition could have been made; that, had it been made, the decedent would not have been killed even if a derailment had occurred; and that, since these things are so, the decedent assumed the risk; his choice of the more dangerous way having been a voluntary one. The law upon this subject is fairly well settled in this state. It is that contributory negligence will be imputed, as a matter of law, to one who, having a duty to perform and a choice of ways to perform it, knowingly and voluntarily chooses the way which is obviously dangerous to the way which is safe, or the way which is obviously more dangerous to that which is less so, unless his choice was justified by an emergency; but in balancing ways for the purpose of making a choice between them, the rule does not require a choice unerring in the light of after events; it requires such a choice as, under all the known or obvious circumstances a reasonably prudent man might take. *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323; *Killeen v. Barnes-King Dev. Co.*, 46 Mont. 212, 127 Pac. 89; *Johnson v. Malette*, 34 Mont. 477, 87 Pac. 447.

If we take the appellant's evidence and measure Hall's choice of method by the light of the event, we may acknowledge that his judgment was at fault. But the true test is: How did the matter appear or how should it have appeared to Hall? The appellant concedes that the engine and tender could not have been turned so as to get the aid of the "pilot" in thrusting aside any obstructions encountered, and the asserted superiority of the tender as a forefront is based upon its weight and the presence of a footboard nearer the track than the platform of the caboose. Mr. Smith testified that the tender without coal and with half a tank of water would weigh "about 40,000 pounds"; that the caboose would weigh "in the neighborhood of 31,000 or 32,000 pounds"; that "the footboard would probably strike the animal first" in case of a collision, and, though but 12 inches wide and a few inches high, "should carry almost any animal along. I don't mean to say that it would have a tendency to throw it out in to the clear; that would all depend on where the animal was

struck." In view of this testimony, it seems to us that, instead of being obvious, the alleged superiority of the tender as a forefront was largely a matter of opinion. But, be this as it may, the record is silent as to Hall's knowledge concerning the relative weight of the tender and caboose as they then stood. It is not beyond controversy that the transposition of the caboose and engine by means of a "flying switch" was clearly a safe or a safer proceeding. It does appear, however, that a train proceeding tender foremost may be derailed by cattle; that with the caboose ahead some lookout on the track was possible with the aid of fuses, and command of the train in case an obstruction were met could be maintained by means of the air control; that with the tender ahead, the lookout nearest the front would be in the cab, the tender's length away, aided by no headlight save a common lantern set against a reflector, and that on many previous occasions—one or more on this branch—the method employed had been pursued with safety and success. To hold, under all these circumstances, that the greater danger of the chosen method was or should have been so apparent that its selection was incompatible with ordinary prudence, is simply out of the question.

[9, 10] The other respect in which it is claimed that assumed risk appears, is "knowledge of his working conditions" by the decedent. The argument is that for various reasons he must have known the railway was unfenced, and that his own acts and utterances establish his appreciation of the danger from such condition. That Hall knew there was no fence is a permissible, though not a necessary, inference from the other facts in the case. The absence of the fence, however, was a passive condition, in itself harmless; and we altogether dissent from those decisions cited by appellant which deduce assumption of risk from knowledge of that fact alone. It is as valid to say that Hall, if he knew there was no fence, may have believed that such condition was permitted by the company because, in the exercise of due care, it had seen no occasion to fence, as it is to say that he assumed all the risk which might arise from the concurrence of that condition with other conditions the existence of which, though known to the company, may not have been known to him. "To make a case of assumption of risk it is not enough that the injured party knew of the thing from which harm might come; he must know and appreciate the danger from which he suffered." *Westlake v. Keating G. Min. Co.*, 48 Mont. 120, 136 Pac. 38; *Osterholm v. Boston & Mont., etc., Co.*, 40 Mont. 508, 107 Pac. 499; *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724; *McCabe v. Montana C. Ry. Co.*, 30 Mont. 323, 76 Pac. 701. In connection with the want of a fence, the presence of cattle in the adjacent country, their ability and propensity to visit

the track, the likelihood of encountering them, the fact that, should they be encountered while the train was backing, a derailment might result, were requisite to command a reasonable apprehension of danger; and, under the rule just stated, it does not answer to say that by exercising reasonable care the decedent could have discovered these things. He was not required to discover them; they must have been known or plainly observable to him (*Moyses v. Northern Pac. Ry. Co.*, 41 Mont. 272, 108 Pac. 1062, *supra*); and as to this the most that can be gathered from the evidence is that such may or may not have been the case. We do not forget that Rae, a witness for the appellant, testified that just before leaving Kila he was told by the decedent to watch the air while the decedent would ride the platform with lighted fuses looking out for stock, and we consider that, if the decedent said and did this, his apprehension of danger was established. On cross-examination, however, the witness modified Hall's alleged statement so as to read, "You look out for the air, and I will look out for the stock," believing that Hall would naturally ride the platform in looking out for stock. No one else heard this conversation. As a matter of fact, Rae did not take charge of the air, and neither he nor any one else testifies that Hall went out on the platform or looked for stock. Moreover, this witness had within ten days of the accident made an affidavit concerning the matter, but he does not know whether he then "said anything about this talk with Hall" or when he first mentioned it to any one. These circumstances, coupled with the inability of Hall to confirm or contradict the witness, and with the fact that his demeanor on the stand may have created an adverse opinion of his credibility, requires us to say that the truth of his statement was a question for the jury.

[11] 4. The procedural errors which it is contended require a new trial have all been duly considered, but we do not feel that any of them merit discussion, save the refusal of appellant's proposed instruction 13. This request involved a proposition of law upon which the appellant was entitled to have the jury correctly instructed, *viz.*, the assumption of risk based upon the choice of ways. But the court cannot be put in error for refusing it because it permits the decedent's choice of ways to be judged in the light of the event, and does not indicate that the choice, to be assailable, must have been of a method obviously dangerous, or obviously more dangerous than its alternative.

Finding no reversible error in the record, the judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(51 Mont. 590)

YELLOWSTONE NAT. BANK v. McCULLOUGH et al. (No. 3584.)

(Supreme Court of Montana. Jan. 22, 1916.)

1. APPEAL AND ERROR ⇨695—MATTERS REVIEWABLE—MATTERS OF FACT—SUFFICIENCY OF RECORD.

The court on appeal involving questions of fact cannot review on the merits the question of the sufficiency of the evidence to sustain the findings of the court below, where material evidence, consisting of exhibits which were admitted without objection, was omitted from the record, since to review the sufficiency of the evidence to sustain the findings all the evidence must be included in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. ⇨695.]

2. DEEDS ⇨211—ACTIONS TO SET ASIDE—MISTAKE—FRAUD—EVIDENCE—SUFFICIENCY.

Evidence of the defendant in an action to foreclose a deed as a mortgage held insufficient to sustain his allegations of fraud or mistake in the execution of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. ⇨211.]

3. ESTOPPEL ⇨94 — PERMITTING SALE OF PROPERTY—EVIDENCE.

The grantee, who sued to foreclose a deed as a mortgage, was not estopped to claim a lien by the fact that he permitted his grantor, after the conveyance to him, to convey by warranty deed to the defendant, where his deed was on record prior to the transaction with the defendant; that being the only notice which he was required in law to give.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 245-247, 276-284; Dec. Dig. ⇨94.]

4. ESTOPPEL ⇨117 — PERMITTING SALE OF PROPERTY—EVIDENCE.

Where the grantee sued to foreclose his deed as a mortgage, and the defense was that he permitted a subsequent grantee of the same grantor to purchase, although he knew of the transaction, and knew that no title could be given by it, it was not error to exclude, as immaterial, evidence that the grantor was responsible financially at the time of the transaction with the defendant, and that he later became irresponsible; the rights of the parties being concluded on the date of the transaction by the fact that the plaintiff's deed had been recorded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 307; Dec. Dig. ⇨117.]

5. ESTOPPEL ⇨117 — PERMITTING SALE OF PROPERTY—EVIDENCE.

Where the grantee sued to foreclose his deed as a mortgage, evidence that the defendant had made inquiry of the county clerk to ascertain whether his immediate grantor could give title, and that the clerk informed him that his title was good, was inadmissible, since the plaintiff could not be charged with a negligent act of the clerk; his title having been on record at the time.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 307; Dec. Dig. ⇨117.]

6. APPEAL AND ERROR ⇨974 — EQUITY ⇨377—TRIAL—JURY—SUBMISSION OF ISSUES.

The judge in the trial of a cause in equity may call a jury to decide issues of fact, and, if he does so, he may submit such issues as he chooses, and error cannot be predicated on his refusal to submit issues, since the act of the jury in such case is only the act of the judge,

and, when adopted by the judge, is considered as emanating from him, and not from a jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3858, 3859; Dec. Dig. §§ 974; Equity, Cent. Dig. §§ 788-793; Dec. Dig. § 377.]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by the Yellowstone National Bank, a corporation, against John McCullough and others. Decree for plaintiff as prayed, and the defendants John McCullough and M. B. Dutton appeal. Affirmed.

Nichols & Wilson, of Billings, for appellants. Johnston & Coleman, of Billings, for respondent.

BRANTLY, C. J. Prior to September 3, 1908, the defendant John McCullough and his wife, Florence, became indebted to the plaintiff in the sum of \$3,700 for borrowed money. This indebtedness was evidenced by two promissory notes, one for \$2,200, and the other for \$1,500. At the time these notes were executed it was understood and agreed between the parties that security would presently be furnished by McCullough and his wife for the entire amount. McCullough was then the owner of 6 lots, with the buildings and improvements thereon, in the town of Joliet, in Carbon county, and 30 unimproved lots in the town of Laurel, in Yellowstone county. For convenience, the first-mentioned property will hereafter be referred to as the Joliet property, and the second as the Laurel property. On September 3d McCullough and his wife took up the two notes held by the plaintiff, substituting therefor their note for \$3,700, the amount of both, due one year from that date, with interest at the rate of 10 per cent. per annum. At the same time they executed and delivered to the plaintiff their warranty deed to all the property referred to above. This deed was designed to operate as a mortgage security; it being orally agreed that upon the payment of the note the plaintiff would reconvey the property to McCullough. The deed was recorded in Yellowstone county on October 8 and in Carbon county on December 29, 1908. On March 6, 1909, McCullough and his wife by warranty deed conveyed to the defendant M. B. Dutton the Joliet property in exchange for 160 acres of farming land in Carbon county. No part of the indebtedness due upon the note having been paid, except the sum of \$500, paid on March 17, 1909, the plaintiff brought this action to obtain a decree directing a sale of the property to satisfy it. The complaint, besides alleging the facts necessary to obtain the foreclosure, alleges further that on July 5, 1911, in order to protect its security, the plaintiff was compelled to pay the taxes upon the property for the years 1908, 1909, and 1910, together with penalties for delinquency, amounting to \$84.74; that on December 2, 1911, it was compelled to pay

the taxes for that year, amounting to \$30.61; and that on November 8, 1912, to prevent the possible impairment of the security by fire, it had the buildings on the Joliet property insured at a cost of \$21. It is demanded that out of the proceeds of sale of the property the plaintiff be reimbursed in these amounts, with interest from the dates at which they were respectively paid. Of the several persons named as defendants, none appeared except McCullough and Dutton, who filed separate answers. Not seriously controverting any of the allegations of the complaint, they allege three separate affirmative defenses, denials of which by the plaintiff's reply present the issues which were determined by the trial court. McCullough alleges in substance: (1) That as security for the payment of the note described in the complaint he agreed to give and the plaintiff agreed to accept a deed to the Laurel property; that, contrary to this express agreement, and without the knowledge of this defendant, the scrivener who prepared the deed included therein the Joliet property also; that in this particular the deed as written and executed did not express the agreement and intention of the plaintiff and the defendant; and that this defendant would not have executed and delivered it had he known of the mistake. (2) That prior to September 3, 1908, he was indebted to the plaintiff in a sum which, with the exception of accrued interest, was the same as the indebtedness mentioned in the complaint; that the plaintiff held as security for it an unrecorded warranty deed from him and his wife to the Joliet property; that on or about that date, having an opportunity to exchange with the defendant Dutton this property, or a portion thereof, for farming lands in Carbon county, this defendant conferred and advised with the plaintiff respecting the exchange; that thereupon the plaintiff "permitted, advised, and directed" him to effect the exchange, and agreed that, if the exchange should be made, it would release its lien upon the Joliet property under the unrecorded deed, and would accept as security in lieu thereof a lien upon the Laurel property; that, relying upon this agreement, the defendant entered into an agreement with Dutton to make the exchange, and thereupon so informed the plaintiff; that thereafter, on September 3, 1908, to effect the agreement between the plaintiff and this defendant, a new deed was prepared by the plaintiff, which was thereupon executed by this defendant and his wife; that it was then understood by defendant that this deed contained only a description of the Laurel property; that, in reliance upon the direction and advice of the plaintiff and his agreement relating to the Joliet property, this defendant conveyed to Dutton by warranty deed all the Joliet property; that Dutton thereupon entered into possession thereof,

claiming it under this deed; and that plaintiff, by reason of the premises, is estopped to assert any lien upon or interest in the Joliet property. (3) That the deed of September 3, 1908, was prepared under the direction of the plaintiff; that the plaintiff fraudulently and wrongfully caused to be inserted therein the description of the Joliet property; and that thereafter, without knowledge of the fact that the Joliet property had been included therein, he executed and delivered the deed to the plaintiff. The prayer is that this deed be reformed so as to express the true intention of the parties, and that a decree of foreclosure be granted as to the Laurel property only. In his answer Dutton relies upon the foregoing, supplementing the facts alleged as an estoppel by the addition of the following: That the plaintiff, with the knowledge that it held the record title to the property described in the deed of September 3, 1908, and with the knowledge that McCullough intended to exchange the Joliet property for the farming property owned by this defendant, advised and permitted McCullough to make the exchange, he being then financially responsible, and this defendant to occupy and improve the property without the assertion of any title thereto, for a long time after McCullough's debt was due; that at no time during the pendency of the negotiations between McCullough and this defendant, nor for years after he had conveyed his lands to McCullough, did this defendant have any knowledge of the deed to the plaintiff; that in his negotiations with this defendant McCullough relied upon the conduct of the plaintiff in advising and directing him to make the exchange, and the agreement of the plaintiff to release the Joliet property and accept in lieu thereof a lien upon the Laurel property; that he would not otherwise have conveyed the Joliet property to this defendant; and that on April 19, 1912, the defendant McCullough was adjudged a bankrupt.

The court found: (1) That it was agreed and understood that the deed to the plaintiff should include both the Joliet and Laurel property; (2) that there was no mistake in the drafting or in the execution of it; (3) that the descriptions of the property to be included in it were furnished to the attorney who drew the deed by McCullough himself; (4) that prior to the execution of the deed the plaintiff did not hold any deed to the Joliet property as security for any debt; (5) that the plaintiff knew that defendant was negotiating with Dutton for an exchange of the Joliet property for the farming property; (6) that plaintiff did not agree to accept a deed to the Laurel property in lieu of the Joliet property; (7) that the plaintiff first learned of the conveyance to Dutton on or before (about?) May 2, 1911; (8) that the plaintiff "advised and directed" McCullough to make the exchange with Dutton; (9) that

McCullough did not sign the deed to plaintiff with the understanding that it would accept the Laurel property as security; (10) that the deed was prepared under plaintiff's direction; (11) that it was executed as security for the payment of the note signed by McCullough and his wife; (12) that the plaintiff, to protect its security, was compelled to pay as taxes the amounts alleged in the complaint for the years 1908, 1909, 1910, and 1911; and (13) that in accepting the conveyance from McCullough Dutton did not rely upon any representation by the plaintiff or any agreement between it and McCullough, but accepted it with constructive notice of plaintiff's deed. Upon these findings it was adjudged that the plaintiff was entitled to recover from McCullough and wife the amount of the note, the taxes paid as alleged in the complaint, and counsel fees to the amount of \$300, and to have a decree of foreclosure as against all the defendants. The appeal is from the decree.

[1] Counsel for the plaintiff challenge the right of the defendants to have the appeal heard on the merits, for the reason that it appears from the transcript that much evidence of a substantial character was not incorporated in the bill of exceptions, and therefore this court cannot fairly determine the propriety of the findings. The evidence in question consists of some 30 exhibits in the form of letters exchanged between A. L. Babcock, the president of the plaintiff, and McCullough, after the former had been informed of the conveyance to Dutton, and letters exchanged between plaintiff's counsel and McCullough upon the same subject. With one or two exceptions, these were admitted without objection and as a part of plaintiff's evidence in rebuttal. The contention has merit, for the reason that the principal argument of counsel for defendants in this court is that the findings are not justified by the evidence, and it does not appear from the recital in the bill of exceptions or from the certificate of the presiding judge that the bill embodies all of the evidence introduced at the trial. So far as this court is informed, these letters may have made such disclosures in the way of admissions by McCullough as to render it impossible for the trial court to find otherwise than it did. The statute imposes upon this court in this class of cases the duty to review and determine all questions of fact arising upon the evidence, as well as questions of law (Rev. Codes, § 8253); but this we cannot safely do unless all the material evidence is embodied in the record. The extent of review required, so far as it includes the evidence, is not to try the case de novo, but, as we have frequently said, to make such examination and to reach such conclusion as in the nature of things is permissible upon the printed record, unaided by observation of the demeanor of the living witnesses as they gave their testimony. Fin-

len v. Heinze, 32 Mont. 354, 80 Pac. 918; Copper Mt. Min. Co. v. Butte & Corbin Co., 39 Mont. 487, 104 Pac. 540, 133 Am. St. Rep. 595; Gibson v. Morris State Bank, 49 Mont. 60, 140 Pac. 76. Furthermore, we have as frequently held that we cannot consider the question of insufficiency of the evidence to sustain the findings or verdict, when it does not appear, either positively or inferentially, that the record contains all the material evidence introduced at the trial or the substance of it relating to the particular question of fact at issue. Stevens v. Ravalli County, 25 Mont. 306, 64 Pac. 876; Landt v. Schneider, 51 Mont. 15, 77 Pac. 307; King v. Pony Gold Min. Co., 28 Mont. 74, 72 Pac. 309; Currie v. Montana C. Ry. Co., 24 Mont. 123, 60 Pac. 989; State v. Sheppard, 23 Mont. 323, 58 Pac. 868.

[2] But, assuming that the omitted evidence was without probative value, after a careful study of so much as is found in the record, we cannot say that it preponderates against the findings. As to the allegation of mistake in the execution of the deed of September 3, 1908, McCullough testified that prior to this date, being indebted to the plaintiff in the amount of the notes referred to in the statement, he and his wife had executed to the plaintiff as security a warranty deed to the Joliet property; that it had been agreed that the bank should for the time not put this deed upon record, in order that McCullough's credit would not be impaired; that this deed had been prepared by Mr. Waldron, the cashier of the bank, and acknowledged before him as a notary; that, while this condition of affairs prevailed, he informed Babcock that he was engaged in negotiating an exchange of the Joliet property for the Dutton farm; that it was thereupon agreed between him and Babcock that the bank would accept a deed to the Laurel property in lieu of the Joliet property; that he brought his deed to the Laurel property to the bank and left it with Babcock in order that he might have the new deed prepared; that he returned on September 3d to execute it; that, relying on the promise of Babcock, he signed the new deed prepared by the direction of Babcock without reading it, and thereupon sent it to his wife at Minneapolis, Minn., to have her execute it. He is corroborated to some extent by the statement of Dutton that, when Dutton first obtained actual knowledge of the deed from McCullough to the bank, he went with McCullough to see Babcock to ascertain whether Babcock would agree to make some adjustment of the matter, so that he would not suffer loss, and that Babcock then admitted that he had agreed to release the Joliet property. These statements are categorically and positively denied by Babcock. He testified that McCullough had not been indebted to the bank for any amount prior to August 20th; that on that day he obtained the loan

for \$2,200; that, not knowing then how much money he would need, it was agreed that later, after ascertaining the amount required, he would obtain it, and then give security for it upon his real estate; that on August 24th he obtained \$1,500; that he did not execute any deed to the bank or give any security other than the personal notes of himself and wife; that it had been expressly agreed that the security, when given, would be in the form of a mortgage or deed, including both the Joliet and Laurel property; that the deed was prepared by Mr. Johnston, the attorney for the bank, and delivered to it by him or from his office; that prior to this time McCullough had stated that he was negotiating for an exchange of the Joliet property for that of Dutton, and Babcock had advised him that he thought the exchange ought to be made, as he (Babcock) thought well of the Dutton property; and that he had nothing to do with the preparation of the deed further than to refer McCullough to Mr. Johnston. He stated positively that the bank had never before that time had in its possession any mortgage or deed from McCullough for security for a loan or for any other purpose. His statement of the origin of the indebtedness, the unsecured condition of it prior to September 3d, and the agreement as to what property should be included in the deed, is fully corroborated by Waldron, who was cognizant of the whole transaction. He is further corroborated by the fact that the records of the bank for several years prior to the transaction in question disclose that McCullough had not been indebted to the bank at any time for any sum. He is also corroborated by McCullough's own admission that he never made demand upon the bank or Babcock, or Waldron, for return to him of the unrecorded deed, and that he never asked for a release of the Joliet property. Furthermore, Waldron testified that he had never prepared a deed for McCullough; that he was never a notary public or qualified to take acknowledgments; and that the bank had never had in its possession a deed from McCullough to any property. The facts relating to the preparation of the deed are related by Mr. Johnston as follows: That he was informed by Babcock that he was to prepare the deed; that in the early morning of September 3d McCullough came to his office bringing his deeds to both the Joliet and Laurel property, in order that Johnston might have the correct descriptions, and gave them to him so that he might get them; that he prepared the deed which, after it had been acknowledged before James Johnston, a notary and brother of the attorney, was delivered to the bank. Upon this evidence the trial judge was fully justified in finding as he did, that the deed of September 3d expressed the true intention of the parties. If the bank never had in its possession the unrecorded deed to the Joliet property, and Mc-

Cullough furnished to Mr. Johnston a description of the property in order that the deed might be prepared (and whether these were the facts depended upon the credit accorded to the witnesses), the conclusion cannot be avoided that McCullough understood what Johnston was to do, and what he had done when the deed was acknowledged; and, if this was the fact, the alleged agreement by Babcock to release the Joliet property could not have been made. There was therefore no mistake. Much less is there any substantial basis for an inference of fraud. The fact that McCullough did not read the deed before he executed it does not in any wise affect the case.

[3] It is strenuously insisted, however, that even though there was no mistake, the bank is estopped to claim a lien upon the Joliet property because the evidence discloses, and the court found (findings 5 and 8) that Babcock knew, when McCullough executed the deed to the bank, that McCullough and Dutton were negotiating for the exchange, and that Babcock advised and directed McCullough to make the exchange. In view of the fact that the court found that Dutton did not rely upon any representations by Babcock or any agreement between him and McCullough, these findings were wholly immaterial. Standing alone, they cast doubt upon what the trial judge had in mind in making them, because they are somewhat equivocal in meaning. But, when we consider them in the light of the allegations of the answer and the evidence, which we must do under the rule of the maxim, that that is to be deemed certain which can be made certain (*Con. Gold & S. Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152), they become entirely clear in their meaning and consistent with the other findings. It will be noted that such conversation on the subject of the exchange as occurred between McCullough and Babcock, occurred before the deed to the bank was executed. Whether this was before or after the loan was effected and the agreement to secure it was made does not appear. It is denied by Babcock that any conversation occurred, other than that he expressed approval of the proposed exchange. But, assuming that it occurred as alleged, it related wholly to the condition as it existed prior to the execution of the deed to the bank, and not afterwards. After this occurred McCullough was wholly divested of his right to sell the Joliet property, except subject to the bank's right, and could not, as a reasonable man, have thought otherwise. There is no evidence that he did think so; for, while he testified that he informed Babcock some months afterwards that he had made the exchange, he did not venture to testify that Babcock ever spoke to him on the subject after the close of the transaction with Babcock and before the conveyance was made to Dutton, or made any recommendation to

him whatever. The findings referred to must therefore be construed as relating to the time prior to the execution of the deed to the bank. So understood, they are not inconsistent with the other findings or with the conclusion that the bank was entitled to claim the full benefit of its security. Moreover, when the exchange had been made, the bank's deed was put upon record. McCullough's alleged conversation with Babcock was not communicated to Dutton. He was not misled by any representations made by Babcock, nor even by Babcock's silence after he had been informed that the exchange had been effected. Babcock had performed his duty to the bank and to all persons who might thereafter seek to acquire title to the property by putting the deed on record, and was under no obligation to disclose to Dutton, either before or after the exchange, that the bank was claiming an interest in it. It may be remarked here that the use of the word "direct," in finding 8, was evidently an inadvertence because there is no evidence justifying its use. According to McCullough's statement, Babcock did not go further than to commend and advise the proposed exchange.

The very purpose of the recording statutes is to require the owners or incumbrancers of real property to give notice of their rights, by recording the evidence of them. When they have done so, they have done all that can be required of them, and may thereafter preserve silence, even though they know that others are about to deal with the property, unless the circumstances are such that they must disclose their rights. *Cornish v. Woolverton*, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; *Porter v. Wheeler*, 105 Ala. 451, 17 South. 221; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453; *Waits v. Moore*, 89 Ark. 19, 115 S. W. 931. Here the bank's deed was on record. It had notified Dutton of its claim as required by law. If it be conceded that the conversation between McCullough and Babcock actually occurred as testified to by McCullough, it was not communicated to Dutton; Dutton was not misled by it, but by the fact that he failed to consult the records and act upon the information afforded by them. Common prudence would have dictated this course. McCullough might well allege Babcock's statement as somewhat excusatory of his conduct, but that this is so cannot aid or avail Dutton.

"There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 344.

This statement of the rule by Chancellor Kent is recognized by all the courts, and

would have application here, had the bank failed to put its deed on record, or perhaps had the conversation of Babcock with McCullough, with the knowledge of Babcock, been communicated to Dutton before Dutton accepted his deed. As the case stands, the latter cannot claim that he was misled to his prejudice by anything other than his own forbearance to exercise care and prudence. The essential element of equitable estoppel is wholly unproved in this case. The only legitimate conclusion one can arrive at touching the conduct of McCullough is that he intended to convey to the bank as he did, and thereafter conveyed to Dutton hoping that he would be able to pay off the debt to the bank and then release the property to Dutton.

[4, 5] It is argued that the court erred in excluding as immaterial evidence of the fact that on September 3, 1908, and for two years thereafter, McCullough was financially responsible, and then became bankrupt, and also evidence of the fact that Dutton caused the clerk of Carbon county to make an examination of the records of the county to ascertain that McCullough's title was clear, and that he was informed by the clerk that it was. The evidence was properly excluded in both instances. As has already been said, when Babcock had put the bank's deed upon record, he had performed the bank's obligation to the public as to notice. The fact that McCullough subsequently became insolvent could not enlarge this obligation. Neither could the fact that Dutton had made inquiry of the clerk and had been misinformed by him be shown in aid of his case. This would be tantamount to permitting a party to excuse his own fault by proving that of another; in this instance the clerk. The bank cannot be held chargeable in any measure because of the clerk's fault.

[6] The trial judge called to his assistance a jury and submitted to them several special findings and which they returned answers. Some of these the judge adopted; others he rejected, making his own findings instead. It is argued that he committed error in refusing to submit certain findings requested by counsel. It is well settled by the decisions of this court that in equity cases the judge may call a jury to his assistance if he chooses, but is not bound to do so. If he does, he is not bound by the findings, but may reject them in whole or in part and make findings of his own. Therefore he is not required to submit the whole case to the jury, but only such issues of fact as he may choose. Whether he adopts the one course or the other, the ultimate result is to be regarded as emanating from the judge, and its correctness is to be determined by a review of his action, and not that of the jury by the standard of counsel's judgment as to what the jury ought to have been required to find. *Lawlor v. Kemper*, 20 Mont. 13, 49

Pac. 398; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Wetzstein v. Largey*, 27 Mont. 221, 70 Pac. 717.

Other contentions made by counsel we do not think of sufficient merit to require special notice.

The decree is affirmed.

Affirmed.

SANNER and HOLLOWAY, JJ., concur.

(51 Mont. 582)

DOICHINOFF v. CHICAGO, M. & ST. P. RY. CO. et al. (No. 3585.)

(Supreme Court of Montana. Jan. 21, 1916.)

1. APPEAL AND ERROR ⇨1041—AMENDMENT PENDING TRIAL—WHEN ALLOWABLE.

Permission to plaintiff to amend his complaint by merely interlining the words "and said defendants" was harmless error, since evidence admissible after the amendment would have been admissible without it and no prejudice could have resulted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. ⇨1041.]

2. PLEADING ⇨207, 367—OBJECTIONS—SPECIAL DEMURRER—MOTION—NECESSITY.

Although a complaint alleging injuries to a servant alleged discovery of his peril or the duty to discover it in the alternative, where it alleged further that the defendants, after seeing his danger and knowing that he was not aware of it, negligently and carelessly failed to stop the engine which struck him, and failed to warn him of his peril, it was, in the absence of seasonable attack by motion or special demurrer, sufficient to plead injuries under the last clear chance doctrine, requiring that the complaint disclose, first, the exposed condition brought about by the negligence of the injured person; second, the actual discovery by the defendant of the perilous situation in time to avert injury; and, third, the defendant's failure to use ordinary care to avert the injury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 511, 512, 1173-1193; Dec. Dig. ⇨207, 367.]

3. PLEADING ⇨165—REPLICATION—NECESSITY.

Where the complaint for injuries to a servant was based on the last clear chance doctrine, and the answer affirmatively set out that the injured servant stepped on the track in front of defendant's locomotive, where his presence could not be discovered in time to avoid striking him, it was not necessary for the plaintiff to reply, since such defense was merely an affirmative wording of a denial of the facts alleged in the complaint, and under Rev. Codes, § 6560, a reply is necessary only when the answer contains a counterclaim, or any new matter.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321, 323; Dec. Dig. ⇨165.]

4. TRIAL ⇨251—INSTRUCTIONS—ISSUES.

It is not error, in an action for the death of a servant, to refuse instructions on contributory negligence, where the complaint was based on the theory of last clear chance; that necessarily involving an admission of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. ⇨251.]

5. TRIAL ⇨84—OBJECTIONS TO WITNESSES—QUESTIONS RAISED.

Where the only objection to the testimony of a witness was that it was irrelevant, as re-

ferring to another conversation than that testified to by another witness, who was sought to be impeached, that objection was not sufficient to raise the question of proper foundation for the impeachment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211–218, 220–222; Dec. Dig. ¶ 84.]

6. APPEAL AND ERROR ¶1048 — HARMLESS ERROR—IMPEACHMENT OF WITNESS.

Informalities in impeaching a witness by showing that he had detailed the events of the injuries to plaintiff's intestate and failed to mention warning were not ground for reversal, where the matter of warning was immaterial, since that referred only to contributory negligence, which was admitted by the complaint based upon the theory of last clear chance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. ¶ 1048.]

7. APPEAL AND ERROR ¶215—OBJECTIONS IN LOWER COURT—INSTRUCTIONS.

Where the court, in an action for the wrongful death of a servant, without objection from either party, instructed that the verdict might be for a lump sum, although that was incorrect under the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657–8665]), which requires that the jury apportion the share between the surviving widow and children, the defendant could not first object on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309–1314; Dec. Dig. ¶ 215; Trial, Cent. Dig. § 683.]

8. MASTER AND SERVANT ¶278 — INJURIES TO SERVANT—LAST CLEAR CHANCE—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

Where the servant's complaint for injuries was based on the theory of last clear chance, the fact of his discovery by the defendant's servants could be shown by circumstantial evidence, which in some cases may be more convincing than direct evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ¶ 278.]

Appeal from District Court, Meagher County; J. A. Matthews, Judge.

Action by Jordan Doichinoff, as administrator of the estate of Chris Koleff, deceased, against the Chicago, Milwaukee & St. Paul Railway Company, a corporation, and another. From a judgment for plaintiff, and order denying new trial, defendants appeal. Affirmed.

L. D. Glenn, of Harlowton, and Shelton & Furman and A. J. Verheyen, all of Butte, for appellants. B. K. Wheeler, of Butte, and E. K. Cheadle, of Lewiston, for respondent.

HOLLOWAY, J. Chris Koleff, an employé of the Chicago, Milwaukee & St. Paul Railway Company, was run over and killed by a locomotive in the service of the railway company and operated by Leo Middleton, one of its engineers. This action by the administrator is prosecuted under the federal Employers' Liability Act of April 22, 1908 (35 Stat. at Large, 65), to recover damages for the use and benefit of the surviving widow and minor child. The complaint proceeds upon the theory of the last clear chance doctrine. The charging part is as follows:

"That they [the defendants] then, after seeing that the said Chris Koleff was in a place of danger, and that he was not aware of his danger, negligently and carelessly failed to stop said engine, and said defendants negligently failed to sufficiently warn the said Chris Koleff of the approach of said engine, and negligently and carelessly permitted and allowed the said engine to coast along noiselessly and to strike the said Chris Koleff, inflicting upon him grievous bodily injury, from which he died within a short time thereafter."

The joint answer of the defendants denies any negligence, and in what is denominated a "Special and Affirmative Answer and Defense," alleges that on February 17, 1913:

"Chris Koleff, now deceased, stepped upon the track of the defendant corporation, immediately in front of the locomotive operated by the said Leo Middleton; * * * that his presence upon the track * * * was not discovered or known by the defendants, or either of them, and could not have been discovered by the exercise of reasonable or any other degree of care; * * * that, as a result of his careless, reckless, and negligent conduct, the said Chris Koleff, now deceased, came to his death, and not otherwise."

The reply denies all the material allegations of the answer, except that Koleff stepped upon the track immediately in front of the locomotive, etc. From a judgment in favor of plaintiff, and from an order denying a new trial, the defendants appealed.

[1] 1. Upon the trial the court permitted plaintiff to amend the complaint by interlining the words "and said defendants" in the charging part of the complaint quoted above. The amendment did not change the pleading in any essential particular. Evidence admissible after the amendment was allowed would have been admissible without the amendment. It accomplished no purpose, and its allowance could not have prejudiced the defendants.

[2] 2. To state a cause of action within the doctrine of the last clear chance, it is necessary to disclose in the complaint:

"(1) The exposed condition brought about by the negligence of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury." *Dahmer v. Northern Pac. Ry. Co.*, 48 Mont. 156, 136 Pac. 1059, 142 Pac. 209.

Preceding that portion of the complaint quoted above, discovery of Koleff's peril or the duty to discover it is charged in the alternative, and in this respect the pleading is indefinite; but, in the absence of a seasonable attack by motion or special demurrer particularly pointing out the defect, we think the allegations, taken as a whole, sufficient to state a cause of action and apprise the defendants of plaintiff's theory of his case. *Gauss v. Trump*, 48 Mont. 92, 135 Pac. 910.

[3] 3. It is urged that, by failing to reply to the so-called affirmative allegations of the answer quoted above, plaintiff admits that Koleff stepped upon the track immediately

in front of Middleton's locomotive, where his presence could not be discovered in time to avoid striking him, and that this is equivalent to a concession that Koleff's death was the result of his own negligence or of an unavoidable accident. Section 6560, Revised Codes, provides for a reply whenever "the answer contains a counterclaim or any new matter." It is very clear that the allegations of this answer do not fall within the definition of a counterclaim found in section 6541, and neither do the facts stated constitute new matter within the contemplation of section 6560 above, because they could have been proved under the general denial of negligence. Indeed, the allegation that Koleff stepped upon the track immediately in front of the locomotive, where his presence could not be discovered in time to avoid injuring him, is but a denial in affirmative form, or an argumentative denial, of the allegation in the complaint that Koleff's presence on the track was discovered by the defendants, and that it was through the negligence of the defendants that the accident occurred. *Guerth v. Arbogast*, 48 Mont. 209, 136 Pac. 383; *National Wall Paper Co. v. McPherson*, 19 Mont. 355, 48 Pac. 550. In *Stephens v. Conley*, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958, we considered this question of pleading at length and determined that:

"If the facts stated in the answer could have been proved under a denial of the allegations in the complaint, they do not constitute new matter within the meaning of the Practice Act, and the failure to reply does not amount to an admission of the truth of the matters stated."

[4] 4. Defendants' offered instructions B and C might have been pertinent upon the issue of Koleff's contributory negligence; but in this instance there was no such issue. Plaintiff's last clear chance theory has its origin in the concession that Koleff was guilty of negligence in the first instance. *Dahmer v. Northern Pac. Ry. Co.*, above.

[5, 6] 5. The proper foundation was not laid for the attempted impeachment of the witness Nadello. Section 8025, Revised Codes, requires that the statement claimed to be inconsistent with the witness' testimony must be related to him, with the circumstances of time, place, and persons present, and he must be asked whether he made such statement, and be given an opportunity to explain if he did so. Much of this record is all but unintelligible. Several foreigners testified through an interpreter, and instead of counsel directing their questions to the witnesses, to be translated and repeated by the interpreter, they directed them to the interpreter. For instance, while the witness Nadello was on the stand, counsel for plaintiff in cross-examination directed to the interpreter the following:

"Ask him if he did not tell you that Mr. Shong wanted to give him \$100."

But for its objectionable form the question would be proper as one intended to elicit

substantive testimony from the witness, but altogether insufficient as a basis for impeachment, as it omits the elements of time, place and persons present. In *re Williams' Estate*, 50 Mont. 142, 145 Pac. 957; *Tague v. John Caplice Co.*, 28 Mont. 51, 72 Pac. 297. However, the objection made to the impeaching testimony does not raise the question of the sufficiency of the foundation. When the witness Gravetti was called, and asked if Nadello had not on the previous Saturday told him that Mr. Shong wanted to give him [Nadello] \$100 to testify in the case, counsel for the defendants objected, on the ground that the question asked Gravetti referred to a different conversation from the one to which Nadello's attention had been directed, in that Nadello's attention was directed to a conversation which occurred on Sunday, and not to one on Saturday. The trial court was not called upon to reframe counsel's objection, but was at liberty to rule upon it as made, even though counsel labored under a misapprehension as to the force or effect of the objection in the form in which it was presented. An objection to the question asked Gravetti upon the ground that a proper foundation had not been laid should have been sustained, and doubtless would have been, but the objection as made was properly overruled.

Nadello testified for the defendants that he warned Koleff of the approach of the locomotive in ample time to avoid the injury. Plaintiff sought to discredit this testimony by showing that, on the Sunday previous to the trial, Nadello had assumed to tell Gravetti what he knew of the accident, but had omitted any reference to this warning. Whatever informalities may appear in the procedure adopted by counsel in their attempt to discredit the witness are of no moment, for the evidence given by Nadello with reference to the warning was wholly immaterial. It went only to the question of Koleff's contributory negligence, and that was not in issue, as we have heretofore observed.

[7] 6. Without objection from any one, the court gave instructions 19 and 20, from which the jury must have understood that the amount of any verdict which might be returned for plaintiff should be expressed in one lump sum. It was not suggested that the amount of the verdict should be apportioned by the jury between the surviving widow and child, as is held to be required under the federal Employers' Liability Act, in *Gulf, C. & S. F. R. Co. v. McGinniss*, 223 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785. In our opinion, the question of the informality of the verdict cannot be raised on appeal for the first time. In failing to object to the instructions above, and particularly to instruction 19, counsel for defendants waived their right to urge a reversal upon the ground now suggested, under section 6746, Revised Codes.

[8] 7. It is true that there is not in this record any direct evidence that Koleff was

actually discovered by the enginemen in time to avoid the accident; but the fact may be established by circumstantial evidence. If in this instance it had been made to appear that Koleff was walking upon the railroad track in broad daylight, 200 feet or more in advance of Middleton's locomotive, that he was apparently unaware of danger, that the view from the locomotive was entirely unobstructed, that the enginemen were at their respective posts of duty on the locomotive, and were keeping a lookout ahead in the direction of Koleff, that the locomotive could have been stopped within from 10 to 30 feet, considering the speed at which it was moving, no one would question the right of a jury to say that Koleff's position was discovered in ample time to avoid striking him, even in the face of the positive testimony of the enginemen that they did not see him at all until he was struck. In other words, a particular combination of circumstances may be more convincing than direct evidence, whose probative force depends upon the veracity of witnesses more or less interested. While the case presented by the evidence before us is not so complete as in the supposititious case above, we think it is sufficient to justify the verdict.

The other assignments do not call for any discussion. No reversible error appears in the record. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(39 Nev. 159)

STATE v. WHITAKER. (No. 2206.)
(Supreme Court of Nevada. Feb. 1, 1916.)

1. CRIMINAL LAW — 1159—APPEAL AND ERROR—REVIEW—EVIDENCE SUPPORTING VERDICT.

Judgment in a criminal case will not be reversed for insufficiency of evidence where the verdict is supported by substantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. — 1159.]

2. BURGLARY — 41—CONVICTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary in the first degree, evidence held sufficient to justify finding against a defendant.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. — 41.]

3. BURGLARY — 41—BURGLARY IN THE FIRST DEGREE—TIME OF BREAKING—SUFFICIENCY OF EVIDENCE.

In a prosecution for burglary in the first degree, evidence held sufficient to justify finding that the mill was broken into in the nighttime, between sunset and sunrise, as defined by Rev. Laws, § 6634.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. — 41.]

Appeal from District Court, Clark County; Charles Lee Horsey, Judge.

C. A. Whitaker was convicted of burglary in the first degree, and from the judgment

and an order denying his motion for new trial, he appeals. Affirmed.

F. R. McNamee, of Los Angeles, Cal., and Leo A. McNamee, of Las Vegas, for appellant. Geo. B. Thatcher, Atty. Gen., and A. S. Henderson, Dist. Atty., of Las Vegas, for the State.

COLEMAN, J. Appellant and two others were charged jointly in Clark county with the crime of burglary in the first degree. The jury brought in a verdict of guilty as to appellant, and not guilty as to the other defendants. This appeal is taken from an order denying a motion for a new trial and the judgment.

It was charged that the defendants broke into the mill of the Searchlight Mining & Milling Company and stole therefrom nine or ten amalgamating plates. The evidence against defendants was entirely circumstantial, and the only error assigned is that there was no evidence upon which a verdict of guilty could be based; and that even if there was evidence that appellant burglarized the mill, there was a total failure to show that it was done in the nighttime, which is the essential ingredient of burglary in the first degree.

[1] It has been held by this court in numerous instances that a criminal case will not be reversed for insufficiency of the evidence if there is substantial evidence to support the verdict. *State v. Thompson*, 31 Nev. 217, 101 Pac. 557. Appellant finds no fault with this rule.

[2] Witnesses in behalf of the state testified that the plates in question were in the mill on July 13, 1915, but that on the 15th of that month it was discovered that the mill had been broken into and the plates taken out. When it was discovered that the mill had been burglarized, the deputy sheriff at Searchlight, 2 miles away, was notified, and he at once took steps to apprehend the guilty parties. He called to his assistance a number of men in the vicinity. It was sought to track the persons who had committed the crime. One of the lessees of the mill testified that shortly after the "clean-up," which took place about July 1st, he put papers on the plates to protect them. Some of the witnesses testified that they traced fragments of papers and small portions of amalgam from the plates for a distance of about 200 feet from the mill, at which point tracks of horses were discovered, which were trailed to the camp of defendants. One of the witnesses who did the trailing testified that he had shod the horses, and that a cut-off shoe was put on one foot by him, which enabled him to distinguish the track. It was also testified that in places leading from the mill to where the horses were mounted, and at other points along the trail, there were tracks of two men, one of whom wore shoes with hobnails in them, and that on one shoe the

nails were broken from the heel in a particular place, which made the track easy to identify.

This witness also testified that after the defendants had been arrested and taken to Searchlight he observed the track of appellant, and it was the same (with some missing nails) as the one he saw leading from the mill and along the trail of the paper, and which he saw in other places leading to the camp of defendants.

The plates weighed about 450 pounds; and as the horses were small, and defendants' camp 21 miles from the mill, it was the theory of the state that defendants thought it too much of an undertaking to have the horses make the trip from the camp to the mill and back, carrying the plates.

The plates were not found in the possession of any of the defendants, but were found on July 27th about 2 miles from the mill, rolled up. At the camp of defendants a canvas was found. One witness testified as to the appearance of this canvas:

"Q. What marks, if any, did you find on the canvas? A. A long, narrow mark, taking up about the length of the canvas. Q. Resembling what? A. Well something hard enough to make that mark had been resting against it, and also—Q. Will you pick out the canvas that you say you saw? A. Yes, sir (witness examines first piece of canvas). That doesn't show anything extra. (Witness examines second piece of canvas.) That is one of the marks, I guess. Q. This mark along here? A. Yes, sir. Q. What is the color—what color does that mark resemble? A. Sediment and mud. Q. Off of what? A. It may have been from the plates, and it may have been—where that piece were cut out it was thicker and heavier. It isn't so very heavy along here. Q. I call your attention to two holes there where some stuff has been cut out. A. There? Q. Yes. A. Yes, sir. Q. Who cut it out? A. My partner. Q. In your presence? A. No sir; not in my presence. Q. Well I thought you knew about its being cut. What about this? (exhibiting piece of canvas to witness). I direct your attention to a spot here, and will ask you if you know what it is? A. Let me see it first (witness examines canvas). That shows very poorly, but it may be some of the sediment. Q. I call your attention to some pieces of that canvas being cut out. What do you know about that? A. I was not present when that was cut out. Q. Where were these pieces of canvas when you saw them? A. Laying at the door, beside the old pack saddle. Q. At whose door? A. At the cabin door of the camp where these boys were camping. Q. What boys? A. Craigs and Whitaker. * * * Q. You may state whether you made an examination of the canvas before the pieces were cut out? A. I did. I examined this with a glass. Q. A microscope? A. Yes, sir. Q. What was the result you found? A. Why you could see the amalgam on this canvas with a glass at that time, but it was loose on the canvas. Q. It wasn't ground into the canvas? A. No; not where I could see, it wasn't. Q. Did you find amalgam in these pieces that were cut out? A. Well, you couldn't see it. Q. I mean with the glass did you find it? A. Well, yes; where those pieces were cut out you could. Q. Did you make any other examination of these canvases? A. No; just examined where those marks were on there. Q. Did you examine this line? A. Yes, sir. Q. What did you find? A. I found amalgam along there, and you could see quicksilver. Q. You examined that with

a microscope? A. Yes, sir. Q. This amalgam that you found there you say was not ground into the canvas? A. No; it was loose at that time; that is, what you could see of it. Q. This amalgam that you speak of, was it in the shape of mud on the canvas? A. Yes. There was ground-up sand with it. * * * Q. I call your attention to a spot on this canvas that I hold in my hand. What would you say this was? A. I would call that sand myself. There might be amalgam in it, but it is sands off plates. Q. Calling your attention to this light line, what would you say about that? A. Well that is a line—it looks like it might have been wrapped around the plates that were stolen. The sands—the peculiarity about it is the white. It looks like the sands had been pounded up fine. Q. Two places in that line you cut out? A. Yes, sir. Q. Why? A. Because it had heavy sands and looked like there was little specks of amalgam in it. That is the reason I had it cut out, to have it assayed, to be sure that there had been such a thing as amalgam in it."

The assays showed values of about \$8,000 per ton.

The horses which it is claimed the defendants used on the night of the burglary had been in charge of one Booth, by whom they were delivered to a son of one of the defendants on July 13th, for the purpose of taking them into California. That night he stayed at the camp of defendants, 21 miles away. According to the evidence for the defense, this boy left the camp of defendants on the 14th and arrived in Barnwell, Cal., that night; but according to the evidence for the state, he did not arrive there until the 17th. The evidence for the state is to the effect that the horses were returned from Barnwell, Cal., 41 miles away, upon telephonic communication, on the 19th, and that they were leg-weary when they reached Searchlight. The evidence on the part of the state also shows that these identical horses made two trips to the camp of defendants and one from there to the mill, the theory of the state being that one set of tracks was made when the horses were taken to defendants' camp by the boy, and that the tracks leading away were made by the horses while the defendants were using them to go to the mill to burglarize it, and the others on their return to the camp.

Each of the defendants, and a brother of the two defendants who were acquitted, testified that they were at work at their property all of the time from the 12th to the 17th of July, on which last-mentioned day the arrests were made.

It is upon these circumstances that appellant was convicted. Can we say that there was no evidence to justify the verdict? It may be that had we heard the testimony we would have acquitted appellant, but we cannot say that the jury was not justified in finding him guilty. It is claimed that the testimony was the same against all of the defendants, and that if the jury did not think all of the defendants guilty they should have acquitted appellant. We do not think this contention sound. The evidence showed that

there were only two men tracked from the mill. The tracks of one indicated that they were made with hobnail shoes. Evidence was offered to the effect that appellant wore hobnail shoes, while the jury could not tell which of the other two defendants was the person tracked from the mill, and consequently acquitted both. If the jury believed the testimony of the witness as to the tracks made by a hobnail shoe leading from the mill being identical with those made by appellant at Searchlight, and also the theory of the state that the amalgam on the canvas was due to the fact that some of the plates were rolled in it, we think the jury was justified in its finding.

[3] The only evidence tending to show that the mill was burglarized in the nighttime is to the effect that candle grease was found in the mill:

"Q. Now, Mr. Lund, I would like you to tell me and tell this jury if those plates were on those tables the day you were in there just before the robbery? A. Yes, sir. Q. They were in place and on the table? A. They were. Q. Well, how can you say, then, that this candle grease wasn't on those tables then, when they were covered by the plates? A. You can tell candle grease when it is newly spilled any time. Q. The plates were on top of the candle grease weren't they? You may be able to do that, but you don't understand my question. You say the candle grease was not on those tables the day before? A. It was not; no. Q. Now, if those tables were covered up by the plates, how could you possibly tell? A. No; but that candle grease would have to be flattened out with those heavy plates on it, and this was a thick grease, standing up this high (indicating). Q. Those plates weigh 400 or 500 pounds? A. They do. Q. And if they set down on those tables how can you tell that candle grease wasn't there? A. Because the weight of those plates would have flattened that candle grease out, and this was not flattened out at all. Q. Yes; that is true enough, but the day before you couldn't say there was no candle grease there? A. No; I couldn't see through the plates. Q. Then if it was covered up by the plates you couldn't have told, so you don't know whether it was there the day before or not; isn't that a fact? A. I know this was newly spilled candle grease. It showed plain evidence of it. Q. You say you had no candles in the mill? A. Yes, sir. Q. You have used candles in the mill haven't you? A. I never, from the time we started, remember the time when we used candles there."

This is all of the testimony in the record to sustain the finding that the mill was burglarized in the nighttime. What, if any, inference should be drawn from the finding of candle grease in the mill? So far as appears, there were no electric lights in the mill, and we cannot indulge the presumption that there were, particularly since that locality is sparsely settled. The mill was operated only periodically, and was probably run only in the daytime. It is a well-known fact that candles are used to provide light, and it will be inferred that the candle grease found in the mill as was testified to was caused by a lighted candle. A lighted candle is used for only one purpose, and that is to enable one

to see; and since nighttime is from sunset to sunrise (section 6634, Rev. Laws), and since in the middle of July there is in Nevada a long space of time both after sunset and before sunrise which is light, we cannot say that the jury was not justified in inferring that the mill was burglarized in the nighttime. As was said in *State v. Druxman* (Wash.) 153 Pac. 382:

"The choice between contrary inferences from evidence, like the credibility of conflicting evidence, is always for the jury."

In *State v. Watkins*, 11 Nev. 30, it was shown that certain articles, which were in a room at 9 o'clock at night, were missing in the morning; that it was impossible for any one to have taken them without entering the room, and they were found in defendant's possession between 12 and 1 o'clock the same night. To the objection that the evidence did not establish the burglary, the court said:

"It was necessary to show that the entry was effected in the nighttime, and proof that defendant had in his possession, outside of the house, between 12 and 1 o'clock, goods which were in the house at 9 o'clock, and which only could have been obtained by entering the house, was proof of an entry in the nighttime."

We cannot say that, in drawing the inference that the mill was burglarized in the nighttime, the jury abused its prerogative. The judgment is affirmed.

NORCROSS, C. J., and McCARRAN, J., concur.

(39 Nev. 169)

SOUTHERN PAC. CO. v. MILLER et al.
(No. 2186.)

(Supreme Court of Nevada. Feb. 1, 1916.)

1. VENDOR AND PURCHASER ⇨302—REMEDIES OF VENDOR—RECOVERY OF PURCHASE MONEY.

Under Rev. Laws, § 5501, limiting the remedy of a mortgagee to an action in foreclosure, where plaintiff, by executory contract, agreed to sell land, retaining title and reserving the right to maintain a suit for the foreclosure of the agreement and any equity of redemption of the purchasers, although, pursuant to the contract, the purchasers went into possession, plaintiff could recover in a personal action for the unpaid balance of the purchase price, not being restricted to an action for foreclosure, as it was not a mortgagee, because a mortgagor holds legal title, and a mortgagee only an equitable lien.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 845-850; Dec. Dig. ⇨302.]

2. MORTGAGES ⇨188—MORTGAGEE'S RIGHT.
In a mortgage legal title is in the mortgagor, and the mortgagee holds only an equitable lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 469, 471-475, 479-481; Dec. Dig. ⇨188.]

3. VENDOR AND PURCHASER ⇨303—REMEDIES OF VENDOR—ACTION FOR PURCHASE MONEY—TENDER OF CONVEYANCE.

In an action by the agreed vendor of realty for the unpaid balance of the price, the averment in the complaint that plaintiff was and had been ready to convey, as agreed, upon perform-

ance of the contract by defendants, with an offer to deliver conveyance into court, was a sufficient tender.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 851-861; Dec. Dig. § 303.]

Appeal from District Court, Mineral County; Peter J. Somers, Judge.

Action by the Southern Pacific Company against C. N. Miller and others. From a judgment for defendants, plaintiff appeals. Reversed, and case remanded for new trial.

Frank Thunen and W. M. Singer, both of San Francisco, Cal., for appellant. John R. Melrose, of Hawthorne, and Mack & Green, of Reno, for respondents.

McCARRAN, J. This action was brought in the court below to obtain judgment in favor of the plaintiff, appellant herein, against defendants, respondents herein, for the sum of \$750, being an unpaid balance, principal on a certain agreement made between appellant and respondents. The agreement, which furnished the basis for the action is as follows:

"This agreement, made the 15th day of March, A. D. 1907, between Southern Pacific Company, a corporation created and existing under laws of the state of Kentucky, first party, and C. N. Miller, George F. Thompson, and A. E. Bettles, of the county of Esmeralda, state of Nevada, second parties, witnesseth that for the sum of one thousand (\$1,000.00) dollars, lawful money of the United States, to be paid at the times and in the manner and upon the terms and conditions hereinafter set forth, first party agrees to sell to second parties, and second parties agree to purchase from first party, all that certain lot, piece, or parcel of land situate in the town of Mina, county of Esmeralda, state of Nevada, particularly described as follows, to wit: Lot six (6) in block ten (10), as shown and delineated upon the map of said town filed by first party in the office of the county recorder of said county of Esmeralda, on the 18th day of September, 1905, and recorded in Book of Surveys at page 2, records of said county, to which reference is hereby made for further description.

"Second parties have paid to first party the sum of two hundred and fifty (\$250.00) dollars, and agree to pay the balance of said purchase price, to wit, the sum of seven hundred and fifty (\$750.00) dollars, in installments as follows, to wit: Three hundred and seventy-five (\$375.00) dollars on or before one year after date; three hundred and seventy-five (\$375.00) dollars on or before two years after date—together with interest on the unpaid principal from date until paid, at the rate of 6 per cent. per annum, payable annually, and second parties shall also pay all taxes and assessments of every kind and nature which may prior to full payment of all said installments of said principal and interest thereon be assessed, levied, or imposed upon the premises afore described or any part thereof.

"And upon full payment of said installments of said purchase price and accrued interest thereon, and all taxes and assessments upon said premises, as aforesaid, first party covenants and agrees to convey said premises to second parties by good and sufficient deed of grant, bargain, and sale, free and clear of all liens and incumbrances made, done, or suffered by it.

"And it is agreed that time, wherever mentioned herein, is an essence of this agreement, and that if the parties of the second part fail to pay any sum herein agreed to be paid for in-

terest or taxes at the time, place, and as agreed to be paid, that all sums herein agreed to be paid, including the amount owing for unpaid purchase price, shall thereupon, at the option of the party of the first part, become immediately due and payable, and the party of the first part, its successors or assigns, may sue for and recover the sum or sums so due for interest, for taxes, or for both, by personal action for the same as money due and owing; or the party of the first part, its successors or assigns, may at its or their option sue for and recover all sums due and unpaid, including the unpaid purchase price, by action in foreclosure of this agreement, or by personal action against the parties of the second part, as for moneys due and owing, and that either or any of such suits may be brought without any tender, demand or notice whatever from the party of the first part, and that the party of the first part may levy upon any money or other property of the parties of the second part to recover the amount of judgment obtained, and may, but need not, first resort to the right or property vested in the parties of the second part by these presents.

"It is further understood that, subject to this agreement, and during the continuance thereof, second parties shall have the right to take possession of, use, and occupy the premises aforesaid.

"This agreement shall bind the successors, heirs, and assigns of the parties hereto.

"In witness whereof first party has caused these presents to be signed by its duly authorized land agent, and the second parties have hereunto set their hands the day and year first above written.

"Southern Pacific Company,

"By Wm. H. Mills, Land Agent.

"C. N. Miller.

"George F. Thompson.

"A. E. Bettles."

The court below, among other things, found as follows:

"The court further finds that by reason of the fact that plaintiff, by said contract and agreement, granted to defendants the right to enter into the possession and use, occupy, and enjoy said premises, and by reason of the fact that said defendants did enter into the possession of said premises, and by reason of the fact that plaintiff retained the legal title to said premises as security for the payment of the unpaid purchase price thereof, and by reason of the further fact that said plaintiff, by said contract and agreement, reserved the right to institute and maintain a suit or action for the foreclosure of said agreement and the foreclosure of any and all equity of redemption of said defendants, the said transaction and plaintiff's rights under said contract and agreement was tantamount to, and, in effect, a mortgage upon, the said lands and premises to secure the payment of said unpaid purchase price, and that by reason of the provisions of section 5501 of the Revised Laws of the state of Nevada plaintiff is limited to its remedy by a suit or action for the foreclosure of said mortgage, and this court is without jurisdiction to render a judgment for said alleged debt in this action."

Upon the foregoing finding judgment was rendered against appellant. From this judgment, direct appeal is taken to this court. The question to be determined here is: Was the agreement tantamount to and in effect a mortgage?

[1, 2] If, as a matter of fact, the relation of mortgagor and mortgagee was established between the vendor and vendee by the making of this agreement and the conferring of possession upon the vendee, then the judgment

of the trial court must be confirmed, because section 5501, Revised Laws, limits the remedy available to appellant as mortgagee to an action in foreclosure. The statute provides:

"There shall be but one action for the recovery of any debt, or for the enforcement of any right secured by mortgage or lien upon real estate, or personal property, which action shall be in accordance with the provisions of this chapter. In such action, the judgment shall be rendered for the amount found due the plaintiff, and the court shall have power, by its decree or judgment, to direct a sale of the encumbered property, or such part thereof as shall be necessary, and apply the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff."

The principle that a mortgage on real property in this state is not an alienation, but rather a security for debt, has been established by decisions of this court. *Hyman v. Kelly*, 1 Nev. 179; *National Bank v. Kreig*, 21 Nev. 404, 32 Pac. 641; *Orr v. Ulyatt*, 23 Nev. 134, 43 Pac. 916. By these decisions it has been established that a mortgage of real property amounts merely to an equitable lien upon the property.

It is the contention of respondents, and this contention was affirmed by the finding of the trial court, that, inasmuch as the agreement provided that the title should remain in the vendor, and that possession should be enjoyed by the vendee, these provisions were sufficient to establish the relationship of mortgagor and mortgagee. If we apply to this reasoning the decisions of this court in the cases of *National Bank v. Kreig* and *Orr v. Ulyatt*, supra, it follows that, inasmuch as it is the established law of this state that a mortgage is not an alienation, but merely a security for debt in the form of an equitable lien, then, the vendor in this instance retaining, as it did, the title to the property and never parting with the same, its position in the premises is something more than a mortgagee; and, as stated in *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, the security held by the vendor is something stronger than a mortgage, because the legal title is retained as security, whereas in a mortgage the legal title is in the mortgagor; the mortgagee holding only an equitable lien.

In the case of *Longmaid v. Coulter*, 123 Cal. 215, 55 Pac. 791, the Supreme Court of California, in a case analogous to the one at bar, referring to the Code of Civil Procedure of that state equal in force and effect to that found in our statute (section 5501), held that a vendor who had retained the title as security for the purchase money, or his assigns of the debt, might sue for and collect the unpaid purchase money in an action at law without, in the first instance, resorting to an action to enforce the lien for the debt. It further held that section 726 of the Code of Civil Procedure, corresponding to our statute

section 5501, did not apply to such a case. To the same effect is the case of *Wood v. Mastick*, 2 Wash. T. 64, 3 Pac. 612.

As we said at the outset, the vital question presented here is as to whether or not the relationship between the parties, created by the contract of sale, was that of mortgagor and mortgagee. We think the most that can be said of the contract entered into between the parties is that it was an executory contract, reserving to the vendor not only the privilege, in case of nonpayment, to foreclose all the rights of the vendees, but, at the option of the vendor, to collect the unpaid portion of the purchase money by personal action against the vendees. Nor are we able to discern any good reason for a rule which would assume to change the relationship thus created by the agreement into one of mortgagor and mortgagee solely because the vendee was, by the terms of the agreement, accorded the right to take possession. Why the mere taking possession of the property by the party who had, prior to the making of the agreement, never had possession, should transform the relationship existing between the parties to one of mortgagor and mortgagee, we are unable to discern. The vendee in this instance entered into an agreement with the vendor upon terms, the latter to sell, the former to buy, the premises described. The vendor never parted with title. It was only subject to the agreement, and during the continuance thereof, that the vendee acquired the right to take possession of or to use or occupy the property. To say that these conditions established the relationship of mortgagor and mortgagee between the parties who by their own act created the conditions, and at the same time to hold that an equitable lien only, and not the legal title, is by law vested in the mortgagee, would be to create an anomaly.

Cases presenting conditions such as those established by the record here are to be distinguished from cases where a conveyance has been actually executed, and a vendor's lien or other security reserved to insure the unpaid portion of the purchase price. Cases such as the one at bar are to be distinguished from those involving contracts in which by their terms the obligation to purchase is not assumed by the vendee.

[3] It is the contention of respondents that appellant cannot demand specific performance, because of the failure of appellant to make sufficient tender of conveyance. In appellant's amended complaint we find the following averment:

"That the plaintiff has done and performed all things required by the terms and conditions of said contract, and has at all times, as provided in said contract, been and is now ready, able, and willing to convey said premises to defendants as agreed in said contract, upon the performance of the terms and conditions in said contract by defendant to be performed, and now offers to deliver such conveyance into court."

In view of the position taken by respondents, we deem it unnecessary to dwell at length on this phase of the case. Suffice it to say that, in our judgment, this allegation, and the offer of appellant therein to deliver conveyance into court, constituted a sufficient tender. Indeed, the offer in this respect, and the averments thereof, appear to us to be much more than has been held sufficient by many courts. *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Biddle v. Coryell*, 18 N. J. Law, 377, 38 Am. Dec. 521; *Roberts v. Beatty*, 2 Pen. & W. (Pa.) 63, 21 Am. Dec. 410.

The judgment should be reversed, and the case remanded for a new trial.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

(39 Nev. 177)

SOUTHERN PAC. CO. v. BUTTERFIELD et al. (No. 2185.)

(Supreme Court of Nevada. Feb. 1, 1916.)

VENDOR AND PURCHASER §214 — REMEDIES OF VENDOR—LIABILITY OF PURCHASER'S ASSIGNEE.

Where land was sold under contract providing that the agreement should bind the successors, heirs, and assigns of the parties, an assignee of the purchasers, who was not a party to the contract and did not execute, sign, or receive it, was not liable to the vendor for the unpaid balance of the price, since the promise of a purchaser of land to pay therefor cannot be enforced against his assignee, either in an action for specific performance or for damages, in the absence of agreement to that effect by the assignee.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 436, 442-448; Dec. Dig. §214.]

Appeal from District Court, Mineral County; Peter J. Somers, Judge.

Action by the Southern Pacific Company against Mrs. C. Butterfield, C. N. Miller, and George F. Thompson. From a judgment for defendants, plaintiff appeals. Judgment as to defendant Thompson affirmed, and reversed as to the other defendants, pursuant to the order of the court in 154 Pac. 929.

Frank Thunen and W. M. Singer, both of San Francisco, Cal., for appellant. John R. Melrose, of Hawthorne, and Mack & Green, of Reno, for respondents.

McCARRAN, J. The questions involved in this case are determined by the decision of this court in case No. 2186, to wit, *Southern Pacific Co., a Corporation, v. C. N. Miller, George F. Thompson, and A. E. Bettles*, 154 Pac. 929, except in so far as the liability of the respondent Thompson is concerned.

The contract involved in this case was one between appellant and respondents Butterfield and Miller for the sale and purchase of land. Stipulated payments were agreed upon, and time was made of the essence of the

contract. The legal title was retained in the vendor, appellant herein. The right of occupancy and possession was by the terms of the contract accorded to the vendee.

It is alleged in appellant's amended complaint:

"That on December 13, 1907, defendant Mrs. C. Butterfield executed and delivered unto defendant George F. Thompson a conveyance transferring to said defendant Thompson the undivided one-half of the property rights and obligations of said Mrs. C. Butterfield under the contract above mentioned."

In the determination of the case, the trial court found:

"That said defendant George F. Thompson was not a party to and did not execute, sign, or receive the said contract and agreement at the time of the execution thereof; that subsequent to the execution and delivery of said contract the said defendant Mrs. C. Butterfield made, executed, and delivered to said defendant George F. Thompson her certain deed of conveyance conveying to said George F. Thompson all her right, title, and interest in and to the said lands and premises."

It is the contention of appellant that, inasmuch as the contract between appellant and respondents Butterfield and Miller provides that "this agreement shall bind the successors, heirs, and assigns of the parties hereto," the respondent Thompson, being the assignee of one of the vendees under the contract, is by reason of the above-quoted provision responsible for the obligations created by the contract.

In the trial court, as well as in this court, the appellant took the position that respondent Thompson's liability grew out of his being the assignee of one of the vendees, under the contract. The complaint charges a conveyance from the vendee Butterfield to the respondent Thompson, transferring an undivided one-half of the property rights and obligations of the vendee. Let us assume, without determining, that this allegation was sufficient to charge Thompson with being the assignee of the vendee Butterfield. The law, we think, is well settled that the promise of a vendee of land to pay purchase money cannot be enforced against his assignee, either in an action for specific performance or in an action for damages, unless there is an agreement to that effect on the part of the assignee. The fact that a contract or agreement contains a provision, as in the case at bar, "binding the successors, heirs, and assigns of the parties hereto," is not of itself, as a general rule, sufficient to impose personal liability upon the assignee, unless by specific agreement to that effect or by an agreed substitution of the assignee for the vendee. *Hugel v. Habel*, 132 App. Div. 327, 117 N. Y. Supp. 78.

In the case of *Lisenby v. Newton*, 120 Cal. 571, 52 Pac. 813, 65 Am. St. Rep. 203, the matter under consideration was similar to that at bar, and the court held to the effect that an assignee of a contract for the pur-

chase of land is not personally liable for the unpaid purchase price, and this, too, even though the contract of sale and purchase specifies that its provisions shall apply to and bind the heirs, executors, administrators, and assigns of the respective parties. The doctrine enunciated in that case was made in the light of the rule that a covenant of this kind made by a vendee is personal, and hence an assignee cannot be charged with its performance.

In the case of *Corbus et al. v. Teed*, 69 Ill. 205, the court held that the vendor of land under a contract assigned by the vendee must make tender of conveyance to the original purchaser. There being a lack of privity between the vendor and the assignee in the making or in the assignment of such a contract it was held that the former could not compel the latter to perform, even though the assignee had, after the taking of the assignment, carried out the provisions of the contract by making a payment thereon.

The holding of the Supreme Court of Michigan in the recent case of *Midland Savings Bank v. Prouty Co.*, 158 Mich. 656, 123 N. W. 549, 133 Am. St. Rep. 401, is to the same effect.

The Supreme Court of Georgia, in the case of *Couch v. Crane*, 142 Ga. 22, 82 S. E. 459, we think very properly held that an assignee of a vendee cannot be held liable to the vendor unless by agreed assumption of the vendee's obligations.

In the case of *Bimrose v. Matthews et al.*, 78 Wash. 32, 138 Pac. 319, the Supreme Court of Washington held that, in the absence of express agreement, the covenants of a purchaser of land to take title or pay the purchase money cannot be enforced against his assignee in the absence of an express agreement binding him so to do, and the court there had under consideration a case in which the contract of sale provided that the covenants therein contained should bind the assigns of the parties.

It is correctly stated by a recent and very reliable compilation that:

An assignment "cannot shift the assignor's liability to the assignee, because it is a well-established rule that a party to a contract cannot relieve himself of his obligations by assigning the contract. Neither does it have the effect of creating a new liability on the part of the assignee, to the other party to the contract assigned, because the assignment does not bring them together, and consequently there cannot be a meeting of the minds essential to the formation of a contract." R. C. L. vol. 2, p. 628.

There is an absence of the essential element of privity between the appellant company, as vendor under the contract, and the respondent Thompson, even assuming that the latter was the assignee of the vendee.

The judgment of the lower court as to the respondent Thompson is affirmed. As to the respondents Butterfield and Miller, the judgment of the lower court is reversed, pur-

suant to the order of this court in case No. 2186.

It is so ordered.

NORCROSS, C. J., and COLEMAN, J., concur.

(39 Nev. 183)

Ex parte BOOTH. (No. 2215.)

(Supreme Court of Nevada. Feb. 9, 1916.)

1. CRIMINAL LAW ⇨995—TRIAL—VERDICT.

A judgment must follow and be supported by the verdict, and, if the verdict is not such as is determinative of the issues made by plea of not guilty, it is a void verdict, and the court has no jurisdiction to enter judgment thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2528, 2528½, 2530, 2536-2543; Dec. Dig. ⇨995.]

2. LIBEL AND SLANDER ⇨141—OFFENSES—DEGREES.

Rev. Laws, § 6428, declaring that every person convicted of libel shall be fined in a sum not exceeding \$5,000 or imprisoned in the county jail not exceeding one year, or in the state prison not exceeding five years, divides the crime of libel into two offenses, one a felony, and the other a misdemeanor.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 402; Dec. Dig. ⇨141.]

3. LIBEL AND SLANDER ⇨158—OFFENSES—PROVINCE OF JURY.

Under Rev. Laws, § 6428, declaring that every person convicted of libel shall be fined in a sum not exceeding \$5,000, or imprisoned in the county jail not exceeding one year, or in the state prison not exceeding five years, and that the jury shall have the right to determine the law and the fact, together with section 7196, also declaring that the jury shall have the right to determine the law and the fact, the determination whether a libel is a felony or a misdemeanor is for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 443; Dec. Dig. ⇨153.]

4. CRIMINAL LAW ⇨875—TRIAL—VERDICT.

A verdict will not be held void for uncertainty if its meaning can be determined by reference to the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2089, 2090; Dec. Dig. ⇨875.]

5. HABEAS CORPUS ⇨30—ERRONEOUS VERDICT—DISCHARGE.

Though a verdict may be so erroneous as to warrant reversal without being entirely void, it will not authorize discharge on habeas corpus of one sentenced thereunder.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⇨30.]

6. LIBEL AND SLANDER ⇨160—OFFENSES—VERDICT.

Rev. Laws, § 6428, declares that the punishment for libel shall be fine and imprisonment in the county jail, or imprisonment in the penitentiary, and that the jury shall be the judge of the law and the fact. Section 7196 makes similar provision. Sections 7216 and 7218 declare that a verdict on a plea of not guilty shall be either guilty or not guilty, and that, if a crime is distinguished into degrees, the jury must find the degree, while sections 7221 and 7222 provide for the reconsideration of an informal verdict, and that no judgment of conviction shall be given unless the jury find expressly against the defendant. In a prosecution for libel the verdict was: "We, the jury, * * * find the defendant * * * guilty of a gross misdemeanor."

Held that, as the jury were entitled to find the grade of the offense, and as the whole record might be looked to, the verdict was not so indefinite that a judgment entered thereon was void; such verdict indicating the degree of the offense of which accused was convicted.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 445; Dec. Dig. § 160.]

Original application by W. W. Booth for a writ of habeas corpus. Writ denied.

Milton Detch, of Goldfield, and Platt & Sanford, of Carson City, for petitioner. Geo. B. Thatcher, Atty. Gen., and J. A. Sanders, Dist. Atty., of Tonopah, for respondent.

NORCROSS, C. J. This is an original proceeding in habeas corpus presenting but one question, to wit, the jurisdiction of the court below to render the particular judgment upon which petitioner was sentenced to be confined in the county jail of Nye county.

Petitioner was proceeded against for the crime of libel under the provisions of section 163 of the Crimes and Punishments Act (Rev. Laws, § 6428), as amended by Stats. 1915, p. 423. So much of the section as involves the question presented in this proceeding reads:

"A libel is a malicious defamation. * * * Every person, * * * convicted of the offense, shall be fined in a sum not exceeding five thousand dollars, or imprisonment in the county jail not exceeding one year, or in the state prison not exceeding five years. In all prosecutions for libel * * * the jury shall have the right to determine the law and the fact."

The trial resulted in a verdict of the jury in the following form:

"We, the jury in the above-entitled cause, find the defendant, W. W. Booth, guilty of a gross misdemeanor."

Judgment was entered upon the verdict, reciting, among other matters, that the verdict of the jury found the defendant "guilty of a gross misdemeanor, to wit, libel as charged in said information."

No attack is made upon the form of the judgment. It is the contention of counsel for petitioner that the judgment is not responsive to the verdict; that the verdict upon its face shows that defendant was not convicted of an offense embraced in the charge alleged in the information, and hence the court was without jurisdiction to enter judgment thereon.

It is the contention of counsel for respondent in this case that the section of our statute defining and punishing libel, by the provisions relating to punishments which may be imposed, subdivides libel into two grades or degrees, one of which is made a felony, and the other of which is made a gross misdemeanor; that it was within the province of the jury to determine the grade or degree of offense; and that the language of the verdict, when read in connection with the information and in the light of statutory provisions, was entirely proper.

[1-6] It is a well-settled proposition of law that in a criminal case tried by jury the judgment must follow and be supported by the

verdict; in other words, that if the verdict of the jury is not such as is determinative of the issues made by the plea of not guilty, it is a void verdict, and the court has no jurisdiction to enter judgment thereon. If a verdict of a jury finds a defendant guilty of an offense other than that charged in the indictment, it is clearly void, and a judgment based thereon is likewise void. The cases of *Ex parte Dela*, 25 Nev. 346, 60 Pac. 217, 83 Am. St. Rep. 603, *Ex parte Harris*, 8 Okl. Cr. 397, 128 Pac. 156, and *Mal v. People*, 224 Ill. 414, 79 N. E. 633, cited by counsel for petitioner, are based on this principle of law.

By section 366 of the Criminal Practice Act (Rev. Laws, § 7216) it is provided that:

"A verdict upon a plea of not guilty shall be either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the offense charged in the indictment."

By section 368 (Rev. Laws, § 7218) it is provided:

"Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

See, also, Rev. Laws, § 7244.

By section 371 (Rev. Laws, § 7221) it is, among other things, provided:

"If the jury render an informal verdict, the court may direct them to reconsider it, and it shall not be recorded until it is rendered in some form from which it can be clearly understood what the intent of the jury is."

By section 372 (Rev. Laws, § 7222) it is, among other things, provided:

"But no judgment of conviction can be given unless the jury find expressly against the defendant upon the issue."

It will be seen from the statute above quoted that a verdict finding a defendant "guilty," without more, is sufficient, unless the crime charged is distinguished into degrees when the degree of guilt must be found also. When such a verdict is returned, the jury may be said to have found expressly against the defendant upon the issue. It is not necessary under the statute that a verdict to be sufficient should specify the crime charged, no more than it is necessary for a defendant to specify the crime charged when entering a plea of "guilty" or "not guilty." Rev. Laws, §§ 7106, 7107, 7216. A verdict of "guilty," says the statute (Rev. Laws, § 7216), "imports a conviction or acquittal of the offense charged in the indictment."

In determining the effect of the words "of a gross misdemeanor" following the word "guilty" in the verdict it will be necessary to determine the nature of the crime of libel. It is one of the few crimes to be found in our statutes which may be punished either as a felony or as a gross misdemeanor.

In the case of *State v. McCormick*, 14 Nev. 347, this court dismissed an appeal from a judgment imposing a jail sentence upon the ground that this court had no jurisdiction upon an appeal in a criminal case unless the same amounted to a felony. The statute under which the defendant was convicted

in the McCormick Case provided that upon conviction the defendant should "be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding two years, or by both such fine and imprisonment; as the court shall adjudge, and, if such imprisonment shall be for a period exceeding six months, the same shall be in the state's prison." St. 1879, p. 121. Referring to the provisions of this statute, this court, speaking through Hawley, J., said:

"The charge in the indictment is of a felony; but under the provisions of the statute the offense may be punished either as a felony or a misdemeanor. The Attorney General contends that the punishment inflicted by the court determines the grade of the offense. *People v. Cornell*, 16 Cal. 187, and *People v. Apgar*, 35 Cal. 389, are cited in support of this position. The principles decided and the conclusion reached in these cases authorize the dismissal of the appeal herein. * * *

"If punished as a felony, that is the 'offense charged,' from which an appeal may be taken. If punished as a misdemeanor, that is the 'offense charged,' and an appeal will not lie."

The doctrine of the McCormick Case was again affirmed by this court in *State v. Quinn*, 16 Nev. 89. In the case of *People v. Cornell*, 16 Cal. 187, cited by this court in the McCormick Case, the Supreme Court of California uses this expression:

"In other words, this sort of assault is a felony or misdemeanor, according to the facts, and we must take the judgment of the court affixing the punishment as determining the class to which the particular offense charged belongs."

The Apgar Case, in 35 Cal. 389, cited supra, affirms the decision of the court in *People v. Cornell*, supra.

In the case of *Gandy v. State*, 10 Neb. 243, 4 N. W. 1019, the Supreme Court of Nebraska also adopted the rule in the Cornell Case. The court in the Gandy Case, among other things, said:

"Besides, if it were intended by section 5441 to enable the court, in affixing the punishment for a given offense, in its discretion to consider it either as a felony or as a mere misdemeanor, then we think the rule adopted by the Supreme Court * * * in the case of *People v. Cornell*, 16 Cal. 187, should be applied, viz.: That the punishment actually inflicted must determine the grade of that offense. This rule certainly has the merit of being both just and humane."

In the Gandy Case the Nebraska court was considering the question whether a defendant convicted of an offense punishable both as a felony and as a misdemeanor, the judgment entered being as for a misdemeanor, could be said to have lost his civil rights which follows upon conviction for a felony. The court held in the Gandy Case that such civil rights were not forfeited.

It is contended by counsel for petitioner that the McCormick and Quinn Cases have no bearing upon the question of the jurisdiction of the court to pass sentence upon the verdict rendered in the case at bar. It is true that those cases were determining the ultimate question of the jurisdiction of this court under the constitutional provisions

limiting the right of appeal to this court to cases of felony. But, in order to hold this court to be without such jurisdiction, it was necessary to hold as a preliminary proposition that the respective statutes "charged" two grades of offenses. The language of the California court in the Cornell Case was also quoted with approval to the effect that the respective crime charged was "according to the facts." We think there is no other construction to be placed upon these decisions than a holding that in a crime providing for punishments of the character prescribed in our libel statute an indictment or information charges two grades of the same offense, one a felony, and one a gross misdemeanor.

Relative to the contention of counsel for the state that libel is distinguished into degrees, little authority can be found. Cyc. says:

"In criminal law the term [degree] denotes a particular grade of crime more or less culpable than another grade of the same offense." 13 Cyc. 766, citing *Rapalje & L. L. Dict.*

The courts seem never to have had occasion to consider whether a statute like the one in question should be regarded as distinguished into degrees, and hence a duty imposed upon the jury to determine the particular degree. So far as the definition given is concerned, it is as applicable to a statute of the character in question as it would be if that statute divided the crime into first and second degrees, and punished the former as a felony, and the latter as a gross misdemeanor. The precise determination of the question here, however, we think unnecessary, in view of the law peculiar to prosecutions for criminal libel. Whether a certain libel is a felony or a misdemeanor is either a question of law or a question of fact, and it is the province of the jury to determine both these questions. Rev. Laws, §§ 6428, 7196. It is therefore proper, if not essential, that the jury in libel cases determine not only the guilt but the degree or grade of guilt.

If the verdict in this case had been "guilty of libel of the grade or degree of a gross misdemeanor," we can hardly see where there could be room to question its sufficiency. It is contended, however, that, because many offenses come within the class of gross misdemeanor, it cannot be ascertained from the verdict in question what gross misdemeanor was intended. If in determining the sufficiency of a verdict courts must look exclusively to the verdict, there would be much force in the contention of counsel for petitioner. A verdict of "guilty," which our statute says is sufficient in cases other than those divisible into degrees, by itself would be unintelligible, but reference may be had to the indictment or information in making up the judgment.

It is well settled, at least by the weight of modern authority, that a verdict will not be held void for uncertainty if its meaning can be determined by reference to the rec-

ord, particularly the indictment or information. *People v. Tierney*, 250 Ill. 515, 95 N. E. 447; *Mai v. People*, 224 Ill. 418, 79 N. E. 633; *Donovan v. People*, 215 Ill. 523, 74 N. E. 772; *State v. Gregory*, 153 N. C. 646, 69 S. E. 674; *State v. Braden*, 78 Kan. 576, 96 Pac. 840; *Ex parte McLean*, 84 Kan. 852, 115 Pac. 647, 35 L. R. A. (N. S.) 653; *Arnold v. State*, 51 Ga. 144; *Doolittle v. State*, 93 Ind. 272; *Burgess v. State*, 33 Tex. Cr. R. 9, 24 S. W. 286; *Howell v. State*, 10 Tex. App. 298; *Hoback v. Com.*, 28 Grat. (Va.) 922; *Washington v. State*, 55 Fla. 194, 46 South. 417; *Albritton v. State*, 54 Fla. 6, 44 South. 745; *Bunch v. State*, 58 Fla. 9, 50 South. 534, 138 Am. St. Rep. 91; *State v. De Witt*, 186 Mo. 61, 84 S. W. 956; *State v. Grossman*, 214 Mo. 233, 113 S. W. 1074; *State v. Jefferson*, 120 La. 116, 44 South. 1004; *Hines v. State*, 48 Tex. Cr. R. 24, 85 S. W. 1057; *People v. Holmes*, 118 Cal. 444, 50 Pac. 675; 12 Cyc. 690.

In *People v. Tierney*, supra, the Supreme Court of Illinois said:

"A verdict is not to be construed with the same strictness as an indictment, but it is to be liberally construed, and all reasonable intendments will be indulged in its support, and it will not be held insufficient, unless, from necessity, there is doubt as to its meaning. *People v. Lee*, 237 Ill. 272 [86 N. E. 573]. The rule is that, in determining the sufficiency of a verdict, and a judgment of conviction based thereon, the entire record will be searched, and all parts of the record interpreted together, and a deficiency at one place may be cured by what appears at another. *People v. Murphy*, 188 Ill. 144 [58 N. E. 984]. Under the Habitual Criminals Act it was only necessary to set out in the indictment the former conviction of the plaintiff in error in apt words, which it is conceded was done in this case, and, as the evidence heard upon the trial is not incorporated into the record, this court clearly is bound to presume, in consideration of the verdict of the jury finding the plaintiff in error guilty, and the judgment of conviction based thereon, that the trial court confined the evidence to the issues involved upon the trial, and that the finding of the jury that the plaintiff in error had been 'convicted of robbery and had served a term in the penitentiary of this state for such offense,' referred to the previous robbery charged in the first paragraph of the second count of the indictment, and not to some other robbery which was entirely foreign to the issues involved in the trial of the case then on hearing before the court and jury."

In *Ex parte McLean*, supra, the Kansas Supreme Court said:

"A verdict of guilty, which can apply to but one of the offenses or degrees charged in the information sufficiently complies with the statute requiring a specification of the degree, although its language may also fit other offenses or degrees that are not included in the charge. * * *

"There are manifest reasons why a judgment should be required to be complete in itself that do not apply in the case of a verdict—why the same fullness of expression is not required in the verdict, upon which the court itself is to act, as in the judgment, under which the penalty of the law is to be inflicted. Here the court interpreted the verdict in the light of the information, and found that the defendant had been convicted of that kind of grand larceny the extreme penalty for which is confinement for five years. This finding was recited in the judg-

ment, which ordered a punishment in accordance therewith."

In *Arnold v. State*, supra, the Supreme Court of Georgia said:

"Verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be set aside unless from necessity. Code, 3561; (*Wood v. McGuire*) 17 Ga. 361 [63 Am. Dec. 246]; (*Gardner v. Kersey*) 39 Ga. 664 [99 Am. Dec. 484]. And this is the general spirit of the Code, as well as the expression of the more universal tendency of jurisprudence towards freedom from that slavish adherence to technical nicety which is the reproach of the common law."

In *Burgess v. State*, supra, the Texas Court of Criminal Appeals, referring to the verdict under consideration in that case, said:

"The verdict of the jury, when considered in connection with the charge in the indictment, and instructions given by the court to the jury, is not vague, but is very certain."

Upon the subject of verdicts generally the following excerpt from Bishop's New Criminal Law, vol. 1, § 1005, is instructive:

"The language of the verdict, being that of 'lay people,' need not follow the strict rules of pleading, or be otherwise technical. Whatever conveys the idea to the common understanding will suffice. And all fair intendments will be made to support it."

This is substantially our statutory requirement, quoted supra, that the verdict be "rendered in some form from which it can be clearly understood what the intent of the jury is."

This case, in some of its features, presents a somewhat novel situation and it has been necessary to determine it upon an application of established legal principles without the aid of precedents precisely in point. We have very carefully considered the numerous citations of respective counsel, a few of which only it will be profitable to refer to specially. In considering these cases, it is important to bear in mind that, with but two exceptions, they were all upon appeal or writ of error, where the province of the court is quite different than upon habeas corpus, where the question is confined to one of jurisdiction. A verdict may be so erroneous as to warrant a reversal, but not so erroneous as to be entirely void. In most instances the cases do not expressly decide whether the particular verdict was held void or merely erroneous.

The cases cited may be regarded as falling within certain general classifications. Those holding that a verdict for an offense different from that charged in the indictment is void have already been alluded to (see citations supra). This case is clearly not within that class; for the words "gross misdemeanor" do not describe a particular or generic offense, but define simply a general class or grade of offense, determined by the limit fixed by law upon the punishment which may be imposed. Rev. Laws, § 6266.

Another class of cases cited deals with verdicts finding a defendant guilty of certain specified acts, omitting certain other acts

charged which are essential to a complete offense. The following cases cited are within this class: *Webber v. State*, 10 Mo. 5; *Donovan v. People*, 215 Ill. 520, 74 N. E. 772; *People v. Lee*, 237 Ill. 272, 86 N. E. 573. Cases within this class are clearly not in point in the case at bar. Besides, such verdicts are not aided by a reference to the record.

Cases cited which may be classified as holding verdicts too vague, indefinite, uncertain, or inconsistent to support the judgment are the following: *Sharff v. Comm.*, 2 Bin. (Pa.) 514; *Miles v. State*, 3 Tex. App. 58; *Howell v. State*, 10 Tex. App. 298; *Senterfit v. State*, 41 Tex. 188; *Com. v. Smith*, 2 Va. Cas. 327; *State v. Weeks*, 23 Or. 3, 34 Pac. 1095; *People v. Ah Gow*, 53 Cal. 627; *People v. Tilley*, 135 Cal. 61, 67 Pac. 42; *Wells v. State*, 116 Ga. 87, 42 S. E. 390. If the verdict in the case at bar is invalid, it is because it is within this classification. Many of the cases cited and included in this classification were decided at a time when courts held technicalities in higher reverence than comports with modern jurisprudence.

The *Sharff Case*, supra (decided in 1810), holding that the court could not say from a verdict that the defendant is "guilty of writing a bill of scandal" that it found him guilty of the offense for which he was indicted, because "a bill is very different from the bill," is cited in support of the contention that the verdict in this case, "guilty of a gross misdemeanor," is indefinite, as not showing what one of numerous gross misdemeanors in our statutes was intended. In the *Sharff Case* the court was of the opinion: "It would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the.'"

If the indictment had charged two separate bills of scandal, there might now be considered force in this decision, but it only charged one. Under the modern rule of interpreting verdicts by a reference to the charge in the indictment or information, this citation is only of historical value. A more modern authority, *People v. McFadden*, 65 Cal. 446, 4 Pac. 421, determined a verdict, "guilty of an assault on murder," sufficient. See, also, 1 *Corpus Juris*, 1.

In the case of *Howell v. State*, 10 Tex. App. 298, a verdict finding the defendant "guilty of a misdemeanor" was held insufficient upon authority of the case of *Senterfit v. State*, 41 Tex. 188. In the latter case the verdict read:

"We, the jury, find the defendant guilty of a misdemeanor in driving from the county of Lampasas one cow brute, and assess his fine at \$18."

The court said:

"We think the verdict was clearly insufficient. It does not sufficiently appear that the misdemeanor of which the jury find the defendant guilty is that charged in the indictment, or that the cow which they find him guilty of driving from Lampasas county was one of his own cattle or one of those charged in the indictment."

It is difficult from the entire opinion to determine to what extent this opinion is in point, but, assuming it to be in point, it is the only case cited, other than the *Sharff Case*, supra, which might be regarded as supporting the contention of counsel for petitioner. Some of the early Texas cases (this case was decided in 1874) may be classed as quite technical. As late as 1883, in *Woolbridge v. State*, 13 Tex. App. 443, 44 Am. Rep. 708, the court held a verdict reading "guilty of murder in the first degree" insufficient and remanded the case for a new trial. There is ample modern authority for holding that an apparent misspelling of a word does not vitiate a verdict.

In *Miles v. State*, 3 Tex. App. 58 (decided in 1877), the indictment charged the theft of hides of the value of \$24. The verdict was "guilty of felony." It would appear from the opinion in this case that to constitute theft a felony the jury must find the value of the property stolen to be of a value of more than \$20. The opinion does not specifically criticize the use of the word "felony" in the judgment. The opinion concludes:

"For the reason that the verdict does not specifically find the accused guilty of the theft of property of the value of \$20 or over, the judgment must be reversed, and the cause remanded for a new trial."

In *Wells v. State*, supra, the court was considering a verdict reading "guilty of misdemeanor," returned upon an indictment charging "hog-stealing." The statute made the offense a felony, but it was provided that in such cases, if the jury made a recommendation that the offense be punished as a misdemeanor, the presiding judge, if he approved the recommendation, could impose sentence as for a misdemeanor. The court held that, under this statute, the jury could not reduce the offense to a misdemeanor even by a recommendation that punishment be imposed as such. "It is clear," says the court, "that the jury * * * could not legally find the accused guilty of a misdemeanor." The statute in question in the *Wells Case* is essentially different from that involved in the case at bar. Under the Georgia statute the jury was held to have no power other than to find a verdict of guilty with or without a recommendation, and that the presiding judge had no option to punish as for a misdemeanor in the absence of such recommendation and its approval.

The *Wells Case*, supra, is referred to in *Smith v. State*, 117 Ga. 16, 43 S. E. 440, where a verdict "guilty of misdemeanor" was also returned. The following excerpt from the opinion in the *Smith Case* is instructive:

"In that case [referring to the *Wells Case*] the charge against the accused was a felony, and the only lawful verdicts which could have been found were guilty, or not guilty, or guilty with a recommendation that the accused be punished as for a misdemeanor. For this reason that case is not absolutely binding as authority in the present case. The presentment in the present case, as will appear from the statement

of facts, was of such a character that there could have been any one of five verdicts rendered thereon, a general verdict of guilty, which would have resulted in the accused being punished as for a felony, a special verdict of guilty, with a recommendation that the accused be punished as for a misdemeanor, a verdict of guilty of larceny from the house, a verdict of guilty of simple larceny, and a general verdict of not guilty. Verdicts are to have a reasonable intendment, should receive a reasonable construction, and are not to be avoided except from necessity. Civil Code, § 5352. Can this rule be so applied in the present case as to show with reasonable certainty what was intended by the jury as their finding? It is clear, of course, that the jury intended to convict the accused of something; but of what? Did they intend to convict him of the felony and recommend that he be punished as for a misdemeanor? Or did they intend to convict him of larceny from the house, or of simple larceny? Let it be conceded that the jury intended to acquit the accused of the felony, and convict him of one of the misdemeanors charged in the presentment. Even if we reach this point, it is impossible to tell from the verdict which misdemeanor it was to apply to. It will not do to say that this is immaterial, even if the punishment, both as to penalty and costs, in each case would be the same. The judge has a discretion in regard to the punishment to be inflicted, and the accused is entitled to have the verdict specify the particular offense of which he has been guilty, in order that the judge may take this into consideration in imposing sentence. A lighter punishment might have been inflicted had the conviction been for simple larceny than for larceny from the house. Under such a verdict it is a mere matter of speculation as to what was intended; and the only proper direction to give the case is to arrest the judgment."

There is some inference at least in the decision in the Smith Case that, had the charge embraced but one misdemeanor instead of two misdemeanors, the verdict would not have been held insufficient.

In none of the cases cited has it been held that the verdicts were void or defective merely because of the wording "guilty of felony," "guilty of misdemeanor," or "guilty of a misdemeanor," as the case may be, merely because of the use of the words "felony" or "misdemeanor," except possibly the Texas court in the Senterfit Case, supra, intended to hold that the use of the indefinite article "a" in connection with the word "misdemeanor" rendered the verdict too indefinite, the same as was held by the early Pennsylvania court in the Sharff Case heretofore considered. If so, that case is not in accord with the modern Texas doctrine of construing verdicts, mentioned in the Burgess Case, supra.

Two cases cited by counsel for respondent may be referred to as illustrative of verdicts containing language apparently qualifying the verdict, but rejected by the court upon a reference to the instructions given in the respective cases, as meaningless or surplusage. In Territory v. Muniz, 17 N. M. 131, 124 Pac. 340, a verdict reading, "guilty of manslaughter, 3 degree," was held a good verdict for manslaughter, the expression "3 degree" being rejected as meaningless, there being no degrees in manslaughter. In People v. Holmes,

118 Cal. 444, 50 Pac. 675, cited supra, a verdict in part reading, "find a verdict of 'involuntary manslaughter,' 'not a felony,' as charged and laid down by the court under the head of involuntary manslaughter," was held a good verdict for manslaughter, the inconsistent words "not a felony" being rejected "as surplusage."

It is suggested by counsel for respondent that these cases are authority for holding the words "of a gross misdemeanor" surplusage in this case, in the event it is determined this use was improper. In the view we take of the verdict, it is unnecessary to consider this suggestion.

Considering the verdict in connection with the information and the law governing the crime of criminal libel, we are not warranted, we think, in holding it void. When reference is had to the information, it is "in form from which it can be clearly understood what the intent of the jury is." Rev. Laws, § 7221, quoted supra. It was the province of the jury to determine the grade of the offense "according to the facts" (People v. Cornell, supra), and this is what the jury clearly intended to do by the use of the words "of a gross misdemeanor." If we are permitted to refer to the record filed on the part of the state, it would appear therefrom that this verdict was precisely in accordance with the instructions given. But, even if that record is not properly before us, and we are not prepared to say that it is not, the rule that all intendments and presumptions must be indulged in in favor of a judgment upon collateral attack is applicable here.

As expressed in authorities cited supra (People v. Tierney; Bishop's New Criminal Law), verdicts are not construed with the same strictness as an indictment or information. This court, in State v. Lovelace, 29 Nev. 43, 83 Pac. 330, in considering the rule governing the interpretation of indictments, after quoting the statutory provisions governing indictments, said:

"The foregoing enactments show that it was the intention of the Legislature of Nevada that in construing indictments the courts should not indulge in a too exact and overnice view of language, but that certainty to a common intent was all that should be required. * * * The sections of the statute above quoted show the legislative intent was that the courts of the state should give interpretations liberal to sustain rather than rigid to overthrow indictments, when * * * substantial rights of defendants are not thereby prejudiced."

In State v. Hughes, 31 Nev. 270, 102 Pac. 562, this court, in considering an indictment, questioned for the first time upon an appeal, said:

"It will not be held insufficient to support the judgment, unless it is so defective that by no construction, within the reasonable limits of the language used, can it be said to charge the offense for which the defendant was convicted."

Also in State v. Raymond, 34 Nev. 203, 117 Pac. 17, this court said:

"It has been the tendency of courts in recent years to be less technical than formerly in construing indictments, especially so where no demurrer was interposed to the indictment and an opportunity afforded to cure the defect prior to trial."

See, also, *State v. Kruger*, 34 Nev. 302, 122 Pac. 483; Rev. Laws, §§ 7302, 7469.

We have considered the important questions of law presented, and reviewed some of the authorities cited, as well as others, at considerable length, because some of the questions are of original impression and establish a precedent in this court.

While it has been held by former decisions of this court that an appeal will not lie except in cases of felony, it may be worthy of note here that a similar provision in the first Constitution of California was changed by the Constitution of 1879, so as to permit appeals in all cases prosecuted by indictment or information.

As the verdict is not void, the judgment was not in excess of jurisdiction. Therefore it is ordered that petitioner surrender himself into the custody of the sheriff of Nye county in pursuance of the judgment from the confinement upon which he was released upon bail pending the hearing on this proceeding, and that upon his so surrendering himself his bail be exonerated.

McCARRAN and COLEMAN, JJ., concur.

(47 Utah, 389)

MOON v. BOLLWINKEL et al.
(No. 2727.)

(Supreme Court of Utah. Jan. 12, 1916.)

1. VENDOR AND PURCHASER ⇨16—CONTRACT—EXECUTION—EVIDENCE—SUFFICIENCY.

Where defendants contracted to sell their lots at a stated price, reserving the right to remove a trap therefrom, and the purchaser struck out from the contract the reservation clause, the contract as modified could not be enforced, in the absence of ratification by the defendants, there being no meeting of the minds of plaintiff and defendant.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 17, 20; Dec. Dig. ⇨16.]

2. VENDOR AND PURCHASER ⇨44—MODIFICATION OF CONTRACT—BURDEN OF PROOF.

In an action for breach of an executory contract for the sale of land wherein the seller by a clause in the writing reserved certain rights, which clause the prospective purchaser struck out, plaintiff has the burden of showing by clear and convincing evidence that the modification was ratified by the seller.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 69-76; Dec. Dig. ⇨44.]

3. COURTS ⇨190—MUNICIPAL COURT—SATISFACTION OF JUDGMENT PENDING APPEAL—EFFECT.

Where a judgment of the city court, not having been superseded, was satisfied by execution pending appeal to the district court, the party successful below could not have further judgment on his claim.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. ⇨190.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Action by A. T. Moon against Joshua P. Bollwinkel and another, doing business as Bollwinkel Bros. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Ben Johnson, of Salt Lake City, for appellants. C. S. Patterson, of Salt Lake City, for respondent.

FRICK, J. This action is based upon the written contract hereinafter set forth to recover damages for its breach. The plaintiff in his complaint merely pleaded the legal effect of the contract, alleged its breach, and prayed judgment for damages, stating the amount thereof. The defendants denied the contract as pleaded, and also alleged want of consideration. We remark that there is considerable evidence which we deem immaterial to this decision, and in view that the findings of the court are not based upon any of such evidence we shall refer to such portions only as are deemed material and upon which the findings are based.

At the trial the plaintiff produced the contract sued on, which reads as follows:

"Salt Lake City, Utah, June 1, 1911.

"In consideration of the sum of one dollar to us in hand paid by A. T. Moon, we, the undersigned, hereby give the said A. T. Moon an option to purchase all of the following lots in City View addition to Salt Lake City, Utah, to wit: [Describing property] at any time within five (5) days from this date for the agreed sum of two thousand two hundred and fifty dollars. It is hereby agreed that Bollwinkels may remove their trap now on above ground at any time within ten days from this date.

"[Signed] Bollwinkel Bros.,

"By J. P. Bollwinkel."

That part of the contract which is not italicized was typewritten, while that portion which is italicized was written with pen and ink.

Before offering the contract in evidence the plaintiff, over the objection of the defendants, was permitted to testify that he and the defendant signing the instrument had arrived at an agreement respecting the price and terms of sale of the lots in question; that immediately thereafter he, in his office, wrote out the agreement in typewritten form just as that part of the agreement appears; that he then presented it to the signer of the contract and the latter objected to signing it, stating his reasons therefor, unless the trap mentioned in the written part of the agreement, which was shown to be of the approximate value of \$390, was excepted from the sale with the right of removing it from the premises; that the plaintiff then wrote in the exception or reservation with his pen, and the defendant signed the agreement. The plaintiff, however, testified that he, at that time, told the defendant who signed the instrument that in his judgment

the purchaser he had in view for the property would not take it subject to the right to remove the trap, and that he could not dispose of the property with the exception insisted upon by the signer. The defendant nevertheless, insisted upon reserving the trap from the sale, and hence the contract was executed by him with the reservation written therein. The plaintiff further testified that when he presented the contract to the prospective purchaser the latter refused to accede to the reservation, and took his pen and drew it through that portion of the agreement, and, after having done so, wrote underneath the defendant's signature the following:

"I hereby accept the above and will pay \$2,250, \$1,000 cash within ten days, bal. \$1,250 on or before 2 years @ 8% interest.
"J. W. Mellen."

The plaintiff also produced some evidence that the defendants had agreed to the modification of the writing as made by Mr. Mellen. This evidence was objected to by defendants, and they both denied that they, or either of them, had agreed or consented to the modification. We remark that from the whole evidence it is quite clear, however, that the minds of the parties never met respecting a sale of the property; that is, plaintiff did not agree that the trap might be removed, and J. P. Bollwinkel, acting for Bollwinkel Bros., never agreed to sell the lots without reserving the trap. It was also shown that the defendants refused to comply with the agreement as modified, and that for that reason the sale was not consummated, and hence the plaintiff claimed damages in the sum of \$200, etc.

The court made findings of fact and conclusions of law in favor of the plaintiff, and entered judgment enforcing the contract as modified. The defendants appeal.

Numerous errors are assigned, but we do not deem it necessary to discuss more than one or two of them, which we deem vital to the judgment. One of the assignments is that the court erred in its finding that a contract was entered into between the parties to sell the lots in question for the sum of \$2,250.

[1, 2] From the statement we have made it appears that, when J. P. Bollwinkel insisted upon the right to reserve the trap which was on the lots in question, the plaintiff told him that in his judgment his prospective purchaser would not consent to its removal. It is evident that the plaintiff thus never agreed to that part of the agreement which authorized the defendants to remove the trap. The fact that plaintiff permitted the prospective purchaser, Mr. Mellen, to strike out the clause excepting the trap from the sale, is a strong circumstance indicating that the plaintiff did not agree to that clause in the agreement. The minds of plaintiff and of J. P. Bollwinkel,

who acted for Bollwinkel Bros., therefore, never met with regard to the clause excepting the trap from the sale. But if it were conceded for argument's sake that the minds of plaintiff and J. P. Bollwinkel did meet regarding the terms of the agreement as Mr. Bollwinkel signed it, yet the evidence is wholly insufficient to justify a finding that J. P. Bollwinkel, or either of the brothers, ever consented to or ratified the modification of the agreement by which their right to reserve the trap was eliminated from the agreement as signed by J. P. Bollwinkel for Bollwinkel Bros. Either view that may be taken, therefore, as above indicated, leads to the same conclusion, namely, that the parties' minds never met upon the terms of the contract sued upon. It is familiar doctrine that where an agreement is signed by one party, and the other party insists that either new terms were added to, or that certain parts were eliminated from, the agreement after the same was signed by the opposite party, the first party must prove by clear and convincing evidence that the party who signed the agreement, and who is to be bound thereby as changed, agreed to the change or ratified the same. This the plaintiff has wholly failed to do in this case. The evidence offered by him on that phase of the case is wholly insufficient to justify a finding to that effect.

Counsel for appellant has, however, somewhat exhaustively argued the further question that the agreement in question is one relating to a sale of real estate, and is therefore controlled by the statute of frauds, in so far as any modification of the contract as claimed by plaintiff is concerned. The courts are not in harmony respecting the extent that executory contracts, which, under the statute of frauds, must be evidenced in writing, may be modified by parol. The question is not without difficulty, and in view that the foregoing disposes of the case, and that it is at least doubtful whether the question argued by counsel is really involved in this case, we express no opinion upon that question.

[3] It was also made to appear that the judgment in favor of the plaintiff, not having been superseded by defendants, execution was duly issued thereon, and the judgment was satisfied notwithstanding the appeal from the city court to the district court. In view of that fact, which stands undisputed, we cannot see how the plaintiff is entitled to a further judgment upon his claim.

The judgment is reversed, and the cause is remanded to the district court of Salt Lake county, with directions to grant a new trial, and to proceed with the case in accordance with the views herein expressed. Appellants to recover costs.

STRAUP, C. J., and McCARTY, J., concur.

(47 Utah, 430)

BOARD OF MEDICAL EXAMINERS OF
STATE OF UTAH v. FREENOR.

(No. 2794.)

(Supreme Court of Utah. Jan. 14, 1916.)

1. PHYSICIANS AND SURGEONS \S 6 — PRACTICING WITHOUT AUTHORITY — INJUNCTION — POWER OF COURT.

Under Comp. Laws 1907, \S 1737, providing that any person practicing medicine, surgery, or obstetrics within the state contrary to law may, at the instance of the board of medical examiners, be enjoined from practicing until lawfully admitted to practice, the district court had equitable jurisdiction, on complaint of the medical examiners, to grant injunction against a chiropractor practicing medicine, as the Legislature has power to change, abolish, or enact rules of equity, as in the instant case by authorizing restraint of a public offense.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 6-11; Dec. Dig. \S 6.]

2. PHYSICIANS AND SURGEONS \S 6 — PRACTICE OF MEDICINE — STATUTE — "CHIROPRACTIC" — "PRACTICING MEDICINE" — "DIAGNOSE."

Under Laws 1911, c. 93, providing that any person shall be regarded as practicing medicine who shall diagnose, treat, operate upon, prescribe, or advise for any physical or mental ailment or any abnormal mental or physical condition of another after having received or with intent to receive any compensation, or who shall hold himself out as a physician or a surgeon, a "chiropractor," one professing a system of manipulations which aims to cure disease by the mechanical restoration of displaced or subluxated bones, especially the vertebrae, to their normal relation, who advertised as a "Graduate Chiropractor. No drugs, or surgery, or osteopathy. Try chiropractic"—and who endeavored not so much to cure ailments as to permit the natural "vital forces of the body," impeded by luxation of vertebrae, to proceed unhindered to any diseased part upon readjusting the displaced vertebrae with his bare hands, for which he received compensation, was "practicing medicine" within the statute, since he "diagnosed" the symptoms of his patients by recognizing the presence of disease from its signs or symptoms in deciding as to its character, and thereafter treated them for compensation.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 6-11; Dec. Dig. \S 6.]

For other definitions, see Words and Phrases, First and Second Series, Chiropractic; Diagnosis; Practice of Medicine.]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Suit by the Board of Medical Examiners of the State against F. J. Freenor. From a judgment for plaintiff, defendant appeals. Affirmed.

A. E. Pratt and George Halverson, both of Ogden, for appellant. A. R. Barnes, Atty. Gen., and J. C. Davis, Dist. Atty., and H. H. Henderson, both of Ogden, for respondent.

STRAUP, C. J. The defendant, upon a complaint filed by the state board of medical examiners, was enjoined from practicing medicine within the state until he obtained a license. He appeals. His chief complaints are that injunction will not lie, and that the proved committed acts did not constitute

practicing medicine within the meaning of the statute. Any person practicing medicine within the state without a certificate or license is guilty of a misdemeanor. C. L. 1907, \S 1739. "Practicing medicine" is defined thus:

"Any person shall be regarded as practicing medicine within the meaning of this title, who shall diagnose, treat, operate upon, or prescribe or advise for, any physical or mental ailment or any abnormal, mental or physical condition of another, after having received or with the intent to receive therefor, either directly or indirectly, any fee, gift, compensation or other pecuniary benefit, reward or consideration; or who shall hold himself out by means of signs, cards, advertisements or otherwise as a physician or surgeon," etc. Laws 1911, p. 135.

It further is provided (C. L. 1907, \S 1787) that:

"Any person practicing medicine, surgery, or obstetrics within the state contrary to law may, at the instance of the board [medical examiners] herein created appearing as plaintiff in the district court, be enjoined by said court from practicing medicine, surgery, or obstetrics in this state until such person shall have been by said board lawfully admitted to practice," etc.

[1] The case was tried to the court, who found the issues in favor of the plaintiff. The first point made is that the alleged and found facts, if they constitute practicing medicine within the meaning of the statute, were criminal, and not invasions of property rights, and that equity will not lend its aid by injunction to restrain mere violations of public or penal statutes, except so far as it may be incidental to its enforcement of property rights or other matters of equitable cognizance. To support this numerous cases and authorities are cited, among them 1 High on Injunction (4th Ed.) \S 20; 6 Pomeroy's Equity, \S 644; 22 Cyc. 902; Taylor v. Marshall, 255 Ill. 545, 99 N. E. 638; Tiede v. Schmiedt, 99 Wis. 201, 74 N. W. 798; Ewing v. Webster City, 103 Iowa, 226, 72 N. W. 511. It is not made to appear that there, as here, express authority by statute was conferred to grant relief in the particular instance by injunction. We need not inquire whether, in the absence of the statute, equity had jurisdiction. It is not claimed that the statute is unconstitutional. It is claimed that it in no manner conferred equitable power which the court theretofore, under its general power, did not have. We think the statute enlarged the power. As to this the court, in the case of Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 South. 809, said:

"The General Assembly, having the authority to attach prior conditions to the practice of medicine, was vested with the right to enforce enactments on that subject by prescribing penalties for violations of the same, either by fine, by imprisonment, or by civil remedies. The right to practice medicine being conditioned by law upon the prior obtaining of a certificate from a medical board, plaintiffs were clearly authorized [under an act], when they had reason to believe that defendant was violating the law in this respect, to test the facts of the case through injunction."

Supporting this are also the cases of *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1118, 122 Am. St. Rep. 653; *Sumner v. Crawford*, 91 Tex. 132, 41 S. W. 994; *State ex rel. Duensing v. Roby*, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Ellenbecker v. Plymouth County*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; *Ohlrogg v. Smith*, 126 Iowa, 247, 99 N. W. 178; *State ex rel. v. Durein*, 46 Kan. 697; *North American Insurance Co. v. Yates*, 214 Ill. 272, 73 N. E. 423. These cases and the following, *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19, *State Tax Law Case*, 54 Mich. 350, 26 N. W. 493, and *State v. Saunders*, 68 N. H. 39, 25 Atl. 588, 18 L. R. A. 646, also answer the further contentions that a proceeding by injunction in such particular is a denial of the right of trial by jury, and, as the defendant may be punished on a criminal prosecution, if he also be made subject to an injunction and deprived of his calling, he is punished twice for the same offense or act. Unless prevented by some constitutional provision, which is not claimed, we think the Legislature had the power to change, abolish, or enact rules of equity, and hence are we of the opinion that the court, by reason of the statute, had jurisdiction to proceed as it did.

[2] This brings us to the facts and to the question of whether the defendant practiced medicine within the meaning of the statute. That he had no license or certificate is, on the record, not in dispute. He is what is termed a chiropractor. As defined by *Nelson's Ency.*, chiropractic is:

"A system of therapeutic treatment for various diseases, through the adjusting of articulations of the human body, particularly those of the spine, with the object of relieving pressure or tension upon nerve filaments. The operations are performed with the hands, no drugs being administered."

By the *International Ency.*:

"A system of manipulations which aims to cure disease by the mechanical restoration of displaced or subluxated bones, especially the vertebrae, to their normal relation. It is claimed that slight displacements of the spinal segments are frequent, that they constrict important nerves and arteries, and that chiropractic adjustment corrects the displacement and relieves the pressure."

The defendant had a common school education, and one year in a high school. From the time he was 16 to 31 years of age he was a machinist working in machine shops. Then he took a one-year's course and graduated in chiropractic at Dr. Palmer's school at Davenport, Iowa, and thereafter, for about four years, and until these proceedings, practiced his profession or calling. The statute (Laws 1911, p. 132) provides:

"The board [medical examiners] shall have power to examine any person of good moral character who furnishes satisfactory proof of having received a degree or diploma from a legally chartered medical college, the requirements

whereof shall include the following subjects as required by the board at the present time, namely: Histology, anatomy, physiology, chemistry, toxicology, urinalysis, therapeutics, bacteriology, pathology, theory and practice of medicine, or osteopathy, surgery, obstetrics, materia medica or osteopathic therapeutics, gynecology, pediatrics, dermatology, hygiene, medical jurisprudence, ophthalmology, otology, rhinology, laryngology. The foregoing showing an aggregate of 3,500 hours and any legally chartered school having the foregoing requirements shall be deemed a recognized school of medicine. Said applicant shall present a certificate from a high school of the first grade or its equivalent, and shall have furnished evidence of at least two units work in Latin and German, * * * and if upon examination of such person, the board is satisfied with his educational attainments, and that the applicant is qualified to practice medicine and surgery, then the board shall issue a certificate to such person so qualified and examined."

It is not claimed that Dr. Palmer's school met these requirements or that the defendant had studied or had knowledge of any of these subjects, except anatomy, physiology, toxicology, urinalysis, and obstetrics. And thus is it apparent that he did not possess a degree or diploma of such a college as is required by the statute to entitle him to take an examination. He maintained an office at Ogden, and in the newspapers advertised as a "Graduate Chiropractor. No drugs, or surgery, or osteopathy. Try chiropractic. Rooms 212-13-14, Col. Hudson Building. Phone 311." Just what he did is best shown by the testimony of his patients whom he treated or manipulated, and by his own testimony.

One of them testified:

That he took his little girl to the defendant for treatment. "I took the girl there to see what was wrong with her, and I asked the doctor what was the cause, and he said it was St. Vitus' dance, and I asked him if he thought he could do any good, and he said he could; he undressed the baby and laid in on a sort of table and pressed on her spine, * * * and said there was some of the spine was out of place, and by putting them back it would cure the case. * * * He said that the spine was out of adjustment, needed replacing, needed resetting, or something, * * * wanted to know if the baby was ever hurt, and I told him she was, and at that time he said as soon as he examined her he could see she had been hurt upon the head."

Another witness testified:

That he had been sick for several months, and asked the defendant if he could help him. The defendant replied that he could. "He put me on a table; he pressed my spine three times; he worked on me a minute or two; * * * he said he would cure me in eight or ten days."

Another testified:

"I consulted him about my condition, and he told me what the matter was, and he told me that he could guarantee me a cure. He said I had a goiter; that he would cure me for \$80. He gave me the adjustments, that is what he calls it; all his treatments, he gives the adjustment of the spine, that is, the main part. He has a table, I should judge, about five or six feet long. It has a place for your feet and a headrest, and the other part is just hollow, and you are face downward, and he adjusts the spine or the neck. * * * He does it with his hands and fingers. I think I went up there three months. * * * I had a goiter. I had

been to medical men and had them treat me. A regular practicing physician told me the best thing was to have it taken out, and then I went to Freenor. * * * He examined my spine.

* * * He simply placed his hands along the spinal column, and asked me if there was any soreness, and when I told him there was he placed pressure on that part of my spine.

* * * While I was in his office he called my attention to another patient who had epileptic fits, and he said he could cure them. * * * He showed me how he adjusted him for it. The young man thought he had a goiter, but he [the defendant] said it was no more goiter than anything else, but he didn't have a goiter; that what he had was this other. He just took his hand and ran down his spine, and he told me just exactly where it was and how he did in order to cure this disease."

Another testified:

"I took the baby up there. He examined the baby down the spine and neck. He said it was a weakness of the spine that ailed the baby; there were three disconnections; that the spine wanted to be adjusted. I have been taking her ever since until now, and he is treating her now. * * * I have paid him \$80. * * * I saw improvement in the child in about three weeks. * * * and the child is continuing to improve. * * * I had taken the child to medical doctors, and they didn't give me any relief. * * * He told me what the cause was that ailed the baby. He told me that the injury to the spine was probably caused in childbirth, and I could see there had been injury to it."

Another witness testified:

"He examined my daughter and told me what ailed her. He said diabetes. He only adjusted her spine. She lay on this table. * * * I think it was the seventh or eighth joint where he adjusted it. He didn't say he could cure my daughter. He has been treating her right along. * * * Two doctors had treated her. She got no relief, and then I went to Freenor in despair. He took and pressed her back, felt the vertebrae as they go along there, and he pressed on a particular vertebra. * * * It showed that the vertebrae was out of alignment at that point, and that appeared to be more tender than the other places. * * * It was about the eighth, I think, from the neck. * * * He put his hand on the spinal column at that place and gave some pressure and adjusted the vertebra. * * * My daughter has improved; * * * she is gaining right along."

Another testified:

"I had been quite sick, and I tried several things, and couldn't get relief." She went to the defendant. "I think he told me what he thought ailed me. The back had been jarred and kind of grown together. He didn't give it a name. He said my spleen ailed me. It was spleen anemia. I took some treatments. I don't exactly know how many. * * * He told me that this trouble came from the backbone, from the nerve being pinched. * * * He told me that the vertebrae was out of normal condition. He told me it was subluxed. There was two or three of the vertebrae adjusted. * * * He called my attention that certain nerves coming through the spinal column, through the foramina lead to certain organs of the body, and these particular places where I felt a soreness were places where the nerves came out and ran to the spleen, and at that particular place there was a sort of squeezing of the nerves supplying the control of the spleen."

Another testified:

"We took our little boy up there. He looked at the boy. I told him he had infant's paralysis, and that he was paralyzed, and he looked at him, and he told him he might get the boy better. He couldn't tell me sure. He made an examination. * * * The little boy's leg was para-

lyzed; he couldn't walk. The doctor looked along the backbone, he looked at the leg, and looked at the back. I saw him press on the backbone quickly and gently. The little boy didn't get better, because I quit."

Another testified:

That she was ill; that her hands and feet would get numb just like they were paralyzed; that she had severe pain in the neck and back of her head for six years. "He didn't tell me what ailed me, only in a way. He said for one thing that I was tired and worn out and poor circulation of the blood, and was caused from the spine. He said he might help me; he wasn't certain. * * * He adjusted my spine. * * * He put his hand down my spinal column and found eight different places in my spine that was very bad. * * * He didn't say what the trouble was. He just treated me and kept his mouth shut; he didn't say anything about it. He put his hands on my spine and gave a quick movement. * * * It cured me sound and well from that pain in my head."

Another witness consulted the defendant for pain in the head. He told her—

"there was a vertebra right here between my shoulders that was out of place. * * * He just used his hands and pressed on that vertebra and put it back in place. * * * He said the fourth or fifth * * * was out of place, and that would cause the arteries to be shut off going to this side of the head, the nerves, and that it stopped the circulation of the blood, and by putting that back into place would overcome this. I took my child to the defendant. * * * He showed me a couple of vertebrae that were out of place. I could see they were out of line. He placed the child upon the table; then put his hand on the child's back along the vertebrae and gave a quick shove or push. * * * It cried and walked in his sleep for six years. The child got over it, and has not been troubled since."

Other witnesses testified to similar treatments for other ailments. All of them testified that the defendant used no drugs, administered no medicine, nor used any instrument or agency except his hands. All but one or two testified that they paid him for the treatments from \$10 to \$80. Most of them testified that they were benefited by the treatments.

The defendant was a witness in his own behalf. After defining the system of chiropractic, he testified:

"As a chiropractor, I claim that, if a vertebra is out of proper relation to the others, it impinges or presses upon some nerve, and that that impingement or pressure upon some nerve interferes with the transmission of the vital force to the tissues and organs of the body, and my purpose is merely to remove that pressure, to the end that the normal transmission of life energy may be carried to the organs and tissues of the body. At the point in the spine where I adjust the vertebrae there is no diseased condition nor abnormal or pathological condition in a diseased sense. These parts, though slightly out of place, are nevertheless normal and healthy. There may, however, as a result of the condition I describe in the spine, be disease in some or all parts of the body. The chiropractor has nothing to do with the diseased part. All I do is to adjust the vertebrae to their normal position to take the pressure off the nerve that is hindering a normal flow of life energy and producing a lack of function in those tissues manifesting disease. * * * I do not make any diagnosis of the patient. I do not do anything except what I have already described. The thing I do there I call an adjustment. My

hands are locked, and the movement is by straightening the arm as rapidly as possible, like that, for the reason that I attempt to remove that vertebra alone. If I used a heavy forceful pressure, I would move the whole spine, and what I want to do is just to move the one vertebra that is out of position, and I must strike it like you would plain brick, if you wanted to move one of the bricks into alignment, that is all you do in making the adjustment. * * *

The school I attended [Palmer School of Chiropractic] does not tell how to treat kinds of diseases; it doesn't try to distinguish between one disease and another, except so far as they want to teach terminology. If a fellow said, 'I have got Bright's disease,' well, you wouldn't know what Bright's disease was, or if he said he had diabetes mellitus, you wouldn't know what that was, or neuralgia, or inflammation; it is to distinguish the meaning of the terms. They teach how to distinguish between different diseases. In my practice I don't try to distinguish; it is not necessary. If a person came into my office and says, 'I have diabetes,' his word would not count anything any more than mine would if I said he had diabetes. * * *

Diabetes insipidus is the name for the disease where there is an abnormal flow of urine without sugar in it. It is not a diseased condition of the kidney. It is an overproduction of the kidney—a stimulated condition of the kidney. * * *

There is a disease of the kidney. Bright's disease is a disease of the kidney. I don't treat Bright's disease. I can distinguish when a person has Bright's disease. I would have to do that by urinalysis. If a patient comes to me and tells me that he has Bright's disease, I don't investigate to find out whether or not he has. I have had a patient come to me with Bright's disease. I did not make an investigation to find out whether it was Bright's disease. He had been to several prominent doctors here, and they all said he had Bright's disease, and that they couldn't help him, and he came to me, and I just analyzed his spine and located the pressure on the nerves leading to the kidneys that were producing this disease, and after that vertebra was placed back he came to the office and told me that he had gone around to the doctors, and they had told him that he had no Bright's disease; that he was well, and, in fact, passed a life insurance. * * *

I took his word for it that he had Bright's disease. I didn't determine if he had any disease of the kidney at all. There are certain nerves that run from the spine to the kidneys between the tenth and eleventh and twelfth dorsal vertebrae, occasionally between the twelfth dorsal and first dorsal lumbar. The spinal cord is in the vertebrae. It runs right down through the center. Certain nerves extend to the lungs. They come from between the first, second, and third, and occasionally between the third and fourth, dorsal. They vary, often finding nerves going to the intestines as high up as between the ninth and tenth dorsal vertebrae and as low down as the fifth lumbar. The heart is usually governed by the nerves running between the first and second and third dorsal vertebrae. Persons that come to see me are usually sick and ailing. I don't treat the sick and ailing; I simply adjust their spine; I make a distinction between adjustment and treatment. If a person comes to me and says, 'I am troubled with diarrhea,' I analyze the spine to determine between what two vertebrae the nerve is being pinched at; that is to locate the subluxation that is the cause of the impingement of that particular nerve and make the adjustment there and remove the pressure. I don't use any knives at all, or mallets. I don't see that I operate upon them with my hands. That depends upon what people think is operating. If a person comes in and says, 'I am not feeling well, I just say, 'Go behind the screen and strip to the waist line; I will analyze your spine.' It is not necessary to

ask what is the matter, whether they have headache, or anything. By analyzing the spine I can tell whether there is a pressure exerted on the nerves leading to the various organs. These organs have many different functions; and to say what function was impinged by the pressure of that nerve would be utterly impossible. I would know that pressure existed, but whether it caused constipation, whether it caused tuberculosis of the intestines, or whether it caused diarrhea or typhoid, I couldn't tell you that, because I couldn't see, but I would know that the pressure exerted there may produce any one of various affections; the name signifies absolutely nothing; call it 'Sadie Jones' would be just as good. The nerves leading between the foramina from the spine and go to the intestines also have ramifications extending to the legs, the generative organs, the bladder. * * *

If a person came into my office and said that he was ill, and I didn't ask him what ailed him at all, but told him to strip off and go in and get on the operating table, and I looked at his back, and the first, second, and third dorsal of his vertebrae was normal, I would conclude that he didn't have any trouble in his lungs, and then, if I should go along the ninth or tenth vertebra, and find them abnormal or out of place, I would say that would be the cause of his disease. The eighth vertebra leads to the stomach, occasionally, very rarely, to the small intestines, and generally to the spleen, so I would say, if the eighth vertebra was out of adjustment, that was the cause of his illness, provided I didn't find any others. By looking at the backbone I don't diagnose a man's difficulties or disease. * * *

Diagnose is trying to name something, give it some tangible name. People have to have names, and we have names for different diseases; that is why we study terminology. Doctors say Bright's disease in order to convey some meaning to me, and they say tonsillitis in order to convey some meaning. Those names have been given to those different diseases arbitrarily. When a patient comes in and says he is ill, I look at his vertebrae and see whether there is any subluxation of that vertebrae. * * *

I examine the spine to find what is the cause of their ailment, but by looking at the spine I don't think I diagnose. I adjusted Mrs. Menassen's spine. I never monkeyed with her goiter. The goiter was an enlargement of the gland of the throat. That was caused by the impingement of some nerve that leads to the throat. I found an impingement on her back, and I concluded in my own mind that was the cause of the goiter, and I manipulated that vertebra and removed that impingement. I know what tonsillitis is. I look at their backbone, and when a person has tonsillitis there is an impingement, and I work to relieve that impingement. * * *

The adjustment tends to remove the cause what is hindering the body from curing itself. * * *

I know what is called consumption of the lungs as much as the books tell us. I do not treat that; I make an adjustment of the vertebrae for that. * * *

I try to make the vertebrae normal, and then let nature do its work. * * *

I adjust the vertebra of the neck for the eyes to take the pressure off the nerves. I start with the assumption that all disease is caused by some displacement of some vertebra; that is, 95 per cent. are caused that way, and the others through an accident or what is called traumatism. * * *

If you come to me with heart trouble, and I palpate down over the spine with my fingers, I would immediately locate the vertebra that is causing pressure on the nerve and prove it to you by putting pressure on the nerve after it has left the foramen, and show you there is a tenderness existing there, and in fact on the entire course of that nerve, and it is shutting off the vital energy. * * *

Bacteria exist, of course, in various forms, and cause various diseases, as doctors say. We take hay fever. This is a

germ disease. It is inflammation of the nasal lining of the mucous membrane which often causes hay asthma. A person may have the inflammation all through the winter time, but the right occasion hasn't happened. He will say to you, 'If I go into the barn, I will have hay fever.' He knows that there is an occasion waiting for him; he knows that he has got it, but the occasion isn't there, so he doesn't have hay fever until he meets that occasion, and he knows it is in the barn. * * * Under medical treatment typhoid fever has to run its course. * * * The chiropractor would notice where the vital energy was shut off. He would simply take the pressure off that vertebra, and permit the normal amount of vital energy to extend from the brain to the intestines, resist the intruder, and throw him off the job, and you are well. * * * In typhoid there is a serum used which is supposed to be a preventive. * * * There is a well-recognized serum for diphtheria. * * * In case of diphtheria I would assume that that was caused primarily by some difficulty with the nerve leading from the vertebrae, and I would seek to make the vertebrae normal so that the nerve would supply the necessary energy to protect the tissues that are being attacked by these germs. I wouldn't seek to cure the disease, but simply to remove the cause of it. What the doctor does, he seeks to inject into the body a certain serum which consists of forms of life which attack or are supposed to attack these other bacteria which are causing the disease. And wouldn't it take an intelligent bunch of bugs to hunt out that other bunch and fight them. I think removing the cause is the better way."

Whether the doing of these things is practicing medicine is dependent upon the statute. They, under some statutes, have been held not practicing medicine. *State v. Liffing*, 61 Ohio St. 39, 55 N. E. 168, 46 L. R. A. 334, 76 Am. St. Rep. 358; *State v. Her-ring*, 70 N. J. Law, 84, 56 Atl. 670, 1 Ann. Cas. 51; *Hayden v. State*, 81 Miss. 291, 33 South. 653, 95 Am. St. Rep. 471; *State v. Gallagher*, 101 Ark. 593, 143 S. W. 98, 38 L. R. A. (N. S.) 328; *Bennett v. Ware*, 4 Ga. App. 293, 61 S. E. 546. These statutes defined the practice of medicine to be the prescribing, directing, or applying "any drug or medicine or other agency or appliance" for the treatment of disease, etc. The rulings were influenced by the maxim *nosctur a sociis*, in obedience to which the words "agency" and "appliance" were held limited by the associated words "drugs" and "medicine." Our statute is dissimilar. Under it one is practicing medicine who for a fee, or other consideration, shall *diagnose* any physical or mental ailment, or any abnormal or physical condition of another, or who shall *treat* any physical or mental ailment, or any abnormal or physical condition of another, or who shall *operate* upon any physical or mental ailment, or abnormal or mental, or physical condition of another, or who shall *prescribe* or *advise* for any physical or mental ailment, or any abnormal mental or physical condition of another, or who shall hold himself out as a physician or surgeon. In the case of *State v. Yee Foo Lun*, 147 Pac. 483, we said:

"If any one does that without a license, he offends, no matter what remedy, substance, or thing he may prescribe, give, administer, or ad-

vis. * * * He offends though he may give or administer but castor oil, or Hostetter's bit-
ters, or a boiled concoction of bark, roots, or herbs, or may give nothing, and only advise exercise or rest."

The statute is not restricted to prescribing, giving, administering, or applying drugs, medicine, or other agency or remedy. It is broad and unrestricted, and by its language was intended to be so. The court, in *State v. Edmunds*, 127 Iowa, 833, 101 N. W. 431, said:

"Undoubtedly the state has the right to determine what acts shall constitute the practicing of the healing art, and it may impose conditions on the exercise of that privilege. * * * Having defined the terms it uses, courts should accept the definition given, and not be too subtle in the use of refined distinctions. To save its people from quacks and charlatans, the state has plenary power to prohibit [prescribe] or supervise the exercise of the healing art."

Our statute is similar to the Illinois statute. There it was held that one practicing osteopathy was practicing medicine within the meaning of that statute declaring that "any person shall be regarded as practicing medicine who shall treat, operate on, or prescribe for, any physical ailment of another." *Jones v. People*, 84 Ill. App. 453. Similar rulings were made under statutes not as broad as ours (*Bragg v. State*, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925; *Little v. State*, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717; *State v. Gravett*, 65 Ohio St. 289, 62 N. E. 325, 55 L. R. A. 791, 87 Am. St. Rep. 605), likewise that chiropractic is practicing medicine (*State v. Johnson*, 84 Kan. 411, 114 Pac. 390, 41 L. R. A. [N. S.] 539; *State v. Miller*, 146 Iowa, 521, 124 N. W. 167; *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. [N. S.] 179); so a magnetic healer who treated a lame ankle by rubbing the affected parts (*Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *People v. Gordon*, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165; *Smith v. People*, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. [N. S.] 158), and one who professed to cure disease by suggestive therapeutics and laying on of hands (*Witty v. State*, 173 Ind. 404, 90 N. E. 627, 25 L. R. A. [N. S.] 1297). And it may be stated that, under statutes similar to ours, it has been quite generally held that what the defendant did was practicing medicine within the meaning of the statute. Perhaps an exception to this is the case of *Nelson v. Board of Health*, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383. Under the evidence we think it indisputably shown that the defendant diagnosed, treated, and operated upon physical ailments and abnormal and physical conditions of others for a fee, and that he held himself out to treat such ailments and conditions. True, he testified that he made no diagnosis; but he cannot exculpate himself by his own definition of that term, "trying to name something; give it some tangible name"—a definition which has neither judicial nor scientific sanction. It is at war with definitions of lexicographers:

Webster and Standard, "The art or act of recognizing the presence of disease from its signs or symptoms and deciding as to its character;" International Ency., "The determination of the nature of a disease as well as of a condition of the organ or tissues affected"—and manifestly is not the sense in which the term is used in the statute, nor in which it is either popularly or technically understood. The defendant's statements that he did not "diagnose any disease" or "the patient," that "he had nothing to do with the diseased part," and that all he did was "to look at the spine and vertebrae—analyze the spine—to ascertain whether there was any displacement or subluxation or any other abnormal condition of the vertebrae," and "whether there was pressure or an impingement of the nerves, or an interference with vital energy or force, or a hindrance of the normal flow of life energy producing the disease," and "to examine the spine to find what is the cause of their ailment," are mere evasions and confusions of what, in fact, is diagnosis to ascertain the cause of the disease or ailment. So are his statements, "I don't treat the sick or ailing; I merely adjust their spine; I make a distinction between adjustment and treatment;" that he "did not treat golter, but merely manipulated the vertebrae to remove the impingement which caused it"; nor consumption, but merely "made an adjustment of the vertebrae for that"; nor the eye, simply "adjusted the vertebrae of the neck for that"; nor tonsillitis or diphtheria, "merely made the vertebrae normal so that the nerve would supply the necessary energy to protect the tissues that are being attacked by these germs." Doing these things the defendant does not call "treating a disease or ailment," merely "an adjustment to remove the cause of the ailment," and thus again, by his own and unwarranted definition, seeks to exculpate himself. As well say that a regular physician did not treat an ailment by giving or advising something to remove the cause producing the ailment. To ascertain and remove the cause of an ailment is one of the essentials sought by every efficacious system of treatment. It is difficult to understand how removing, or attempting to remove, the cause of an ailment is not treating, or attempting to treat, the ailment itself. Whatever merits or demerits the system of chiropractic may have, it is but egotism to assert that it is the only system which seeks to ascertain and remove causes of disease or ailments, and on that ground to claim it distinguishable from all other systems of treatment.

The law is not concerned with the question of whether chiropractic is as good as or better than other systems of treatment. It is concerned with the question that before any one shall undertake, no matter by what system, to diagnose, treat, operate upon, or prescribe or advise for any physical or men-

tal ailment or condition of another for a fee or other consideration, he shall possess the learning and skill required by the statute and produce a degree or diploma from a college meeting the requirements enumerated in the statute, and successfully pass an examination before the board showing his competency. When he does that, then he can practice whatever system he may consider the most efficacious, or do that in a given case which he thinks will produce the best result. Until he does that he cannot practice at all, unless he comes within the exception of the statute, "those who heal only by spiritual means without pretending to have any knowledge of the science of medicine," an exception put in the statute to permit treatment by Christian Science or other spiritual means.

When we look to the testimony of the defendant's patients, it very clearly appears that he not only diagnosed physical ailments and abnormal conditions, but also treated them. One of them he diagnosed as "St. Vitus' dance"; another "a golter"; another "spleen anæmia"; another "diabetes"; another as "a worn-out condition" and "lack of blood circulation"; and all of them as displaced or subluxed vertebrae, some at six or eight places. These he manipulated and adjusted to remove the cause producing the ailments which he said the patients had. That such is diagnosing and treating an ailment or condition of another cannot successfully be gainsaid. As stated by the Illinois court (*Jones v. People*, supra), if that "is not a treatment or operation for a physical ailment, what is it? It seems to us the mere statement of the question demonstrates the absurdity of every opposite position."

But it is said that, if such a system as practiced by the defendant did no good, it did no harm, and that it is unlike administering powerful drugs or performing surgical operations from which ill consequences may follow unless in the hands of the skillful. Though the defendant's treatments may be harmless, still that is no reason to permit him to violate the law. The statute does not say that one may operate upon or treat an ailment of another so long as he does him no harm or shall not make him worse. But this oft-repeated statement does not bear scrutiny. Much harm may come to one afflicted with an ailment and seeking professional advice or aid from one incompetent to give it. There are many ailments in their acute stages which, if correctly diagnosed and properly treated, yield most readily, but, if not recognized and not properly treated, become, in their chronic stages, most stubborn and unyielding. The defendant undertook to treat various ailments of children without even professing any knowledge whatever of pediatrics, and many other ailments where knowledge of histology, biology, pathology, and other branches of science was essen-

tial to properly recognize and understand them. It needs no argument to show the harm that may result by one without knowledge of ophthalmology attempting to treat some acute and virulent disease of the eye by attributing the cause of the disease to a subluxed vertebrae of the neck causing "nerve pressure," not that the manipulation to reduce the pretended subluxation might itself do harm, but that in the meantime the disease, for want of recognition and proper attention, may have progressed to a stage where it no longer can be arrested.

We think the findings are well supported by the evidence, and that the judgment is right.

It therefore is affirmed, with costs.

MCCARTY, J., concurs.

FRICK, J. I fully concur in all that is said by the Chief Justice. In view of the importance of the questions involved, however, it may not be out of place for me to make a few observations.

It is seldom that the wisdom, utility, and the necessity of a statute can be so forcibly and irrefutably demonstrated in an opinion as is the case in the preceding opinion. Here is a so-called doctor who, without hesitation, informs us in the first quarter of the twentieth century, that:

"In case of diphtheria I would assume that that was caused primarily by some defect with the nerve leading from the vertebrae."

Instead of arresting the deadly toxins, the doctor would merely "palpate" the spine, and in that way attempt a cure.

The same would be true, he informs us, in case of typhoid, tuberculosis, malaria, or any other like disease, all of which, it has been demonstrated over and over again, are caused by some form of bacilli or bacteria. The experiments and experience of the past 40 years, all of which have become publicly known and may be found in the health statistics of both the state and the nation, are thus cast to the winds, and we are informed by the doctor that 95 per cent. of all human ailments are caused by mere displacements of the vertebrae. Indeed, the doctor contends that in case one suffers from eyestrain, or some other eye difficulty, that in all probability is caused by astigmatism or some other local defect in the eye, he would seek and find both the cause and the cure by making what he is pleased to call an analysis of the vertebrae. While the statute in question does not concern itself with any school of medicine or system of healing, or treating those afflicted with disease, and while it does neither condemn nor approve any particular school or system, yet it does in no uncertain terms require those who desire to follow any school of medicine or system of healing and treating the sick to properly prepare and qualify themselves for that most important

duty. If an applicant is qualified under the statute, he is entitled to a license to practice medicine in this state. The law assumes, and it may well do so, that if one possesses the theoretical knowledge required by the statute, he will protect the best interests of society. Under such circumstances it may well be assumed that the one who is so qualified will recognize and appreciate the difference between eyestrain and typhoid, between diphtheria and a sprained joint, between communicable and noncommunicable diseases. The state has the right, and it is its duty, to protect the public against all contagious, infectious, and communicable diseases. While any adult person may perhaps choose his own doctor and method or system of treatment, he has no right, however, in case he is afflicted with a communicable disease, to expose any other person to such disease. This is so whether the afflicted person or his doctor, or both, believe in the modern theory of disease or not. They must submit to the law. If such were not the case, the aim and efforts of state and local health boards to minimize, and, if possible, to stamp out, communicable diseases, would be nullified. Each case of contagious or infectious disease, in the hands of a man like the defendant, would become a center of infection and the source of innumerable other like cases. The aim of the bodies aforesaid, with the help of the law, is to make it possible for all who are born to more nearly live out their natural expectancy of life. Not only is society as a whole vitally interested in bringing about that result, but the individual is likewise interested. That is so not only on account of the economic value of a human life, but is so for many other reasons. It is often the case that those who are without means are very much opposed to statutes like the one in question, and assume that they are inimical to their best interests. The very opposite is the fact. As matter of course, each laboring man with a family is vitally interested in maintaining his own as well as his family's good health. He therefore is directly interested in the enforcement of every law which prevents the communication and spread of disease. Again, the poor man without property, in order to protect his family against want in case of sickness or premature death, must carry some life, and at times other, insurance. We all know that the rates of life insurance are based upon the insured's expectancy of life. Now, if any considerable number of those who are insured will become afflicted with, and prematurely die from, communicable diseases, then the rates of those in the same class who survive must be very materially increased. Vital statistics show that a very large per cent. of the deaths in middle life are caused by preventable diseases. The survivors must thus pay more than their natural share of the burden of insurance. Again, a child, or one in early

manhood, may be afflicted with a communicable disease which, while it may not prove fatal, may nevertheless lower the vitality of such an individual and leave him a weakling totally unprepared to withstand the ravages of disease. All such are thus made a burden, not only to themselves, but to those upon whom they are dependent. It is of the utmost importance to all, therefore, that all communicable diseases be limited to as few individuals as it is possible to do. The state, so far as possible, should prevent those who do not possess the requisite qualifications to recognize and combat at least all communicable diseases from following the important calling of healing the sick.

The fact that no specific has as yet been discovered for all communicable diseases is no reason why those who desire to treat disease should not qualify under the statute. Nor does the fact in any way do away with the demonstrated facts that nearly all, if not all, of the communicable diseases are caused by the different bacilli or bacteria, and in many instances are communicated by means of insects like the mosquito or house fly, or otherwise. The potent fact remains that in the last 25 years the frightful death rate of children from diphtheria and of adults from malaria, typhoid, yellow fever, etc., has been greatly reduced. The defendant should know, as all other men know, that the vertebrae of a certain individual may be in precisely the same condition in Mississippi that they are in California after leaving the former state, and yet in the former state he may have been seriously afflicted with malaria, while in the latter he is entirely immune therefrom. What is true of those diseases is true of many others. Why then insist that the cause of 95 per cent. of all diseases is found in the displacement of vertebrae? It is a well-known fact that every system of healing sometimes, and under certain circumstances, will produce unlooked-for results, while all systems sometimes, and under certain circumstances and conditions, fail to accomplish what is expected. It therefore, to a certain extent, may always remain true, as was so well said more than 3,000 years ago:

"Like leaves on trees the race of man is found,
Now green in youth, now withering on the ground;
Another race the following spring supplies;
They fall successive, and successive rise."

Vital statistics have, however, become publicly known whereby it is shown that the causes of disease are becoming more and more understood, and that the public health and welfare are being safeguarded best by those men who are best qualified to discover and recognize the different forms of organisms which cause diseases in the human body. If the present statute, in connection with proper quarantine regulations, is properly enforced, society will at least be pro-

tected against the spread of communicable diseases; and, if that is accomplished, the question of whether one or the other system of healing is applied in individual cases is merely of secondary importance. One fact must, however, be conceded by all fair-minded men of every school of medicine, that the man who is so blind as not to discover danger to the human family, except from what he is pleased to call dislocated vertebrae, had better become enlightened by complying with the requirements of the statute, and, after doing so he, no doubt, will discover what others have discovered, that in practicing medicine and in attempting to protect the human family from disease "a little learning is a dangerous thing."

(47 Utah, 452)

STATE v. ERICKSON. (No. 2819.)

(Supreme Court of Utah. Jan. 14, 1916.)

1. INDICTMENT AND INFORMATION \S 110—SUFFICIENCY—PRACTICING WITHOUT AUTHORITY—STATUTE.

An information for practicing medicine without a license, charging the offense in the language of Laws 1911, c. 93, was not insufficient, under Comp. Laws 1907, \S 4730, 4732, providing that every information must contain a sufficient statement of the acts constituting the offense and the particular circumstances necessary to constitute a complete offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 289-294; Dec. Dig. \S 110.]

2. STATUTES \S 114—TITLE—CONSTITUTIONALITY.

Laws 1907, c. 88, entitled "An act for the regulation of the practice of medicine and surgery and for the appointment of a board of medical examiners in the matter of such regulation, and providing for the repeal of" certain statutes for the regulation of the practice of medicine and surgery, comprehending provisions defining the practice of medicine, prescribing the qualifications to practice, requiring a license to practice, and making it unlawful to practice without one, creating a board of medical examiners, and prescribing its duties and powers, was not violative of Const. art. 6, \S 23, requiring that the subject of an act be clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 145, 147-149; Dec. Dig. \S 114.]

3. PHYSICIANS AND SURGEONS \S 6—PRACTICING WITHOUT AUTHORITY—SUFFICIENCY OF EVIDENCE.

In a prosecution of a chiropractor for practicing medicine without a license, evidence held sufficient to justify a finding that defendant for a fee diagnosed, treated, and operated upon a physical or abnormal ailment and condition of another, thus practicing medicine as defined by Laws 1907, c. 88.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. \S 6-11; Dec. Dig. \S 6.]

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

P. E. Erickson was convicted of practicing medicine without a license, and he appeals. Affirmed.

Parley Jensen and B. N. O. Stott, both of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and G. A. Iverson, Asst. Attys. Gen., for the State.

STRAUP, C. J. [1] The defendant was convicted of practicing medicine without a license, and appeals. The information is that he did "willfully and unlawfully," on a day and at a place specified, "practice medicine without holding a lawful certificate or license issued by the state board of medical examiners of the state of Utah, by then and there diagnosing, treating, operating upon, and adjusting for the physical ailments of one Thomas E. Browning for a fee of \$2, then and there paid by the said Thomas E. Browning to, and received by," the defendant. The offense is stated in the language of the statute (Laws 1911, p. 135) defining the practice of medicine. It is contended that the information is insufficient because it does not, as provided by C. L. 1907, §§ 4730, 4732, contain a sufficient "statement of the acts constituting the offense," nor "the particular circumstances necessary to constitute a complete offense," and that, under the ruling of *State v. Topham*, 41 Utah, 39, 123 Pac. 888, the information must be held bad. The rule, of course, is familiar that an information must fully state the offense, and, if the statutory words do not suffice for that it must be expanded beyond them. But here, the statute itself defines the offense by the use of words which have a well-recognized meaning, and itself designates the particular acts or means whereby the offense may be committed. Under such circumstances, to charge the offense substantially in the language of the statute is sufficient. Had the statute but declared that any person "practicing medicine" without a license or certificate was guilty of an offense, then it might well be argued that an information stating the offense must, to be good, be expanded beyond the language of the statute. But the statute itself defines what shall be regarded as "practicing medicine." It is:

"Any person shall be regarded as practicing medicine within the meaning of this title, who shall diagnose, treat, operate upon, or prescribe or advise for, any physical or mental ailment or any abnormal, mental, or physical condition of another, after having received or with the intent to receive therefor, either directly or indirectly, any fee, gift, compensation or other pecuniary benefit, reward or consideration," etc.

Under such a statute, to charge in the language of the statute suffices. To require more would require the setting forth of evidence.

[2] A further point made is that the act itself is unconstitutional because the subject is not, as required by section 23, art. 6, of the Constitution, clearly expressed in its title. The title, chapter 88, Laws 1907, is, "An act for the regulation of the practice of medicine and surgery in the state of Utah, and for the appointment of a board of medi-

cal examiners in the matter of such regulation and providing for the repeal of" certain named sections of R. S. 1898, and as stated in chapter 93, Laws 1911, "An act amending" a number of specified sections of "C. L. 1907, for the regulation of the practice of medicine and surgery." Under that, we think enactments defining the practice of medicine, prescribing the qualifications to practice, requiring a license to practice and making it unlawful to practice without one, and creating a board of medical examiners and prescribing its duties and powers are all within, and germane to, the title.

[3] Another point made is that the defendant was not practicing medicine within the meaning of the statute. He is what is known as a chiropractor, and practiced what is known as chiropractic. He, as such, maintained an office at Salt Lake City. Browning, the person named in the information, sprained his foot or ankle working in a mine. He called on the defendant at his office. The defendant examined his ankle and foot, which were in "a swollen and black and blue condition." He had Browning strip to the waist and lie on a table, and then began to manipulate his spine. When "he came to a particular spot, he gave it a hard press, and then a little farther down gave another." He continued that operation for a considerable time and then operated a vibrator up and down the back. He explained to the patient that the trouble was in the nerve centers of the third lumbar vertebra, and that the nerve forces had been shut off, and that there was not sufficient nerve energy to heal the leg, and that he would have to readjust that particular lumbar and get it in its proper place, and that then there would be a sufficient flow of nerve energy to heal up the leg. He also advised Browning on retiring to wrap a towel saturated with strong salt brine around the foot. The defendant gave him but one treatment or adjustment. Browning testified that his foot, or ankle, had "just turned on me, and it was months before it recovered; I had to wear a whalebone brace on it," but not that the defendant put it on or advised it. He further testified that the defendant did not tell him that he had a sprain, or that he had any disease. Browning paid the defendant \$2 for the adjustment or treatment.

The defendant testified that:

"I do not practice surgery; I do not diagnose diseases; I do not operate on people; and I do not treat them for diseases."

He further testified that:

After Browning had removed his clothing, "I found an afflicted lumbar region. He asked me what it would cost to have a chiropractic adjustment. That is what he paid the \$2 for. I placed him on a two-piece table so as to have access to the spinal or back region, and adjusted his lumbar from the left to the right. I did that with my empty bare hands. I did not diagnose any disease; did not administer drugs, prescribe medicine, nor perform any surgical operation. * * * I have an office as a chiro-

practor, and that is my means of livelihood. I charge for my labor. I don't know what was the matter with Mr. Browning's foot. I didn't try to find out. I wasn't interested in his foot. When I saw it I knew there was something wrong in the lumbar region. I don't treat diseases. The effect was in the foot, and the cause in the lumbar. I don't cure anything. When I adjust the lumbar I expect to take away the cause; nature would do the rest. * * * I adjusted the lumbar on account of the luxation. I believe there are nerves in the human body, and, if one of the lumbers is pushed to one side, it would very likely affect the nerve, and according to our system we adjust the lumbar to relieve that nerve pressure."

We think this evidence justified a finding that the defendant practiced medicine within the meaning of the statute: that he, for a fee, diagnosed, treated, and operated upon a physical or abnormal ailment or condition of another. What, as to this question, we said in the case of State Board of Medical Examiners v. Freenor, 154 Pac. 941, just decided, also applies here.

The judgment therefore is affirmed.

FRICK and McCARTY, JJ., concur.

(47 Utah, 323)

H. T. & C. CO. v. WHITEHOUSE et ux.
(No. 2746.)

(Supreme Court of Utah. Jan. 3, 1916. Rehearing Denied Jan. 15, 1916.)

1. COVENANTS ⇐57—WARRANTY BY STRANGER TO TITLE—EFFECT.

A covenant of warranty by one having neither possession of, nor title to, the land conveyed does not run with the land, but is a personal covenant, and does not pass to a subsequent grantee except by assignment.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 54; Dec. Dig. ⇐57.]

2. HUSBAND AND WIFE ⇐81—LIABILITY ON COVENANT—CONVEYANCE BY HUSBAND AND WIFE.

Where a wife joins with her husband in a warranty deed to land of which she has no title or estate except the contingent interest created by Comp. Laws 1907, § 2826, providing that a wife who survives her husband shall have one-third interest in fee simple of land possessed by the husband during the marriage to which she has not relinquished her rights, she is not liable to one other than her immediate grantee, since her covenant is personal, and does not run with the land; her grantee not having assigned his cause of action to plaintiff.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 331-335; Dec. Dig. ⇐81.]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Action by the H. T. & C. Company against J. W. Whitehouse and wife. Judgment for plaintiff, and defendants appeal. Affirmed on condition, and remanded, with directions.

Plaintiff, a corporation, brought this action to recover damages from defendants for the alleged breach of warranty of title to 200 acres of land situated in Tooele county, Utah, which land was on February 7, 1906, conveyed under contract by the defendants to Theodore Schulte, trustee, for Joseph H. Hurd, J. B. Taylor, and Walter A. Cooke. From a

judgment rendered in favor of the plaintiff, defendants prosecute this appeal.

The contract under which the land was conveyed, so far as material here, is as follows:

"This agreement made this 29th day of January, A. D. 1906, by and between Jeremiah W. Whitehouse, of Lincoln, Tooele county, Utah, party of the first part, and Theodore G. Schulte, of Salt Lake City, Utah, party of the second part, witnesseth that the party of the first part agrees to sell and the party of the second part to purchase all of the following described real property, situate in Tooele county, Utah, namely [describing the land], for the sum of twenty-seven hundred fifty (\$2,750.00) dollars, payable twelve hundred (\$1,200.00) dollars cash at the date hereof, receipt of which is hereby acknowledged, and the balance of fifteen hundred fifty (\$1,550.00) dollars, payable twelve hundred (\$1,200.00) dollars on or before August 1, 1906, and three hundred fifty (\$350.00) dollars on or before October 1, 1906. The party of the second part also agrees to pay the balance due the state of Utah on the said southeast quarter and the east half of the southwest quarter of section 20, in township 8 south of range 3 west, Salt Lake meridian.

"It is hereby further mutually understood and agreed that the aforesaid premises shall be conveyed by warranty deed, and that the party of the first part and his wife will execute such warranty deed, and that the same shall be placed in escrow with some bank or other depository to be agreed upon, to be delivered upon the payment of said sum of fifteen hundred fifty (\$1,550.00) dollars, balance of the aforesaid purchase price thereof. * * *

"In witness whereof the said parties of the first and second part have hereunto set their hands the day and year first above written.

Jeremiah W. Whitehouse.
Theodore G. Schulte."

On September 17, 1906, Schulte, at the request of his beneficiaries, Hurd, Taylor, and Cooke, conveyed to plaintiff by warranty deed the above-mentioned 200 acres of land.

At the time the foregoing contract was entered into and the deeds referred to were executed the land was, and since October 31, 1904, had been, incumbered by a certain agreement in writing entered into between the defendants and one Catherine Le Vine and Elizabeth R. Pratt by which the defendants agreed to sell and convey to Le Vine and Pratt, and they agreed to purchase from defendants, for the sum of \$2,000, the 200 acres of land described in the deed herein mentioned from defendants to Schulte. Suit was brought against the Whitehouses in the district court of Tooele county for the specific performance of the last-mentioned contract. Schulte was made a party defendant. The plaintiff herein, grantee and assignee of Schulte, was later on substituted as defendant in lieu of and in the place and stead of Schulte. A trial was had, and from the judgment rendered in favor of the Whitehouses denying specific performance the cause was brought to this court on appeal. This court, after considering the questions presented by the appeal, remanded the cause, with directions to the trial court to set aside the judgment theretofore rendered and to enter judg-

ment decreeing a specific performance of the last-mentioned contract. For a more detailed statement of the facts concerning the making of that contract, and of the suit brought thereon, we invite attention to the case of *Le Vine et al. v. Whitehouse et al.*, 37 Utah, 260, 109 Pac. 2, Ann. Cas. 1912C, 407.

The court in the case at bar found, and the record shows, that the district court, in pursuance of the remittitur and the directions of this court in the case above mentioned, rendered and entered judgment against the Whitehouses and the plaintiff herein for a specific performance of the agreement—

"adjudging that defendants and each of them (and particularly the plaintiff herein) should execute and deliver to said Le Vine and said Pratt a good and sufficient conveyance in fee conveying the fee-simple title to the tract of land (200 acres) described in said agreement, * * * and that thereupon, by virtue of said decree, and the proceedings taken therein, * * * plaintiff herein * * * was evicted and ousted from the possession" of the premises (the 200 acres of land), and ever since has been, and is now, dispossessed of the same.

The court also found, and the evidence supports the findings:

"That at the time of entering into the said agreement of January 29, 1906, between the said Theodore G. Schulte and the defendant J. W. Whitehouse, the said 200 acres of land, from the possession of which the plaintiff herein was ousted as aforesaid by the said Catherine E. Le Vine and Elizabeth R. Pratt by virtue of the aforesaid judgment and decree of this court, was valued and it was agreed that the same should be taken at and for the sum or price of \$10 per acre, or a total of \$2,000 for the said 200 acres, and that the same was at said time and ever since has been, and still is, of said value, * * * which was paid by the said Theodore G. Schulte and his beneficiaries hereinbefore referred to.

"That no part of the purchase price paid by the said Schulte and his said beneficiaries to the defendants herein has been repaid to them or either of them or to the plaintiff herein, and no part of the damage arising by reason of the defendants' breaches of said contract and of the warranty and covenants in said warranty deed conveying the said 200 acres of land, excepting that the plaintiff received from the said Catherine E. Le Vine and Elizabeth R. Pratt the sum of \$517.23, and which was paid on the 16th day of July, 1910, * * * and excepting the further sum of \$100 paid on the 17th day of February, 1911, and \$400 paid on the 5th day of June, 1913, and for which the defendants are entitled to credit upon the amount of said damages suffered by the plaintiff by reason of said breaches of the terms and covenants of said deed and agreement, and that, after crediting all of said sums, there is due to the plaintiff from the defendants, and the plaintiff is entitled to recover from the defendants as damages and for principal and interest, costs, and attorney's fees suffered, paid out, and expended, the sum of \$1,720.83."

Hancock & Barnes, of Salt Lake City, for appellants. Joseph H. Hurd, of Salt Lake City, for respondent.

McCARTY, J. (after stating the facts as above). There are numerous assignments of error. The only assignment, however, we deem of sufficient importance to consider is the one in which the findings of fact, conclu-

sions of law, and the judgment are assailed, wherein it is held that Ettie Whitehouse is liable under the covenant of warranty contained in the deed from the Whitehouses to Theodore Schulte executed February 7, 1906.

[1, 2] Plaintiff's evidence shows that Mrs. Whitehouse was not a party to the transactions leading up to and which culminated in the making of the contract under which the deed was executed, and that she was not known "at all in the transaction" prior to the execution of the deed. The evidence, without conflict, shows that she signed the deed merely as the wife of Jeremiah Whitehouse, and that she had no title to, or estate in, the land conveyed, except the contingent interest created by Comp. Laws 1907, § 2826, which, so far as material here, provides:

"One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, and to which the wife had made no relinquishment of her rights, shall be set apart as her property in fee simple if she survive him."

The rule, as declared by the great weight of authority, seems to be that a covenant of warranty by one having neither possession of, nor title to, the land conveyed does not run with the land, and that the right to recover on the covenant belongs only to the grantee to whom it is made. In other words, a warranty by one who is a stranger to the title, and not in possession of the land conveyed, is a personal covenant and does not pass to a subsequent grantee, except by assignment. In this case there was no assignment from Schulte to the plaintiff.

In Jones on Real Property, § 942, the author says:

"A covenant will not run with the land unless there is either mutuality or succession of interest. Privity of contract is sufficient between the immediate parties, but there must be privity of estate to carry the benefit of the covenant to subsequent owners of the property to which the covenant relates." 11 Cyc. 1100; *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; *Mygatt v. Coe*, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850; *Pyle v. Gross*, 92 Md. 132, 48 Atl. 713; *Bull v. Beiseker*, 16 N. D. 290, 113 N. W. 870, 14 L. R. A. (N. S.) 514.

We also invite attention to an instructive note in 14 L. R. A. (N. S.) 514, to the last case cited in which the annotator cites and reviews numerous decisions wherein the doctrine herein announced is upheld.

We are of the opinion, and so hold, that plaintiff, under the admitted facts, is not entitled to recover against Ettie Whitehouse on her covenant of warranty to Schulte. The cause is therefore remanded, with directions to the trial court that, in case the plaintiff shall, within 15 days after notice of the remittitur, file with the clerk of the court its consent in writing to a modification of the findings of fact, conclusions of law, and judgment to conform with the views herein expressed, the judgment will stand affirmed as to Jeremiah Whitehouse, each party to pay his own costs on this appeal. Should plaintiff fail to file with the clerk of the trial

court his consent in writing to a modification of the findings of fact, conclusions of law, and judgment within 15 days after receiving notice of the remittitur, the trial court is directed to grant a new trial; appellants to recover their taxable costs on this appeal.

STRAUP, C. J., and FRICK, J., concur.

(47 Utah, 456)

CODY v. CODY. (No. 2876.)

(Supreme Court of Utah. Jan. 28, 1916.)

1. NEW TRIAL ⇐117—NOTICE OF DECISION—NECESSITY FOR SERVING.

Where the decree in divorce was in favor of plaintiff, and was prepared by her attorneys, no notice of decision was necessary in order to set in motion the time for filing and serving a motion for new trial by plaintiff because of refusal of permanent alimony.¹

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 238-241; Dec. Dig. ⇐117.]

2. APPEAL AND ERROR ⇐346—AMENDMENT OF JUDGMENT—EFFECT—MOTION FOR NEW TRIAL.

An amendment to a decree in a divorce case, intended merely to carry into effect the decision of the court, does not extend the six months period in which notice of appeal must be filed and served, if an appeal is desired.²

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1891, 1894; Dec. Dig. ⇐346.]

3. COSTS ⇐246½—APPEAL FORMA PAUPERIS.

While affirmance of a judgment usually carries costs, costs will not be awarded where appellant filed an affidavit of impecuniosity.

[Ed. Note.—For other cases, see Costs, Dec. Dig. ⇐246½.]

4. DIVORCE ⇐280—DECISIONS APPEALABLE.

An appeal will lie from an order of the trial court denying the petition of a wife, who secured a divorce, for an award of alimony, filed long after the rendition of the decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 764; Dec. Dig. ⇐280.]

5. DIVORCE ⇐245—ALIMONY—RIGHT TO.

Under Comp. Laws 1907, § 1212, amended by Laws 1909, c. 109, declaring that, when an interlocutory decree of divorce is made, the court may make such order in relation to the children, property, parties, and maintenance as shall be equitable, and subsequent changes or new orders may be made with respect to the disposal of children and distribution of property as shall be reasonable, a wife, who was granted no alimony when an interlocutory decree of divorce was rendered, will not thereafter be granted alimony on petition to.³

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691-695; Dec. Dig. ⇐245.]

Frick, J., dissenting in part.

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Belle Cody against J. J. Cody. From orders dismissing a motion for new trial and denying an increase of alimony, plaintiff appeals. First appeal dismissed, and order affirmed as to second appeal.

S. P. Armstrong, of Salt Lake City, for appellant. J. W. McKinney, of Salt Lake City, for respondent.

FRICK, J. This proceeding was originally commenced in the district court of Salt Lake county by the plaintiff, Belle Cody, against her husband J. J. Cody, the defendant, to recover judgment for separate maintenance. While the action was pending the plaintiff amended her complaint and prayed for a divorce. The defendant contested plaintiff's prayer for maintenance, as well as for divorce. Permanent alimony was prayed for in the complaint. On the 6th day of November, 1913, the district court aforesaid entered an interlocutory decree for divorce in favor of the plaintiff, under our statute as amended by Laws of Utah 1909, c. 109. In that decree, in addition to being granted a divorce, the plaintiff was also awarded the custody of her infant, a boy of six years of age, and the defendant was required to deposit with the clerk of said court the sum of \$20 a month, which, as stated in the decree, was allowed "as permanent alimony, the same to be used by the plaintiff, or such portion thereof as shall be necessary, for the care and support of said minor child." On the application of the defendant that portion of the decree quoted above was, on the 20th day of December, 1913, amended so as to make the decree conform to the decision of the court as the same was contended to be by the defendant. The decree was accordingly amended, so as to require the defendant "to pay to the clerk of this court the sum of \$20, the same to be used for the care and support of said minor child." Said sum of \$20 was required to be paid monthly, and the record shows that, pursuant to said decree, the defendant paid, and the plaintiff received, the monthly payments from and including November, 1913, and to and including September, 1914. On the 6th day of May, 1914, the plaintiff served and filed a notice of motion for a new trial. On the 26th day of May, 1914, the defendant, by his counsel, filed a motion to strike, or to "dismiss," as it is called, the alleged notice of motion for a new trial, upon the grounds that the same was not filed within the time required by our statute. On June 6th following the court granted defendant's motion, but at the same time, and after granting said motion, also "overruled" plaintiff's motion for a new trial. The plaintiff, on the 19th day of June, 1914, served and filed her notice of appeal from the interlocutory decree entered on November 6, 1913, as before stated.

The defendant has interposed a motion to dismiss the appeal from that decree on the ground that the same was not taken within the time required by our statute, namely, within six months from the entering of the decree, or within six months from the time

¹ Jensen v. Lichtenstein, 145 Pac. 1036.

² Parsons v. Parsons, 40 Utah, 602, 122 Pac. 907; Custer v. Custer, 41 Utah, 575, 126 Pac. 880.

³ Read v. Read, 28 Utah, 297, 78 Pac. 675; Buzzo v. Buzzo, 148 Pac. 362.

the decree became final upon the overruling of the motion for a new trial. Defendant's counsel contend that the notice of motion for a new trial was not filed within the time authorized by our statute, and for that reason the filing of said motion did not have the effect of extending the time for taking an appeal from the interlocutory decree of divorce. While, as we have seen, that decree was entered on November 6, 1913, or more than six months prior to the 19th day of June, 1914, when the notice of appeal was served and filed, yet counsel for the plaintiff insists that the notice of appeal was served within proper time for two reasons: (1) Because no notice of the original decision was served on the plaintiff; and (2) because the original decree was the same as if entered on December 20, 1913, and hence an appeal could legally be taken at any time within six months from that date, and inasmuch as the notice of appeal was served on the 19th day of June, 1914, it was served within six months from the date the judgment or decree became appealable.

[1] As to the first proposition, we remark that the record is conclusive that the decree as entered was entirely in favor of the plaintiff, and that the same was prepared by her attorneys. Surely the statute requiring notice of a decision in order to set in motion the time for serving and filing a notice of motion for a new trial was not intended to apply to the party in whose favor the decision is given, when that party has prepared the findings of fact and conclusions for the court to sign. The party who prepares the findings and conclusions, and decree, must of necessity, as pointed out by us in *Jensen v. Lichtenstein*, 145 Pac. 1036, be deemed to have notice of the decision, and hence is not entitled to further notice thereof. The plaintiff, therefore, was not entitled to notice of the decision in the divorce proceedings, and hence her notice of motion for a new trial was not filed within the time required by our statute, and it therefore could not be used as a means to extend the time within which to take an appeal.

[2] Plaintiff's counsel, however, insists that, even though that be conceded, the decree did not become final until December 20, 1913, when it was amended in the particular we have stated. We are of the opinion, however, that in view of the record in this case the amendment in question did not have the effect contended for by plaintiff's counsel. The alleged amendment, or change, was merely to make the decree reflect the original decision as made by the court. The amendment, therefore, related back to the time when the decree was originally entered, and did not have the effect contended for by counsel, namely, that it was the same as if a new decree had been entered as of that date. The plaintiff, therefore, was required to serve and file notice of appeal within six months from the entering of the interlocutory decree,

if she intended to appeal from that decree, as pointed out in *Parsons v. Parsons*, 40 Utah, 602, 122 Pac. 907, and *Custer v. Custer*, 41 Utah, 575, 126 Pac. 880. That it is manifest she has not done. The motion to dismiss the appeal from the interlocutory decree must therefore prevail.

There is, however, another phase of the case which requires consideration. As already stated, the action was originally commenced for separate maintenance. Notwithstanding that fact, however, the plaintiff asked for permanent alimony in her original complaint in the following words:

"That the court assign and set apart and decree to her, as alimony for the permanent support of herself and her said minor child, such amount of the earnings of the defendant as the court in its discretion may deem just and equitable."

When the complaint was amended by asking for a divorce, the prayer for permanent alimony as given above, remained therein. The court, in the interlocutory decree, however, did not award the plaintiff anything except the \$20 per month for the support of the minor child. As we have before stated, nothing is made to appear in the findings of fact or conclusions of law why no permanent alimony was allowed. In view of the fact that no permanent alimony had been allowed by the court in the interlocutory decree, and that an allowance of only \$20 per month had been made therein for the child, the plaintiff, on the 8th day of September, 1914, served and filed her notice of motion for an allowance to her of permanent alimony, and also asked for an increase in the allowance for the child as aforesaid. The defendant, on the 10th day of September, 1914, filed a motion in which he moved the court "to dismiss said motion for alimony upon the ground that the matter of alimony had been adjudicated." Two days thereafter the court granted defendant's motion and dismissed plaintiff's motion or application for permanent alimony and for an increased allowance for the support of the child. The plaintiff, in her application, in substance alleged that since the interlocutory decree for a divorce was entered her physical condition, by reason of bodily injuries, had changed so that she, at the time and for that reason, was not able to support herself, and also averred that the defendant's earnings were then sufficient to authorize the making of an allowance of alimony for her, and also to permit an increase of the allowance made for the support of the child. All those allegations and averments were contained in papers and affidavits on file in the case, and were specially referred to in the motion. The court, it seems, did not consider the allegations and averments, or changed physical condition of the plaintiff, but entered an order or judgment dismissing the motion upon the sole ground that the matter had been adjudicated in the interlocutory decree of divorce. The plaintiff has also prosecuted a separate ap-

peal from that order or judgment, and now insists that the court erred in that regard.

Defendant's counsel contend that plaintiff's appeal must fail for two reasons: (1) Because the bill of exceptions in which the proceedings are recorded was not settled in time; and (2) because the matter of alimony was adjudicated in the interlocutory decree. And they further assert that, because the appeal from that decree failed for the reasons before stated, we are powerless to review the question.

The contention that the bill of exceptions which contains the matters relating to the second appeal was not settled in time cannot prevail. As to those matters the bill was settled in accordance with the requirements of our statute, and hence we are required to consider the matters therein contained in so far as they have any bearing on the second appeal. The question of whether the matters covered by the second appeal have been adjudicated in the interlocutory decree, and should have been reviewed on the appeal from that decree, if reviewed at all, remains to be considered. It is doubtless true, as contended by defendant's counsel, that where the court allows, or disallows, alimony in the interlocutory decree by which a divorce is granted, the party aggrieved, in the absence of fraud, must review the question on an appeal from that decree, and, in case no appeal is prosecuted from that decree within the time prescribed by our statute, the matter of alimony, like all other matters included in the divorce proceedings, is concluded by that decree. While it is true that in attempting to appeal from the interlocutory decree the plaintiff sought to have reviewed the court's refusal to allow her permanent alimony, yet that fact, standing alone, is not necessarily fatal to her second appeal. Her second appeal is based upon Comp. Laws 1907, § 1212, as amended by chapter 109, Laws Utah 1909. That section reads as follows:

"When an interlocutory decree of divorce is made, the court may make such order in relation to the children, property, parties, and the maintenance of the parties and children as shall be equitable: Provided, that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting to which of the parents they will attach themselves.

"Subsequent changes, or new orders, may be made by the court in respect to the disposal of the children or the distribution of property, as shall be reasonable and proper."

Her counsel contends that, inasmuch as it was made to appear in plaintiff's application that after the interlocutory decree was entered her physical condition had changed by reason of the alleged injuries, and that the defendant, when the application was made, was earning sufficient money to authorize an allowance for alimony and an increase in the allowance originally made for the child, she was at all events entitled to have the court consider her application and make

findings of fact and conclusions of law thereon. That, counsel contends, is what is contemplated by the statute we have quoted above. The contention seems reasonable. The statute in terms provides that:

"Subsequent changes or new orders may be made by the court in respect to the disposal of the children, or the disposition of property as shall be reasonable."

Defendant's counsel, however, contend and cite authorities to the effect that, if the court had in the interlocutory decree granted the plaintiff some amount as permanent alimony, then the court could, upon a proper application and showing, have changed such an allowance; but they insist, in view that the court made no allowance whatever, that therefore there is nothing to change, and hence the only way that a modification or change in the interlocutory decree could have been effected in that regard was by timely appeal to this court, and upon a review of the evidence produced before the trial court. We think the Legislature in adopting the statute intended to, and did, enlarge the common-law powers of our courts of original jurisdiction in divorce proceedings. We also think that the Legislature possessed ample power to pass such a statute. The statute must therefore be given a reasonable construction and application. Although the language is general in permitting "subsequent changes and new orders" to be made, yet we think it was not thereby intended that the courts could at any time review their own former orders or decrees respecting the allowance of alimony, etc., and are of the opinion that what was contemplated by the statute was that where a court had granted a decree of divorce and had allowed alimony, or had made distribution of property and disposal of children, either party could thereafter come into court and allege that since the entry of the original decree material and permanent changes had taken place, by reason of which the allowance of alimony, as made, was either excessive or insufficient under the changed conditions, and that for that reason the existing allowance should either be increased or decreased, as the case may be, or that the distribution of the property, or the disposal of the children, as made, should be changed so as to reflect justice between the parties.

To illustrate: Suppose that after the original decree was entered, in which a fixed sum as permanent alimony was allowed to the wife, she, while still unmarried, should suffer serious personal injuries, or should lose her property, if she had any, and by reason of that fact the previous allowance should be insufficient to supply her with the necessities of life, and it should further be made to appear that her former husband had ample means to supply her wants; why should not the court change or modify the former allowance or make a new order in

that regard, if necessary, in order to prevent the divorced wife from becoming a public charge? Again, suppose that a husband at the time a divorce is granted has ample means, and the court makes a liberal allowance to the wife as alimony, to be paid periodically or otherwise for a definite period of time, and suppose, further, that in such a case the husband, after the decree is entered, and after the time for an appeal has elapsed, suffers financial reverses and loses the most, if not all, of his property, or he is injured physically, or loses his health, and the allowance theretofore made for the divorced wife is no longer just and equitable; why should not the court, upon such a statement of facts being shown, modify the decree by decreasing or setting aside the allowance theretofore made. A change under such circumstances was permitted, even under the statute before it was amended. See *Buzzo v. Buzzo*, 148 Pac. 362. Moreover, why should not a divorced husband be required to increase the allowance made for the maintenance of his minor child, the custody of which was awarded to the divorced wife, in case it was made to appear that after the allowance was made the child suffered permanent physical injuries, or by reason of serious illness, or otherwise, the original allowance is no longer just or sufficient for its maintenance and support?

The foregoing, however, are mere illustrations, and are not intended as fixing the limits within which modifications of existing allowances may be made upon the proper applications and proof and under changed conditions. We have set them forth only for the purpose of showing that there are various conditions that may arise after the granting of the original decree that may require the changes or new orders spoken of in the statute respecting the original allowances made, without giving the courts the power to review their own allowances upon the facts existing at the time they were made. We do not think the Legislature intended that the courts should review the allowances made by them for alimony in divorce proceedings, but what was intended was that, where material new conditions have arisen after the decrees were made, which conditions were not, and could not have been, considered or passed on by the courts, then, upon proper application and proof, the courts may make "subsequent changes or new orders" respecting the allowance of alimony or the distribution of property or the disposal of children. Where a party is dissatisfied with the original allowance or distribution of property, or the disposal of the children, he must prosecute a timely appeal to review the court's orders or decrees in that regard, and in such cases the review must be had upon the evidence adduced upon the original hearing. When the conditions have changed, however, as before stated, the changes or new orders

must be based upon the allegations of the changed conditions and the evidence in support thereof.

We think, therefore, the district court should have heard the evidence in support of plaintiff's application, and should have made findings of fact and conclusions of law upon the evidence, and entered judgment accordingly. By what we have said we do not mean to be understood as holding that the court should have made an additional allowance in this case for the child, or should have made an allowance of alimony in favor of the plaintiff. Applications that are made for a change of allowance, or which require new orders, must first be submitted, considered, and passed on by the trial courts, and those courts must make findings of fact and conclusions of law thereon and enter their judgments accordingly. In that regard much must be left to their discretion, and all we have the power to do is to review their judgments, the same as in other cases.

In conclusion, we remark that the record presented to us is very incomplete, imperfect, and unsatisfactory. This condition, we think, was brought about by two causes: (1) For the reason that different counsel represented plaintiff from time to time pending the proceedings; and (2) that because of appellant's poverty she was unable to advance any money to counsel for costs and expenses, either to prosecute her case or in preparing it on appeal, all of which is made to appear from her affidavit of impecuniosity filed in this court. Notwithstanding the condition of the record, however, we have given it full force and effect, except where the defects were jurisdictional. In view that neither party advanced any money for printing, nor for other purposes in this court, we make no allowance for costs. The district court may, however, make such allowance to the plaintiff in presenting her application as to it may seem just and equitable.

Since writing the foregoing the Chief Justice has handed me his opinion, in which he, in part, dissents from the conclusions reached herein. I have carefully considered what is said by the Chief Justice, and have also again carefully reviewed my conclusions, and, while I agree with much that he says, yet I must confess my inability to yield to the conclusions reached by him. I can see no way to escape the positive provisions of our statute. The Chief Justice, in effect at least, concedes that if the court, in the decree, reserves the right to make changes in the matters contemplated by the statute, then perhaps such can be made in the same action upon filing a proper application therefor. In my judgment, under our statute, the reservation exists to the same extent as though it were written into every decree. True, a proper application should be made, and, as I have pointed out in my

opinion, the court should not attempt a review of his former decree, but should limit any change strictly to the new conditions as they are alleged in the application and established by the evidence. It is often the case that courts deem themselves better qualified to determine what the law should be upon a given subject than the Legislature, and for that reason, by strict construction, practically fritter away the substance of a statute governing that subject.

As stated in the original opinion, in my judgment, our statute clearly confers powers upon the courts of original jurisdiction which they did not possess before it was adopted. These powers should not be minimized or construed away by the court of last resort, simply because that court may deem the power conferred unwise, or that by a careless court it may be too liberally applied, or even at times abused. All courts should exercise the powers conferred upon them carefully, prudently, and conscientiously, and the presumption is that they will do so until the contrary is shown. But in view that the Legislature has conferred the power, it is the exclusive prerogative of that body to withdraw it, or to modify it, if deemed wise to do so. I also concur with the Chief Justice that an application should be made in a formal manner, and that it should be stated therein, in clear and concise terms, just what the applicant complains of and what he desires to prove. While the application in this case is far from a model, yet, under the facts and circumstances, it was sufficient to apprise the court and the opposite party just what the applicant claimed. Nor did the court disregard the application because it was insufficient either in form or substance. For these reasons I am still of the opinion that the former conclusions should prevail.

For the reasons stated the first appeal is dismissed, and the second is sustained. So far we are all agreed, but beyond this we are divided. For the reasons stated in my opinion I still think the order of the trial court dismissing the application to modify the decree should be reversed and the case remanded, with directions to reinstate the application and to proceed in accordance with the views expressed by me. To this my Associates, for the reasons stated by them in their separate opinions, do not agree, and their judgment in that regard must therefore prevail. The order of the court below dismissing the application to modify the decree, therefore, should be, and it accordingly is, affirmed.

[3] Ordinarily, under the statute, the affrmance of the judgment carries costs. In this case, however, the appellant, who was the former wife of respondent, files an affidavit of impecuniosity, and the appeal, therefore, is one in forma pauperis. We shall therefore make no order for costs in favor of respondent against his former wife.

STRAUP, C. J. (dissenting). The plaintiff, in her amended complaint, asked for a divorce on the grounds of cruelty, permanent alimony, custody of the child, and an award for its support. The defendant denied the allegations of cruelty, and alleged that the plaintiff was addicted to the use of opiates and intoxicating liquors, and was guilty of adultery and licentious conduct. The court found the issues in favor of the plaintiff, granted her a divorce, awarded her the custody of the child and \$20 a month for its support, but awarded her nothing for alimony or counsel fees. Neither a motion for a new trial nor an appeal from that judgment was made or taken in time; hence the proceedings resulting in the judgment are not properly before us for review. Nearly a year after the judgment became final and irreversible, the plaintiff served and filed a notice that she, on a day named, would ask the court for an allowance of \$50 a month as permanent alimony, and an increase of \$20 a month for the support of the child. The notice, of course, was not verified, and was signed only by plaintiff's counsel. It stated that the motion would be based on the fact that since the decree the plaintiff had sustained personal injuries by accident which incapacitated her from earning a livelihood, and that it would be made upon "the records and files and minutes of the court in said cause and upon testimony of witnesses to be produced at the hearing of this motion." Nothing else was filed to invoke action to modify the decree.

The defendant served and filed a notice of motion that on a specified day he would ask the court to dismiss plaintiff's motion, on the ground that "the question of alimony has heretofore been decided and adjudged by this court by its decree herein, by which decree the said plaintiff is denied alimony." Both these motions came on for hearing. The court, first hearing arguments on the defendant's motion, granted it, and dismissed plaintiff's motion to modify the decree. Then the plaintiff, as stated by her counsel, "to make a record," stated that he offered to show that the defendant then was, "and during the course of these proceedings, since this action was brought, had been, earning in the neighborhood of \$200 a month," and that since the decree the plaintiff had sustained personal injuries," so that she is not able to do work which she could do prior to that time and had been doing," and that "she is not able to earn wages or to do housework to any great extent, and is not able to earn a living by reason of those injuries, and by reason of injuries which she had received during the marriage, which partially incapacitated her from doing housework, which is the only kind of work she is capable of doing; that those injuries had been greatly aggravated by this fall, and that particularly since that time she has been unable to earn anything more than probably

her board and room; and we ask for an allowance of alimony, both on the ground that it should have been originally awarded, and on the ground of the change of the condition of the plaintiff since the divorce, that she should have alimony awarded, and that the defendant is amply able to pay a reasonable allowance of alimony." It is thus seen that the modification of the decree was asked on error, and matters adjudicated in the original decree, and on the only new matter or changed conditions, that the plaintiff, since the decree, had by accident sustained personal injuries.

[4, 5] Now, I think the ruling an appealable order; but I think the motion to modify the decree was properly dismissed. I have no doubt that, under the statute, when judicial action is properly invoked, the court, as to orders which relate to alimony, custody of children, and awards for their support, when they are continuing and over which the court retains a continuing jurisdiction, is authorized on a proper showing to modify the decree in such particulars. But a further essential to such relief and which is universally agreed upon, is that there must be averments and proof of a change of circumstances or conditions of the parties. Thus I think the order awarding \$20 a month for the support of the child was, on such averments and proof, subject to modification. Such an order by its very nature is continuing. So also was the order awarding the custody of the child continuing and subject to modification according to changed conditions, circumstances, habits, and conduct of the parties. So also would be an order allowing alimony for a designated amount per month or other stated period, or until the happening of a contingency or contingencies. But where, upon issues and evidence, the question of alimony is set at rest, either by awarding a gross sum in lieu of all rights in and to the husband's property, or where, in lieu of all such rights specific property is in fee awarded to the wife, or where, upon issues and evidence adduced, no alimony whatever is awarded, then I think such an order is final and constitutes a full discharge, unless the order awarding no alimony is based upon grounds that the husband then had no property and no means with which to support the wife, and physically was unable to earn support for her, and that he thereafter acquired property or otherwise became able to support her.

I know there are authorities which hold that a final judgment for alimony in gross is, even after the judgment becomes irreversible, subject to modification on averments and proof of changed conditions and circumstances. But I believe the better rule and weight of authority to be against such a holding. The cases bearing on the question may be found in 7 Standard Ency. of Procedure, 842; 17 Century Digest, Divorce, § 692; 7 Decennial Digest, Divorce, § 245;

2 Nelson on Divorce, §§ 933a and 934. Except dicta stated in them, there is nothing in Read v. Read, 28 Utah, 297, 78 Pac. 675, or Buzzo v. Buzzo, 148 Pac. 362, to make against this. If an order allowing alimony in gross, or specific property in lieu of all rights in and to the husband's property, is final and res adjudicata, and not open to modification, except upon averments and proof of fraud, deceit, or misrepresentation in procuring the order, for just as cogent reasons do I think an adjudication upon issues and evidence awarding no alimony is likewise final and set at rest, and not subject to modification, except on averments and proof of fraud, deceit, or misrepresentation in procuring it.

Though it should be assumed that the order was continuing, both as to the disallowance of alimony and the award for the support of the child, still, I am of the opinion that the motion for a modification of the decree was properly dismissed, on the ground that judicial action for a modification was not properly invoked. To invoke such action it, of course, was not essential to bring a new action. The plaintiff could move for a modification in the main cause. But to do that it nevertheless was requisite to file a verified petition, or affidavit, or some pleading, setting forth the new matter, or facts constituting the changed conditions or circumstances of the parties. 7 Standard Ency. of Procedure, 844; 14 Cyc. 787. Nothing of that kind was filed, and until something of that kind was filed judicial action for a modification was not properly invoked. All that the plaintiff did was to serve and file a notice that she at a specified time would apply to the court for a modification of the decree in the particulars stated in the notice. Such a notice but served the purpose of a summons or citation or process to appear. It was no more traversable than is a summons or citation. As well could it be sought to take a judgment on a summons without a complaint as a modification of the judgment on a mere notice, without a petition or affidavit or some pleading calculated to invoke action and confer power. To sanction the latter requires but a further step to permit the former. If a party desires a modification of a decree which has become final and irreversible, there is no hardship in requiring the filing of a petition, affidavit, or some pleading setting forth the facts relied on to invoke action and secure relief. I do not well see how such action may otherwise be invoked. To look at the notice itself for averments of facts is to confuse process with pleadings and to do violence to well-recognized principles that pleadings, not process, are the juridical means of investing a court with jurisdiction to adjudicate; that the jurisdictional facts must affirmatively appear and be stated in the right pleading; that fundamental principles of procedure arise, not from process, but from organic law; and that the jurisdictional record, the right record, and

which generally is strictly construed; must sustain the order or judgment—otherwise the proceedings will be regarded as coram non judice. Because no such petition, or affidavit, or other instrument in the nature of a pleading, was filed, I think the court was without jurisdiction to modify the decree in any particular, and that it therefore properly dismissed the motion.

Though the notice should be regarded as the juridical means to invest the court with jurisdiction to modify, yet, when it is looked to, it fails in substance. So far as it relates to the award for the support of the child, it is wholly wanting in facts as to changed conditions or circumstances. The only new matter stated to modify the order of disallowance of alimony is that the plaintiff, since the decree, sustained personal injuries. But it is not made to appear in what respect such alleged new matter was pertinent. Neither the findings nor the decree in the original cause show the specific ground on which the court denied the allowance of alimony. In this proceeding it must be assumed that the disallowance was based upon some good ground justifying it. If the court, on the issues and evidence, erred in such respect, the error ought to have been corrected by a motion for a new trial or by appeal, which, as has been seen, were not invoked in time. The matter, therefore, stands as though no action was taken to correct what, if any, errors were made. Thus, must it be presumed that there were no errors and that the court properly, and for good cause, disallowed alimony? The grounds upon which the disallowance was based are but inferable. It certainly was not done on the ground that the plaintiff had property, or herself had other means of support, for the undenied averments in the pleadings show that she had no property or other means of support. Neither was the disallowance made upon the ground of any disability of the defendant, for by his answer in the original cause it was admitted that he was a railroad engineer in the employ of a railroad company and that "his average earnings are about \$150 per month." Thus it would seem that the court disallowed alimony upon the ground of misconduct or misbehavior of the plaintiff.

True, the court, in general terms, found the averments of the complaint to be true, and those of the answer to be untrue, from which it can be argued that the court found that the plaintiff was not guilty of the alleged misconduct in the answer. But the fact nevertheless remains that the court disallowed alimony; and it may be that after the court found the averments in the complaint to be true and those in the answer to be untrue, it most grievously erred in disallowing alimony. But, as before observed, if so, that ought to have been corrected by a motion for a new trial, or by an appeal. It cannot be corrected on an application for a

modification of the decree, for that must proceed on the theory of new matter and changed conditions and circumstances of the parties which have arisen since the decree or upon facts fraudulently withheld. So unless it is made to appear by averments and proof that the disallowance of alimony was based on the ground that the plaintiff had ability to earn her own support and livelihood, and since became disabled, or that when the decree was rendered the defendant was without ability, and since became able, the fact that the plaintiff, since the decree, sustained personal injury affecting her ability to support herself is not pertinent. That the plaintiff since the decree sustained personal injury affords no ground to now review the ruling of the court in disallowing alimony, and now do what the court could have done on a motion for a new trial, or what we could have done on an appeal—correct the error, if one in such particular was made, and award alimony. That would be a most novel writ of error, or review, or method to restore a lost appeal or motion for a new trial. If, on the other hand, the court disallowed alimony on the ground of misconduct of the plaintiff, then, of course, the fact that she, since the decree, sustained personal injury, would have no bearing on the modification of such an order. So I do not see how, on an application for a modification of the decree, the merits of a ruling made in the main cause may be reviewed, or the question of alimony thrown at large, as it seems was attempted by plaintiff's offer of proof, because she, since the decree, sustained personal injuries.

I therefore think the plaintiff's motion to modify the decree was properly dismissed.

MCCARTY, J. Comp. Laws 1907, § 1212, so far as material here, provides:

"When a divorce is decreed, the court may make such order in relation to the children, property, parties, and the maintenance of the parties and children as shall be equitable. * * * *Subsequent changes may be made by the court in respect to the disposal of children or the distribution of property, as shall be reasonable and proper.*"

While the scope and intent of that part of the section which I have italicized is not free from doubt, I am of the opinion that it can only be invoked for the purpose of procuring "changes" in the distribution of property in cases where an order respecting distribution has been made. In other words, the phraseology, "*subsequent changes* * * * *of the distribution of property,*" presupposes that some order respecting distribution has been made. In this case no order respecting alimony or distribution was made by the court; hence I am of the opinion that the court was without jurisdiction to make any order of distribution.

I therefore concur with the reasoning of, and in the conclusions reached by, the Chief Justice.

(47 Utah, 571)

McMILLAN v. FORSYTHE et al. (No. 2624.)

(Supreme Court of Utah. Dec. 3, 1915. Rehearing Denied Feb. 11, 1916.)

1. APPEARANCE ⇐9—GENERAL DEMURRER—"GENERAL APPEARANCE."

Under Utah practice the filing of a general demurrer constitutes a general appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. ⇐9.]

For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

2. JUSTICES OF THE PEACE ⇐90—PLEADINGS.

Pleadings in justice court, except the complaint, may be oral.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 306; Dec. Dig. ⇐90.]

3. JUSTICES OF THE PEACE ⇐128—RECITAL IN JUDGMENT—CONCLUSIVENESS.

In an action to vacate a justice judgment entered on the then defendant's default, the justice judgment's recital that "From the evidence I find the defendant is indebted," etc., is not conclusive under the statute that the justice heard evidence and rendered judgment in accordance therewith, as required by Comp. Laws 1907, § 3707, but only controvertible prima facie evidence.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

4. JUSTICES OF THE PEACE ⇐128—COLLUSIVENESS OF JUDGMENT—SUFFICIENCY OF EVIDENCE.

In an action to vacate a justice judgment, entered on the then defendant's default, evidence held sufficient to show collusion between the justice and the then plaintiff's attorney in obtaining the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

5. JUSTICES OF THE PEACE ⇐84—APPEARANCE—DEMURRER.

Where a justice did not receive his authorized filing fee of 10 cents with a demurrer sent him by defendant's attorneys in an action before him, but received and retained such demurrer without notifying the attorneys, such demurrer was filed in his office for the purpose of an appearance by defendant.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 266-273; Dec. Dig. ⇐84.]

6. JUSTICES OF THE PEACE ⇐128—DEFAULT JUDGMENT—PROPRIETY.

Where defendant, in an action before a justice, appeared by filing his demurrer, his counsel had the right to assume that the justice would perform his statutory duty to notify of the time of trial, and a default judgment, entered by the justice without such notice, was improper.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

7. JUSTICES OF THE PEACE ⇐59—PRESUMPTIONS FAVORING JUDGMENT.

No conclusive presumptions prevail in favor of the judgment of a justice of the peace.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 216; Dec. Dig. ⇐59.]

8. JUSTICES OF THE PEACE ⇐128—VACATING JUDGMENT—EVIDENCE.

In an action to vacate a justice judgment, it was proper for the plaintiff to show all the facts respecting the conduct of the justice, as

well as of the attorney for the then plaintiff in the action before him, so far as such conduct related to the procuring of the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

9. JUSTICES OF THE PEACE ⇐128—JUDGMENT—VALIDITY.

The fact that plaintiff, in an action before a justice, had no cause of action when the action was commenced did not render the judgment for him void on its face, but it was a matter proper to be shown, in an action to set aside the judgment, as reflecting on the conduct of the justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

10. JUSTICES OF THE PEACE ⇐128—VACATING JUDGMENT.

Where a justice of the peace improperly entered a default judgment, and the plaintiff and his counsel, in the action before the justice, opposed the party against whom the judgment was entered in his attempt to avoid it, invoking all means in their power to enforce the judgment, plaintiff and his attorney must be held, in the other party's action to set aside the judgment, partakers of the wrong acts of the justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

11. JUSTICES OF THE PEACE ⇐128—VACATING JUDGMENT.

Plaintiff, in an action before a justice, whose attorney participated in the wrong of the justice in improperly entering a judgment against defendant in the action by default, could not resist defendant's action to vacate the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

12. JUSTICES OF THE PEACE ⇐128—VACATING JUDGMENT—EQUITABLE RELIEF.

Where plaintiff, in an action before a justice, had no cause of action, and the justice acted corruptly in entering a default judgment for him, such judgment will be set aside at the suit of the defendant in the action, since a court of equity will restrain proceedings upon a judgment at law where its enforcement is against conscience if the applicant comes into court with clean hands, has exhausted his legal remedies, is free from laches, and has a meritorious defense.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

13. JUSTICES OF THE PEACE ⇐128—VACATING JUDGMENT—LACHES.

Where a justice of the peace without taking evidence corruptly entered a default judgment against defendant, the judgment being kept from the knowledge of defendant for several years, when, believing that he had lost his right of appeal, he unsuccessfully endeavored to review it by certiorari, and thereafter was unsuccessful in appealing, the district court being restrained from hearing the appeal, as it was not taken in time, he was not barred by laches from claiming equitable relief against such judgment, under the broad rules of equity governing the reopening of judgments secured by fraud and collusion.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. ⇐128.]

Straup, C. J., dissenting.

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Neal McMillan against William R. Forsythe and others. From a judgment for plaintiff, defendants appeal. Affirmed.

El. A. Walton, of Salt Lake City, for appellants. Ray Van Cott and Geo. M. Sullivan, both of Salt Lake City, for respondent.

FRICK, J. The plaintiff, respondent in this court, commenced this action against the defendants, appellants here, to vacate a judgment and to enjoin its enforcement. The judgment in question was obtained against respondent by the appellant William R. Forsythe in the justice's court of Murray City, Salt Lake county. Appellant Francis G. Luke was the attorney for Forsythe in the justice's court, and he and James A. Luke are the principal stockholders of the appellant Merchants' Protective Association, a corporation, which is a collecting agency through which the judgment in the justice's court was obtained. The subject of this action in different forms has already been before us twice. *McMillan v. Durand*, 38 Utah, 274, 112 Pac. 807, and *Forsythe v. District Court*, 41 Utah, 16, 123 Pac. 621. Durand is the justice of the peace who rendered the judgment in question. In the first case respondent sought to obtain relief against the judgment by certiorari proceedings, but by reason of the incompleteness of the justice's record the writ was denied by the district court and on appeal to this court we affirmed the judgment. Respondent then undertook to appeal from the justice's judgment to the district court of Salt Lake county, and the appellant Forsythe applied to this court for a writ of prohibition to prevent said court from taking jurisdiction and to try said appeal upon the ground that the same was not taken within the time required by our statute. The writ was issued, and upon a hearing the district court was restrained from trying said appeal. See *Forsythe v. District Court*, supra. Respondent then commenced this proceeding in equity for the purpose before stated. A hearing in the district court resulted in findings in favor of respondent, and said court entered judgment vacating the justice's judgment and enjoining its enforcement upon the ground of collusion and fraud practiced in procuring it.

All the defendants appeal from the judgment. They assail the sufficiency of the evidence to sustain the findings, and insist that the judgment is "against law." What they really complain of is perhaps best stated in their own language which is found on page 4 of their brief as follows:

"Appellants have assigned very many errors, but we shall not discuss them separately. They principally relate to our contention that the judgment is against law, and that any finding of fraud is without support in the evidence."

It is not necessary to refer to the pleadings, except to state that the complaint con-

tained the entire history of the case and alleged collusion and fraud and contained a plea of payment, as well as one of the statute of limitations, as defenses to the cause of action alleged in the justice's court. The collusion and fraud were denied in the answer, and the certiorari proceedings had, as shown on the appeal to this court and the writ of prohibition, were set forth as defenses to this action. The facts upon which the findings and judgment in this case are based, briefly stated, are as follows: On the 9th day of February, 1907, appellant Forsythe, by his attorney Francis G. Luke, filed his complaint against the respondent McMillan in the justice's court of Murray City, in which the alleged cause of action is stated, in the following words:

"That on or about the 15th day of January 1904, at Murray City, Salt Lake county, state of Utah, the defendant became indebted to the plaintiff in the sum of \$183 on account of labor performed by the plaintiff to the defendant, on or about the day aforesaid, at defendant's special request. That the defendant has not paid the same, nor any part thereof."

Judgment was asked for the amount stated. The complaint was signed by Francis G. Luke as attorney, but was not verified as required by Comp. Laws 1907, § 3685. Summons was duly issued, which was served on respondent on the 25th day of February, 1907, and two days thereafter respondent, by his attorneys, who lived and had their offices in Salt Lake City, deposited in the United States post office, postage prepaid, a demurrer in due form addressed to the justice before whom the complaint was filed. Said justice received said demurrer and indorsed thereon the following: "Rec'd. 2-28-'07." He did not file the same in the action for the reason, as he afterwards said, that he held the same for a 10-cent filing fee. The justice, without notice of any kind to either the respondent or his attorneys, and notwithstanding he had received and retained the demurrer as aforesaid, on the 11th day of March, 1907, entered a judgment by default against respondent for the full amount claimed in the complaint. On the hearing of the case at bar it was established without question that in entering the judgment in question the justice heard no evidence whatever; that the claim for which suit was brought was for services which Forsythe claimed he had rendered for respondent during the years 1898, 1899, and 1900 in Sevier county, Utah, and for which services he had been fully paid. The checks issued by respondent and delivered to Forsythe in payment for said services were produced in evidence, the last one of which is dated April 30, 1900. Neither Forsythe, nor any one else, disputed the evidence of payment, nor made any claim whatever at the trial that respondent was indebted to him in any amount at the time of trial, or that he was at any time except as stated above. It is due counsel for appellants to state here that his view of the mat-

ter was that he was not required to contradict or meet those matters. For the purpose of this decision the facts herein stated must be assumed to be true. It was also made to appear that the Merchants' Protective Association claimed one-half of the judgment as a collection fee, and that Francis G. Luke and James A. Luke owned a majority of the capital stock of said association. It was also shown without contradiction that not a single fact stated in the complaint filed in the justice's court was true; that it was not true that respondent, on the 15th day of January, 1904, or at any time, "became indebted to the plaintiff" aforesaid "at Murray City, Salt Lake county"; that neither the respondent nor his attorneys knew that a judgment by default, or otherwise, had been entered in the case, but that they believed the case was pending upon the demurrer and did not learn of the judgment, or that the demurrer was "held for fees" until some time in July, 1910, when an execution was issued on the judgment, and from which time respondent and his attorneys have constantly been trying to prevent the enforcement of the judgment, first by the writ of certiorari, and then by appeal as hereinbefore stated. It was further shown that at the time the attorney for Forsythe prepared the complaint filed in the justice's court he had evidence before him of the fact that, even though Forsythe at one time had a meritorious claim, yet that it had been barred by our statute for a number of years before the complaint was filed, and, further, that Forsythe in fact at no time had any claim whatever against respondent which arose at Murray or in the year 1904 as alleged. It did appear, however, that during all the years that the alleged services were rendered up to the time that the action was brought Forsythe never made any claim whatever that respondent was indebted to him either for services or otherwise.

The justice was called as a witness by respondent, and he admitted that he received the demurrer as before stated, and that it was indorsed "held for fees"; that he was well acquainted with respondent, who, lived at Murray City about all his life, and at the time lived within a block or so from the justice's office; that if he had notified respondent respecting the fee, in all probability he would have received it forthwith; that the complaint filed in the case was a printed form used by said collecting agency to commence actions in said justice's court. It was also shown that both Francis G. Luke and James A. Luke were, and for many years had been, well acquainted with respondent's attorneys, and were so acquainted at the time the action was commenced in the justice's court and when the demurrer was filed, and that they all had their offices in Salt Lake City. It was also testified to by respondent's attorney, and not disputed, that at the time the demurrer was filed he was not

aware that justices did charge, or had a right to demand, a fee of 10 cents for filing a demurrer, and that he in his practice never had paid, and never had been required to advance, such a fee. The attorney conceded, however, that the justice may have had a legal right to demand a fee of 10 cents.

The only question for us to solve is whether, under the facts and circumstances, the district court erred in granting the relief before stated.

[1] By our statute, Comp. Laws 1907, § 3771, justice's courts are declared to be courts of limited jurisdiction. The filing of a general demurrer, under our practice, constitutes a general appearance. In section 3684 it is provided that when a party has appeared it is the duty of the justice to fix a time for trial and to notify the parties who have appeared in the action of the time so fixed.

[2, 3] Pleadings, except the complaint, may be oral. Section 3707 in part provides that if the defendant fails to appear within an hour after the time specified in the notice of trial, as provided in section 3684 "the justice must, upon application of the plaintiff, enter the default of the defendant and hear the evidence offered by the plaintiff, and render judgment in his favor for such sum, not exceeding the amount specified in the complaint, as appears by such evidence to be just." By section 3757 it is provided that the justice must keep a docket in which, among other things, he must enter "the time when the parties, or either of them, appear, or their nonappearance, if default be made; * * * the names of all witnesses sworn, and at whose request; * * * the judgment of the court, * * * and the time when rendered." By section 3758 the entries aforesaid are declared to be "prima facie evidence of the facts so stated." The docket entries in the case of Forsythe v. McMillan did not disclose that any witness was sworn, nor that any evidence was heard, notwithstanding that by section 3707, supra, the justice is required to hear evidence and to render judgment in accordance therewith. True, the justice incorporated into the judgment this recital:

"From the evidence I find the defendant is indebted to plaintiff in the sum of \$200.30, including interest."

[4] This however, it is apparent, was a mere form of expression. But if it be assumed that this recital is sufficient to show that evidence was heard, yet, under our statute, in a proceeding like the one at bar, such a recital is not conclusive, but is only prima facie evidence of the fact recited, and may thus be controverted by any proper evidence. Such has been held to be the law under a statute of California, from which ours is copied, in *Rauer v. Justice's Court*, 115 Cal. 84, 46 Pac. 870. The evidence is without contradiction that no evidence whatever was heard by the justice. It is also

not questioned that the complaint was not verified. The judgment was therefore entered without a word of testimony by any one, without any evidence whatever, and without a claim of any kind under oath. For the reasons just stated we need not speculate upon the effect that such a recital would have in a judgment entered in a court of record, or of one of general jurisdiction in a proceeding of this character. The facts, therefore, are that an appearance was made by the defendant in the action by the filing of a demurrer, that he, however, did not appear further in the case because of the circumstances hereinbefore stated, and that judgment was entered without any evidence whatever upon a complaint not verified. If the action had been commenced in one of our courts of record or of general jurisdiction, a default judgment could not have been legally entered until the complaint had been verified. Let us assume, however, that the judgment was for those reasons not void, but merely irregular, yet, from all the evidence and circumstances and the conduct of the justice, collusion between him and Forsythe's attorney is clearly inferable in obtaining the judgment in the manner it was done.

[5] Let it also be assumed that the justice was authorized to demand a filing fee of 10 cents for filing the demurrer, yet, under the circumstances, we think when he received and retained the demurrer in the manner he did, it must be deemed as having been filed in his office for the purpose of an appearance by respondent in the action. Suppose the respondent had thereafter sought to avoid the effect of the appearance, would not the fact that he had mailed the demurrer, and that it was received by the justice as stated, have prevented him from successfully doing so? If the justice did not want the demurrer to have that effect, we think it was his duty to notify either the respondent or his attorneys, and if the fee was then refused, the demurrer could have been stricken. Again, if the justice did not desire to receive the demurrer, he could have returned it forthwith to the attorneys. His conduct cannot be justified under any view that can be taken, and, in our judgment, it amounted to a willful concealment that a judgment by default would be entered against respondent.

[6] As we have pointed out, under the statute, after the respondent had appeared by filing the demurrer he or his counsel were entitled to a notice from the justice in which the time of trial was fixed. After filing the demurrer, therefore, counsel had a right to assume that the justice would perform his duty in that regard, and before proceeding further would notify them. The receipt of the demurrer by the justice clearly constituted a filing thereof within the decision of the Supreme Court of California in *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501-506. But let us again assume that the justice's conduct in that regard merely constituted a gross

irregularity, and that inasmuch as he had acquired jurisdiction, the judgment is not void for that reason. But here again it amounts to proof of improper conduct on the part of the justice from which the trial court was justified to infer both collusion and concealment.

[7, 8] In view that no conclusive presumptions prevail in favor of the judgment in question, it certainly was proper for respondent to show all the facts respecting the conduct of the justice, as well as of the attorney for Forsythe, so far as that conduct related to the procuring of the judgment in question.

[8] Moreover, he had a right to show that no cause of action whatever existed in favor of Forsythe at the time the action was commenced. While that fact, standing alone, would not make the judgment void on its face, yet it was proper to show the fact as reflecting upon and characterizing the conduct of the justice and that of the attorney for Forsythe. Let it be remembered, also, that under the circumstances the justice's conduct cannot be attributed to innocent ignorance. When his memory was searched by counsel with regard to whether he heard any evidence before entering the judgment, he evaded the subject and attempted to shield himself behind the statement that he did not charge his memory with "that case any more than hundreds of other cases." By "that case" he referred to the case in question. He, however, admitted that he never had seen Forsythe, nor had any recollection of hearing any evidence. If, therefore, he conducted hundreds of other cases, he must have been conversant with the law and practice respecting his duty to hear evidence before entering a judgment, and to act impartially in all matters brought to his court. It seems to us he was well informed respecting his right to demand a 10-cent fee from respondent, and he, in the interest of Forsythe or his attorney, relied on his right in that regard as the only excuse for entering a default judgment against respondent. Upon the other hand, he was so kind and considerate as not to expose Forsythe, or his attorney, to the charge of perjury or of subornation thereof that he was willing to and did enter judgment without any evidence or without requiring the complaint to be verified as required by the statute. Such conduct by any one who essays to wear the garb of a judge, and who pretends to act in the name of justice, is utterly indefensible either in law or morals.

[10] But it is contended that, although the justice was guilty of the acts charged, yet unless Forsythe had knowledge thereof or had participated therein, he is not to be held responsible therefor. Such, however, is not the law. Both Forsythe and his counsel Francis G. Luke, who has a personal interest in the judgment, from the very first have sought to retain every advantage which a

judgment at law gives to him in whose favor it is rendered. They always have opposed, and continue to oppose, respondent in his attempt to avoid what he deems a mere extortion of money, and they have invoked all means within their power to maintain the judgment and to enforce it. Such being their conduct and attitude, they must, so far as this proceeding is concerned, be held as partakers of the wrongful acts of the justice. In a note to *Little Rock, etc., Ry. Co. v. Wells*, 54 Am. St. Rep. 238, the rule applicable to cases like the one at bar is stated thus:

"If there is fraud upon the part of the court or judge, there seems to be no reason why it does not constitute as complete a ground for relief as if the prevailing party had been guilty thereof. Such fraud can but rarely occur without a conspiracy between the judge and the party benefited, and, even if there be not such conspiracy in the beginning, the party benefited ought to be regarded as joining therein when, being informed thereof, he seeks to retain its advantage" (citing cases).

[11] But we need not go to that extent in this case, since it is clearly inferable from the whole evidence that Francis G. Luke, the attorney for Forsythe, had knowledge of the justice's conduct, and either connived at his acts or actually participated therein. Forsythe may thus not profit by the wrongs of his agent and attorney. *Webster v. Diamond*, 36 Ark. 543, where it is held that under such circumstances relief in equity from a judgment is proper.

[12] Let us now for a few moments examine into the law respecting the power of courts of equity to interfere with judgments and under what circumstances such interference is permissible. The Supreme Court of Indiana, in *Walker v. Heller*, 90 Ind. 200, states the rule thus:

"It is well settled that a court of equity will restrain proceedings, upon a judgment at law, where its enforcement is against conscience, and the same has been recovered by an unfair advantage. Wherever, by accident, mistake, fraud, or otherwise, an unfair advantage has been obtained in proceedings at law, and it is against conscience to make use of such advantage, a court of equity will restrain the party from making use of the same; and, after judgment, any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not avail himself in defense of the suit, will authorize the court to interfere by injunction and restrain the party from enforcing the judgment. These are familiar principles, and are not questioned by the parties to this controversy."

In *Lockwood v. Mitchell*, 19 Ohio, 451, 53 Am. Dec. 438, the court, in referring to the law upon the subject, says:

"A decree or judgment receives its force from the fact that it is the decision of a competent tribunal, before which both the parties have had an opportunity of appearing and prosecuting their claims and having them fairly adjudicated. When this is prevented by the fraud or circumvention of one of the parties, without the fault or negligence of the other, the decree or judgment of the court ceases to have its binding effect, and it is competent for the party injured to resort to a court of chancery to obtain relief."

In *Bibend v. Kreutz*, 20 Cal., at page 115, the Supreme Court of California quotes and adopts the language from *Story's Equity*, § 885, as follows:

"In general," says Story, "it may be stated that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained."

The question is thoroughly discussed in *High on Injunctions*, §§ 190 to 208, inclusive, to which we refer the reader. In section 200, in attempting to formulate a general rule, the author says:

"Illustrations of the rule as above stated are numerous, but the same general principle of preventing one who has gained a legal advantage by fraud from availing himself of its benefits will be found to underlie them all."

Of course, to be entitled to relief, the applicant must come into a court of equity with clean hands; he must have exhausted his legal remedies, be free from laches, and ordinarily must prove that he has a meritorious defense to the action. Moreover, the fraud must not relate to the original cause of action, but must affect the judgment from which relief is sought. Under the evidence all must concede that Forsythe had no cause of action against respondent when the action in the justice's court was commenced. It is equally clear that the justice merely prostituted his powers as a court in the interest of Forsythe and his attorney Luke, and disregarded every rule of law and justice, as well as practice, in order to enter judgment in favor of Forsythe, and against respondent, who, it is shown, was a man of large property interests, and well able to pay the judgment. The judgment, entered as it was in the very teeth of the statute which authorizes the justice to enter a judgment only after hearing the evidence, is a fraud and a sham, and is enforceable only because it has the form of a valid judgment.

In *Wagner v. Shank*, 59 Md. 322, the Court of Appeals of Maryland, in referring to a judgment which was entered by default by a justice under a statute which, like ours, required the justice to hear evidence, it is said:

"Judgments entered up as these were are simply shams, mere attempts to create debts by the forms of law where none were ever proved to exist, or where none in fact ever existed."

[13] It is contended that respondent and his counsel were guilty of laches, and for that reason are not entitled to prevail in equity. This is really the only serious question in the case. The writer has examined a great number of cases, and from a consideration of them all has become thoroughly convinced that upon that question no hard and fast rule should be laid down, but every case should be determined in accordance with

its own peculiar facts and circumstances. While judgments cannot be assailed and courts of equity may not, except for good and sufficient cause, reopen matters once litigated, yet in actions where, as here, fraud and collusion may be inferred from the acts of the justice and counsel in obtaining the judgment which is assailed, then the inflexible and somewhat narrow and strict rules of law no longer have any application, but the broader, more flexible and utilitarian rules of equity must determine the result. It is in the light of those rules, therefore, that we must approach the question. It is contended that respondent had a remedy by appeal, and hence cannot invoke the powers of a court of equity. The facts in that regard are these: In the year 1907 the Legislature amended the statute respecting the taking of appeals from justices' courts to the district courts. Laws 1907, p. 256. The amendment went into effect on the 25th day of March, 1907, or 14 days after the judgment which it is sought to vacate was entered. Before the amendment was passed an appeal had to be taken within 30 days after the rendition of the judgment. The Legislature, in order to avoid concealment, so amended the statute that, in order to set the running of the time for taking an appeal in motion, the prevailing party was required to serve his adversary with notice of the entry of judgment, stating the time when it was entered. This statute was apparently overlooked by respondent's counsel, and thus, when they learned, in July, 1910, that the judgment had been rendered on the 11th day of March, 1907, they assumed that the time within which to prosecute an appeal had passed, and hence they commenced the proceedings of certiorari under Comp. Laws 1907, § 3630, in which, so far as judgments in justices' courts are concerned, it is provided:

"Said writ shall issue at any time, after judgment, and the district court shall, pursuant to said writ, inspect and review the proceedings had in the justice's court, and shall determine whether said justice's court had jurisdiction of the cause of action or the person of the defendant, and had regularly pursued its authority as prescribed by law." (Italics ours.)

After the judgment sought to be vacated herein had been entered we held that a party could waive the notice of entry of judgment provided for in the amendment of March 25, 1907, supra, and that a direct attack upon the judgment constituted such a waiver. *State v. District Court*, 38 Utah, 138, 110 Pac. 981, Ann. Cas. 1913B, 437. When, therefore, an appeal was taken to the district court after the certiorari proceedings had failed, Forsythe instituted prohibition proceedings to restrain the district court from hearing said appeal. In that proceeding he was successful. *Forsythe v. District Court*, 41 Utah, 16, 123 Pac. 621. We there held that, inasmuch as respondent had directly assailed the judgment by certiorari proceedings, upon the

authority of *State v. District Court*, supra, he had waived the notice of entry of judgment, and that the appeal was therefore not taken in time. For those reasons it is now contended by appellants that respondent must again fail upon the ground of laches in not pursuing the proper remedy at the proper time. While it is true that under the law as we have construed it in *State v. District Court*, supra, respondent lost his right of appeal, yet we do not think that under the peculiar facts and circumstances of this case the defense of laches should prevail. As was said by the Court of Appeals of Maryland, in *Wagner v. Shank*, supra, at page 318 of 59 Md., in passing upon this question:

"But this rule in terms recognizes the doctrine, which is equally well settled, that where a party is not in fault by failing to use reasonable diligence, and is prevented from defending the action at law, by fraud or accident, or the acts of the opposite party, equity will lend its aid and give relief."

The only laches that can be attributed to counsel is that they did not avail themselves of the amendment of 1907 respecting the right of appeal. Under the law, as it stood when the judgment was entered, the right of appeal had lapsed long before counsel and appellant learned of the judgment. Why should respondent, with regard to that law, be charged with laches any more than Forsythe or his attorney? After the amendment of 1907 it became their duty to serve the notice of entry of judgment, but they failed to do so, and made no attempt to do so until August 10th, after respondent had instituted the certiorari proceedings, and had thus waived his right to the notice. By the justice's conduct respecting the demurrer respondent's counsel were induced to believe that the case was still pending on demurrer. From all the facts and circumstances it is clearly inferable that either the justice or Forsythe's counsel, or both, intended to conceal the fact that the judgment was entered until the time for an appeal had elapsed, and that they fully believed that they had done so when they issued the execution upon the judgment. It may be conceded that under the strict rules of law, when there is a legal remedy which takes precedence, that remedy must be pursued, and a failure to do so may deprive a party of all remedy. Such, in our judgment, should, however, not, under all circumstances, be held to be the case under the more flexible rules of equity. That is also the conclusion arrived at by the Supreme Court of California, in a similar case when it held that, although the remedy was not pursued that might have been, yet that that alone will not always deprive a court of equity of jurisdiction or prevent it from granting proper relief. *Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50. To the same effect is *Thompson v. Laughlin*, 91 Cal. 313, 27 Pac. 752. It may also be said, as was said in the Maryland cases quoted from, that the case

at bar is practically an exception and may be differentiated from nearly all cases of this class. The judgment entered by the justice is a mere sham and a fraud; it is based upon not even a semblance of right. All this was known to both the justice and Forsythe's attorney at the time and before the judgment was entered. If equity shall refuse relief from such a judgment, then collusion, fraud, and concealment are quite as effective in protecting judgments as truth, fair dealing, and honesty could possibly be. If such conduct is permitted to succeed, then no one is safe from extortionate demands, and no one need take the risk of committing perjury nor of suborning any one to commit the crime in order to obtain a judgment. All he has to do is to find some court who will be accommodating enough to disregard every statutory provision and enter judgment without any evidence whatever, and if the victim shall not promptly pursue the most approved remedy, the beneficiary need only point to the fact that he has not done so, and hence must go without relief and the extortioner collects his demands. Such a result is contrary to good conscience and to every sense of justice and fairness, and cannot prevail in any court of conscience except where the court shields itself behind the strict rules of law and practice in order to deny protection to the citizen and to shield him from wrong and oppression by those who seem to make it their business to concoct schemes whereby they can make use of some court and of some legal rules to further their unjust purposes. While courts of equity should not lightly and without good and sufficient cause interfere with judgments, nor do so when it is made to appear that the applicant either comes into court with unclean hands or has slept upon his rights, yet, when, as in this case, it is made to appear that from the very day the respondent and his counsel learned of the wrongful judgment, they, in season and out of season, always sought relief therefrom, they should not be turned out of court simply because they did not pursue a new remedy which became effective only after the judgment was entered, although they could have invoked it in this case. We hold, therefore, that under the peculiar circumstances of this case we are not inclined to interfere with the findings and conclusions of the district court, and we affirm the judgment of that court that relief in this case should not be refused upon the ground of laches.

We desire to add in conclusion that we have not considered the question of whether this proceeding is a direct or collateral attack upon the judgment in question for the reason that the presumptions that usually apply to judgments of courts of record or of general jurisdiction under our statute have no application here. Neither have we considered the question that respondent made no application in the justice's court to set aside the judgment, as under certain circumstances

he might have done, since, when he or his counsel learned of the judgment, the justice, under our statute, had lost jurisdiction of the case and had no power to entertain such a motion.

For the reasons stated, the judgment of the district court is affirmed, with costs to respondent.

STRAUP, C. J. (dissenting). On the 9th of February, 1907, Forsythe, in the justice's court, commenced an action for services rendered, against McMillan by the filing of an unverified complaint. Summons showing personal service on McMillan on the 25th of February was returned, and was filed by the justice on the 9th of March. All these were properly entered in the justice's docket and are shown by the files. The justice's record and docket show no appearance by McMillan, but show that at the expiration of his time to appear and plead, entries on the 11th of March were made of his default and judgment against him in accordance with the demands of the complaint. The justice's record further recites that:

"From the evidence I find the defendant is indebted to plaintiff in the sum of \$200.30, including interest. It is therefore ordered and adjudged by the court that plaintiff have and recover from the defendant the sum of \$200.30, and costs taxed at \$3.40, C. F. Durand, justice of the peace."

It was, however, made to appear, allunde the justice's record, that before default day the attorneys for McMillan mailed to the justice a demurrer to the complaint which was received by him. The filing fees required by the statute having not been tendered nor paid, the justice did not file the demurrer, but placed it in an envelope and indorsed thereon "Held for fees," and kept it about his office, but not with the files and records of the case. The justice, treating the tender of the demurrer without payment of fees as no appearance, later entered the default and judgment. There the matter stood until in July, 1910, when an execution was issued on the judgment. It was claimed by McMillan that until the service of the execution he had no knowledge that a judgment had been taken against him, he assuming that his demurrer had been filed, and that the case during all that time was pending on demurrer. Because no notice of the entry of the judgment had been given him as required by statute to set in motion his time to appeal, McMillan had the right to prosecute an appeal from the judgment to the district court within 30 days from the time he first obtained notice or knowledge of the entry of the judgment which was in July, 1910. He then took no appeal. Instead he applied to the district court for, and was given, a review by certiorari of the justice's record and proceedings by which review he sought to have the justice's judgment annulled and vacated on the alleged ground that the mailing of the demurrer and its receipt by the justice con-

stituted in law a filing of the demurrer and an appearance, notwithstanding the filing fees were not paid nor tendered, and that hence the justice, without authority, and in excess of jurisdiction, entered the default and judgment. The district court on such review refused to annul, but affirmed, the judgment. From that judgment of the district court McMillan prosecuted an appeal to this court. The judgment was affirmed by us. *McMillan v. Durand*, 38 Utah, 274, 112 Pac. 807. While the case on certiorari was pending on appeal, Forsythe served notice on McMillan of the entry of the judgment in the justice's court. Within 30 days from that time McMillan prosecuted an appeal from the justice's judgment to the district court. There a motion was made to dismiss the appeal on the ground that it was not taken in time, it being claimed that McMillan, by his direct attack on the justice's judgment by certiorari, had, for nearly two years before taking his appeal, actual knowledge and notice of the entry of the judgment. The district court refused to dismiss the appeal, and was about to proceed with the case when we, on prohibition, arrested his action. That opinion was rendered by us in April, 1912, and is reported (*Forsythe v. District Court*) in 41 Utah, 16, 123 Pac. 621. Then in June, 1912, McMillan brought this action in equity to annul the justice's judgment upon allegations that he, until service of the execution, had no knowledge of the entry of the judgment in the justice's court, and until then assumed and believed that the case was pending on demurrer and upon allegations of fraud that F. G. Luke, as the attorney for Forsythe and J. A. Luke, principal stockholders of the Merchants' Protective Association, a collecting agency, with knowledge that the demurrer had been mailed and received by the justice, and that McMillan had good defenses to the complaint, persuaded and induced the justice not to file the demurrer, to enter a default, and, without evidence, to enter a judgment in accordance with the demands of the complaint. It is also alleged that McMillan, by payment and bar of the statute of limitations, had good defenses to the complaint, but by reason of the alleged fraud was prevented from interposing them. These allegations were all denied by the defendants. They further pleaded the certiorari and prohibition proceedings in bar and as estoppels to this action. The case was tried to the court, who found the issues in favor of the plaintiff. McMillan, annulled the justice's judgment and enjoined its enforcement. From that judgment Forsythe has prosecuted this appeal. He contends that the findings and conclusions as to the alleged fraud are not sustained by the evidence, and that equity may not be invoked to annul the justice's judgment, except on allegations and proof of fraud in the procurement of the judgment.

I think it well settled that the fraud for which equity will relieve against the enforce-

ment of judgments is that practiced in the procurement of the judgment, and not that which taints or vitiates the cause of action upon which the judgment was founded (1 High on Injunction, § 190A), and must be extrinsic and collateral to the matters involved in the issues or trial at law (23 Cyc. 1024), and must be actual and positive and not merely constructive (*Ross v. Wood*, 70 N. Y. 8), and that the party seeking the relief must show that his situation was not due to his own fault or neglect in failing to plead to or defend the original action, or otherwise to watch over, protect, and assert his rights in the proceedings, or to apply in due season for such remedies as were open to him by appeal or other proceedings to vacate the judgment (23 Cyc. 979). These propositions are not seriously controverted. The court found that the Lukes, knowing that the demurrer had been mailed to and received by the justice, and that McMillan had a good defense to the complaint, induced the justice not to file the demurrer. I do not see any evidence to support the finding. It is not claimed that the demurrer was served on any one—it was not required to be served—nor is it claimed that the Lukes' attention, in any manner, was called to the demurrer, or that any one said anything or communicated anything to them concerning it. It is not even shown that J. A. Luke had anything whatever to do with the case. F. G. Luke, as appears by the complaint filed before the justice, acted as the attorney for Forsythe. But it is not shown that he had any knowledge that a demurrer had been mailed to the justice, or that it for any reason was withheld from filing. It is not claimed that McMillan or his attorneys, or the justice, or any one, gave Forsythe, or Luke, his attorney, any such information. It is not even shown at whose request the default was entered. It is presumed at Luke's, from the fact that he acted as attorney for Forsythe. I think that a natural presumption, but it does not follow from that that he had any knowledge that a demurrer had been sent to the justice, or that it was withheld. The justice's record did not disclose any such thing. So an inspection of the record and files gave no such information. The only evidence given to substantiate these allegations of fraud is that the attorneys for McMillan mailed a demurrer to the justice, who withheld it from filing because his fees were not tendered nor paid, that he did not notify counsel that the demurrer was withheld from filing, and that F. G. Luke was the attorney for Forsythe, and as such filed, or caused to be filed, the complaint for him. From that it is argued that Forsythe or Luke, his attorney, had knowledge that the demurrer had been mailed to the justice, and that Luke persuaded and induced him not to file it, and not to notify McMillan's counsel that the demurrer was withheld. I do not think such deductions of fraud justifiable where, as here, the proof of fraud must be clear and positive.

I think the justice's fees were waivable, and that before he withheld the demurrer from filing he ought to have demanded his fees, which he did not do, and that that was ground on an application therefor to have set aside the default and judgment. But when equity is invoked to annul the judgment on the ground of fraud, that is another matter. Because the justice erroneously or improperly withheld the demurrer from filing because his fees were not paid does not, in itself, justify a charge of fraud on the part of the justice or of the plaintiff, or his attorney. Were that true, then mere errors made by a justice would, in equity, be ground to annul judgments rendered by him. The complaint in this action proceeds on the theory of actual fraud and connivance between the justice and Forsythe's attorney in withholding and not filing the demurrer. Whatever speculation may be indulged as to that, I see no evidence in the record upon which to base any such a finding. Because the justice erroneously or improperly withheld the demurrer from filing did not divest him of jurisdiction to enter the default and judgment. That in effect is what is held by us in the case on certiorari. 38 Utah, 274, 112 Pac. 807.

The point also is made that the complaint before the justice was not verified. Because of that I do not think the justice was without jurisdiction to proceed. The complaint admittedly states facts sufficient to constitute a cause of action. Another point is made that the justice entered the judgment without evidence. His record, in effect, recites that the judgment was entered upon evidence. It recites that:

"From the evidence I find that the defendant is indebted to the plaintiff in the sum of \$200.30."

The district court, in this action, does not find that the justice's judgment was rendered or entered without evidence. What the court found is:

"That there was not sufficient evidence offered or received by the said justice at the time of the entry of said judgment, or at any time prior thereto, in support of said complaint."

It is not disclosed in this case what evidence was offered or received by the justice. Nor does the proof show that no evidence was offered or received, or that the justice's recital in such respect is false. The only proof as to that is the testimony of the justice, who testified that:

"There were many judgments entered upon the same basis—nonpayment of fees—and this case made no more impression upon my mind than any other case. I do not remember whether there was any evidence taken in this case or not"

—and the testimony of Luke who testified:

"I do not remember anything about it now."

These witnesses were called by the plaintiff, and by them it was expected to prove that the judgment was entered without evidence. I do not think that the testimony given by

them is proof of such fact; at least not sufficient to overcome the recitals of the justice's record that the judgment was entered upon evidence. Merely to call witnesses, though they may be hostile, to prove a fact, and who but testify that they did not then remember anything about it, is far from proving the fact itself. But, further, equity may not be invoked to annul a judgment on the ground that it was rendered or entered on insufficient or no evidence. *Hunter v. Hoole*, 17 Cal. 418; *Powell v. Stewart*, 17 Ala. 719; *Wright v. Eaton*, 7 Wis. 597; *Martin v. Pifer*, 96 Ind. 245; *Burke v. Wheat*, 22 Kan. 722. This is so, as the remedy is by appeal, writ of error, or certiorari.

It is also contended that there is no merit to the complaint filed before the justice for the reason that the evidence in this case, without dispute, shows that the claim sued on before the justice had been paid and was barred. Of course, in this action to annul the judgment entered by the justice, the plaintiff here, among other things, was required to show that he had a meritorious defense to the complaint filed before the justice. But the issue as to whether the plaintiff in the justice court ought to have prevailed on his complaint, or the defendant on his defenses of payment or bar of the statute, was not before the court for adjudication. Since such defenses were material only to the inquiry of whether the plaintiff had any defense to the complaint in the justice's court, any offer of the defendants to prove that the claim had not been paid, and that the statute had not run, or was tolled, would have been impertinent, just as it would have been impertinent to have offered proof in support of the allegations of the complaint filed before the justice. What the plaintiff by this action contends is that he, in the justice's court, was prevented through fraud from interposing and making such defenses, and for that reason seeks to have the judgment annulled and set aside in order that he may properly make and show them. But notwithstanding that, the district court in this action stated the conclusion "that the alleged claim upon which said action (in the justice's court) was founded has been duly paid and satisfied," and was barred. Thus, the defenses which the plaintiff showed he could interpose and make to the complaint in the justice's court, if the judgment be annulled and set aside, the court, in this action, adjudged in plaintiff's favor as though the court had before it and had tried such issues on merits. I, therefore, think the complaint made of that is well founded.

But aside from these considerations I think the plaintiff must be denied relief in equity on the ground that he had a complete remedy by appeal, but wholly, through his own fault and neglect and without any fault or interference whatever on the part of the

defendants, or either of them, failed to avail himself of it. Let it be conceded that the plaintiff presumed that the case in the justice's court for more than three years was pending on demurrer, and that he had no knowledge that a judgment had been taken against him until the service of an execution in July, 1910. He then, within 30 days thereafter, had the right to prosecute an appeal from the justice's judgment to the district court. This he did not do until nearly two years thereafter, and after he had unsuccessfully pursued a wrong and unavailing remedy and had long lost his right to appeal. It is claimed that he did not then know that he had the right to appeal. But from the time of the mailing of his demurrer in February, 1907, to the presentation and submission of this cause, he, in all that he did, was represented by counsel. But it is said that they also did not know that then the right of an appeal existed, and for that reason unsuccessfully sought relief by certiorari, and when that was ended the right to appeal had long expired. 41 Utah, 16, 123 Pac. 621. It is familiar doctrine that equity will not relieve against a judgment at law where complete relief against the judgment could have been had by appeal, but which, through the neglect or fault of the aggrieved party, and without the fault of his adversary, was not taken. To invoke equity in such case because of the want of knowledge that the right of an appeal existed, or losing it by mistaking and pursuing an unavailing and inappropriate remedy, is to do violence to the familiar maxims, that "ignorance of the law excuses no one," and, "that to be ignorant of the law is gross neglect," and to the principle that an election of remedies is final and conclusive. I, therefore, think the judgment should be reversed.

(28 Idaho, 403)

GOLDENSMITH et al. v. SNOWSTORM MINING CO., Limited.

(Supreme Court of Idaho. Jan. 17, 1916.)

1. PUBLIC LANDS — 41—POSSESSION—ABANDONMENT—PROOF.

Where it appears that a person has gone into possession of a tract of unsurveyed land of the United States and has fully complied with sections 4552-4555, Rev. Codes, providing for the settlement upon, and occupancy of, the public domain of the United States in this state, such possession and compliance with the law being shown, abandonment thereof must be made to appear clearly and conclusively by the party relying on it to defeat the right of the claimant to have his possession in the land quieted.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 103-105; Dec. Dig. —41.]

2. PUBLIC LANDS — 40—HOMESTEAD—"ABANDONMENT"—TEMPORARY ABSENCE.

Held, that the temporary absence of a person from a homestead selected in the manner provided by sections 4552-4555, Rev. Codes, supra, in order to obtain a livelihood or for any other legitimate reason, would not of itself be

sufficient proof to establish an "abandonment" of such homestead.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 100-102; Dec. Dig. —40.]

For other definitions, see Words and Phrases, First and Second Series, Abandonment.]

3. APPEAL AND ERROR — 1002—JUDGMENT—CONFLICTING EVIDENCE — HOMESTEAD — ABANDONMENT.

What constitutes abandonment is a question of intent to be gathered from the facts, and, where there is a conflict in the testimony involving the question of abandonment, this court, under the well-established rule, will not disturb the judgment of the trial court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. —1002.]

4. PUBLIC LANDS — 35—RIGHT OF POSSESSION—QUIETING TITLE—DEFENSE.

Held, under the facts in this case, that the appellant, in seeking to defeat respondents' right to possession of an unsurveyed tract of public land of the United States claimed as a homestead under sections 4552-4555, Rev. Codes, is not in position to raise the question of respondents' failure to apply to the local land office of the United States for entry of this land under the homestead laws after the same was surveyed by the government, since the right of respondents to have possession of the premises quieted against appellant accrued prior to the survey, and, more particularly, in the absence of any testimony showing higher evidence of right to possession or title acquired by appellant from a paramount source.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. —35.]

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action by W. R. Goldensmith and another against the Snowstorm Mining Company, Limited. From judgment for plaintiffs, defendant appeals. Affirmed.

John P. Gray, of Cœur d'Alene, and Therrert Towles, of Wallace, for appellant. A. G. Kerns, of Wallace, for respondents.

BUDGE, J. This is an appeal from a decree of the district court of the First judicial district quieting title in respondents, except as to the paramount title of the United States, to the following described premises: Beginning at the northwest corner of the Snowstorm mill site Sur. No. 2066 B.; thence N. 78° 14' W. 441.27 feet to the N. W. corner; thence S. 4° 43' W. 2,202.50 feet to the S. W. corner; thence S. 78° 14' E. 441.27 feet to the S. E. corner; thence N. 4° 43' E. 1,893.54 feet; thence N. 84° 42' W. 10.24 feet; thence N. 6° 20' E. 363 feet to the place of beginning—containing 22.28 acres, more or less.

Respondents commenced this action by filing a complaint against appellant in the above-named court on May 28, 1909, claiming that they were the owners, except as to the paramount title of the United States, of the premises described in the complaint, and entitled to the possession thereof, and asking that their title therein be quieted. To this complaint appellant filed its answer and cross-

complaint, denying specifically the allegations of the complaint, and setting up in its cross-complaint the ownership and possession of the Sunlight mill site, covering the same ground described in respondents' complaint. Thereafter, by permission of the court, appellant filed a supplemental answer in which it set forth, among other things, that respondents were not then, and had not been for more than five years last past, in the possession of said premises, and that they had abandoned and ceased to occupy, cultivate, and improve the same, and had not lived upon, occupied, improved, or cultivated the same during said period of time, and further set forth that the approved plat of government survey of the lands embracing said premises was filed in the land office on June 28, 1911, and that respondents nor either of them had filed his or her declaratory statement to make entry of said premises in the land office within the time provided by law. Upon the issues thus framed a trial was had, resulting in judgment for respondents quieting title in them to the premises described in the complaint.

W. R. Goldensmith, former husband of respondent Maude E. Goldensmith, did not appear on the trial of this cause. However, the record discloses that Maude E. Goldensmith is the real party in interest.

Appellant relies for reversal of this cause upon six assignments of error, which go to the admission of certain evidence by the trial court over the objection of appellant, the action of the trial court in denying appellant's motions for nonsuit, both at the close of respondents' case and when renewed at the close of all of the testimony, the entering of a decree in favor of respondents, for the reason that the same was contrary to the evidence and to law, and the insufficiency of the evidence to sustain the decree.

The action of the court in admitting the testimony offered by respondents during the trial of the cause and complained of by appellant, being immaterial and not prejudicial to any substantial rights of appellant, did not constitute reversible error. *Bradbury v. Idaho, etc., L. I. Co., 2 Idaho, 239, 10 Pac. 620; Works Bros. v. Kinney, 8 Idaho, 771, 71 Pac. 477; McKinnon v. McIlhargey, 24 Idaho, 720, 185 Pac. 828.* The remaining five assignments of error will be discussed and considered together.

From the record it appears that appellant applied for a patent for a mill site embracing the land claimed as a homestead by respondents. To this application respondents filed a protest in the United States Land Office, and proceedings were thereupon had, which terminated on November 18, 1914, in the rejection and cancellation of the mill site application by the honorable Secretary of the Interior.

The proof upon the trial shows that on January 30, 1908, the premises described in

respondents' complaint were occupied as a homestead by W. A. Bowers and wife, who had resided thereon for a number of years; that respondent Maude E. Goldensmith purchased from Bowers and wife the improvements located on these premises, and during February, 1908, moved into the home formerly occupied by Bowers and wife, and resided thereon continuously, cultivating a small part of the premises, up to and including December, 1910; that after the latter date she temporarily left the premises to seek employment, and remained away for approximately 13 months, or until about January, 1911, when she again returned to the home, and lived there for a period of 7 months; that when she first established her residence upon the premises, she moved into the home all of the furniture owned by her, and the same has never been removed from the place; that this is the only home she has; that her absence was due entirely to the fact that it was necessary for her to seek employment in order to obtain a livelihood; that during her absence, and at various times, she had improvements made upon the home, repairing the fence surrounding the same, and there is testimony to the effect that she left in charge of said premises an agent who looked after the same; that she was separated from her husband, and was wholly dependent upon her own labor for a living; that her boy, 12 years of age, was in school in Osburn, where she also lived a portion of the time.

[1, 2] On May 10, 1909, respondent Maude E. Goldensmith made and swore to a notice of possessory claim under the provisions of sections 4552-4555, Rev. Codes, and this notice was duly recorded with the county recorder of Shoshone county on May 14, 1909. There is a substantial conflict in the testimony touching the value of the improvements placed upon the premises described in the notice of possessory claim, but we think the evidence fully supports the contention of respondents that the improvements placed upon the premises by their predecessors in interest and those subsequently made thereon by respondents, were sufficient to comply with the provisions of sections 4552-4555, supra.

Counsel for appellant insist that the absence of respondents from the premises and the testimony upon the trial conclusively show an abandonment of the premises by them. With this contention, however, we are not in accord. The temporary absence of a person from a homestead selected in the manner provided by sections 4552-4555, Rev. Codes, in order to obtain a livelihood, or for any other legitimate reason, would not of itself be sufficient proof to establish abandonment of such homestead. Abandonment has been defined by the weight of authority to mean the voluntary relinquishment of possession of the premises by the owner with the intention of terminating the ownership, without vesting it in any other

person. And, in order that a claim of abandonment may be predicated on the acts of the owner of property in relinquishing his possession of the same, it is necessary that such acts should be absolute and unconditional, and also that they should have been done voluntarily; that is, without coercion or pressure of any kind.

In order to justify the conclusion that there has been abandonment of a homestead acquired under the provisions of said sections, there must be some clear, unmistakable, affirmative act or series of acts indicating a purpose to repudiate ownership and right to possession. The abandonment of rights in land does not occur if the person in possession leaves it with the intention of returning. The owner of property, by leaving an agent in charge after he ceases to occupy the premises in person, conclusively rebuts any presumption of abandonment arising from the fact that he ceases to occupy or reside thereon.

Where it appears that a person has gone into possession of a tract of unsurveyed government land and has fully complied with sections 4552-4555, supra, providing for the settlement upon, and occupancy of, the public domain of the United States in this state, such possession and compliance with the law being shown, abandonment thereof must be made to appear clearly and conclusively by the party relying on it to defeat the right of the claimant to have his possession in the land quieted. *Richardson v. McNulty*, 24 Cal. 339; *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Utt v. Frey*, 106 Cal. 392, 39 Pac. 807.

It is apparent from the record in this case all the way through that respondent Maude E. Goldensmith never intended to abandon the premises, but, on the contrary, intended to return, and that her absence was due solely to the fact that she was dependent upon her own labor for her support and the maintenance of her son. It further appears that she visited the property upon numerous occasions; that she protected it by having the doors properly secured, the windows boarded up, the fence repaired; that such household effects as she owned and other property were left in the building; and that she exercised during her temporary absence rights of ownership and control over the premises. From her explanation of her temporary absence her good faith and intention of returning are obvious.

[3] What constitutes abandonment is a question of intent to be gathered from the facts; and, where there is a substantial conflict in the testimony involving the question of abandonment, this court, under the well-established rule, will not disturb the judgment of the trial court on appeal.

Counsel for appellant insist that their motion for nonsuit should have been sustained,

and that the evidence was not sufficient to support the findings of fact or the decree based thereon. It is a well-settled rule that a motion for nonsuit admits the truth of plaintiff's evidence and every inference of fact that can be legitimately drawn therefrom, and the evidence must be interpreted most strongly against defendant. *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; *Colvin & Rinard v. Lyons*, 15 Idaho, 180, 96 Pac. 572; *McDaniel v. Moore*, 19 Idaho, 43, 112 Pac. 317. In view of this rule, and in the absence of any evidence offered on behalf of the appellant, we are of the opinion that the evidence was amply sufficient to warrant the court in making its findings in favor of respondent, and that the evidence was not insufficient to support the decree.

[4] We come now to the last contention of counsel for appellant, viz., the failure of respondents to apply to the land office to enter the premises described in their complaint under the homestead laws of the United States after this land was surveyed by the government, and the plat filed, on June 28, 1911. We do not think that appellant, in order to defeat respondents' right to possession, is in a position to raise this question, since the right of respondents to have the possession of said premises quieted against appellant accrued prior to the date of the survey of said land by the government, and, more particularly, in the absence of any testimony showing a higher evidence of right to possession or title acquired by appellant from a paramount source. The question involved between appellant and respondents here is one of right of possession to the public domain of the United States prior to survey thereof, and, even though respondents, as between them and the government, may be trespassers, appellant may not raise that question in this proceeding to establish his right of possession.

From our examination of the record we find no error in the action of the trial court in denying appellant's motion for a nonsuit, and we are satisfied that the evidence offered and admitted is sufficient to sustain the decree, and that the decree was not contrary to law.

The judgment of the trial court is affirmed, and costs awarded to respondents.

SULLIVAN, C. J., and MORGAN, J., concur.

(28 Idaho, 412)

MCLEOD v. ROGERS.

(Supreme Court of Idaho. Jan. 18, 1916. Rehearing Denied Feb. 15, 1916.)

1. LIMITATION OF ACTIONS—180, 182 — PLEADING—DEMURRER—ANSWER.

Where it clearly appears on the face of the complaint that the cause of action is barred by the statute of limitations, the statute must be pleaded by special demurrer. Where, however,

this does not appear on the face of the complaint, the plea of the statute must be taken by answer.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670-682, 695, 705; Dec. Dig. § 180, 182.]

2. LIMITATION OF ACTIONS § 182—DEFENSE—ABANDONMENT.

Where the statute of limitations is sought to be invoked as a defense, if it cannot be urged by special demurrer, and is not pleaded in the answer, it must, for the purpose of the action, be regarded as abandoned, and cannot be taken advantage of on objection to the admissibility of evidence.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 676-680, 682, 695, 705; Dec. Dig. § 182.]

3. APPEAL AND ERROR § 928—PRESENTATION FOR REVIEW—INSTRUCTIONS—PRESUMPTION.

Where the transcript on appeal fails to contain instructions as given by the trial court, it will be presumed that the jury were correctly instructed upon all of the material issues involved as presented by the pleadings, and the judgment of the court will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.]

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action by Annie McLeod against Joseph P. Rogers. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. Kerns, of Wallace, for appellant. James A. Wayne, of Wallace, and John P. Gray, of Coeur d'Alene, for respondent.

BUDGE, J. On July 18, 1914, plaintiff filed her complaint in the district court of the First judicial district against defendant, alleging that between December 31, 1901, and November 1, 1913, plaintiff at the special instance and request of defendant furnished to defendant, at plaintiff's residence in the city of Wallace, board and lodging; that such board and lodging so furnished during said period of time was of the reasonable value of \$6,160, and that there was an implied contract on the part of defendant to pay the same; that defendant had not paid any part of said sum, but that he had rented a dwelling house to plaintiff from November 1, 1913, to July 31, 1914, at the agreed rental value of \$25 per month; and that on this account defendant was entitled to offset the sum of \$225.

To the complaint defendant filed a demurrer, which was overruled. Thereafter defendant answered plaintiff's complaint, denying all the material allegations thereof, and alleging affirmatively that he had paid plaintiff various sums of money, which payments were in full settlement of the claim sued upon; and as a counterclaim he set up that defendant had rented to plaintiff the dwelling house mentioned in her complaint, and that she had occupied the same 21 months, paying no rent therefor, and was indebted to defendant on account of said rent in the sum of \$525.

The cause was tried before the court and a jury, resulting in a verdict for the sum of \$2,170 in favor of plaintiff. Judgment was thereupon entered, from which judgment this appeal is prosecuted.

Appellant assigns eight specifications of error, yet in his brief discusses and relies on but seven. The first error complained of is the action of the trial court in overruling appellant's demurrer. For causes of demurrer appellant alleged: (1) That the complaint did not state facts sufficient to constitute a cause of action; (2) that the cause of action was barred by the provisions of section 4053, Rev. Codes (which is the section of the statutes which limits the commencement of actions on contracts, obligations, or liabilities, not founded upon instruments of writing, to four years); and (3) that the complaint was ambiguous in alleging a conclusive statement that said alleged contract was implied.

[1] In our opinion the complaint states facts sufficient to constitute a cause of action, and it is not subject to the objection of ambiguity in alleging that the action is upon an implied contract. For the reason that upon its face this complaint states a cause of action it is not subject to subdivision 2 of appellant's demurrer, namely, that the cause of action is barred by the provisions of section 4053, Rev. Codes. This court held in the case of *Chemung Mining Co. v. Hanley*, 9 Idaho, 786, 77 Pac. 226, that if it clearly appears on the face of the complaint that the cause of action did not accrue within the statutory time, the plea of the statute of limitations should be taken by special demurrer. Where, however, it does not appear on the face of the complaint that the cause of action is barred by the statute of limitations, then the plea of this statute should be taken by answer.

Notwithstanding the complaint states a cause of action as to all items of indebtedness contracted within a period of four years prior to July 18, 1914, the date on which this action was commenced, appellant sought by demurrer to plead the statute of limitations to the entire complaint, and not to any particular portion of it. This court in numerous cases has held that the plea of the statute of limitations is a personal one; that it is a privilege which the law gives to the debtor, which he may waive or insist upon. The statute acts upon the remedy, and not upon the debt. The running of the statute does not extinguish the debt, and to be available it must be pleaded directly, and cannot be interposed by argument or inference. *Moulton v. Williams*, 6 Idaho, 424, 55 Pac. 1019; *Sterrett v. Sweeney*, 15 Idaho, 416, 98 Pac. 418, 20 L. R. A. (N. S.) 963, 128 Am. St. Rep. 68; *Kelly v. Leachman*, 3 Idaho, 629, 33 Pac. 44; *Bixby v. Crafts*, 53 Pac. 404; ¹

¹ Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 120 Cal. xvii.

Frantz v. Idaho Artesian Well, etc., Co., 5 Idaho, 71, 46 Pac. 1026. If, therefore, any portion of the debt sued upon was barred by the statute of limitations, it became the duty of appellant, if he wished to avail himself of this statute, to specifically point out the portion barred.

[2] Appellant did not plead the statute of limitations in his answer, but his second assignment of error is based on the action of the trial court in overruling his objection to the introduction of any evidence on the part of respondent in support of indebtedness which occurred prior to four years before the commencement of the action, in violation of section 4053, *supra*. The statute of limitations could not be urged in this case by special demurrer, for the reason, as heretofore stated, that the complaint upon its face showed a cause of action. And under the general rule of pleading, where the statute of limitations is sought to be invoked as a defense, and if it cannot be urged by special demurrer, and is not pleaded in the answer, this defense cannot thereafter be relied on, but is deemed to have been waived. The trial court, therefore, did not err in overruling the objection to the introduction of the evidence complained of. 25 Cyc. 1405; *Meeks v. Hahn*, 20 Cal. 620.

We have considered, but do not deem it necessary to discuss, the remaining three assignments of error urged by appellant to the admission of evidence, as we are of the opinion that the action of the trial court in admitting the evidence thus objected to was not prejudicial to appellant and did not constitute reversible error.

[3] The remaining three assignments of error insisted upon by counsel for appellant go to certain instructions given and refused by the trial court. Upon an examination of the transcript we find that the *præcipe* delivered to the clerk of the court by counsel for appellant fails to contain a request that the clerk include in the transcript all of the instructions given by the court, but requests that the transcript include only the instructions requested by respondent and given by the court and the instructions requested by appellant and refused. Not having all of the instructions given by the court before us, we must presume that the court correctly instructed the jury on all of the material issues involved as presented by the pleadings, and that the instructions of the court, taken as a whole, fairly submitted the case to the jury. That being true, the verdict of the jury and the judgment based thereon will not be disturbed by this court. *Hopkins v. Utah Northern Ry. Co.*, 2 Idaho, 300, 13 Pac. 343.

Having examined all of the errors specified, and finding no substantial error in the record, the judgment must be affirmed; and it is so ordered. Costs are awarded to respondent.

SULLIVAN, C. J., concurs. MORGAN, J., did not sit at the hearing of this case or participate in the decision.

(28 Idaho, 274)

KEANE v. KIBBLE et al.

(Supreme Court of Idaho. Dec. 21, 1915.
On Rehearing, Feb. 10, 1918.)

1. CHATTEL MORTGAGES §38—CONDITIONAL SALE—EXTRINSIC EVIDENCE.

Under section 3392, Rev. Codes, the fact that a transfer was made subject to a defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or incumbrancer for value and without notice), though the fact does not appear by the terms of the instrument.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 44; Dec. Dig. § 38.]

2. CHATTEL MORTGAGES §281 — FORECLOSURE—APPOINTMENT OF RECEIVER—STATUTORY RIGHT.

The right to have a receiver appointed in Idaho is statutory, and is available in an action by a mortgagee for the foreclosure of his mortgage and the sale of the mortgaged property, where it appears that the property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 529; Dec. Dig. § 281.]

3. CHATTEL MORTGAGES §6 — CONDITIONAL SALE—AGREEMENT OF CONTRACTING PARTIES—INTENT.

Whether the instrument sued upon in this case is a conditional sale note or a chattel mortgage, and whether or not respondent has mistaken his remedy, are questions which are dependent upon the agreement of the parties at the time the transaction was entered into, and must be decided from all the facts and circumstances which will tend to show the intent of the parties.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 23-41; Dec. Dig. § 6.]

4. APPEAL AND ERROR §874—APPOINTMENT OF RECEIVER—SCOPE OF REVIEW.

This court, on appeal from an order appointing a receiver and from an order denying a motion to set aside the appointment, can only inquire into the merits of the action so far as the facts may bear upon the propriety of making such orders.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530-3540; Dec. Dig. § 874.]

Budge, J., dissenting.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by J. J. Keane against M. C. Kibble and another. From an order appointing a receiver and an order denying motion to set aside the appointment, defendants appeal. Affirmed.

C. H. Lingenfelter, of Boise, for appellants. Hawley & Hawley, of Boise, for respondent.

MORGAN, J. On February 13, 1913, the appellants above named made, executed, and

delivered to respondent their promissory note in words and figures as follows:

"Boise, Idaho, February 13, 1913.

"On or before two (2) years from date thereof, for value received, I, we, or either of us promise to pay to the order of J. J. Keane three thousand one hundred (\$3,100) dollars, in lawful money of the United States of America, with interest thereon in like lawful money from date until paid at the rate of ten (10) per cent. per annum, interest to be paid monthly, and if not so paid the whole sum of both principal and interest to become immediately due and collectible. And in case suit or action is instituted to collect this note or any portion thereof, we promise to pay, besides the costs and disbursements allowed by law such additional sum as the court may adjudge reasonable as attorney's fees in such suit or action.

"It is understood and agreed that the consideration for this note is the purchase price of a National automobile; and the principal of this note shall be paid at the rate of not less than one hundred (\$100) dollars on or before the 1st day of each and every month, together with the proportionate amount of interest due thereon that the partial payment bears to the amount due, until the whole principal and interest is paid.

"And it is further understood and agreed that the ownership and title to said National automobile shall not pass from J. J. Keane until the full sum of the principal and interest is paid.

"M. C. Kibble.
"W. O. Kibble."

On September 25, 1915, respondent filed his complaint in the district court against appellants, wherein he alleged, among other things, the making and delivery, for a valuable consideration, of the note above set out, that respondent is the owner and holder thereof, and that there is due, owing, and unpaid thereon the sum of \$2,296.70. It is further alleged in the complaint that at the time of the execution of said note, and as a part of the same transaction, the appellants and respondent agreed that the respondent should have title to the automobile as security for the payment of the note. It further appears from the complaint that appellant M. O. Kibble has the automobile in his possession, and is using it as a carrier of passengers, and that the use to which it is being put is causing it to depreciate rapidly, that it is in great danger of being lost, removed, and materially injured by said usage, and that its value, which is alleged to be \$750, is not sufficient to discharge the debt for which it was mortgaged as security.

Respondent prays for a judgment against appellants for the amount of the principal and interest due and attorney's fees; that the note be decreed to be a mortgage upon the automobile; that the court appoint a receiver to take and keep possession of the automobile during the pendency of the action and until the sale thereof; that the mortgage be foreclosed; and that the automobile be sold, and the proceeds be applied as is usual in the foreclosure of chattel mortgages.

On the day the complaint was filed respondent made written application to the district judge for the appointment of a receiver, which was granted. Thereafter, and on Oc-

tober 1, 1915, appellants filed a motion and gave notice of motion to set aside the order appointing the receiver, which motion was, on October 16, 1915, denied. From the order appointing the receiver and from the order denying the motion to set aside the appointment, this appeal has been taken.

Appellants contend that the complaint fails to disclose a cause of action entitling respondent to equitable relief, and insist that, having failed to plead a mortgage, respondent has not invoked either the exclusive or the concurrent jurisdiction of a court of equity, and that the district judge was therefore without jurisdiction to appoint the receiver; in other words, that the instrument sued upon shows upon its face that it is a conditional sale note, and that title to the automobile never passed from respondent, and that the transaction cannot be construed to have created the relation of mortgagors and mortgagee between the parties. Appellants urge that the instrument sued upon is neither ambiguous nor uncertain in its terms, and that it must be inferred from the second and third paragraphs thereof that respondent conditionally sold the automobile to appellants, but retained the title to it until the full amount of the purchase price is paid; that, since appellants do not and never have owned the property, they could not mortgage it. Respondent contends that the instrument discloses no such state of affairs; that it is ambiguous and uncertain; that, while it does recite that the indebtedness mentioned is the purchase price of the automobile, it does not state from whom it was purchased, whether from respondent or from a third party, and that the money mentioned in the note may have been, so far as is therein disclosed, loaned by respondent to appellants with which to make the purchase; also that, while it is recited that title shall not pass from respondent, it is not stated for what purpose it is held by him, and he insists that it is so held only to secure the payment of the principal and interest due to him from appellants, and that parol evidence may be submitted at the trial to prove that the note was intended as a mortgage, and not as evidence of a conditional sale.

[1] Under the heading "Defeasance may be shown by parol," section 3392, Rev. Codes, provides:

"The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or incumbrancer for value and without notice), though the fact does not appear by the terms of the instrument."

It is said in 35 Cyc. p. 659:

"If goods are delivered to the buyer under an agreement whereby the property in the goods is transferred with a reservation of a lien to secure the purchase price, the transaction is a mortgage. But, if the goods are delivered under an agreement by virtue of which there is no conveyance of title, but the property in the goods is to remain in the seller until payment of the

price, the transaction is not a mortgage, but a conditional sale. Generally the question whether the transaction is a conditional sale or a mortgage is one of intent of the parties to be determined from a consideration of all of the provisions of the contract, and in some cases contracts of conditional sale have been held to be chattel mortgages within statutes requiring chattel mortgages to be recorded."

In case of *Smith v. Pfluger*, 126 Wis. 253, 105 N. W. 476, decided by the Supreme Court of Wisconsin and reported in 2 L. R. A. (N. S.) 783, 110 Am. St. Rep. 911, wherein an instrument in form a bill of sale was held to be a chattel mortgage, the court said:

"Counsel seem to suppose that an instrument in form an absolute conveyance cannot be shown to be anything else, except by judicial interference in an equitable action. Such is not the general rule, especially in jurisdictions where the distinctions between actions at law and suits in equity have been abolished. The mere form of an instrument cuts but very little figure in respect to whether it is enforceable as a mortgage or not upon its character being called in question in a legal or equitable action, as those terms are used under our system. The purpose of the instrument is the controlling feature under all circumstances. If that is security, and the facts of the matter are established in any action involving the subject, the instrument is treated as a mortgage, and nothing else." *Hudson v. Wilkinson*, 45 Tex. 444; *D. A. Tompkins Co. v. Monticello Cotton Oil Co.* (C. C.) 137 Fed. 625; *McLellan v. Shinn*, 82 U. S. (15 Wall.) 105, 21 L. Ed. 87.

There is appended to the decision of the case of *People v. Burns*, 161 Mich. 169, 125 N. W. 740, 137 Am. St. Rep. 466, a note, on page 489, wherein a great number of authorities are collected in support of the rule that as between the parties themselves chattel mortgages although defective in form will be held valid.

Counsel for respondent has brought to our attention certain cases holding that oral chattel mortgages are valid as between the parties. *Mower v. McCarthy*, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942, and cases cited in note thereto. This doctrine, however, cannot be held to apply in Idaho; for section 3389 of our Revised Codes is as follows:

"A mortgage can be created, renewed or extended only by writing executed with the formalities required in the case of a grant or conveyance of real property."

See *Willows v. Rosenstein*, 5 Idaho, 305, 48 Pac. 1067.

In this case, however, the instrument sued upon is in writing, and is executed with the formalities required in the case of a grant or conveyance of real property, for it is signed as provided for by section 6007, Rev. Codes, relating to transfers of real property, and, while it is not acknowledged, the acknowledgment of instruments is made necessary by section 3153, Rev. Codes, in order that they may be recorded, and section 3163 provides:

"An unrecorded instrument is valid as between the parties thereto and those who have notice thereof."

[2] The right to have a receiver appointed in Idaho is statutory, and is provided for by section 4329, Rev. Codes, as amended by Sess. Laws, 1909, p. 26, which is, in part, as follows:

"A receiver may be appointed by the court in which an action is pending or has passed to judgment, or by the judge thereof: * * *

"(2) In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt."

[3] Whether the instrument here sued upon is a conditional sale note or a chattel mortgage, and whether or not respondent has mistaken his remedy, are questions which are dependent upon the agreement of the parties at the time the transaction was entered into, and must be decided, not alone from the language of the instrument itself, but from all the facts and circumstances which will tend to show the intent of the parties to it. They are questions which must be left for the trial court to determine after having heard the evidence, and are not before this court for decision at this time.

[4] This court, on appeal from an order appointing a receiver and from an order denying a motion to set aside the appointment, can only inquire into the merits of the action so far as the facts may bear upon the propriety of making such orders. *Cotton et al. v. Rand et al.* (Tex. Civ. App.) 92 S. W. 286.

If it should appear on the trial of this case that the respondent is the owner of said automobile, and does not hold the title thereto simply as security, he must fail in this action; and, if he has procured the appointment of a receiver to take charge of his own property, he must pay the cost and expense of such receivership; but, if it should appear that he simply holds the title as security for the payment of his debt under the allegations of the complaint, he has a right to have a receiver appointed to hold said property in statu quo in order that his security may not become valueless on account of its being used during the pendency of his action by the mortgagees. Appellants are not in position to contend that by the appointment of a receiver they have been deprived of the possession and right to the use of their property, since they contend on this appeal that said automobile is the property of respondent.

We find that the complaint sufficiently alleges that the instrument sued upon was given as security for the payment of money to justify the trial court in admitting evidence to show that it was intended for that purpose, and was therefore a mortgage, should such evidence be offered, and that it states the necessary jurisdictional facts to warrant the trial judge in making the orders ap-

pealed from and his action in so doing is accordingly affirmed.

Costs are awarded to respondent.

SULLIVAN, C. J., concurs.

BUDGE, J. (dissenting). This appeal is taken from two orders made by the trial court: First, in appointing a receiver to take charge of a certain automobile; and, second, in refusing upon proper application to set aside such order.

From the record it appears that on September 25, 1915, the plaintiff, who is respondent here, filed a complaint in the district court of the Third judicial district to recover a balance due upon a promissory note and conditional sale contract, with a prayer for the appointment of a receiver to take possession of an automobile referred to in the note. The application was ex parte and without notice to the appellants. The receiver was thereupon appointed, and on the 1st day of August, 1915, the appellants filed a motion to set aside the order of appointment, which motion was denied.

The instrument sued upon is set out in *hæc verba* in the majority opinion of the court, and by reference thereto it will appear that it is a promissory note and conditional sale contract for the payment of money on a stipulated date and in stipulated amounts. The following clause appears in the note:

"And it is further understood and agreed that the ownership and title to said National automobile shall not pass from J. J. Keane until the full sum of the principal and interest is paid."

Counsel for respondent contends that this instrument is a chattel mortgage. But it will be observed that it is not acknowledged; that it has never been recorded; that it is not entitled to be recorded; that it is not accompanied by an affidavit of the mortgagor; "that it is made in good faith and without any design to hinder, delay, or defraud creditors;" and that it contains no right of redemption of the property referred to therein either before or at the sale of such property. While it may be conceded that, as between the mortgagor and the mortgagee, in order to constitute a valid mortgage, it is not essential to its validity that it be acknowledged, recorded, or entitled to be recorded, or that it be accompanied by the affidavit of the mortgagor that it was made in good faith, yet, in the absence of a right of redemption, such an instrument cannot be construed to be a valid mortgage, even between the parties.

The absence of the acknowledgment, the affidavit, and the failure to record the instrument, and especially the lack of a provision authorizing the mortgagor to redeem the property mortgaged, furnish ample evidence that the parties intended the transaction to be a conditional sale, and that the instrument was not intended to be considered a mortgage. The instrument contains all of

the necessary elements to constitute a conditional sale, and it should, in my opinion, have been so construed by the trial court upon the application to appoint a receiver. It is true that it is frequently difficult to say whether a particular transaction constitutes a mortgage or a conditional sale as between the parties; yet the mere difficulty of determining this question would not justify the court in failing to carefully scrutinize the allegations of the complaint, and basing its action upon those allegations. The rule is well established by numerous decisions that a conditional sale is an agreement to sell upon conditions to be performed, and not an absolute sale. In the case of *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, it was said that a conditional sale is a transfer of ownership for a price paid or to be paid, to become absolute on the performance of the conditions expressly stipulated in the contract; and, if the conditions of the payment are not strictly performed at or before the time limited, the right to the title of the property is lost, and there is no right of redemption; while, on the other hand, a chattel mortgage is an instrument whereby the owner of personal property transfers the title of such property to another as security for the payment of money or the performance of contract or other obligations, such to be defeated on payment of the money or performance of the obligation.

In the case at bar it cannot be successfully contended under the instrument sued upon or upon a fair construction of the complaint that the respondent transferred the title to the automobile to the appellants, and that the appellants thereafter gave security upon said automobile to respondent for the payment of the money stipulated in the agreement.

Jones on Chattel Mortgages, § 26a, p. 36, says:

"There can be no mortgage without a conveyance from a debtor to his creditor."

It clearly appears that a mortgage was never given to secure the debt. But, on the other hand, the contract in question expressly provides that, upon payment of the \$3,100 according to the terms stipulated in the note, a considerable portion of which is admitted to have been paid, together with interest, which constituted the consideration for the purchase price of the automobile, the ownership and title to said National automobile should pass to appellants. And, upon the failure of the appellants to pay the sum stipulated in the note according to the terms thereof, it was expressly understood and agreed between the parties that the ownership and title to said automobile should not pass from respondent to appellants.

In the case of *Barton v. Groseclose*, 11 Idaho, 227, 81 Pac. 623, this court had under consideration an instrument similar to the one in the case at bar, which also contained a clause that the ownership of the property did not pass from the vendor until fully paid for, and the court held that such an agree-

ment clearly constituted a conditional sale. See, also, *Kester v. Schuldt*, 11 Idaho, 663, 85 Pac. 974; *Mark Means Transfer Co. v. MacKinzie*, 9 Idaho, 165, 73 Pac. 135; and *Jones on Chattel Mortgages*, supra, where the following rule is laid down:

"A contract for the sale or lease of property, the purchaser or lessee to pay installments or rent at stipulated times, the property to remain the seller's until a certain sum shall have been paid, is a conditional sale."

If the instrument upon which this action is predicated is not a chattel mortgage, but an ordinary promissory note and conditional sale contract, it must be conceded that the appointment of a receiver to take charge of the property would not be justified under a reasonable construction of section 4329, Rev. Codes, as amended by Sess. Laws 1909, p. 26, or under any other statutory provision of this state. And, where the instrument itself is not ambiguous or unintelligible, but certain in its terms, to anticipate what evidence might be adduced upon the trial, and appoint a receiver to take possession of the property depriving appellants of the use and revenue from the same and causing additional expense incident to the discharge of the duties of a receivership, is, in my opinion, inequitable and unjustifiable.

In order to justify the appointment of a receiver, the question is not what evidence may appear upon the trial or the ability of respondent in this case to prove that the automobile was conveyed to him by appellants to be held as security for the payment of a debt, but it is: What does the complaint show? Before a receiver can be legally appointed in a given case, it is necessary for the plaintiff to allege a case within the jurisdiction of a court of equity; that is, a case which a court of equity has power to consider, and one which will justify a decree for relief by the court of equity. However strong a case a plaintiff may be able to establish by his evidence, and whatever the real facts may be, are absolutely immaterial, unless the facts, as alleged in the complaint, are sufficient to authorize the appointment of a receiver and the ultimate granting of the relief sought to be obtained by the plaintiff in his suit.

The complaint in this case fails to establish a cause of action founded upon a chattel mortgage. Therefore the respondent was not entitled to the appointment of a receiver. The complaint utterly fails to show a transfer or conveyance of title to the automobile by appellants to respondent. It, however, affirmatively shows upon its face that, unless the obligation sued upon has either been paid or in some manner discharged, the title to the automobile is in the respondent, and was in the respondent at the commencement of the suit in the trial court.

It therefore follows that neither the contract sued upon nor what are purported to be the facts as alleged in the complaint afford

sufficient basis for the conclusion that the automobile is held by respondent as security for the payment of a debt. Moreover, in the absence of an admission of the adverse party, it should not be conclusively presumed that the indebtedness has not been fully discharged.

If the automobile is the property of the respondent, he has no right to the appointment of a receiver to take charge of it. If it were the intention of the parties that the instrument was to be a chattel mortgage, and not a promissory note and conditional sale contract, as appears upon its face, and respondent intended to rely upon parol evidence to establish that fact, it was incumbent upon him to so allege, and state that a mutual mistake had been made by the parties in drafting the instrument, and ask that the court reform the same to conform to what their intention really was, and to enforce it in keeping with their mutual agreement as a chattel mortgage. The pleader having failed to do this, it cannot be presumed that such a state of facts existed.

It is a well-settled principle of law that, in a case in which the court is empowered to appoint a receiver, the power will not be exercised where the plaintiff's right to recover upon the allegations of his complaint is doubtful. 34 Cyc. 22. It is also a general rule that a receiver will not be appointed where there is another safe and expedient remedy, or where the party has an adequate remedy at law. 34 Cyc. 25.

In *Schack v. McKey*, 97 Ill. App. 460, it was held that in a suit founded upon a state of facts which makes a case for replevin or trover a receiver will not be appointed.

The appellants do not contend, for they have not yet answered, that the respondent is the owner of the automobile and entitled to the possession thereof. They do, however, contend that the complaint fails to disclose a cause of action predicated upon a chattel mortgage, and fails to supply the necessary facts to entitle respondent to equitable relief, and that, the respondent having failed to plead a chattel mortgage and a right to have the same foreclosed, the trial court was without jurisdiction to appoint a receiver. The instrument upon its face is plain and unambiguous and constitutes simply a promissory note with a conditional sale contract, and, unless the obligation has been paid or discharged, the title to the automobile is in the respondent. That being true, the court was without jurisdiction to appoint a receiver and the appointment was a nullity. If the holders of promissory notes with conditional sale contract clauses are entitled to the appointment of receivers, the expense of litigation will be augmented, and unnecessary burdens imposed upon litigants.

As I view it, receivers should not be appointed in doubtful cases. The appointment of a receiver is a severe remedy, because it

divests the holder of property of his possession and use before a final hearing, and should not be resorted to save in strong cases, and never unless the plaintiff would otherwise be in danger of suffering irreparable loss.

Even admitting for the purpose of argument that the instrument sued upon in this action is a chattel mortgage, nevertheless, in my opinion, the trial court erred in appointing a receiver under the allegations contained in the complaint. It appears from the record that the appellants are engaged in the business of carrying passengers between certain points in Idaho, using the automobile referred to for that purpose. It is also alleged that the value of the automobile at the time of the appointment of the receiver was but \$750. By reason of the appointment of the receiver the appellants were deprived of the possession and right to the use of the property. The appointment of a receiver is part of the jurisdiction of equity, and is based on the inadequacy of the remedy at law, being intended to prevent injury to the thing in controversy and to preserve it pendente lite, for the security of all parties in interest, to be finally disposed of as the court may direct. The power of appointing a receiver is of a high and extraordinary character, and should be exercised by courts with the utmost caution, and only under such special circumstances as demand summary relief.

It is the duty of the court to look to the facts stated in a complaint before entertaining an application for the appointment of a receiver. And, where a complaint fails to allege the insolvency of a defendant, or show that he is unable to respond in damages, a receiver should not be appointed. The mere fact that the property is deteriorating in value, or may become wholly lost to the plaintiff, will not of itself justify the court in making the appointment.

This court has held that, in the absence of allegations of insolvency or of proof thereof upon the trial, it is error for the court to appoint a receiver. *Sweeny v. Mayhew*, 6 Idaho, 455, 56 Pac. 85; *Kelly v. Steele*, 9 Idaho, 141, 72 Pac. 887; *Brundage v. Home Savings & Loan Ass'n of Minneapolis*, 11 Wash. 277, 39 Pac. 666. To the same effect is the case of *Blondheim et al. v. Moore*, 11 Md. 365, where it was held that a trial court is not authorized to appoint a receiver on the ground that the appointment can do no harm.

In view of the authorities cited, whether the respondent will be required to pay the expenses of the receiver if he is unable to prove his case is absolutely immaterial, and no justification for the appointment of the receiver.

In the case of *Buckley v. Baldwin*, 69 Miss. 804, 13 South. 851, the court said:

"Creditors have rights which should be upheld. So have others, which must not be disre-

garded in the effort to enforce the rights of creditors. When a proper case is made for a receiver, the power to appoint should be exercised, but even then, with due regard to the situation and circumstances of the case and the rights and interests of defendants, and never without notice to them and opportunity to be heard, unless there is a satisfactory showing of a necessity for such urgency."

From an examination of the record it is apparent to my mind that the complaint fails to contain a sufficient showing for the appointment of a receiver. The trial court was therefore without jurisdiction to make such appointment, and should, upon application of appellants, have discharged the receiver.

On Rehearing.

SULLIVAN, C. J. A rehearing was granted in this case, and on such rehearing oral argument was heard. The case has been fully reconsidered, and we find no cause or reason for changing our views as expressed in the original opinion in this case, and therefore adhere to the conclusions reached therein.

MORGAN, J., concurs.

BUDGE, J. (dissenting). I know of no reason why I should change my views as expressed in the dissenting opinion.

(28 Idaho, 376)

RUDDY v. ROSSI.

(Supreme Court of Idaho. Jan. 15, 1916.

Rehearing Denied Feb. 10, 1916.)

(Syllabus by the Court.)

1. PUBLIC LANDS §140—HOMESTEAD—LIABILITY FOR DEBTS—EXEMPTION—"PRIOR TO ISSUING PATENT."

Under section 2296, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1393), relating to homesteads, and providing that no lands acquired under such section shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, land so acquired is not liable for a debt contracted prior to the making of final proof and receiving final certificate entitling the entryman to a patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377-382; Dec. Dig. §140.]

2. PUBLIC LANDS §140—HOMESTEAD—LIABILITY FOR DEBTS—EXEMPTION.

Held that, under section 2296, supra, where a debt was contracted after the issuance of a final certificate of entry to defendant, but prior to his obtaining a patent, the land might lawfully be taken in satisfaction of the debt, since the patent, when issued, relates back to the date of the final certificate.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377-382; Dec. Dig. §140.]

Sullivan, C. J., dissenting.

Appeal from District Court, Shoshone County; Wm. W. Woods, Judge.

Action by Charles F. Ruddy against Herman J. Rossi. From judgment for plaintiff, defendant appeals. Modified and affirmed.

James A. Wayne and Walter H. Hanson, both of Wallace, for appellant. A. H. Featherstone and Charles E. Miller, both of Wallace, for respondent.

BUDGE, J. The respondent in this case filed a homestead entry on the northeast quarter of the northwest quarter, section 34, township 48 north, range 4 east, Boise Meridian, on August 6, 1903. Final proof was submitted by respondent in the local land office on October 4, 1909, and receiver's final receipt and certificate of entry acknowledging receipt of the purchase price of the land was issued November 12, 1909. The final patent to respondent for this land was not issued until August 26, 1912. During the period between the date of the issuance of receiver's final receipt and the issuance of the patent itself appellant advanced to respondent various sums of money. From the record it appears that there were also certain advances of moneys made to respondent prior to the issuance of the final receipt.

In September, 1912, appellant commenced suit in the district court of the First judicial district against respondent to recover the amount due the former, which amount was subsequently split into two separate suits, one upon promissory notes given by respondent to appellant, and the other upon an open account. On May 8, 1914, judgment by confession for the sum of \$931.87 was entered in favor of appellant in the action on the promissory notes; and on May 12, 1914, a jury in the suit on the open account rendered a verdict in favor of appellant for \$2,115.48, and costs amounting to \$19.05. At the commencement of both of these actions attachments were levied upon the property heretofore described, and thereafter, in the month of June, 1914, executions were issued upon both these judgments, and levy of the same was made upon the land in question. Thereupon respondent commenced this action in the district court for the purpose of removing the cloud of these judgments, attachments, and executions from this land.

[1, 2] In his complaint respondent alleges that he obtained patent for this land on August 26, 1912, and ever since said date has held the title thereto. Appellant, by his answer, admits the issuance of the patent on the date mentioned, but denies that the same was issued by virtue of the compliance by respondent with the homestead laws of the United States, and denies that respondent now holds the title thereto. Respondent then avers the rendition of the two judgments heretofore mentioned, and this allegation is admitted by the answer, as is also the allegation of the complaint that attachments were levied in these two suits upon the land of respondent. Respondent then alleges that each and every item of indebtedness going to make up the two judgments in question was contracted by him prior to the date of

the issuance of the patent to said land, and that said land is by the provisions of section 2296, Rev. St. U. S., exempt from liability for the satisfaction of said judgments. Section 2296, *supra*, provides:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

This action was submitted to the trial court on a stipulation of facts, upon which judgment was rendered in favor of respondent, from which judgment this appeal is prosecuted.

The only question decided by the trial court in this case was: Can land procured from the United States under the provisions of the homestead law be sold on execution for the payment of a debt contracted after final proof has been made, but before the issuance of the patent therefor? And this is the only question before us.

Respondent claims that the property was exempt from levy and sale by virtue of section 2296, *supra*, while appellant insists that the property is subject to levy and sale for debts contracted subsequent to the issuance of the final receipt, though prior to the issuance of the patent.

It is stipulated by counsel in paragraph 5 of their stipulation of facts that the notes on which the judgment of \$931.87, including costs, was rendered, were all dated and the debts incurred prior to the date of the issuance of the receiver's receipt, to wit, prior to November 12, 1909. Counsel, by their own stipulation, have therefore eliminated from our consideration that judgment, by reason of the fact that it is conceded the indebtedness on which it was founded was incurred prior to the issuance of the final receipt. The trial court properly held that that judgment was not a cloud upon respondent's title to the land above described, and that the land was not subject to levy and sale under an execution thereon. No indebtedness incurred prior to November 12, 1909, could become a lien against the land of respondent, having been contracted prior to the issuance of the final receipt. *Leonard v. Ross*, 23 Kan. 292; *Kansas Lumber Co. v. Jones*, 32 Kan. 195, 4 Pac. 74.

It is further stipulated by counsel that the items which make up the judgment for \$2,115.48 all accrued between September 22, 1909, and August 9, 1912; while the bill of particulars shows that the first item of indebtedness upon which this judgment was based accrued on January 3, 1910, and the last on August 9, 1912. These facts are, however, easily reconcilable, as the stipulation of facts contains a general statement of the dates between which the indebtedness accrued, and the bill of particulars shows the specific dates of the items of indebtedness. It may therefore be properly conceded that all of the items of indebtedness on which this judgment was based were incurred sub-

sequent to the date of the issuance of final receipt, but prior to the issuance of the patent to this land.

It is contended by respondent's counsel that lands to which title is acquired under the homestead laws of the United States are not liable for any debts of the entryman prior to the actual issuance of the patent itself. This contention is based on section 2296, U. S. Rev. Stats., heretofore quoted, and is supported by a number of decisions rendered by courts of recognized eminence. The State Supreme Courts before which this question has been brought are not, however, unanimous in opinion; some of them holding to the literal, technical construction of section 2296, that lands to which title is acquired under the homestead laws of the United States are not liable for any debts of the entryman prior to the actual issuance of the patent itself; while others equally reputable have held that such lands are liable for debts of the entryman contracted between the date of the issuance of the receiver's final receipt or certificate and the date of the issuance of the patent.

One of the early cases construing this section of the homestead law is found in *Leonard v. Ross*, 23 Kan. 292, in which opinion Justice Brewer (afterwards one of the Justices of the Supreme Court of the United States) fully concurred. The question involved in that case was whether a piece of land owned by Ross was exempt from execution held by Leonard, sheriff of Harvey county, Kan. The facts of that case were that on May 3, 1873, Ross entered his land under the homestead act of Congress. On October 25, 1873, he became surety on the official bond of Monger, as treasurer of Harvey county. On May 19, 1874, he made his final proof, and paid his money for his land under the eighth section of said homestead act. At some time or times between November 5, 1872, and October 12, 1874, Monger and his sureties became liable on said official bond for breaches thereof. On December 15, 1874, Ross' patent for his land was issued to him. On April 24, 1875, an action was brought by the commissioners of Harvey county against Monger and his sureties for said breaches of the bond. On December 27, 1876, a judgment was rendered against Monger and his sureties. Whereupon an execution was ordered and levied upon said land to satisfy said judgment. The question was: When did said land become subject to execution for debts? The court held that the land became subject to execution for debts subsequent to May 19, 1874, at the time when Ross made his final proof and payment, and based its conclusion upon the theory that Ross was entitled to his patent on May 19, 1874, and therefore his right must be determined as though the patent had, in fact, been issued on that date. That court said:

"The failure of the officers to issue the patent at the time that it ought to be issued does

not affect the rights of any person. The property becomes the purchaser's at the time he pays for it, with the bare, naked legal title only remaining in the government. After Ross paid his money, he did not any longer hold his land under the provisions of the congressional homestead act. When he paid for his land, he thereby took it out of the further operation of said homestead act. * * * That provision of said homestead act which refers 'to the issuing of the patent' has reference to that period of time when the patent ought to be issued, and not to the mere clerical work of issuing it."

That the issuance of the patent is purely a ministerial act has been practically the universal holding of the courts. *Blachley v. Coles*, 6 Colo. 350; *Poire v. Wells*, 6 Colo. 406; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Heydenfeldt v. Gold, etc., Co.*, 93 U. S. 634, 23 L. Ed. 995.

When the final receipt or certificate is issued to the homestead settler, the land becomes liable for the payment of debts contracted subsequent thereto, even though prior to the issuance of the patent. *Hobb v. J. I. Case Thresh. Mach. Co.*, 39 Okl. 383, 135 Pac. 395; *Struby-Estabrook Merc. Co. v. Davis*, 18 Colo. 93, 31 Pac. 495, 38 Am. St. Rep. 266; *Budd v. Gallier*, 50 Or. 42, 89 Pac. 638; *Johnson v. Borin*, 7 Kan. App. 369, 54 Pac. 804; *Shelby v. Ziegler*, 22 Okl. 799, 98 Pac. 989; *Weare v. Johnson*, 20 Colo. 363, 38 Pac. 374.

One of the principal cases relied upon by counsel for respondent to support their position is the case of *Barnard v. Boller*, 105 Cal. 214, 38 Pac. 728. That court places an exactly opposite construction upon section 2296 of the homestead act, supra, to that of the Supreme Courts of Oklahoma, Colorado, and Kansas, and holds, in effect, that a homestead acquired pursuant to this homestead act is not liable to the satisfaction of any debt contracted prior to the issuance of the patent, and that no lands thus acquired can be taken in execution for any debt incurred after the issuance of a receiver's receipt entitling the homestead claimant to a patent and before the issuance of the patent. In this case the court said:

"The date of issuing the patent is made the point of time which divides the liability and non-liability of the land. It is this event or act which determines the question of liability, and not the title or the question of relation as applicable to the holder thereof which must be taken as the criterion.

"Congress has in plain and direct terms exempted the land from the debts of its owner or claimant contracted up to the happening of a specific event, viz., 'to the issuing of the patent therefor.' Had the statute provided that homesteads should not be liable for the debts of the patentees thereof contracted during their natural lives, or for ten years after the issuance of the patent, its constitutionality being conceded, the end of the life of the patentee or the expiration of the ten years would afford the test by which to measure the liability, and in such a case it is believed no just claim of liability could be maintained on account of debts contracted before the expiration of the time specified or event mentioned upon the ground that the patentees had previously held the title, legal or equitable. The provision of section 2296 is re-

garded as being equally explicit with the case supposed."

The Supreme Court of Oklahoma, in the case of *Flanagan v. Forsythe*, 6 Okl. 225, 50 Pac. 152, in discussing the opinion of the Supreme Court of California just referred to, and in answer to the argument advanced, which it quotes at length, among other things, says:

"We cannot agree with the reasoning just quoted, but believe it to be faulty in many respects. It does not give to the congressional enactment a reasonable interpretation, but assumes that that body intended thereby to arbitrarily fix the date of the performance of a mere clerical duty as the time when homesteads might become liable for debts contracted by those who had entered them, instead of the time at which such entrymen had performed all of the requirements of the law on their part entitling them to such patents. The officers of the government whose duty it is to issue these patents might on account of the accumulation of work, delay the issuance thereof for a period of five or even ten years after the entrymen had become entitled thereto; and yet, under the interpretation given the statute in question in the California case, the holder of the final or patent receipt could rest assured that the tract of land of which he had, to all intents and purposes, become the owner, could not be held liable for any debts which he might contract. * * * When an entryman complies with all of the requirements of the law, and acquires such title to the tract of land entered as a homestead as to enable him to dispose of same at will, and to require him to pay taxes thereon, we can see no reason why the exemption provided in said section of the Revised Statutes should still be held to apply thereto."

Counsel for respondent also cite and rely upon the case of *Wallowa Nat. Bank v. Riley*, 29 Or. 289, 45 Pac. 766, 54 Am. St. Rep. 794, wherein the court said:

"So far as the question of title is concerned, this question may be conceded; but the vice of the position, as applied to the case before us, lies in the fact that we are not dealing with title, but with the question of exemption under a valid statute which declares, in plain and direct terms, that the land granted thereby shall not be liable for debts contracted prior to the happening of a specific event."

Yet it is conceded by the great weight of authority that, when the homesteader has complied with all of the provisions of the law for the disposition of public lands, has paid the purchase price and received his final receipt or certificate therefor, has done all that is required to vest the complete title in him, he thereby acquires a title of which he cannot be deprived by the government, except for fraud or mistake. When he has complied with these provisions and made final proof, he may sell the land thus acquired, at his pleasure; he may create, by his voluntary act, a lien upon the same; and he may maintain an action of ejectment to recover its possession. The land is then liable to assessment for taxes, and can be sold to satisfy a tax lien; and there remains in the government only what by some authorities has been defined to be the "naked legal title." There is nothing remaining for the homestead entryman to do but wait for the final issuance of the patent, which, when issued, simply fur-

nishes evidence of ownership, and relates back to the date of the issuance of the final receipt or certificate.

We are therefore unable to recognize the doctrine so earnestly contended for by counsel for respondent and supported by the case of *Wallowa Nat. Bank v. Riley*, supra, which is the extension of exemption of a homestead entryman's land from execution beyond the issuance of the final receipt, when he has by a full compliance with the provisions of the congressional homestead act taken himself out of the further operation thereof. In other words, when the United States has parted with the title to the land, and the same has vested in the homestead entryman, the authority by which Congress may extend the provisions of exemption to his land after he has title and before the issuance of the patent, thereby dealing with the question of exemption, which, in our opinion, is exclusively within the jurisdiction of the state, and which is a personal right of the debtor that he may waive or claim under the statutes of the respective states, is not manifest to us. The application of this doctrine would result in defeating the just claims of creditors, and it is a principle with which we are not in accord.

We are of the opinion that that provision of section 2296, supra, which refers to the issuance of the patent has reference to the period of time when the patent ought to be issued, and not to the mere clerical work of issuing it, and that said section no longer applies to homesteads after final proof has been made and receiver's final certificate has been issued therefor. This rule appears to us to be supported, not only by reason, but also by the weight of authority.

From the foregoing conclusions it follows that the trial court did not err in holding that the judgment for \$931.87 in favor of appellant was not a lien or a cloud upon the land described in respondent's complaint, but that the court did err in holding that the judgment in the sum of \$2,115.48 was not a lien upon said land.

We therefore affirm the judgment of the trial court so far as it holds that the judgment for \$931.87 is not a lien or cloud upon the title to the land described in respondent's complaint, and the cause is remanded to the trial court, with direction to modify its judgment to the extent that the judgment in the sum of \$2,115.48, and costs amounting to \$19.05, is a valid and subsisting lien upon the premises of respondent described in his complaint.

Costs are awarded to appellant.

MORGAN, J., concurring.

SULLIVAN, C. J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. The main question for determination in this case is whether the land acquired by a homesteader under the

homestead laws of the United States is liable to seizure and sale for the satisfaction of a debt contracted after final proof has been made by the homesteader and before patent issues. The decision of this question depends upon the proper construction of the provisions of section 2296, Rev. St. U. S., which is as follows:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

The chapter of the United States Statutes in which said section is found includes the provisions enacted by Congress for the entry of homesteads on the public domain of the United States. By the federal Constitution the Congress of the United States is expressly vested with the power of making all needful rules and regulations respecting the public domain, and may dispose of the public lands of the United States on such terms and conditions as, in its judgment, it may deem advisable; and one of the rules and regulations provided by Congress is that contained in said section 2296. It seems to me that said section is so plain, clear, distinct, and unambiguous in its language as not to require any construction whatever. The conditions and limitations placed upon the disposition of such lands must be derived from the language Congress has used in fixing or limiting such conditions, provided such language is plain and unambiguous. Courts cannot legislate conditions in or out of the grants which Congress has made of the public lands. It seems to me there is no room for judicial construction of said section. That section prescribes one of the conditions upon which such lands should be conveyed to the homesteader, namely, upon the condition that the lands acquired under its provisions should not be liable for any debts contracted prior to the issuing of the patent therefor. It thus clearly and distinctly fixes the exact time at which exemptions shall cease and the conditions become ineffective, and that is when the patent shall issue.

The majority of the court construes the word "patent," in said section, to mean "final certificate." Certainly, if Congress had intended that the exemption there provided should cease when the final certificate or final receipt was issued, it would have used the words "final receipt" or "final certificate," instead of the word "patent." Is it too much to assume that Congress was familiar with the law it had enacted for the disposition of the public lands; that it clearly understood the distinction between a final certificate and a patent? It seems to me the majority has refused to give to the language used in said section its plain, natural and ordinary meaning, but has construed the word "patent" to mean "final certificate."

The opinion in the case of *Barnard v. Bolter*, 105 Cal. 214, 38 Pac. 728, contains my views upon the question under consideration,

and the proper construction of the provisions of said section 2296. That case refutes the application of the doctrine of relation in such a case as the one at bar, and holds that, under the provisions of said section, the condition or circumstance of the equitable title is not made the criterion of liability for antecedent debts. That section clearly provides that the land shall not in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The date of the issuing of the patent is made the point of time which divides the liability from the nonliability of the land. It is this event or act which determines the question of liability, and not the title or the question of relation as applicable to the holder thereof, which must be taken as a criterion, and in the last cited case it is stated:

"Congress has in plain and direct terms exempted the land from the debts of its owner or claimant contracted up to the happening of a specific event, viz., 'to the issuing of the patent therefor.'"

The majority quotes from *Flanagan v. Forsythe*, 6 Okl. 225, 50 Pac. 152. I am unable to agree with the reasoning in that case, and believe it to be faulty in many respects, and that it utterly fails to properly construe said section 2296. In that case Mr. Justice Tarsney filed a dissenting opinion, which, in my view of the matter, utterly demolishes the arguments and reasoning used by the majority in that case.

The Supreme Courts of Kansas, Oklahoma, and Colorado hold that the homestead is liable for the debts incurred after the issuance of final receipt and before the issuance of the patent, while Arizona, Arkansas, California, Minnesota, Missouri, Nebraska, Oregon, South Dakota, Washington, and Wisconsin all hold that said section 2296 means just what it says and that the homestead entry is not liable for the payment of the debts of the homesteader contracted prior to the issuance of the patent.

The United States court has construed said section 2296, and in *Re Cohn* (D. C.) 171 Fed. 570, referring to said section, the court said:

"It is the issuance of the patent which fixes the time when the property shall become liable to subsequent debts of the homesteader."

In *Grames v. Consolidated Timber Co.* (D. C.) 215 Fed. 785, the court, speaking through Wolverton, District Judge, after quoting said section 2296, said:

"This provision has received a literal construction, and comprises any debt accruing or existing prior to the date of the issuance of the patent, and, although in some cases affecting the title to the homestead, where the issuance has relation back to the issuance of the final certificate, the clause can bear no such interpretation, as it applies to the exemption designed for the benefit of the homesteader."

See, also, *Seymour v. Sanders*, decided by Dillon, Circuit Judge, Fed. Cas. No. 12,690.

Not a single federal case has been called to my attention where the construction of said section 2296 was involved where the fed-

eral courts have not held that the issuance of the patent is the date fixed when the land of the homesteader shall become liable for his subsequent debts, and not one of them holds that the land becomes liable for such debts upon the issuance of the receiver's final certificate.

The judgment of the trial court ought to be affirmed.

(28 Idaho, 417)

STOLZ v. SCOTT et al.

(Supreme Court of Idaho. Jan. 22, 1916.)

1. EVIDENCE \S 177—ACTION AGAINST DIRECTORS — UNLAWFUL DIVIDEND — BEST EVIDENCE.

Where books of account and records of a corporation have been investigated and experted by an accountant who has reached a conclusion therefrom as to its solvency and as to whether a dividend had been paid from its capital stock or from surplus profits, and where some of the books have been subsequently lost or destroyed and the others cannot be properly identified as records of the corporation, it was not error for the trial court to reject as evidence the report of the accountant and oral testimony as to his conclusions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 557, 570-579; Dec. Dig. \S 177.]

2. EVIDENCE \S 370 — BOOKS OF ACCOUNT — ADMISSIBILITY.

The mere production of books of account without identification is not sufficient to entitle them to admission in evidence; and, where there was a total failure to show that a journal contained either an accurate or complete account of the corporation's business during the period of time it purported to cover, it was not error for the trial court to exclude it when offered to show that the dividend was declared from the capital stock of the corporation, and not from surplus profits arising from its business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1533, 1559, 1560, 1562-1578, 1592; Dec. Dig. \S 370.]

3. APPEAL AND ERROR \S 981 — NEW TRIAL \S 102 — DISCRETIONARY RULING — NEWLY DISCOVERED EVIDENCE — DILIGENCE.

The granting or denying of a new trial rests in the sound discretion of the trial court; and, where the motion was based upon an affidavit, alleging newly discovered evidence, and it appeared that the evidence could have been, by the exercise of ordinary diligence, produced at the trial of the cause, an order, denying the motion, was not an abuse of that discretion and will not be disturbed upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3876; Dec. Dig. \S 981; New Trial, Cent. Dig. \S 207, 210-214; Dec. Dig. \S 102.]

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Action by Fred A. Stolz, as receiver of the Winn-Barr-Chainey Company, Limited, a corporation, against J. T. Scott and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Reed & Boughton, of Cœur d'Alene, and Samuel R. Stern, of Spokane, Wash., for appellant. McFarland & McFarland and R. M. Smith, all of Cœur d'Alene, for respondents.

MORGAN, J. This action was commenced by appellant as receiver of the Winn-Barr-Chainey Company, Limited (hereinafter referred to as the corporation), which was, prior to July 15, 1910, engaged in the mercantile business, to recover from J. T. Scott, O. E. Barr, F. D. Winn, Benjamin Chainey, and H. H. Barton, who were formerly directors of the corporation, the sum of \$3,895, together with interest thereon, alleged to have been paid as a dividend, on or about January 14, 1908, from its capital stock and not from surplus profits arising from its business. Barr and Winn failed to appear, and Scott, Chainey, and Barton filed separate answers. Appellant moved to strike out certain portions of the answers of Scott and Chainey, which motions were sustained in part; and, while it does not appear what action, if any, the court took with respect to the remaining portions attacked by the motions, appellant assumes that the motions, in all respects where in they were not sustained, were denied, and assigns as error the action of the court in denying them. The case was brought to trial before a jury, and at the close of the introduction of proof on behalf of the plaintiff, defendants moved for a nonsuit, which was granted, and which action upon the part of the court is assigned as error. Judgment was entered in favor of defendants, dismissing the action and for their costs. A motion for a new trial was made and denied, and this appeal is from the judgment and from the order denying the motion for a new trial.

Since the appeal was taken, J. T. Scott, one of the respondents, died, and a motion was made to abate the action so far as it concerns his estate. Subsequently Kate M. Scott filed in this court written suggestion of the death of J. T. Scott, and therein informed the court that she has been appointed administratrix of his estate and has qualified as such, and she renews the motion to abate the action. An order has been entered, substituting Kate M. Scott, as administratrix of the estate of J. T. Scott, deceased, for J. T. Scott as respondent.

[1] The principal question presented here, as we view it, arises out of the action of the court in rejecting certain oral and documentary evidence by which appellant sought to prove that the dividend, above referred to, was declared and paid from the assets of the corporation constituting its capital stock, and not from the surplus profits of its business, which is the gist of this action. It is very apparent that the evidence admitted does not establish this fact and that, in the absence of error in the rejection of evidence, there was none committed in granting the nonsuit. Section 2732, Rev. Codes, fixes the liability of directors of corporations in cases of this kind, and is as follows:

"The directors of corporations must not make dividends, except from the surplus profits arising

from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they reduce or increase the capital stock, except as in this title specially provided. For a violation of the provisions of this section, the directors, under whose administration the same may have occurred (except those who may have caused their dissent therefrom to be entered at large in the minutes of the directors at the time, or, when not present, when the same did occur) are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced. * * *

It appears that on or about July 15, 1910, the corporation assigned and turned over all its assets to one William E. Muse, as trustee for the use and benefit of its creditors, and that on October 9, 1911, McClintock-Trunkey Company, one of its creditors, commenced an action against it to recover a sum of money alleged to be due from it to said company, and in that action the appellant here was appointed receiver of the assets of the corporation. It further appears that, prior to the commencement of this action, a number of the creditors of the corporation placed their claims in the hands of a collection agency, which, at their request, caused an investigation to be made of its books, and that, under the direction of the collection agency, a firm of accountants was employed to make the investigation. It also appears that the books and records of the corporation were under the control of the representatives of the creditors, and were turned over to the accountants; that they were shipped from Cœur d'Alene to Spokane for inspection and to be experted, and were then returned to Cœur d'Alene, and were thereafter, from time to time, stored in different places, including the basement of a store building and a warehouse to which a number of people had access. Proper care was not taken to preserve the books, and at the time of the trial some of them could not be found and their disappearance could not be accounted for, nor were those produced properly identified as records of the corporation. An effort was made to prove by the accountant the conclusions he reached as a result of his examination of the books and also to introduce in evidence his report, which does not contain a copy of the records, but is in the nature of deductions he has made from his examination. This evidence was rejected, and the action of the court in rejecting it is assigned as error.

Appellant attempts to avail himself of the provisions of subdivision 5, § 5999, Rev. Codes, which provides that there can be no evidence of the contents of a writing other than the writing itself, except when the original consists of numerous accounts, or other documents, and cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole. The offer of the rejected evidence was not an effort to prove the contents

of the books, but to prove the result of the investigation made by the accountant as to whether he found the corporation to be solvent or insolvent, at the time the dividend was declared, and as to whether or not it was declared and paid from surplus profits of the business. This secondary evidence was not offered or rejected upon the theory that the books and records were so voluminous that they could not be examined in court without great loss of time, but because those which were produced could not be properly identified and others had been permitted to be lost, or destroyed, by representatives of the creditors in whose behalf this action was being prosecuted. The rule stated in the statute above referred to cannot be so far extended as to meet the requirements of appellant. Even if the deductions made by the accountant could have been, upon any theory, admitted, it would have been, indeed, unfair to the defendants to admit them in the absence of the records from which the deductions were made, since they would have had no basis from which to cross-examine him. Furthermore, the report made by the accountant to the collection agency, which was offered in evidence and rejected, shows upon its face that it covers the period of time from September 20, 1908, to July 27, 1910, and since the dividend was declared on January 14, 1908, more than eight months prior to the commencement of the time covered by the report, it does not appear that the report would have established the fact that the dividend was declared and paid from capital other than surplus profits had it been admitted. We conclude that the court committed no error in rejecting the proffered evidence as to the result of the investigation made by the accountant.

[2] The action of the court in rejecting from evidence a journal, contended by appellant to have been one of the books of account of the corporation, is assigned as error. While there is some evidence tending to show that this journal was, in whole or in part, in the handwriting of a former bookkeeper of the corporation, the bookkeeper was not produced as a witness, and there was a total failure to show that the journal contained either an accurate or a complete account of the corporation's business during the period of time it purported to cover, and two of the defendants, by whom it was sought to prove that it was a record of the corporation, were unable to identify it as such. It is said in Jones on Evidence, section 573:

"It is well recognized that the mere production of books of accounts without identification is not sufficient to entitle them to admission. * * * In most jurisdictions it is necessary that testimony should be given authenticating the book of account and showing it to be the book of original entries kept for that purpose; also that the entries were true and correct, and contemporaneous with the transactions. * * * The books must be identified as the account books of the party whose books they purport to be. Under the old rules it was necessary to

show, by other customers or parties who had dealt with the owner of the books, that he kept fair and honest books of account, but under the later decisions the correctness of the entries may be proved by the person who made them, or by any one who is able of his own knowledge to testify to it. This testimony should be given by the party, if the entries are in his handwriting, or by a clerk, if the entries are in his handwriting, unless he is dead or out of the state, in which case, the books are admissible upon proof of the handwriting."

It appears in an affidavit supporting a motion for a new trial that the bookkeeper was out of the state, but no foundation was laid at the trial for the introduction of testimony, other than his, that the book was authentic. In the section of Jones on Evidence, above quoted, it is further said:

"What is sufficient proof of the verity of books is a question almost entirely for the discretion of the trial court."

In view of the circumstance that these books had been in many different hands, had been stored in places where many persons had access to them, and a part of them had been lost, or destroyed, and in view of the absence of evidence that the journal in question was a correct record of the corporation, we are of the opinion that the trial court did not abuse its discretion in rejecting the journal from evidence.

The conclusion we have reached that no error was committed in the rejection of proof offered by appellant and in granting the nonsuit makes unnecessary any discussion of a number of assignments of error, including those predicated upon the action of the court in disposing of appellant's motions to strike out portions of the answers of certain of the defendants. The complaint stated a cause of action which was denied by the answers, and, appellant having failed to establish a prima facie case upon the issue thus joined, even though error was committed in failing to strike out portions of the answers which do not affect that issue, it would be immaterial.

[3] Appellant moved for a new trial upon the following grounds:

"(1) Newly discovered evidence, material for plaintiff, which could not, with reasonable diligence, be discovered and produced on the former trial of said action; (2) errors in law occurring at the trial in the rejection of evidence offered by plaintiff and deemed excepted to by said plaintiff; (3) accident or surprise which ordinary prudence would not have guarded against; (4) errors in court in granting a nonsuit and the dismissal of said action."

The rulings of the trial court upon the questions presented by the second and fourth grounds of this motion have heretofore been considered and disposed of. The motion is supported by the affidavit of F. W. Reed, Esq., of counsel for appellant, and by that of W. F. Bigelow, former bookkeeper for the corporation. In his affidavit Mr. Reed states that he did not know of the whereabouts of Bigelow prior to the trial of the action; that he had heard he was in the state of Mon-

tana, but did not learn his address until during the trial; that immediately upon learning the address he telegraphed Bigelow, urging him to be present, and received a reply that it was impossible for him to do so. Affiant further says:

"If a new trial is granted, that the attendance of said W. F. Bigelow can be had in said action, or his deposition taken, and that said W. F. Bigelow can, and will, identify the journal of said Winn-Barr-Chainey Co., Ltd., used in the business of said company during the year 1907 and 1908; and that said book, when so identified, will show that said Winn-Barr-Chainey Co., Ltd., paid a dividend to the amount of \$3,895, and that the same were paid out of the capital stock of said company, or, in other words, that said book will show that, instead of there being a profit in the business of the Winn-Barr-Chainey Co., Ltd., for the year 1907, there was a loss of over \$3,000, over and above the dividend paid; that said evidence is material, and could not, with reasonable diligence, have been produced at the trial.

"Affiant further says that he was taken by surprise, which ordinary prudence could not have guarded against, when defendants J. T. Scott and Benjamin Chainey refused to identify the journal, sought to be introduced in evidence by the plaintiff as the journal of the Winn-Barr-Chainey Company, Ltd., and particularly because said Benjamin Chainey was actively engaged in operating the business of said Winn-Barr-Chainey Company, Ltd., during all the time it was doing business, and he, said Benjamin Chainey, must have known that said journal was the journal of said Winn-Barr-Chainey Co., Ltd., and could have identified the same."

After reciting that he has examined the journal in question, and that it is a journal that was used by the corporation during the time it was in business in Cœur d'Alene, Mr. Bigelow says:

"That said journal is all in his handwriting, except pages 217 to 220, both inclusive, which are not in his handwriting. Deponent says further that when he wrote said journal he was the bookkeeper for said corporation, and that said journal was written by him in the performance of his duties as bookkeeper for said corporation; that said journal is a book of original entries, and was made by him contemporaneously with the transactions therein set forth and in the usual course of business; that he has examined the same carefully, and upon such examination states that no changes have been made in the part of said journal written by him, except in a few instances, where such changes were made immediately after such book was written in order to make same conform to the facts set forth in said journal, and so far as said journal was written by this deponent, it is a register of the daily business transactions of said corporation, and a correct record thereof between the dates mentioned in said journal."

It does not appear that it was unknown to appellant or his attorney, prior to the trial, that Bigelow would testify to the facts stated in his affidavit, but the record does disclose that, long prior to the trial, counsel for appellant knew Bigelow had been the bookkeeper for the corporation, and from this it may be inferred they must have known he would be a material and proper witness to identify the records he had kept. It does not appear that any effort had been made, prior to sending the telegram referred

to, either to learn his exact whereabouts, to procure his attendance as a witness, to take his deposition, or to have the case continued in order that he might be found. The granting or denying of a new trial rests in the sound discretion of the trial court; and, where the motion is based upon an affidavit alleging newly discovered evidence, and it appears that the evidence could have been, by the exercise of ordinary diligence, produced at the trial of the cause, an order denying the motion is not an abuse of that discretion, and will not be disturbed upon appeal. *Hall v. Jensen*, 14 Idaho, 185, 93 Pac. 962; *Montgomery v. Gray* (on rehearing) 26 Idaho, 585, 144 Pac. 646; *Scanlan v. San Francisco, etc., Ry. Co.*, 128 Cal. 586, 61 Pac. 271; *Broads v. Mead*, 159 Cal. 765, 116 Pac. 46. Mr. Reed states in his affidavit:

"That he was taken by surprise, which ordinary prudence could not have guarded against, when defendants J. T. Scott and Benjamin Chainey refused to identify the journal."

It would seem that ordinary prudence would have prompted counsel, before relying implicitly upon the testimony of adverse parties, in so important a matter as this, to make an effort to ascertain what the nature of their testimony would be, and it does not appear that either Mr. Scott or Mr. Chainey had ever been asked as to their ability to identify this journal before being placed upon the witness stand. The evidence sought to be adduced from the witness Bigelow cannot be deemed to be newly discovered evidence, nor do we find that the appellant was the victim of accident or surprise which ordinary prudence could not have guarded against. The fourth subdivision of section 4439, Rev. Codes, provides, as one of the grounds for a new trial:

"Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial."

Even if the proffered testimony of Bigelow could be considered newly discovered evidence, appellant has shown no diligence whatever to discover it or to produce it at the trial, except the sending of the telegram above referred to, nor has any reason been advanced for the failure to make an effort to find the whereabouts of the witness, in order to procure his attendance, or to take his deposition, at a time when such an effort might have been reasonably expected to be successful. The motion for a new trial was properly denied.

The judgment of the trial court is affirmed. Costs are awarded to respondents.

Having affirmed the judgment of dismissal and the order denying the motion for a new trial, it is not deemed to be necessary to pass upon the motion to abate the action as against the estate of J. T. Scott, deceased.

SULLIVAN, C. J., and BUDGE, J., concur.

CARROLL et al. v. HARTFORD FIRE INS. CO.

(Supreme Court of Idaho. Jan. 22, 1916.)

1. ACTION — 46 — PLEADING — 52 — LEGAL AND EQUITABLE CAUSES — JOINDER.

By section 1, article 5, of the Constitution of this state, the distinction between actions at law and suits in equity is prohibited. Both legal and equitable causes of action may be joined in the same complaint. These causes of action need not be separately set forth, provided that a concise and complete statement of them is made, and when that is done the plaintiff is entitled to any relief at law or in equity that his proof under such allegations may show him to be entitled to.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 449, 451-468; *Dec. Dig.* — 46; *Pleading*, Cent. Dig. § 113; *Dec. Dig.* — 52.]

2. REFORMATION OF INSTRUMENTS — 47 — INSURANCE POLICY.

Where it is alleged in the complaint and shown by the proof that an insurance policy, as written by the agent of the insurance company, does not truly state the contract of insurance as actually made between the parties, or the facts upon which such contract was based, a court of general jurisdiction in this state may reform such contract, so as to make it express the intention of the parties and enforce it as so reformed, in one action.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. §§ 195-198; *Dec. Dig.* — 47.]

3. INSURANCE — 4 — POLICY — NEGLIGENCE OF AGENTS — OPERATION OF STATUTE.

Section 13 of an insurance act, passed in 1913 (Sess. Laws 1913, p. 593), one of the objects of which was to provide a standard form of fire insurance policy in this state, in accordance with the "New York standard," was not intended by the Legislature to abridge any contractual rights which an applicant for fire insurance would have had prior to its enactment, or to confer upon insurance companies any immunity for the negligence of their agents in incorrectly reducing an insurance contract to writing.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 4; *Dec. Dig.* — 4.]

4. INSURANCE — 378 — ACTION ON POLICY — DEFENSE — MISSTATEMENT OF INTEREST — KNOWLEDGE OF AGENT.

Where a fire insurance policy contains a clause that it shall be void if the interest of the insured be not truly stated therein, or "if the interest of the insured be other than unconditional and sole ownership," and the insured truly stated his interest as that of chattel mortgagee to the agent when applying for the insurance, but the policy as written by the agent disclosed no interest in the insured other than sole ownership, and the company thereafter accepted the policy and the payment of premiums thereon, the knowledge of the agent was the knowledge of the company, and in case of loss and suit to recover on the policy, the insurance company will not be permitted to set up the defense that the policy was made void by the violation of said conditions.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 968-997; *Dec. Dig.* — 378.]

5. INSURANCE — 552 — PROOF OF LOSS — MISSTATEMENT OF INTEREST.

Under our statute (Sess. Laws 1913, p. 597), an essential element of the offense of falsely swearing to a proof of loss on an insurance policy is the intent to defraud, and unless such intent is shown, the fact that the insured incorrectly stated in the proof of loss his interest in the property destroyed is no defense to an

action on a policy which by its conditions is to be void in case of any fraud or false swearing by the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1358; Dec. Dig. ¶552.]

6. APPEAL AND ERROR ¶1064 — HARMLESS ERROR—INSTRUCTIONS.

Where a fire insurance policy was issued on 250,000 feet of lumber in a lumber yard, which contained a greater quantity of lumber than the amount insured, and in an action to recover on the policy the court incorrectly instructed the jury that in arriving at the amount of loss under the policy they should "determine the same by ascertaining the cash value of the lumber in the millyard" instead of the cash value of the actual amount destroyed, but the proof showed that in fact more than 250,000 feet was destroyed and that only 4,020 feet was left in the yard, *held*, that under the evidence such incorrect instruction was not reversible error, as the jury manifestly was not prejudicially misled thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4218, 4221-4224; Dec. Dig. ¶1064.]

7. INSTRUCTIONS.

Held, that the instructions given, on the whole, fairly state the law applicable to the facts of this case, and that the court committed no error in the refusal to give instructions requested by defendant.

8. INSURANCE ¶606—SUBROGATION OF INSURED—MORTGAGEE—SECURITY.

Where a chattel mortgagee insured his interest in a part of the property mortgaged, which was afterwards destroyed by fire, and recovers judgment for the full amount of his policy, the insurance company cannot be subrogated to his security as such mortgagee without first paying to him the remainder of the indebtedness for which the mortgage was given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1504-1511, 1514-1516; Dec. Dig. ¶606.]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by H. P. Carroll and another against the Hartford Fire Insurance Company, a corporation. From a judgment for plaintiffs, defendant appeals. Affirmed.

Lester P. Edge, of Spokane, Wash., and Reed & Boughton, of Cœur d'Alene, for appellant. Ezra R. Whitla, of Cœur d'Alene, for respondents.

SULLIVAN, C. J. This action was brought to recover upon a \$2,500 fire insurance policy which was given to the plaintiffs to insure them against the direct loss or damage by fire of 250,000 feet of lumber situated in Kootenai county.

The answer denied the material allegations of the complaint and set up certain affirmative defenses. Upon the issues made the case was tried by the court with a jury, and resulted in a verdict and judgment in favor of the plaintiffs for \$2,500, with interest thereon. A motion for a new trial was denied, and this appeal is from the order denying the new trial.

Numerous errors are assigned, but as we view the matter, only a few of them need to be specifically reviewed in this opinion.

It appears from the record that the plaintiffs had a mortgage on said lumber, and that they had no greater or other interest than that of chattel mortgagees, but were in fact insured in the policy as sole owners of the property; and, that being true, it is contended by counsel for appellant that plaintiffs cannot recover because of the following provision contained in said policy:

"The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss, * * * or if the interest of the insured be other than unconditional and sole ownership."

It is contended by counsel for appellant that those provisions voiding the policy in case of a chattel mortgage or in case the insured is not the unconditional and sole owner are reasonable and ought to be enforced; while counsel for respondent contend that the appellant through its agent knew of the state of the title of the property in question before the policy was issued, that the insurance company knew before it issued the policy that the insured had only a mortgagee's interest in said property, and that said insurance was procured to protect said interest, and for that reason appellant should be required to pay.

As to whether the company, through its agent, had full knowledge of said facts, the evidence is conflicting. The evidence of the plaintiffs shows that the agent fully understood the interest they had in said lumber as mortgagees, while the defendant's witnesses testified to the contrary. The jury has passed upon this question and found in favor of the plaintiffs to the effect that the agent of the company, and the company through its agent, had full knowledge of all those facts.

[1] In regard to these contentions, we have two lines of decisions, some of the courts holding that where a company, through its agent, issues a policy with knowledge of existing facts which under the terms of the policy would render it void, that they thereby waive those provisions; other courts holding that since the policy of insurance is a written contract, the parties having made and reduced their agreement to writing, to follow the rule permitting parol evidence to show a waiver of the terms would be no more nor less than to permit parol evidence to vary the terms of a written instrument, and for that reason they refuse to subscribe to the doctrine that if an insurance company, through its agent, issues a policy with knowledge of existing facts which, under the terms of the policy, would render it void, the company thereby waives those provisions.

In support of this latter contention, counsel for appellant cites Northern Assurance

Co. v. Grandview Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and the authorities therein cited. Mr. Justice Shiras in delivering the opinion of the court in that case quoted largely from the case of Dewees v. Manhattan Ins. Co., 35 N. J. Law, 366, and prefaced his quotation with the statement that that opinion contains an able and sound statement of the law on the question there involved. A part of the quotation is as follows:

"The assumption is, and must be, that the warranty, in its present form, was a mistake in the agent. But a mistake cannot be corrected, in conformity with our judicial system, in a court of law. No one can doubt that, in a proper case of this kind, an equitable remedy exists. 'There cannot be, at the present day,' says Mr. Justice Story, 'any serious doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake; and a policy of insurance is just as much within the reach of the principle as any other [written] contract. *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 10, Fed. Cas. No. 374.'"

The court there holds that in a proper case of this kind an equitable remedy exists, and that this right would unquestionably exist in a court of equity, but that it could not be administered under the federal jurisdiction in a court of law. That rule applies to a line of cases cited by counsel for appellant upon this point, which were determined by courts in states where the distinction between actions at law and suits in equity and the forms of all such actions and suits were not prohibited. But under the provisions of section 1, article 5, of our state Constitution, the distinction between actions at law and suits in equity is prohibited, and it is there provided that there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which proceeding shall be denominated a civil action.

In *Bates v. Capital State Bank*, 21 Idaho, 141, 121 Pac. 561, this court, in construing said section 1, article 5, and section 4168, Rev. Codes, held that under those provisions the technicalities of the common law in regard to pleadings have been dispensed with, and that the plaintiff need only state his cause in ordinary and concise language, without regard to the ancient forms of pleading; and where that is done, the plaintiff is entitled to any relief, either at law or in equity, that his proof may warrant.

In *Coleman v. Jagers*, 12 Idaho, 125, 85 Pac. 894, 118 Am. St. Rep. 207, this court held that one of the objects of our practice act and the provisions of our state Constitution in abolishing all distinctions between actions at law and suits in equity, and giving our district courts full and complete jurisdiction both at law and in equity, was to rid our system of a multiplicity of suits and a vexatious and cumbersome procedure, and to give litigants full and complete relief in a single action, where under the old practice

several suits were necessary to accomplish that result.

[2] We have no serious doubt but that courts of general jurisdiction of this state have authority to reform a contract, and a policy of insurance is just as much within the reach of that principle as any other written contract.

Counsel for appellant lays particular stress upon what he contends is the vice of the complaint in this case, in that it mingles legal and equitable causes of action, and this was the basis both of his motion in the lower court to require plaintiffs to separately state their causes of action, and of his demurrer upon the ground, among other things that: "Said complaint neither stated the form nor the substance of the agreement alleged to have been made between plaintiff and defendant."

And in his brief he says:

"He sued upon a written instrument and in his complaint alleged that that was not the agreement of the parties, but did not set up the agreement which he alleged had been made."

An inspection of the complaint discloses that plaintiffs made therein a concise and complete statement of the facts constituting their causes of action, including representations claimed to have been made by them to the agent concerning the property to be insured, and the mistakes claimed to have been made by the agent in writing the policy. They also attached to their complaint and made a part thereof a copy of the policy actually issued to them. We cannot conceive how the defendant corporation could have been in any way misled by the allegations of this complaint or misinformed as to the relief sought. It was incumbent upon plaintiffs to allege and prove the facts as to the contract which was actually made and as to the mistake on the part of the agent in reducing it to writing. Having done this, if the evidence warrants it, they are entitled to a judgment in accordance with the true contract thus shown, for the recovery of their insurance money.

[3, 4] The only question before us is whether or not plaintiffs had a valid insurance contract with the defendant company. Under our practice and the decisions of this court, they may plead and prove any state of facts which entitles them to judgment, either at law or equity. The lower court did not err in denying defendant's motion to require plaintiffs to separately state their causes of action, or in overruling the demurrer to the complaint.

As we have already stated, this policy contained a provision that it should be void under certain conditions, among which are specified "if the interest of the insured in the property be not truly stated herein," and "if the interest of the insured be other than unconditional and sole ownership." In 1913 the Legislature of this state enacted an insurance law (Sess. L. 1913, p. 593), section 13 of which is as follows:

"On and after the first day of January, 1914, no fire insurance company, except county mutuals, shall issue any fire insurance policy covering on property or interest therein in this state, other than on the form known as the New York standard, as now or may be hereafter constituted, except as follows. * * *

Counsel for appellant contends that by this act the New York standard form of policy was made the standard insurance policy in this state just as effectively as if it had been set out in *hæc verba* in the act; and, that being the law of the state, plaintiffs in this case must be presumed to have known its contents, even before they received the policy, including the provision that under certain conditions the policy would be void, and that this provision could not be waived, as the law itself prescribing a standard policy so provided. Counsel for respondent, on the other hand, contends that the act in question does not effectively provide a statutory form of insurance policy for this state, because the act itself does not set forth any form, or refer to any form, which is a matter of public record anywhere in this state, and that the Legislature of this state cannot, merely by referring in a general way, to some form of policy that has been adopted in another state, make it a part of the laws of this state, at least without requiring that form to be accessible to our citizens in some public record of the state, so they may be able to determine what the law is. Counsel for appellant cites as leading cases in support of his contention *State v. Howard*, 96 Neb. 278, 147 N. W. 689, and *Oatman v. Bankers' & Merchants' Mut. Fire Relief Ass'n*, 66 Or. 388, 133 Pac. 1183, 134 Pac. 1033. An examination of these cases discloses that in the Nebraska case the law providing for a statutory form was more definite than the Idaho statute, in that it provided that the form should be prepared by a state insurance board, on the basis of the New York standard form. At the same time the court held that that provision of the Nebraska statute providing that the New York form should be used as a standard as "it may be hereafter constituted" was invalid, because its effect would be to control the powers and duties of Nebraska officials by the future action of the Legislature of New York.

In the Oregon case cited, it appears that the prescribed conditions to be inserted in the standard insurance policy of Oregon were specifically set forth in the statute itself. These cases are therefore not exactly in point in construing section 13 of our 1913 statute, which appears to be unique in insurance legislation. However, we do not believe it was the intention of our Legislature, in seeking to enforce a standard form of policy in this state, to withdraw from the insured any protection theretofore afforded them under the law of contracts, or to confer upon insurance companies any immunity

for the carelessness or negligence of their agents which they had not before enjoyed. Section 18 of article 3 of our Constitution prohibits the amendment of existing laws of this state by reference to their title, and commands that such sections as are amended be set forth at length in the new statute; and in view of this constitutional provision it would seem somewhat anomalous if the Legislature could nevertheless adopt the law of another state by reference, not to its title even, but to something still more indefinite, namely, "the New York standard, as now or may be hereafter constituted."

From these considerations we conclude that the plaintiffs in this case cannot be held to have had the constructive notice of the contents of their policy which appellant seeks to fasten upon them under the law in question, and that their contractual rights were in no way abridged by the 1913 statute.

Much has been said in the briefs of counsel in this case with reference to the legal principles of mutual mistake, waiver, and estoppel, and their applicability to the facts of this case. As we view the matter, the conduct of the insurance company's agent in writing a policy of insurance which did not disclose the true title or interest of plaintiffs, although they had stated the nature of that interest to the agent, knowledge of which therefore is imputed to the company, followed by the acceptance of premium on such policy by the company and the reliance of plaintiffs on its validity, effectually estops the insurance company from setting up the defense that the policy is void because the plaintiffs were not in fact sole owners of the property insured.

In the case of *Allen v. Phoenix Ins. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903, 10 Ann. Cas. 328, some of the facts were similar to those in the case at bar, and the court there said:

"In this case it does not definitely appear whether the insured made a written application for insurance or simply had a parol understanding with the agent who solicited the risk. If the title disclosed were held to be short of the requirement contained in the policy, still it would not defeat the right of recovery, if it could be shown that the insured, by their written application, truly and correctly represented the state and condition of the title to this property. In such case the insurer could not insert a contrary provision in the policy with knowledge of the true condition of the title, and thereby bind the insured and defeat his right of recovery in case of loss" (citing authorities).

We particularly call attention to the last sentence of the above quotation, which seems in point under the facts of this case.

We are aware that there is a considerable divergence among the reported cases as to the legal principle to be applied in cases of this kind. This is quite apparent from an examination of the cases cited by counsel. Some of them take the view that such action on the part of the agent in mistakenly reducing the insurance contract to writing

should be considered as a mutual mistake between the parties, and that only the remedy appropriate to that class of cases should be applied. Others go further and consider the conduct of the agent a waiver of the right of the company to declare the policy void under specific conditions. A third class of cases goes still further and hold that the insurance company is estopped by such conduct on the part of its agent; that is to say, that it cannot assume one attitude as to known facts for the purpose of making the contract, and then be permitted to assume another and inconsistent attitude in order to avoid it. Owing to the great variety of facts and circumstances which might be shown in cases of this kind, it is apparent that some of them might properly fall in one class and some in another. In the case at bar, the following excerpt from the opinion of the New York Court of Appeals in the case of *Robbins v. Springfield Fire & Marine Ins. Co.*, 149 N. Y. 477, 44 N. E. 159, appears to us to be in point:

"The rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it, by proving the existence of facts which would render it void, where it had full knowledge of them when the policy was issued, is too well established by the authorities in this state to require further discussion. * * * Whether the decisions in this class of cases proceed upon the charitable theory that the insurance company by mistake omitted to make the required indorsement, or intended to waive the provision regarding it, or upon the idea that its purpose was to defraud the insured, and is for that reason estopped, is of but little consequence, as any one of those theories is sufficient to avoid the defense relied upon in this case."

One of the defenses of the defendant corporation in this case was that plaintiffs had been guilty of falsely swearing in their proof of loss, thereby making their policy void. The record shows that the plaintiff Carroll made affidavit in the proof of loss that no other person but himself and Ward had any interest in the lumber which had been destroyed. The evidence shows that the company's adjuster wrote the proof of loss himself, and that Carroll, who was an unlettered man and not familiar with business of that sort, signed and swore to it without question, relying upon the adjuster for its correctness.

[5] Appellant assigns as error the instructions given by the court to the effect that before they could find for the defendant they must not only find that plaintiffs swore falsely in their proof of loss, but that such false swearing was knowingly and willfully done for the purpose of deceiving defendant, and was done by them with a fraudulent intent. These instructions were not erroneous under section 8 of the insurance law of 1913 (*Sess. L. 1913, p. 597*), the language of which is:

"Any person who, knowing it to be such, presents, or causes to be presented, a false or fraudulent claim, or any proof in support of such a claim, for the payment of a loss upon a contract of insurance, or who prepares, makes or subscribes false or fraudulent account, certifi-

cate, affidavit, or proof of loss, or other document or writing, with intent that the same be presented or used in support of such a claim, shall be guilty of a misdemeanor."

Under this statute the intent is an essential element in the offense of false swearing, and it does not appear from the evidence that the false statement in the proof of loss was knowingly made by plaintiff.

[6] Appellant also assigns as error the giving of instruction No. 10, wherein the court instructed the jury that in arriving at the amount of loss under the policy they should—"determine the same by ascertaining the cash value of the lumber in the millyard, and then deducting therefrom 15 per cent. of the manufacturers' net market value of similar stock in like quantity at the time and place of the fire, as the policy provides that 15 per cent. shall be deducted from the cash price in arriving at the amount to be paid under the policy."

It is contended that the court erred in this instruction in specifying "the cash value of the lumber in the millyard" as the measure of loss, when the true measure was the cash value of the lumber destroyed. It is obvious that the court's instruction in this respect might tend to mislead the jury, but it had been shown by the evidence that at the time of the fire there was about 256,000 feet of lumber in the yard, all but 4,020 feet of which was destroyed. The policy covered 250,000 feet. It is also shown by the evidence that the cash value of this lumber, taken as a whole, was "between \$11 and \$12 per thousand." In view of this evidence, we do not think the jury was prejudicially misled by this instruction or that reversible error was committed in giving it, although the language used by the court was inexact.

[7] Appellant assigns as error the giving of a number of other instructions and the refusal to give certain instructions offered on behalf of defendant. We have carefully examined the instructions given by the court, as well as the ones refused, and are of the opinion that the instructions taken as a whole fairly and fully state the law applicable to the facts of this case, and that no reversible error was committed by the court in giving or refusing to give the instructions last-above referred to.

[8] Appellant contends that the court erred in denying its motion for subrogation. In passing upon that motion the court said:

"It is by the court ordered that the motion of the defendant for subrogation to the rights of plaintiffs under said mortgage in proportion to the amount of the verdict of the jury be, and the same hereby is, deferred until such time as defendant shall pay to the plaintiffs the amount of said verdict and judgment rendered thereon, or pay said amount into court for the use and benefit of said plaintiffs."

It thus appears that the trial court did not definitely determine the question of subrogation. Clearly under the law the appellant is not entitled to subrogation, in any event, until it has paid or offered to pay the judgment in this case. Counsel for respondent contend that there is no subrogation clause in

the policy, and therefore it must be covered by the common-law rule, and cite 1 Clement on Fire Insurance, p. 378, where the author says:

"Where the insurance is not sufficient to cover the mortgage debt, the company takes nothing by subrogation and assignment until the mortgage is paid or tendered in full, both principal and interest."

However, the trial court did not deny the motion to subrogate, but simply held the matter in abeyance until such time as the company would make or tender payment of said judgment in full, at which time it reserves the right to take up and decide said question.

There is nothing in the contention of appellant that the court erred in denying said motion for subrogation.

Some other questions were raised on the motion for a new trial, one in particular in regard to newly discovered evidence. We assume that the appellant does not rely upon that since counsel have not referred to it in their brief.

We therefore conclude that the judgment of the trial court must be affirmed; and it is so ordered, with costs in favor of respondent.

BUDGE and MORGAN, JJ., concur.

(28 Idaho, 22)

McKUNE v. CONTINENTAL CASUALTY CO.

(Supreme Court of Idaho. Sept. 25, 1915.

On Rehearing, Feb. 16, 1916.)

1. APPEAL AND ERROR §1071—FINDINGS—CONFORMITY WITH STIPULATED FACTS—DISPOSITION OF CAUSE.

Where a case is submitted to the trial court upon an agreed stipulation of facts and the trial court makes findings, a part of which are not fully supported by the stipulated facts, the case will not be reversed and sent back for further findings where the law applicable to the agreed statement of facts warrants and supports the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. §1071.]

2. TRIAL §388—FINDINGS OF FACT—AGREED STATEMENT—JUDGMENT.

Under an agreed statement of facts, no findings by the court are absolutely necessary; the question then being what is the law applicable to such facts. Where the court makes findings of its own in such a case, an objection that they are not justified by the evidence cannot be sustained if the law applicable to the agreed statement of facts supports the judgment, since the judgment must be tested by the agreed statement of facts and not by the finding of facts made by the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908-911, 915; Dec. Dig. §388.]

On Rehearing.

3. INSURANCE §177, 392—FORFEITURE FOR NONPAYMENT OF PREMIUM—WAIVER.

Where an insurance company issues a policy upon which the premium is payable in four installments, the payment of the first, second, third, and fourth installment to continue the policy in force for respective periods of two, two, three, and five months, all such periods

to be computed successively from the date of the policy, which was November 8, 1912, and credit is given the insured for the first payment at the time of the issuance of the policy, and an installment of the premium was received by the insurance company only on January 20, 1913, and upon February 20, 1913, notice was given by the company that the second installment should be paid, and on February 24th the insured was killed, which fact was known to the company on March 3d, and the company never recalled the demand made for payment of the second installment and received payment out of wages due the insured on March 20th and retained said money until April 29th, held, that the payment made on January 20th continued the policy in force for two months from its date, and that the conduct of the company amounted to a waiver of the conditions of the policy wherein forfeiture is declared as a penalty for nonpayment of installments of premium.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 372-373, 1041-1056, 1058-1070; Dec. Dig. §177, 392.]

4. INSURANCE §310, 371, 388—NONPAYMENT OF PREMIUM—FORFEITURE—WAIVER—PRESUMPTION.

An insurance company may waive forfeiture for noncompliance with the provisions of a policy by its own conduct, and, as a forfeiture is not favored, waiver will be inferred whenever it is a reasonable inference from the facts. The provisions of the policy alone do not of themselves work a forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 703, 761, 780, 826, 840, 904, 943-946, 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. §310, 371, 388.]

5. INSURANCE §645—FORFEITURE CLAUSE—WAIVER—EVIDENCE—PLEADING.

Ordinarily, evidence of a waiver is not admissible, unless waiver is pleaded; but this is true only where the party relying upon the waiver had an opportunity to raise it by proper pleading. It is not true, if waiver is properly relied upon by plaintiff as rebuttal matter to meet a defense raised by defendant. Held, that in this case the point of waiver is raised in rebuttal to meet the defense of forfeiture attempted to be raised by defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. §645.]

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Action by Rose McKune against the Continental Casualty Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Budge & Barnard, of Pocatello, for appellant. Paul S. Haddock, of Shoshone, for respondent.

SULLIVAN, C. J. This is an action to recover on an accident policy issued by the appellant to one Frank J. McKune; the beneficiary named in the policy being his mother, Rose McKune, the plaintiff in this action. The case was submitted to the lower court upon an agreed statement of facts, and thereupon the court made its finding of facts, conclusions of law, and entered judgment in favor of the plaintiff for \$1,000; that being the amount named in the policy of insurance. The appeal is from the judgment.

The assignments of error specify the insufficiency of the evidence to justify the findings and judgment, as well as certain alleged errors of law.

The following facts, among others, appear from the agreed statement of facts:

On November 8, 1912, Frank J. McKune made a written application to the defendant company for a policy of accident insurance, which policy is attached to and made a part of said stipulated facts. At the time McKune made said application, he signed a pay order drawn on the Oregon Short Line Railway Company and delivered the same to the defendant insurance company, a copy of which order is attached to and made a part of the stipulation. Said application and order were received by the defendant company at its branch office in San Francisco, Cal., on November 19, 1912, and the company thereupon issued and delivered to said McKune the policy sued on herein.

On November 8, 1912, the said McKune was in the employ of the Oregon Short Line Railway Company as an "extra" freight brakeman, and continued in such employment until his death on February 24, 1913. As such employé, he performed intermittent and irregular service as required by said railroad company, and his compensation therefor was based upon mileage made and "overtime." The earnings of said McKune were as follows: During November, 1912, \$85.12; December, 1912, \$82.02; January, 1913, \$51.47; February, 1913, \$87.99.

It was the custom of said railroad company to pay its employes on or shortly after the 15th of each month the wages earned during the previous month, after deducting therefrom the amount of any "pay order" drawn against such wages by the employé. The defendant company, pursuant to its regular custom and immediately upon the receipt of said pay order, sent the same to the Oregon Short Line Railway Company, and on or about December 20, 1912, billed the McKune account to the railroad company for collection of the first installment of premium on his said policy from his wages for the month of December, 1912. Said billing was on the form used by the defendant company commonly called a "paymaster's return list," and consisted of several sheets. Said bill was made up in the office of the defendant company and contained the names of the employes of the railroad company who had given pay orders to the defendant company authorizing deductions or premiums from their wages for the month of December, 1912. Copies of said sheets are attached to said stipulated facts and made a part thereof.

The first installment of premium in the sum of \$15 was deducted by the paymaster of the railroad company pursuant to said pay order of McKune. Said exhibit, together with a remittance of \$15 to cover the

deduction made from McKune's wages for December, was forwarded by the railroad company to the San Francisco office of the defendant and received there on January 20, 1913. Thereafter the defendant company included the name of McKune on the paymaster's return list for the month of January, 1913. Said list was made up at the San Francisco office of the defendant and sent to the railroad company two or three days later. A copy of the particular sheet of the January billing on which the name of McKune appeared is attached to and made a part of the stipulation of facts. A penciled memorandum appears on said sheet opposite the name of McKune, as follows: "Not enough time in." On November 20, 1912, McKune executed in favor of one Land a pay order in the sum of \$50 at Glenns Ferry for a watch purchased from Land, and the pay order provided for the deduction of \$20 from the November, 1912, wages of McKune, \$20 from the December, 1912, wages, and \$10 from the January, 1913, wages. Said order was executed in duplicate and one copy thereof transmitted to Stevenson, superintendent of the Idaho division of said railroad company, and by him transmitted to the paymaster of the Oregon Short Line Railroad Company at Salt Lake. McKune resided at the railroad company's hotel and gave further additional pay orders, payable out of his January, 1913, wages, for the sum of \$50, and he was also liable for a hospital fee in the sum of 50 cents. The railroad company made disposition of McKune's January wages on or about the 15th of February by disbursing the same as follows:

1 hotel pay order.....	\$30 00
1 watch pay order.....	10 00
1 hospital fee.....	50
Balance paid McKune.....	10 97

Total earned..... \$51.47

In making payment of the said sum of \$10.97 to McKune, the usual form of check of the railroad company was employed, and contained no statement or information as to the amount earned by said McKune nor as to what pay orders had been honored. The defendant had no knowledge that the second installment of premium had not been deducted from the January wages of McKune until the receipt of Exhibit E on February 20, 1913. There had been stamped the word "lapsed" on said Exhibit E opposite the name of the insured, and his account was marked as "lapsed" on the records of the defendant company. On the same date, to wit, February 20th, the defendant mailed to McKune at Shoshone, Idaho, a certain notice, a copy of which is attached to the stipulation of facts and made a part thereof. Said "lapse" notice was not received by the insured during his lifetime, but was received by the plaintiff, Rose McKune, after her son's death.

McKune died on the 24th of February from

injuries received on that day by reason of being caught between cars and crushed while making a coupling. His death was caused solely by injuries effected through accidental means and was occasioned in a manner covered by the terms of the policy. Rose McKune, as required by the terms of said policy, gave notice and filed proof of the death of McKune. The death notice was received by the defendant company at its San Francisco office March 3, 1913, and this was the first notice or knowledge the defendant company had of the injury and death of McKune. Deceased's name was included by the defendant company on its paymaster's return list for the month of February, 1913, and this list was made up in the San Francisco office of the defendant on or about the 20th of February, 1913. The sum of \$30 was deducted by the railroad company from the wages of said McKune earned by him in the month of February, 1913, and forwarded by the railroad company, together with the paymaster's return list or sheet, to the San Francisco office of the defendant company and was received there on or about March 20, 1913. The defendant company had no knowledge as to whether or not any deduction had been made by the railroad company from the February wages of McKune until the receipt of said remittance together with Exhibit H.

Said \$30 upon its receipt at the San Francisco office of the defendant was placed in the "Suspense Account," and the claim was then taken up with the main office of the defendant at Chicago, Ill., and on April 29, 1913, the defendant's check for \$30 was mailed from the San Francisco office of the defendant to the plaintiff and was received by her. She declined to accept the \$30 and returned the same to the defendant company. The defendant company is ready and willing to return said \$30 to whomsoever may be entitled to it. In all of its actions in connection with the policy of said McKune, the defendant company has pursued the same course it has always pursued under similar circumstances in connection with similar policies held with it by other employes of the Oregon Short Line Railway Company.

It is also stipulated that sometimes wages earned by "extra" freight brakemen, such as McKune, whose duties were similar to those of McKune, earned in the last day or two of a month, would be included in the wages of the employe the next succeeding month. It is further stipulated that in this particular case no wages earned by McKune in January were carried over to February, and no wages earned in December were carried over to January.

At the end of each run the conductor in charge of the train on which McKune was working would make up a slip showing the amount earned on the run, and this slip was

in every instance signed by McKune and forwarded by the conductor to the proper official of the railroad company. It was the custom of the company to honor watch and board orders and hospital fees in preference to insurance fees, where the sum earned was insufficient to pay all off.

From the foregoing facts, the trial court made its finding of facts, conclusions of law, and entered judgment in favor of the plaintiff for \$1,000.

[1, 2] The main contention of the appellant is that the finding of facts is not sustained by the evidence, and for that reason the judgment is not based upon the agreed facts, but upon the facts as found by the court, and counsel proceed in their printed brief to criticize the findings made by the court and contend that certain of such findings are not supported by the evidence.

It must be conceded that some of the findings made by the court were not necessary under the facts of the case, and it was not necessary for the court to make any findings of its own, as it might have adopted the facts as stipulated as the finding of the court. The reason why finding of facts is not necessary in cases of this kind is because the stipulation of facts takes the place of the court's findings, and if, on the stipulated facts, the court has made findings that were not necessary and not supported by the evidence, that will not be permitted to vitiate the judgment. The judgment must be tested by the agreed statement of facts, and not by findings of fact made by the court in such a case. The stipulated facts are before this court, and, if the law applicable to such facts warranted the judgment entered by the trial court, this court ought not, and will not, reverse that judgment simply because the court has found some things as facts that were not stipulated.

It was said in *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109, as follows:

"The objections to certain findings upon the ground that they were not justified by the evidence cannot be sustained. As the case was submitted upon an agreed statement of the facts, no findings were necessary; the only question being as to what was the law applicable to those facts."

In the case before us the question is: What is the law applicable to the stipulated facts, regardless of the finding of facts made by the court? We are satisfied that the stipulated facts support the judgment.

It is therefore not necessary to send the case back to the trial court to change in any manner its finding of facts. As bearing upon some of the questions involved in this case, see *Continental Casualty Co. v. Jennings*, 45 Tex. Civ. App. 14, 99 S. W. 423; *Loftis v. Pacific Mutual Life Ins. Co.*, 33 Utah, 532, 114 Pac. 134.

Finding no reversible error in the record, the judgment must be affirmed, and it is so

ordered, with costs in favor of the respondent.

MORGAN, J., concurs. BUDGE, J., took no part in the decision of this case.

On Rehearing.

McCARTHY, District Judge. A rehearing was granted in this cause, and the principal point urged in the argument on the rehearing is that the insurance policy issued by appellant to respondent had lapsed before the death of the insured for failure to pay an installment of the premium.

It appears from the stipulation of facts that the policy was issued as of November 8, 1912, upon an application of the same date. In the application the insured agreed to pay a yearly premium of \$60 in four installments of \$15 each. The following language is used in the application:

"I agree to pay therefor \$60.00 in 4 installments of \$15.00 each. If paymaster's order is given to provide for the payment of these installments, I agree to pay them as therein provided, and do hereby make such order a part of my contract with the company. * * * I further agree that if any payment be not made by 12 o'clock noon, standard time, of the day when due, as above specified, all my rights under said policy and the rights of the beneficiary thereunder shall then and thereby become void, and that my policy can be reinstated only at the option of the company as provided in the policy and that no claim for loss arising between the time of such forfeiture and reinstatement shall be good against the company."

The insured also signed a pay order authorizing his employer, the Oregon Short Line Railroad Company, to deduct his premium in four installments of \$15 each from his wages for the months of December, 1912, and January, February, and March, 1913. The pay order contains the following language:

"* * * and further, at the option of the Continental Casualty Company, to pay any installment, payment of which has been in default from any reason whatever, from my wages from any month thereafter succeeding.

"I understand and agree as to the duration of my insurance; * * * (2) that if premium is payable in four installments the payment of the first, second, third and fourth installments shall continue my policy in force for respective periods of two, two, three and five months, * * * all such periods to be computed successively from the date of the policy; (3) that the failure to pay any installment of premium, from whatsoever cause it may arise, shall terminate my said policy at the expiration of the specified period without any notice; (4) that the paymaster is my agent and his action entirely at my risk; (5) that should default be made in the payment of any installment and the defaulted installment afterwards be paid, then such payment shall reinstate my policy only from the date of acceptance of the overdue premium as provided in the policy."

The insurance policy contains the following provisions:

"The company shall not be liable for any loss occurring while the assured shall be in default in the payment of any premium. If this policy shall lapse at any time by reason of the failure of the assured to pay premium as agreed the

subsequent acceptance of the overdue premium by the company * * * shall reinstate the policy as to accidental insurance to cover disability or death resulting from accidental injury thereafter sustained."

The pay order gave the insurance company option to collect any installment, payment of which had been defaulted for any reasons whatever, from wages for any month thereafter succeeding, and further provided:

"Should default be made in the payment of any installment and the defaulted installment afterwards be paid then such payment shall reinstate my policy only from the date of acceptance of the overdue premium as provided in the policy."

The insurance company sent the railroad company a notice authorizing the deduction of the first installment from the insured's wages for December, 1912. The December wages were payable about the middle of January, and the installment was received by the insurance company on January 20, 1913. The installment from the January wages was not paid. About February 20th the insurance company learned that the deduction from the January wages had not been made, and sent the insured a notice, marked "Exhibit G," reading as follows:

"This is to inform you that we have been unable to collect the second installment on order No. 2206520 given by you on paymaster of the Oregon Short Line Railroad Co. * * * to pay the premium on your insurance. This installment of \$15.00 should be sent to this company immediately. Otherwise you will be without insurance until the overdue premium is received in the usual way from your paymaster. No man can afford to be without insurance. 'It is better to be safe than to be sorry.'"

The insurance company, in making up the February paymaster's list, included the name of the insured in order that the installment from the January wages might be collected, and sent this list to the railroad company about February 20th. On February 24th, the insured was killed, and the insurance company learned of this fact on March 3d. It never recalled the demand made on the railroad company for payment, and received payment from the railroad company out of wages due the insured on March 20th. It kept this money until April 29th, and then tendered it back and attempted to declare a forfeiture of the policy.

[3,4] The contention of the appellant is that the insurance policy was forfeited at the time of the insured's death by reason of nonpayment of an installment from the January wages. It occurs to us that the first question is: How long did the payment from the December wages, received on January 20, 1912, continue the policy in force?

The pay order says that if the premium is payable in four installments the payment of the first, second, third, and fourth installments shall continue the policy in force for respective periods of two, two, three, and five months; all such periods to be computed successively from the date of the policy. This apparently contemplates that there shall be

a first payment at the time the policy is issued which shall continue the policy in force for two months from that time, and that there shall then be a second payment which shall continue the policy in force for two months more. In this case it is apparent that the first payment was waived. The company gave McKune credit for the first payment, and, if he had died during the first two months, the policy would have been in force upon payment of the premium after his death. The first payment which he made took the place of the second payment, in the ordinary case. In the ordinary case, the second payment would continue the policy in force for two months from its date.

It may thus be reasonably contended in this case, in accordance with the language of the pay order, that the payment made on January 20th continued the policy in force for two months from its date. The use of the language to the effect that all periods are to be computed successively from the date of the policy furnishes some ground for an argument to the contrary, but this argument is met by the fact above pointed out that the first payment was waived and the payment made on January 20th is to be considered as similar to the second payment in the ordinary case.

If the construction of an insurance policy, as applied to the facts of the case, is a matter of doubt, then we are inclined to think that a construction is to be favored which prevents a forfeiture, rather than one which favors a forfeiture. This is a reason for favoring the construction above outlined. There may be other provisions in the pay order and policy which favor a different construction; but, in such cases, we hold that those provisions should be given effect which prevent a forfeiture, rather than those which favor one.

Since the payment on January 20th continued the policy in force for two months, or until March 20th, and the insured was killed on February 24th, it is evident that he was not in default at the time of his death.

The construction of the contract which we have adopted disposes of the case, but we think it well to advert to the question of waiver, which was also mentioned in the argument.

The respondent contends that, even if the insured was in default at the time of his death, the insurance company waived its right to insist upon a forfeiture of the policy by its conduct in first demanding payment of the past due premium; second, failing to recall that demand, even after learning of the insured's death; and, third, keeping the money for over thirty days after receiving it. It is, of course, the settled law that an insurance company may waive a forfeiture, and that, a forfeiture being not favored, a waiver will be inferred whenever it

is a reasonable inference from the facts. The mere provisions of the policy do not of themselves work a forfeiture. The question is whether the company so conducted itself that it is able to insist upon the forfeiture provisions of the policy.

[5] Before referring to the merits of this question of waiver, a question of pleading must be disposed of. The appellant contends that, since the plaintiff does not plead a waiver in his complaint, the question of waiver cannot be considered. Ordinarily evidence of a waiver is not admissible unless waiver is pleaded. This, of course, is true only where the party relying upon the waiver had an opportunity to raise it by proper pleadings. It is not true if waiver is properly relied upon by a plaintiff as rebuttal matter to meet a defense raised by the defendant, because in this state no pleading by way of replication is necessary. In this case the point of waiver is raised in rebuttal to meet the defense of forfeiture, attempted to be raised by the defendant. The facts upon which the waiver is based are all contained in the stipulation without any objection on the ground of insufficiency of the pleading. Under these facts, we think that it would be the height of technicality to refuse to consider the question of waiver.

Returning to a consideration of the question of waiver on the merits, we call attention to the case of *Loftis v. Pacific, etc., Ins. Co.*, 38 Utah, 532, 114 Pac. 134, in which the Supreme Court of Utah held that the right to insist upon a forfeiture was waived in a case very similar to the present one, so far as the provisions of the policy and the conduct of the insurance company are concerned. Even if it should be held that the insured was in default at the time of his death, and that the company therefore had a right to insist upon a forfeiture, we think that that right was waived by the company in this case by its conduct as above outlined. The notice sent to him is to be reasonably construed as a demand for payment rather than a notice of forfeiture. The failure to recall the demand upon the railroad company after learning of the insured's death is more consistent with an intention to waive the forfeiture than with an intention to insist upon it. Keeping the money for a length of time which this court considers to be unreasonable under the circumstances, before returning it, is also inconsistent with an intention to declare a forfeiture.

We have reached the conclusion that the questions involved in the petition for rehearing and presented to the court upon the argument were correctly decided in the original opinion in this case, which is, accordingly, adhered to.

SULLIVAN, C. J., and MORGAN, J., concur.

(28 Idaho, 442)

DUDACEK v. VAUGHT.

(Supreme Court of Idaho. Jan. 25, 1916.)

1. APPEAL AND ERROR §612—PRESENTATION FOR REVIEW—DENIAL OF NEW TRIAL—CERTIFICATE OF TRANSCRIPT.

Section 4819, Rev. Codes, provides that on appeal from an order, except an order granting or refusing new trial, the appellant must furnish the court with a copy of the papers used on the hearing in the court below. Section 4821, Rev. Codes, provides that the copies mentioned in section 4819, Rev. Codes, must be certified to be correct by the clerk or attorneys.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.]

2. APPEAL AND ERROR §612—PRESENTATION FOR REVIEW—DENIAL OF NEW TRIAL—CERTIFICATE OF TRANSCRIPT.

Where, upon an appeal from an order dismissing a motion for a new trial because same was not prosecuted with due diligence, the transcript contains no certificate showing that the papers and records therein were used by the judge upon the hearing of such motion, but merely contains a certificate from the clerk to the effect that it is a true and correct transcript of the proceedings therein contained, such certificate does not comply with the statutory requirement and the rules of this court, and the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by Frank G. Dudacek against J. K. Vaught. From an order dismissing a motion for new trial, defendant appeals. Appeal dismissed.

Angel & Boyle, of Hailey, for appellant. F. C. White, of Boise, C. H. Edwards, of San Francisco, Cal., and Sullivan, Sullivan & Baker, of Hailey, for respondent.

BOTHWELL, District Judge. This is an appeal by the defendant, J. K. Vaught, from an order made by the Honorable Edward A. Walters, judge of the Fourth judicial district, sustaining objections to hearing a motion for a new trial and dismissing said motion because the same was not prosecuted with due diligence.

The transcript contains a certificate made by the clerk, certifying that the transcript was compiled and bound under his direction as a true and correct transcript of the proceedings therein contained. The transcript contains no certificate showing that the papers and records it contains were used by the trial judge upon the hearing. Thus under the record in this case, this court is required to pass upon an order of the trial court without knowing what papers and records were considered on the hearing.

[1, 2] Section 4819, Rev. Codes, provides that on appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of

papers used on the hearing in the court below.

Section 4821, Rev. Codes, provides that the copies mentioned in section 4819, supra, must be certified to be correct by the clerk or attorneys.

Rule 24 of this court, which was formerly rule 21, prescribes a convenient form of certificate to be used on appeals of this nature. The transcript on appeal in this case was filed in this court on April 6, 1914. Respondent's brief was filed July 29, 1914, and the attention of counsel for appellant was therein directed to the failure of the transcript to contain a proper certificate, in the following language:

"It will be further noted that the transcript in this court does not contain the certificate required by rule 21 of this court as to the papers used on the hearing of the contested motion; that is, the motion to dismiss and the objections to the hearing of the motion for a new trial. The record fails to show what papers were before the court or considered by it in passing upon the objections and motion of respondent."

The cause was assigned for hearing and oral argument on January 12, 1916, but was submitted only on briefs. Had appellant seriously desired the appellate court to pass upon the merits of his appeal, he has had ample time to suggest a diminution of the record, as provided by rule 32 of said court.

The question of the absence of the certificate that the transcript is required to contain, showing that the papers and records contained therein were used by the trial judge on an appeal from an order other than one granting or refusing a new trial, has been before this court in *Simmons Hardware Co. v. Alturas Commercial Club*, 4 Idaho, 334, 39 Pac. 553, 95 Am. St. Rep. 66; *Village of Sand Point v. Doyle*, 9 Idaho, 236, 74 Pac. 861; *Knutsen v. Phillips*, 16 Idaho, 267, 101 Pac. 596; and from an order granting or refusing a new trial, in *Steve v. Bonners Ferry Lumber Co.*, 13 Idaho, 384, 92 Pac. 363; *Doust v. Rocky Mt. Bell Tel. Co.*, 14 Idaho, 679, 95 Pac. 209; *Johnston v. Bronson*, 19 Idaho, 449, 114 Pac. 5.

In the case of *Village of Sand Point v. Doyle*, supra, which was an appeal from an order granting a temporary injunction, the court said:

"The transcript in this case contains no certificate showing that the papers and records it contains were used by the judge upon the hearing, but merely contains a certificate from the clerk that they are true and correct copies of the papers it purports to contain as the same appear on file in his office. This certificate is good as far as it goes, but falls short of showing that the papers contained in the transcript were used by the district judge upon the hearing of the motion. Many other papers and documents might have been used, for aught this record shows, or many of the papers in this transcript may not have been presented to the judge at all. It would be a dangerous practice for this court to pass upon such appeals without having before it copies of all the papers used upon the hear-

ing properly identified by certificate as contemplated by statute.⁴

And so, in this case we may say, in addition to rule 27 (formerly rule 24), adopted by the Supreme Court of this state, which requires a strict compliance with the requirements of the rules concerning preparation of transcripts, that this being an appeal from an order under section 4819, Rev. Codes, other than granting or refusing a new trial, the appellant must furnish the court with a copy of the papers used on the hearing in the court below; and under section 4821 the transcript must contain a certificate that they are the papers required by section 4819, and were the papers used on the hearing in the court below.

A failure to furnish such a certificate affords nothing for the appellate court to pass upon, and will necessitate a dismissal of the appeal upon the court's own motion. A judgment affirming or reversing the order of the trial court, under the record in this case, would be purely conjecture.

It follows that the appeal must be dismissed; and it is so ordered. Costs awarded to respondent.

BUDGE and MORGAN, JJ., concur.

(24 Wyo. 53)

PETERS v. KILLIBREW et al. (No. 858.)
(Supreme Court of Wyoming. Feb. 14, 1916.)

1. MECHANICS' LIENS §13—PROPERTY SUBJECT—SCHOOL BUILDINGS.

The provision of the mechanics' lien law (Comp. St. 1910, § 3799) that "every mechanic or other person, who shall * * * perform any work, * * * or furnish any materials * * * for any building * * * shall have * * * a lien upon such building" did not give a materialman a lien for brick furnished in the construction of a county high school building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 14, 15; Dec. Dig. §13.]

2. MECHANICS' LIENS §229—CONSTRUCTION OF SCHOOL BUILDING—MATERIAL FURNISHED—LIABILITY TO SUBCONTRACTOR—FAILURE TO REQUIRE BOND.

That a school board neglected to require a school building contractor, who afterwards became bankrupt, to give the bond against mechanics' liens provided for by the building contract did not render the school district liable for material furnished by a subcontractor and used in the construction of the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Dec. Dig. §229.]

Error to District Court, Converse County; Charles E. Winter, Judge.

Action by Howard G. Peters against W. L. Killibrew and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Stansbury & Stansbury, of Douglas, for plaintiff in error. John D. Clark, of Cheyenne, for defendant in error Converse County High School.

BEARD, J. The defendant in error Converse County High School is a school district

and body corporate, organized and existing under and by virtue of chapter 142, Comp. Stat. 1910. The other defendant in error, Killibrew, had a contract with the school district to furnish the materials for, and to construct, a school building for said school district. The plaintiff in error furnished to Killibrew certain brick for said building. Killibrew failed to pay for all of said brick, and plaintiff sought by this action to hold the school district for the balance due him for said brick, and to establish and enforce a mechanic's lien on the building and the lots on which it is situated. A general demurrer was sustained to the petition, judgment was rendered for defendant for costs, and plaintiff brings error. But two questions arise in the case: First, is the property subject to mechanics' liens? and, second, is the school district otherwise liable under the facts alleged in the plaintiff's petition?

[1] The first question has been before the courts of last resort in many of the states upon statutes similar to those of this state, and it has been almost uniformly held that public property, such as the school building and the lots upon which the same is situated as in this case, are not subject to mechanics' liens, in the absence of a statute expressly so providing, and that such general or comprehensive language as is used in our statute, "Every mechanic or other person, who shall do or perform any work or labor upon, or furnish any materials * * * for any building, erection or improvement upon land, * * * shall have * * * a lien upon such building" (Comp. St. 1910, § 3799), etc., does not, under the well-settled rules of construction of statutes, include public property such as courthouses, school buildings, etc., belonging to the county or school district and used for public purposes. We shall not attempt to review the numerous decisions, or to quote from them, but content ourselves by saying that the reasons assigned for so holding in the numerous decisions accord with our views, and that such is the proper construction to be placed upon our statute. In support of our conclusion we cite the following cases from among many: *A. L. & E. F. Goss Co. v. Greenleaf*, 98 Me. 436, 57 Atl. 581; *Phillips v. University*, 97 Va. 472, 34 S. E. 66, 47 L. R. A. 284; *Atascosa County v. Angus*, 83 Tex. 202, 18 S. W. 563, 29 Am. St. Rep. 637; *Board of Commissioners of Parke Co. v. O'Conner*, 86 Ind. 531, 44 Am. Rep. 338; *Fatout v. Board of School Commissioners of Indianapolis*, 102 Ind. 223, 1 N. E. 389; *Knapp v. Swaney*, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397; *Abercrombie v. Ely*, 60 Mo. 23. For a more extended list of decisions, on the question see 20 A. & E. Enc. L. (2d Ed.) 295; 27 Cyc. 25, 26; *First Nat'l Bank of Idaho v. County of Malheur*, 30 Or. 420, 45 Pac. 781, 35 L. R. A. 141, and note; *National Fire Proofing Co. v. Town of Huntington*, 51 Conn. 632, 71 Atl. 911, 20 L. R. A. (N. S.) 261,

and note, 129 Am. St. Rep. 228; Morganton Hardware Co. v. Morganton Graded School et al., 150 N. C. 680, 64 S. E. 764, 134 Am. St. Rep. 953, 17 Ann. Cas. 130, and note; Special Tax School District v. Smith, 61 Fla. 782, 54 South. 376, Ann. Cas. 1913A, 757, and note; State v. Tiedermann (C. C.) 10 Fed. 20; Ford v. State Board of Education, 166 Mich. 658, 132 N. W. 467.

[2] As to the other question, the averments of the petition are to the effect that by the contract between plaintiff and Killibrew the plans and specifications for the building were made part of the contract, and that said specifications contained the following:

"Persons making proposals will be required to deposit with their bids, a sum in cash, or by certified check, equal to one per cent. of the amount of their bid. If the party making a proposal for the work fails to execute a contract and give a satisfactory surety bond for the performance of such proposal, and give a satisfactory bond for the full amount of contract price against mechanics' liens, when same shall be awarded to him by the board of education, the deposit of such party shall be forfeited to the board as liquidated damages."

That the board waived and neglected to require Killibrew to give such bond against mechanics' liens, and that by such negligence plaintiff was deprived of any remedy except under the mechanics' lien statute; and that Killibrew had become bankrupt. It is not material to consider what rights the school district, or any one else, might have on such bond if it had been required or given, for the reason that plaintiff does not come within its terms. By its terms, as alleged, it was for protection against mechanics' liens only, and, had it been given, it would have availed plaintiff nothing, he not being entitled to such lien. We have been cited to no statute, nor are we aware of any, requiring the officers of the school district, when entering into a contract for the erection of a school building, to take such a bond, or any bond, for the protection of subcontractors. Their failure to do so would not therefore render the district liable to such subcontractor. For the reasons above stated, we are of the opinion that the petition failed to state a cause of action against the school district, and that the demurrer thereto was properly sustained. The judgment of the district court, therefore, is affirmed.

Affirmed.

POTTER, C. J., and SCOTT, J., concur.

(24 Wyo. 42)

CADLE v. BLACK. (No. 811.)

(Supreme Court of Wyoming. Feb. 14, 1916.)

1. ATTORNEY AND CLIENT \Leftrightarrow 166 — GRATUITOUS SERVICES—SUFFICIENCY OF EVIDENCE.

Evidence in an attorney's action to recover for services in probating the will of defendant's deceased husband and procuring an order vesting the property of the estate in her as the sole legatee and executrix, defended on the ground that the services had been rendered gra-

tuitously, held to sustain a verdict for defendant.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368-372; Dec. Dig. \Leftrightarrow 166.]

2. ATTORNEY AND CLIENT \Leftrightarrow 167 — ACTION FOR COMPENSATION—INSTRUCTION.

Where plaintiff claimed that the third person to whom he made statements regarding his services was not the defendant's agent, but where it might be inferred that such person had communicated such statements to the defendant, an instruction that plaintiff was not bound by his statements to such third person, as it was not shown that such person was authorized to employ plaintiff, and that, if plaintiff stated to such person that his services would be gratuitous, intending such statement to be communicated to defendant, and she accepted the services on the understanding that they were gratuitous, she might rely on plaintiff's statement as if made to her personally, was as favorable to plaintiff as he was entitled to under the evidence.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 373-375; Dec. Dig. \Leftrightarrow 167.]

3. ATTORNEY AND CLIENT \Leftrightarrow 167—ACTION FOR SERVICES—INSTRUCTIONS.

In such action, an instruction that the plaintiff would not be bound by any statement made after the services were rendered that plaintiff would make no charge therefor, did not prevent the jury from considering any such statement they believed in connection with the other evidence in determining what plaintiff's original intention as to charge for the services was, or whether they were offered and rendered gratuitously.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 373-375; Dec. Dig. \Leftrightarrow 167.]

4. ATTORNEY AND CLIENT \Leftrightarrow 130—COMPENSATION FOR SERVICES—IMPLIED PROMISE TO PAY.

Where plaintiff, an attorney, offered his services to defendant without charge, and they were accepted by the defendant upon that understanding, plaintiff was not entitled to recover, as that which is offered and accepted as a gratuity cannot afterward be converted into a debt, or a ground for recovery on an implied promise to pay.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 292, 293, 295, 296, 306, 307, 311; Dec. Dig. \Leftrightarrow 130.]

5. ATTORNEY AND CLIENT \Leftrightarrow 167—ACTION FOR SERVICES—INSTRUCTION.

In an attorney's action to recover for services, a requested instruction that plaintiff would not be bound by any statements as to his charge, made to a third party acting in the interest of the defendant, was properly refused as misleading, as the jury might have understood that without showing an express agreement between plaintiff and defendant, plaintiff might recover notwithstanding what the evidence might show or what might be reasonably inferred from it as to the intention or understanding of the parties.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 373-375; Dec. Dig. \Leftrightarrow 167.]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by S. P. Cadle against Maggie Black. Judgment for defendant, with judgment against plaintiff for costs, and he brings error. Affirmed.

Cadle & Byrd, of Sheridan, for plaintiff in error. D. L. Gogerty and R. E. McNally, both of Sheridan, for defendant in error.

POTTER, C. J. This case is here on error for the review of a judgment rendered against the plaintiff in error for costs, upon the verdict of a jury, in an action brought by him to recover the sum of \$200, alleged to be due for services as an attorney at law in probating the will of the deceased husband of the defendant in error, and procuring an order vesting the property of the estate in her as the sole legatee and executrix.

[1] The only question in the case upon the evidence was whether the services had been rendered gratuitously or under circumstances from which a promise to pay might be implied. Upon that point the evidence was conflicting, and we think it sufficient to sustain the verdict.

The plaintiff testified, in substance, that he and Mr. Black, the decedent, had been neighbors and very good friends, and that Mrs. Black was a friend of his wife; that a Mr. Stephenson came into his office and said that they were going to probate the will, and "we have no attorney, and I wanted to ask you a question as a friend of Dick's"; to which he (the plaintiff) then replied that anything he could do he would be glad to do; that Stephenson asked his advice about paying one Smith some money that he claimed to have loaned to Mr. Black, and, after advising him about that matter, Stephenson said, "I just wanted to ask your opinion about it; we are going to probate the will to-day and we have no attorney;" that the plaintiff then told him that he was going up to the courthouse in a few minutes, and, if he could be of any assistance in examining the witnesses, he would examine them for Mrs. Black and would not charge her anything, the plaintiff then supposing that the witnesses would be present; that Stephenson then said that the proof was all made, but, if anything was needed later, he would let him know; that in about a half an hour he returned to plaintiff's office and informed him that they could not prove the will, because the court would not accept the proof, but he did not know what was the matter, and he asked the plaintiff to go to the courthouse and see what the trouble was and what was necessary to be done, and that he would see that Mrs. Black would pay him; that he went to the courthouse, found that the will had been executed in Iowa, and that the only proof was an affidavit of an attorney in Iowa who was one of the witnesses to the will; that he told the clerk that the will could not be proved in that way, and that there would have to be new proceedings; that he then filed a petition or application for the appointment of a commissioner to take the depositions of the witnesses to the will, readvertised the matter

for hearing, had depositions taken and subsequently accepted by the court and the will probated, and also procured the necessary orders and prepared the necessary papers to vest the property in the defendant; that after the court had accepted the testimony and ordered the will probated the defendant met him in the clerk's office and said that she wanted to pay him for his trouble in the matter, and that he told her not to worry about it, that they were not through yet, and when they were through she could settle with him; that shortly thereafter, without paying him, the defendant went to California, and thereupon he sent her a bill for his services which she refused to pay. On rebuttal the plaintiff testified that he had not seen the defendant after her husband died until the will was probated; that he had no agreement with her about his services, and had no conversation with anybody about them except as he had previously stated; that Mr. Stephenson came into his office and said they could not prove the will "in that way, or something to that effect," and told him (the plaintiff) to "go up and do what was necessary to be done"; and that he did not think anything was said then about any pay.

John R. Stephenson, the person referred to by the plaintiff in his testimony as having asked his advice about a claim against the Black estate and requested his services in probating the will, was the principal witness for the defendant. He testified that he had no recollection of a conversation with the plaintiff about the Smith claim or a statement by the plaintiff that he was going to the courthouse and would examine the witnesses to the will, and that he did not believe any such conversation occurred, but that plaintiff had voluntarily offered his services without charge, and for that reason was called to assist in the matter when the services of an attorney were found to be necessary; his testimony respecting that matter being substantially as follows: That Mr. Black before his death had told him that he had made a will and where it had been left, and requested that he do what he could to help Mrs. Black in case of his death, and said to him that he did not think there would be any trouble about the will, or that she would need an attorney; that after Mr. Black's death he told Mrs. Black that the will was in Iowa, and she went there and got it and had it sent to the clerk of the court at Sheridan; that a day or two before the date set for the hearing on the application to probate the will he met the plaintiff on the street, and the latter asked him if Mrs. Black had an attorney to probate the will; that he (the witness) replied that he did not think she needed an attorney, and that the plaintiff then said that, if she did need one, he would like to do the work for her, because he and Mr. Black were friends,

and it would not cost a cent, and that he would like to do it for her free of charge; that he said to the plaintiff he would see Mrs. Black, and if she thought she needed an attorney he would speak to her about it; that afterwards the witness, his wife, and Mrs. Black went to the courthouse to probate the will before the district judge, when it was found that the affidavit of a witness sent with the will was insufficient, and the judge required a deposition, and told them that they had better get an attorney; that he said to the judge that Mr. Cadle had offered to do the work free of charge, and asked if he would do, and that the judge said he would answer the purpose; that they then left the courthouse, and he (the witness) met the plaintiff on the street and told him that it was necessary to get a deposition to prove the will, and that Mrs. Black had said that the plaintiff might do the work for her; that they then went to the courthouse and the papers were prepared for the deposition; that after the will was probated they went into the clerk's office to fix up the bond and other papers, and Mrs. Black then asked the plaintiff, in the presence of the witness and his wife and the clerk of the court, what she owed him, and the plaintiff replied that all she owed him was the money he was out for expenses; that Mrs. Black then told him that Mr. Stephenson would pay him the money that he was out; that on the next day he went to the plaintiff's office and gave him a check for the amount of the expenses, and said to him that Mrs. Black wanted to thank him for his services, to which he replied that she was welcome; that, when he gave him the check the plaintiff said nothing about anything due him for his services, except that when the witness thanked him for Mrs. Black he said that she was welcome. Mrs. Stephenson and Mrs. Black each testified, the latter by deposition, as to the conversation in the clerk's office, and that, when the defendant asked the plaintiff what she owed him, the latter replied that she owed him nothing except the expenses he had paid, whereupon she told him that Mr. Stephenson would settle with him for that; Mrs. Stephenson also stating in her testimony that Mrs. Black then thanked the plaintiff very kindly for what he had done for her. And in her deposition Mrs. Black testified that she did not employ the defendant or request him to act as her attorney.

[2] The above is the substance of all the evidence explaining the circumstances under which plaintiff's services were performed. Thus it appears that he was not employed or requested by the defendant to perform the services, unless what was said to him by Stephenson amounted to such an employment or request, and she would be liable only on the theory that she accepted the services under circumstances from which a promise to pay therefor would be implied. And that is

the ground upon which the plaintiff bases his right to recover; for it is contended in his brief that the evidence fails to show that Stephenson was the defendant's agent, or authorized to bind either party to the controversy, and on the trial he requested an instruction that the plaintiff was not bound by statements made by him to Stephenson, since it was not shown by the evidence that the latter was authorized to employ the plaintiff, and the court so instructed the jury, but added, in substance, that if the plaintiff stated to Stephenson that he would do the legal work incident to the settling of the Black estate gratuitously, intending such statement to be communicated to Mrs. Black, and it was so communicated, and she accepted plaintiff's services with the understanding that they were voluntary and gratuitous, she might then rely on plaintiff's statement the same as if made to her personally. Plaintiff excepted to the instruction as given, but, with reference to his conversation with Stephenson, the instruction was certainly as favorable to the plaintiff as he was entitled to under the evidence. While there was no direct showing that any such statement was communicated to the defendant, it might be inferred from the fact of her presence in court with Mr. Stephenson at the time of the first hearing, when Stephenson, as he testified, informed the judge that the plaintiff had volunteered to do the work free of charge, if not from her apparent acceptance of the friendly assistance of Mr. Stephenson in the matter of probating the will.

[3] At the request of the plaintiff the court also instructed the jury that the plaintiff would not be bound by any statement made after the services were rendered to the effect that he would make no charge therefor. But that did not prevent the jury from considering any such statement they believed to have been made, in connection with the other evidence, in determining what plaintiff's original intention or expectation was as to charging for the services, or whether or not they were offered and rendered gratuitously.

[4] The legal principles to be applied are elementary. If the plaintiff offered his services free of charge, as Stephenson testified, and they were accepted upon that understanding, he was not entitled to recover. That the jury believed the testimony to that effect is shown by the verdict, and in the face of the conflicting evidence on the subject the verdict ought not to be disturbed; there being sufficient evidence to sustain it:

"That which is offered and accepted as a gratuity cannot afterwards be converted into a debt." Addison on Contracts (11th Ed.) 453.

"If a party agrees to do work and receive no pay, he cannot recover pay, if he do the work." 2 Parsons on Contracts (5th Ed.) 54.

In Chitty on Contracts, p. 591, it is said:

"Nor can an action be maintained for services performed upon an understanding that the plaintiff was to make no charge."

And in *Cyclopedia of Law and Procedure*: "Where services are rendered with the understanding that they are to be gratuitous, the law does not imply a promise to pay therefor." 40 Cyc. 2812.

In *Hyde v. Honiter*, 175 Mo. App. 583, 158 3. W. 83, the court say:

"Where a party voluntarily does an act, or renders services, and there was no intention at the time that he should charge therefor, or understanding that the other should pay, he will not be permitted to recover; for that which was intended originally as a gratuity cannot be subsequently turned into a charge."

See, also, *Wood v. Lewis*, 183 Mo. App. 553, 568, 167 S. W. 666; *Owen v. Hadley*, 186 Mo. App. 1, 8, 171 S. W. 973.

In the case of *Kansas Crude Oil & Gas Co. v. Kansas & T. Oil, Gas & Pipe Line Co.*, 84 Kan. 778, 115 Pac. 398, the court, in the opinion by Johnston, C. J., said:

"Ordinarily, when valuable services are rendered or the use of property furnished by one person to another, which are voluntarily accepted, and there is no express agreement as to compensation, the law implies a promise to pay a reasonable compensation for such services or use. On the other hand, if the services are performed or use furnished with the intention that no charge shall be made for them, and if they are accepted in reliance upon such intention, the first party cannot subsequently, upon changing his mind, recover for them."

The general rule is stated in the *Virginia case of Briggs v. Barnett*, 108 Va. 404, 61 S. E. 797, as follows:

"Where one renders service for another at the latter's request, the law, in the absence of an express agreement, implies a promise to pay what the services are reasonably worth, unless it can be inferred from the circumstances that those services were to be rendered without compensation."

And where, in an action to recover for services, they appeared to have been rendered without any intent on plaintiff's part to charge for them; if the testimony on the part of the defendant was accepted as true, and the circumstances justified a finding that the services were gratuitous, a judgment for the defendant was affirmed. *Hecker v. Baker*, 19 Cal. App. 667, 127 Pac. 654. See, also, *Hanrahan v. Baxter* (Iowa) 116 N. W. 595, 16 L. R. A. (N. S.) 1046. In *Kiser v. Holladay*, 29 Or. 338, 45 Pac. 759, it is said in the opinion of the court by Judge Wolverton:

"As between strangers, the rule seems to be that, when one personally performs services for the benefit and with the knowledge and tacit consent of another, the law implies a promise to pay a reasonable compensation. [Citing cases.] But the implication of such a promise may be overcome by evidence of an understanding that no compensation should be made. Where there is such an understanding, the law cannot imply a promise, and the understanding itself may be implied from circumstances. [Citing *Moulin v. Columbet*, 22 Cal. 510.]"

It was further said in the opinion:

"No recovery can be had for an act done for the benefit of another as a voluntary courtesy, and without his request."

And see *Zane v. De Onativia*, 139 Cal. 328, 73 Pac. 856, a case to the same effect.

Plaintiff in error complains of the instructions given at defendant's request, but, without otherwise referring to them, we deem it sufficient to say that we find them in accord with the principles above stated, and, in view of the testimony of defendant and her witnesses, applicable to the case.

[5] The refusal of the court to give a part of the requested instruction embracing the proposition that plaintiff would not be bound by any statements to Stephenson is also complained of. The court was asked thereby to instruct that there was no evidence tending to show that plaintiff and defendant agreed before the services were rendered that no charge would be made. It would have been misleading, if not an invasion of the province of the jury, and was properly refused. The jury might have understood from it that in the absence of a showing of an express agreement between plaintiff and defendant the plaintiff would be entitled to recover, notwithstanding what the evidence might show, or what might be reasonably inferred from it, as to the intention or understanding of the parties.

The judgment will be affirmed.

Affirmed.

BEARD and SCOTT, JJ., concur.

(55 Okl. 499)

CHOI v. TURK et al. (No. 6377.)

(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. JUDGMENT \S 248—VALIDITY—PLEADING—EVIDENCE.

A judgment not justified by the allegations of the petition and not supported by the evidence is void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 434; Dec. Dig. \S 248.]

2. JUDGMENT \S 386—VOID JUDGMENT—VACATION.

A void judgment should be vacated and set aside at any time upon motion of the defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 735-744; Dec. Dig. \S 386.]

3. APPEAL AND ERROR \S 564—TIME FOR APPEAL—REFUSAL TO VACATE JUDGMENT.

An exception to an order overruling a motion to vacate a judgment which has been preserved in a case-made, served and settled as provided in section 5242, Rev. Laws 1910, may be brought to the Supreme Court for review by petition in error and case-made, within six months after the date of the entry of such order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2501-2506, 2555-2559; Dec. Dig. \S 564.]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Sarah Turk and another against Sam Choi. Judgment for plaintiffs, and defendant brings error. Reversed.

James R. Lewis and Everest & Campbell, all of Oklahoma City, for plaintiff in error. G. A. Paul, of Oklahoma City, for defendants in error.

GALBRAITH, C. This action was instituted in the trial court to recover money alleged to be due under a lease contract for a business room in a building located at 26 West Grand avenue, Oklahoma City. Although an answer was on file, the cause was tried to the court, in the absence of the defendant, and a judgment rendered in favor of the plaintiffs for \$2,040. However, upon the presentation of a motion for new trial a remittitur in the sum of \$400 was filed, and judgment was entered for \$1,640. This judgment is attempted to be brought to this court for review by petition in error and case-made.

The defendants in error have presented a motion to dismiss the appeal on the following grounds:

"First. That said case-made was not served in time and in the manner required by law.

"Second. That the alleged errors complained of cannot be reviewed by this court by transcript of the proceedings had in the court below.

"Third. That this court has no jurisdiction to determine these proceedings and determine said cause."

[3] The judgment in the trial court was entered on the 7th day of November, 1913. The motion for a new trial was filed on the 10th of November, and overruled on the 27th of December, 1913. There was an exception to the order overruling the motion for new trial, and the court allowed 60 days to make and serve a case-made on appeal to the Supreme Court, and 10 days thereafter to suggest amendments, the case-made to be settled on 5 days' notice. Four days before the expiration of the 60 days given for making and serving case-made, to wit, February 21, 1914, the court made an order extending the time for making and serving the case 30 days. The time for serving case-made was therefore extended until March 27, 1914. The case-made was not served until April 27, 1914. Therefore, in so far as the errors assigned in overruling the motion for a new trial and errors occurring at the trial are concerned, the same have been abandoned, and are not brought up for review, for the reason that the case-made was not served and filed within the time as extended by the court. However, on March 21, 1914, the plaintiff in error filed in said cause a motion to vacate the judgment on two grounds, viz.: (1) On the ground of fraud on behalf of the plaintiffs in obtaining said judgment; and (2) because the judgment is not warranted by the allegations of the petition, and is not supported by the evidence at the hearing, and is therefore void. This motion was accompanied by an answer to the merits of the cause, and after various continuances the court permitted the filing of the motion and answer, and on the

14th day of April, 1914, heard the motion and overruled the same. Exception was saved to this ruling. The court further denied the request for time to make and serve a case-made. Again exception was saved to this ruling. The time for making and serving a case-made as to the order denying the motion to vacate the judgment, not having been extended, under section 5242, Rev. L. 1910, would therefore expire in 15 days. It seems that the case-made was served prior to that time, to wit, on the 27th day of April, 1914, and was therefore served in time. The section of the statute above referred to also provides that the defendants in error shall have 3 days after service in which to suggest amendments, and the case-made and amendments shall upon 3 days' notice be submitted to the judge of the trial court, who shall sign and settle the same. It appears that notice was given to the counsel for defendants in error of the time and place of settlement of the case-made on the 1st day of May, 1914, and that the case-made was settled on the 5th day of May, 1914. The notice of the time and place of settlement was therefore within the terms of the statute, and the case-made was properly served and settled, and brings up for review the exception to the order of the court denying the motion to vacate the judgment. The motion to dismiss the appeal should therefore be denied.

[1, 2] As to the merits of the cause the only question presented by the petition in error and case-made is the exception to the ruling of the trial court denying the motion to vacate the judgment, that is, the order made on the 14th of April, 1914. The grounds of this motion were: (1) Fraud by the defendants in error in obtaining said judgment; and (2) that the judgment is not warranted by the allegations of the petition, and not supported by the evidence.

The first ground of the motion is not here for review, inasmuch as the trial court heard the evidence and found against the claim of fraud, and his finding is conclusive on this court. However, the second ground of the motion is properly here for review. If the judgment was void, it was error in the trial court to deny the motion to vacate, and it was void if the allegations of the petition are not sufficient to justify the judgment, or if it is unsupported by the evidence. Sarah Turk, guardian, and J. Chonowsky commenced the action as plaintiffs, and alleged: (1) That on the 14th day of December, 1910, the plaintiffs, Chonowsky and Sarah Turk, then the administratrix of the estate of Nathan Turk, deceased, owned lot 20, block 5, Oklahoma City; that thereafter the estate of Nathan Turk was duly administered upon, his interest in the property distributed to his heirs, and Sarah Turk was duly and legally appointed guardian of the minor heirs of said Nathan Turk; that on the said 14th day of December, 1910, the plaintiffs entered into a written

contract with Sam Choi by the terms of which they leased to Sam Choi the lower floor of the building 26 West Grand avenue, above described, for a period of three years, beginning January 1, 1911, for an agreed rental of \$7,200, setting out a copy of the lease as an exhibit; that in pursuance of the terms of the lease Sam Choi entered into the occupancy of the premises, and continued to occupy the same until on or about the 24th day of April, 1913, when he abandoned and vacated the premises; that he paid as rental the aggregate sum of \$5,400; that there is now due and unpaid by the plaintiff by virtue of the terms of said lease the sum of \$1,800; "that the said plaintiffs had not terminated said lease, and had not taken possession of said premises." The prayer was for judgment in the sum of \$1,800. There is a second count in the petition wherein it is alleged by and under a verbal agreement between the parties the defendant agreed to restore the premises in the same condition they were at the time he took possession; that he would do this at the termination of the lease; and that he failed to do this, and it would cost \$500 to make such repairs. Therefore judgment was prayed in the sum of \$500 additional, or \$2,300. The lease attached to the petition bears date of December 14, 1910, and purports to have been made between John Chonowsky and Sarah Turk, administratrix of the estate of Nathan Turk, deceased, party of the first part, and Sam Choi & Co., by Sam Choi, second parties, and the covenant in regard to the payment of rent reads as follows:

"To have and to hold the same to the said parties from the 1st day of January, 1911, to the 1st day of January, 1914, the said second parties in consideration of the premises herein set forth, agree to pay to the first parties as rental on the described premises the sum of seventy two hundred and no/100 (\$7,200.00) dollars, payable as follows, to wit: \$200.00 the 1st of January, 1911, and a like amount on the 1st day of each month thereafter until said sum is paid in full."

The evidence offered at the trial was that Sam Choi had paid the rental as specified in the contract up until the 1st day of May, 1913, and that he vacated the premises the latter part of April, 1913. The suit was filed May 7, 1913, and the evidence offered on behalf of the plaintiff shows that on the 13th day of August, 1910, an order of distribution was made in the estate of Nathan Turk, deceased, vesting the title to the leased premises in his minor heirs, and that afterwards Sarah Turk was duly appointed and qualified as guardian of said minor heirs. The lease introduced in evidence and upon which the cause of action is based is dated December 14, 1910, and purports to be executed by J. Chonowsky and Sarah Turk, administratrix of the estate of Nathan Turk, deceased, and is signed by "J. Chonowsky and Sarah Turk, and Sam Choi & Co., by Sam Choi, One of the Firm." It therefore appears from the evidence that Sarah Turk as administratrix of

the estate of Nathan Turk had no control over the leased premises at the time of the execution of this lease; further, that she did not execute the lease as guardian, and that she owned no interest in the building that would justify her in making the lease, the one-half interest in the property that she claimed to represent belonged to her minor children, and the minors' interest was not and could not be bound by this lease. *Capps v. Hensley*, 23 Okl. 311, 100 Pac. 515. It therefore appears that there was no legal authority in Sarah Turk to execute the lease in the manner and form in which the lease was executed, and therefore the evidence offered did not support the judgment rendered, and the same is for that reason void. *Holmes et al. v. Alexander*, 152 Pac. 819.

Again, under the lease contract in evidence, assuming it to be a legal obligation, there was only \$200 due when the action was commenced. There was no supplemental pleading filed, but the cause was tried on the original petition. There was testimony that it would cost \$300 to make the repairs that Sam Choi had agreed to make, but had failed to do. It therefore appears that the largest judgment that the evidence would support was one for \$500. The judgment for \$1,640 finds no support in the evidence, and is not justified by the allegations of the petition. The motion to vacate should have been sustained for this reason also. *McAdams v. Latham*, 21 Okl. 511, 96 Pac. 534; *Nicholson v. Midland S. & L. Co.*, 21 Okl. 598, 96 Pac. 747; *Harding v. Gillett*, 25 Okl. 199, 107 Pac. 665.

We therefore recommend that the judgment appealed from be reversed, and said cause remanded to the trial court, with directions to sustain the motion to vacate the judgment, and for such further proceedings as may be proper.

PER CURIAM. Adopted in whole.

(55 Okl. 495)

MILLER v. HAIR et al. (No. 6348.)

(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. CONTRACTS — 229 — BUILDING CONTRACT —
COMPENSATION OF SUPERINTENDENT —
AMOUNT — PUBLIC BUILDINGS.

Where a firm of architects were employed by a county to make drawings, etc., of a courthouse and jail being constructed by the county, and in the contract it is specified that the county shall employ a superintendent, who shall be paid out of the compensation of the architects, but the contract leaves the amount of his compensation blank, held that, in the absence of a contract with him fixing his compensation, he was entitled to recover a reasonable sum for his services.

[Ed. Note.—For other cases, see *Contracts*. Cent. Dig. §§ 1045-1057, 1059-1066, 1070, 1077; Dec. Dig. § 229.]

2. CONTRACTS ~~229~~—BUILDING CONTRACT—
COMPENSATION OF SUPERINTENDENT —
AMOUNT RECOVERABLE.

In such case it is not material that the architects agreed with the county commissioners that the compensation should not exceed \$75 per month, when this was not communicated to the plaintiff, the contract on file with the commissioners left the salary blank, and for some months the commissioners paid him at a higher rate.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1045-1057, 1059-1066, 1070, 1077; Dec. Dig. ~~229~~.]

Commissioners' Opinion, Division No. 2. Error to County Court, Osage County; Chas. R. Gray, Judge.

Action by J. L. Miller against C. E. Hair and another, copartners as C. E. Hair & Co. Judgment for defendants, and plaintiff brings error. Reversed, and remanded for a new trial.

This action was commenced by the plaintiff in error against the defendants in error to recover a balance alleged to be due him as superintendent in the construction of the courthouse and jail in Osage county. It appears that the defendants in error were architects employed by the county to furnish preliminary sketches, contract, working drawings, specifications, detailed drawings, and general superintendence of the building operations of such courthouse and jail. The contract further provided that, when the buildings had progressed to the extent to justify daily superintendence, the county should select a superintendent, who should be paid by the architects, the compensation not to exceed \$—— per month, as expressed in the contract on file in the office of the commissioners. Acting under this contract the county employed the plaintiff in error as superintendent, but made no contract with him as regards his compensation, and paid for a part of the time at the rate of \$5 per day. A jury being waived, the court made the following findings of fact and conclusions of law:

"(1) The court declares the law to be that oral testimony was admissible in this case to show what the contract was between C. E. Hair & Co. and the county commissioners of Osage county, as to the amount of salary that the superintendent should receive.

"(2) The court finds the fact to be that the agreement between C. E. Hair & Co. and the board of county commissioners was that the board of county commissioners were to employ a superintendent at a salary of not to exceed \$75 per month, and the court finds that C. E. Hair & Co. did not ratify or acquiesce in the board of county commissioners paying J. L. Miller a greater sum than \$75 per month.

"(3) The court declares the law to be that J. L. Miller could not recover from C. E. Hair & Co. a greater sum than \$75, as provided in the contract between C. E. Hair & Co. and the board of county commissioners, unless C. E. Hair & Co. acquiesced in or ratified the paying to J. L. Miller a greater sum than \$75 per month.

"(4) The court finds that the evidence does not show that the plaintiff, J. L. Miller, had any knowledge or information of the contract between C. E. Hair & Co. and the board of county commissioners, whereby the board of county commissioners was not to pay the superintendent a greater sum than \$75 per month.

"(5) The court finds that C. E. Hair & Co. recognized J. L. Miller as superintendent up to and including January 6, 1913."

There was judgment for the defendants, and the plaintiff brings the case to this court by petition in error and case-made.

Horsley, Peters & Walton, of Pawhuska, for plaintiff in error. Templeton & Tillman, of Pawhuska, for defendants in error.

DEVEREUX, C. (after stating the facts as above). The governing question in this case is whether the defendants in error are bound by the action of the county in paying the plaintiff in error more than \$75 per month for his services as superintendent.

[1, 2] It appears from the findings of the court that the county did pay more than \$75, and that, although the defendants limited the county to \$75 per month, yet the plaintiff had no knowledge or notice of this agreement, and that the defendants received the benefit of his services, while he was acting under the belief that he was to be paid at the rate of \$5 per day. By the contract with the county, authorizing them to hire a superintendent to be paid out of the money agreed to be paid by the county to the architects, the defendants constituted the county its agent to hire the plaintiff, and as his compensation was left blank in the contract on file with the county, and the only one to which the plaintiff had access, there was nothing to put him on notice that any specified sum had been agreed to as his pay. Under the facts of this case it was the duty of the defendants to have ascertained what compensation the county had agreed to pay the plaintiff, and having failed to do so, and plaintiff having performed his part of the agreement, they cannot now complain. U. S. Fidelity & Guaranty Co. v. Shirk, 20 Okl. 576, 95 Pac. 218; Midland Savings & Loan Co. v. Sutton, 30 Okl. 448, 120 Pac. 1007; First State Bank of Keota v. Bridges, 39 Okl. 355, 135 Pac. 378; C. R. I. & P. R. Co. v. Newburn, 39 Okl. 704, 136 Pac. 174; J. I. Case Threshing Machine Co. v. Lyons & Co., 40 Okl. 356, 138 Pac. 167. The compensation of the defendant being left blank in the contract, and no agreed sum fixed by the county, he is entitled to recover the reasonable value of his services.

We therefore recommend that the judgment be reversed and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(12 Okl. Cr. 260)

JOHNSON v. STATE. (No. A-2412.)
(Criminal Court of Appeals of Oklahoma. Feb. 12, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1184—APPEAL—CORRECTION OF SENTENCE.

Under Proc. Cr. section 6003, Rev. Laws, the appellate court has plenary power to rectify the judgment appealed from by reducing the sentence in conformity to the punishment prescribed by the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3199, 3200; Dec. Dig. § 1184.]

2. CRIMINAL LAW §1184 — PUNISHMENT — CORRECTION OF SENTENCE — ASSAULT WITH DANGEROUS WEAPON.

Upon an information charging assault with intent to kill by shooting with a pistol, the verdict was "guilty of assault with a dangerous weapon as charged in the information," and assessing the punishment at "one year in the county jail and \$100 fine." The sentence was in accordance with the verdict. *Held*, that the words "\$100 fine" in the verdict and that part of the judgment imposing such fine should be treated as mere surplusage, and the judgment and sentence should be so modified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3199, 3200; Dec. Dig. § 1184.]

3. SUFFICIENCY OF EVIDENCE.

The evidence in this case considered, and held sufficient to sustain the conviction for assault with a dangerous weapon.

Appeal from District Court, Cherokee County; John H. Pitchford, Judge.

Henry Johnson was convicted of assault with a dangerous weapon, and appeals. Modified and affirmed.

J. Berry King, of Tahlequah, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. On information filed in the district court of Cherokee county charging the crime of assault with intent to kill, the plaintiff in error, Henry Johnson, was convicted of the included offense of assault with a dangerous weapon, and the punishment assessed at confinement for one year in the county jail and a fine of \$100. From the judgment rendered in accordance with the verdict the defendant appealed by filing in this court on March 11, 1915, a petition in error with case-made. No brief has been filed and no appearance was made in behalf of the plaintiff in error when the case was called for final submission, whereupon the case was submitted on the record.

The errors assigned are that:

(1) The court erred in overruling the motion for a new trial.

(2) That the verdict was not sustained by sufficient evidence.

(3) That the verdict is contrary to law in assessing the punishment by a fine and confinement.

The information charged:

"The said Henry Johnson did willfully, feloniously, and with a premeditated design to effect the death of Henry Sanders make an assault upon the said Henry Sanders with a deadly weapon, to wit, an automatic pistol, and did then and there unlawfully, willfully, feloniously, and with a premeditated design to effect the death of the said Henry Sanders shoot and wound him the said Henry Sanders, contrary to," etc.

The evidence shows that the shooting took place at a Sunday school picnic held near Dykes Chapel, about nine miles south of Tahlequah. There is a direct conflict in the testimony as to the character of the encounter, which took place between the parties when the shooting occurred. The defendant testified that Sanders was the aggressor and struck him with his fist, and that he fired two shots at him with an automatic pistol in self-defense, one of the shots striking Sanders in the side.

Upon the facts, of which the foregoing is a brief outline, the case was submitted to the jury in a charge fully and fairly covering the law. But one instruction therein was objected to. The exception thereto was not well taken. The fifth instruction was as follows:

"You are further instructed that, while the information in this case contains a charge of assault with intent to kill, it also contains a charge of assault with a dangerous weapon, which is defined as follows: 'Any person who, with intent to do bodily harm, and without justifiable or excusable cause, commits any assault upon the person of another with any sharp or dangerous weapon, or who, without such cause, shoots or attempts to shoot at another, with any kind of firearm or airgun, or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable by imprisonment in the penitentiary not exceeding five years, or by imprisonment in a county jail not exceeding one year.'"

[2] The verdict of the jury was:

"We, the jury duly impaneled and sworn in the above-entitled action, do upon our oaths find the defendant guilty of assault with a dangerous weapon as charged in the information, and assess his punishment as follows: One year in the county jail and \$100 fine."

It will be observed that the statute (section 2344) already quoted in the aforesaid instruction No. 5 does not prescribe the payment of a fine as punishment for the crime therein defined. It appears from the record that, when this verdict was received, no objection to the same was made by the defendant, and the objection to the verdict was first made on a supplemental motion for new trial. We cannot understand why the court failed to render the judgment in conformity with the provision of the statute which was included and made a part of instruction No. 5. However, we think that the words "and \$100 fine," in the verdict, and that part of the judgment imposing a fine of \$100, should be rejected as surplusage, and the judgment should be so modified.

[1] Our Criminal Procedure Act provides:

"The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial." Section 6003, Rev. Laws.

Under this provision this court, exercising its revisory jurisdiction, has the power and authority to modify any judgment appealed from by reducing the sentence. *Fritz v. State*, 8 Okl. Cr. 342, 128 Pac. 170.

The judgment appealed from will be modified by striking out the words "and to pay a fine of \$100."

[3] Having carefully examined the record, and finding no material error therein, the judgment and sentence of the district court of Cherokee county, as thus modified, will be affirmed.

FURMAN and ARMSTRONG, JJ., concur.

(12 Okl. Cr. 263)

CLARK v. STATE. (No. A-2103.)

(Criminal Court of Appeals of Oklahoma. Feb. 15, 1916.)

(Syllabus by the Court.)

CRIMINAL LAW §510—APPEAL—VERDICT—UNCORROBORATED TESTIMONY OF ACCOMPLICE.

In this jurisdiction a conviction for crime cannot be sustained upon the uncorroborated testimony of an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.]

Appeal from District Court, Custer County; James R. Tolbert, Judge.

Dennis Clark was convicted of larceny of domestic animals, and appeals. Reversed.

Echols & Merrill, of Elk City, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Dennis Clark, was convicted at the December, 1911, term of the district court of Custer county on the charge of larceny of live stock, and his punishment fixed at one year in the state penitentiary.

A careful examination of the record discloses the fact that this conviction is based wholly upon the testimony of an admitted accomplice, which accomplice had been tried and convicted upon the separate charge of larceny of the same animals upon which the conviction in the case at bar rests. It appears that this accomplice caused the arrest and prosecution of the plaintiff in error herein after he had been convicted himself.

The Assistant Attorney General has filed a confession of error in this cause, based upon the ground that the accomplice was wholly unsupported. Under the law it is necessary that there be corroborating testimony sufficient, in addition to the testimony of an accomplice, to connect plaintiff in error with

the crime charged, and support the material points in such testimony. The state having failed to corroborate the accomplice, it becomes the duty of the court to reverse the judgment.

Judgment reversed. Mandate ordered forthwith.

DOYLE, P. J., concurs. FURMAN, J., absent.

(13 Okl. Cr. 264)

RUSHING v. STATE. (No. A-2299.)

(Criminal Court of Appeals of Oklahoma. Feb. 15, 1916.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY §91—INTENT TO DO BODILY HARM — SUFFICIENCY OF EVIDENCE.

In a prosecution for assault with intent to kill, the evidence examined, and held to be sufficient to sustain a verdict finding the defendant guilty of assault with intent to do bodily harm.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. § 91.]

2. CRIMINAL LAW §865—VERDICT—REFUSAL TO DISCHARGE JURY.

After the jury retired to consider of their verdict, they returned into court and announced that they had come to an unanimous agreement with respect to the guilt of the defendant, but could not agree as to the degree of the offense and the punishment. Thereupon defendant moved the court to discharge the jury, which was overruled, and the court then ordered the jury to again retire and consider of their verdict. Held, that the court very properly overruled defendant's motion to discharge the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 865.]

Appeal from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Andrew Rushing was convicted of assault with intent to do bodily harm, and appeals. Affirmed.

A. N. Munden and William Harrison, both of Oklahoma City, for plaintiff in error. S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of conviction in the superior court of Oklahoma county upon an information charging that plaintiff in error, Andrew Rushing, did feloniously commit an assault and battery upon William C. Puckett, with a razor, a dangerous weapon, and did then and there and thereby inflict certain dangerous wounds upon the said Puckett with the felonious intent to kill him. The defendant was by the jury found guilty of "assault with intent to do bodily harm," but they failed to agree upon the punishment. The court sentenced the defendant to imprisonment in the penitentiary for the term of two years. From the judgment an appeal was taken by filing in this court on May 29, 1914, a petition in error with case-made.

[1] The evidence tends to show that W. C. Puckett, a groceryman in Oklahoma City,

had a dispute with the defendant over the price of some meat, involving 10 cents. About two hours later the defendant met Puckett on the street and said to him: "God damn you; you insulted me"—struck him in the face, knocking his glasses off, and then cut him with a razor or knife across the neck, cutting off about one-third of the lobe of the left ear, and cutting the neck over the jugular vein. Several eyewitnesses testified that the defendant was the aggressor. The defendant, running from his victim, was stopped by a policeman, who asked what was the matter, and the defendant said "he had cut a white man." As a witness in his own behalf the defendant testified that he went to Puckett's place of business to buy some meat, and that "there was a little misunderstanding about the price;" that later, meeting Mr. Puckett on the street, he said to him, "You ought not to do me that way," and that Mr. Puckett struck him twice, saying, "Come on, boys, here is a bad negro," and, "I got out my knife and cut him on the arm to get myself loose."

[2] The errors assigned are predicated upon the proceedings had in receiving the verdict. It appears from the record that the jury, having retired to deliberate of their verdict, returned into court and announced that they had agreed on the question of the guilt of the defendant, but could not agree as to the punishment. The record is then as follows:

"By the Court: If you find that you cannot agree as to the matter of fixing the punishment, you may then so state in your verdict, and leave the punishment to be fixed by the court."

"By Mr. Munden: I suggest that such a form of verdict be furnished the jurors."

"By the Court: Gentlemen of the jury, if you are unable to agree as to the punishment to be assessed, you may sign one of the three forms of verdict now submitted to you. That is, finding him guilty of the charge you find him to be guilty of; and, if it is assault with intent to kill, you will sign this verdict, finding him guilty of assault with intent to kill, and leave the punishment to be fixed by the court. If you find him guilty of assault with intent to do bodily harm, you will sign that verdict, and if you find him guilty of simple assault and battery, you will find him guilty, and leave the punishment to be fixed by the court."

"By a Juror: Shall we all sign the same verdict? There are three forms of verdict."

"By the Court: There are three forms of verdict; one of assault with intent to kill, one, assault with intent to do bodily harm, and one of assault and battery. You will sign one of those three forms."

"By a Juror: That is just where we split up."

"By the Court: You mean as to the degree of the crime?"

"By the Juror: Yes, sir."

"By the Court: You are not then agreed as to the guilt or innocence of the defendant as to the degree of the crime?"

"By the Juror: No, sir."

"By the Court: Then, gentlemen, you have not attempted to fix the punishment because you have not agreed as to the guilt or innocence of the defendant."

"By the Juror: I thought we should find him guilty or innocent, and then vote on the punishment; but they are trying to vote on the punishment and the guilt all at the same time."

"By the Court: You gentlemen will have to fight those matters out by yourselves. The court cannot assist you in that regard."

"By Mr. Munden: Comes now the defendant and moves the court to discharge the jury because of the mistakes which have been here and now made, both by statements of the jurors and by his honor."

"By the Court: If you will specify what mistake the court has made, the court will be very glad to rectify any mistake made. If the court has misspoke himself in any way, the court will be very glad to rectify any mistake that may have been made if counsel will draw his attention to any mistake."

"By Mr. Munden: All of the statements presupposed the jury had found him guilty, which was perfectly proper under the statement by the foreman, but that has had its effect on the jury in finding him guilty when as a matter of fact they have not yet agreed upon his guilt."

"By the Court: The court fails to detect any error in the statement as made by counsel. The statements of the court were made under the misapprehension of the statement of the foreman. It has developed that the jury have not arrived on an agreement as to the guilt or innocence of the defendant, and the court now makes this statement to the jury: Mr. Foreman, after hearing from the several members of the jury, it is evident that you have not agreed as to the guilt or innocence of the defendant. You will therefore retire and deliberate further. The forms of verdict will not be submitted at this time."

"By the Court: The motion to discharge the jury is overruled."

"By Mr. Munden: To which the defendant excepts."

We think the court very properly overruled the defendant's motion to discharge the jury. Our Procedure Criminal provides:

"After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony or if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to the county attorney and the defendant or his counsel, or after they have been called. Section 5913, Rev. Laws."

It is further provided:

"If the jury render a verdict not in form, the court may, with proper instructions as to the law, direct them to reconsider it, and it cannot be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury." Section 5926, Rev. Laws."

Under the statutes it was clearly within the province of the court to order the jury to retire further to deliberate and render a verdict responsive to the issue. Nothing appears in the record tending to show that the action of the trial court improperly influenced the jury in returning the verdict upon which the judgment was rendered. To constitute error it must appear that the defendant was prejudiced by the answers of the jurors, or that the action of the court was such as would tend to coerce the jury in arriving at a verdict of guilty. It is not claimed that the court said anything that in any way would tend to influence the jury to return the verdict that was rendered. This was the only exception taken upon the trial. Upon a careful consideration of the

whole record we are of the opinion that the defendant has no just cause of complaint.

The judgment appealed from is affirmed, with directions to the court clerk of Oklahoma county to issue forthwith a commitment in accordance with the judgment of the superior court of Oklahoma county, as rendered on the verdict.

FURMAN and ARMSTRONG, JJ., concur.

(12 Okl. Cr. 269)

AKINS et al. v. STATE. (No. A-2411.)

(Criminal Court of Appeals of Oklahoma. Feb. 19, 1916.)

(Syllabus by the Court.)

LARCENY \S 57 — THEFT OF DOMESTIC ANIMALS—FELONIOUS INTENT—SUFFICIENCY OF EVIDENCE.

In a prosecution for theft, where the taking was open, without fraud or stealth, and there was no subsequent attempt to conceal the property, and no denial, but an avowal of the taking, and the testimony for the state, standing alone, raises a presumption of fact in favor of an innocent taking, *held*, there being no evidence tending to prove a felonious intent, the evidence is insufficient to sustain the conviction.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. $\S\S$ 150, 151; Dec. Dig. \S 57.]

Appeal from District Court, Adair County; John H. Pitchford, Judge.

Dow Akins and Bill Carden were convicted of larceny of live stock, and appeal. Reversed.

R. Y. Nance, of Stillwell, for plaintiffs in error. R. McMillan, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiffs in error, Akins and Carden, were jointly charged, tried, and convicted of stealing two hogs, the personal property of J. L. Brown, and in pursuance of the verdict they were each sentenced to imprisonment in the penitentiary for the term of one year. From the judgments rendered on the verdict, they appeal. The only question necessary to be reviewed is the sufficiency of the evidence to sustain the verdict.

A substantial statement of the evidence is as follows:

J. L. Brown testified that he missed two sucking pigs Tuesday night, and found them the next Sunday morning at Ed Adair's; that he stopped at the New Hope Church that morning and Ed West told him he thought they were at Ed Adair's in the chicken yard; that he asked Mr. Ford to go with him; that they carried the pigs to his place and put them down near the sow to see if she would own them, and she did; that Ed Adair told him they belonged to Dow Akins and Bill Carden.

J. H. Neff testified that he was deputy sheriff and went with J. L. Brown on Sunday morning to the home of Ed Adair; that Adair's place was about three-quarters of a mile from Brown's place; that they were

having Sunday school at the New Hope Church that morning, which was about 150 yards from Brown's house; that it was about 300 yards from Brown's house to Quil Leatherwood's.

Hugh Adair testified that both of the defendants had been living with his parents; that the family had no hogs, and that the defendants, Dow and Bill, brought two small pigs there and told the family that they got them from their uncles, Quil Leatherwood and Will Leatherwood; that while he was attending Sunday school with the defendants on Sunday morning the pigs were taken away.

To the same effect is the testimony of Walter Adair, brother of Hugh Adair.

The defendant Dow Akins testified that on the Tuesday the pigs were said to have been stolen he and Bill Carden were going by the New Hope Church, and each picked up a pig and walked on to Ed Adair's, where they were staying; that they got them about midway between Mr. Brown's house and Quil Leatherwood's house; that his uncle Quil had two red sows and a black one, and he told him that he was going to take two pigs, and his uncle told him which ones to get; that when he took these pigs he thought they were Leatherwood's pigs; that Brown's pigs were about the same age, and they all looked alike; that at Sunday school that morning he asked his uncle if he had missed the two pigs; that Ed Adair is his stepfather, but he used to live with Quil Leatherwood; that Leatherwood's and Brown's sows were together when they took the pigs; that fifteen or sixteen pigs belonged to his uncle; that Bill Carden is his first cousin.

The defendant Bill Carden testified that they took the pigs Tuesday afternoon; that there were three sows, two red and one black, and a large number of pigs in the bunch.

Quil Leatherwood testified that the Sunday before the arrest the defendants were at his place, and Dow Akins said that they were going to get the pigs, and his brother Lee told Dow not to take a certain pig; that he and his brother had been expecting Dow to take the pigs; that he raised one of these boys.

Lee Leatherwood testified that he lived with Quil Leatherwood, and one of the boys spoke to them about taking the pigs, and he told them not to take a little bobtail one; that their stock were supposed to be Red Durocs, and were running out there at the time of the alleged theft, and he had seen Brown's sow and pigs running out there with them.

Dan Hill testified that he was at the New Hope Church when the boys were arrested; that he was teacher of the Bible class, and the defendants were there; that he heard the defendant Akins ask Lee Leatherwood there that morning in a joking way how his pigs were getting along; that after that the deputy sheriff called the defendants out and arrested them.

The charge of the court, consisting of seven instructions, makes no reference as to the law of circumstantial evidence, or as to the law in respect to the possession of property recently stolen.

The sixth instruction is as follows:

"(6) You are instructed that, if the hogs in question were the property of Quil Leatherwood or Lee Leatherwood, it would be your duty to acquit the defendants; or, if the testimony in the case raises in your minds a reasonable doubt as to whether said hogs were the property of said Quil Leatherwood or Lee Leatherwood, you should resolve the doubt in favor of the defendants and acquit them. (To the giving of this instruction the defendants objected. The objection is by the court overruled, to which the defendants except. John H. Pitchford, Judge.)"

Obviously this instruction was inapplicable. Brown's ownership of the pigs in question was undisputed and the giving of this instruction was prejudicial to the defendants. However, we are clearly of the opinion that the evidence is insufficient to sustain a verdict, in that the evidence does not tend to prove a felonious taking.

In cases of theft the question of the intent with which the accused took the property is one of fact to be decided by the jury, except where the taking is open and without fraud or stealth, under a claim of ownership, or where, as in this case, the testimony as to the taking, standing alone, raises a presumption of fact in favor of an innocent taking, and, there being no evidence from which the jury may legitimately infer a felonious intent, such evidence is insufficient to sustain a verdict of guilty.

Two of the four witnesses for the state in this case testified that the defendants stated when they brought the pigs home that they had taken them from their uncle. Upon the whole case we are without doubt as to the propriety of reversing the judgments rendered upon the verdict of the jury in this case.

For the reasons stated, the judgments appealed from are reversed, and the cause remanded, with direction to dismiss the prosecution.

FURMAN and ARMSTRONG, JJ., concur.

(12 Okl. Cr. 273)

DOUD v. STATE. (No. A-2441.)

(Criminal Court of Appeals of Oklahoma. Feb. 19, 1916.)

(Syllabus by the Court.)

1. WEAPONS §786—POINTING OF PISTOL—DEFENSE—INSTRUCTIONS—EVIDENCE.

In a prosecution for pointing a pistol, when the evidence tends to show justification in self-defense, and in defense of habitation, it is error for the court to refuse to give a requested instruction which fairly presents the law of the case on the theory contended for by the defendant.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. §§ 20, 22-33; Dec. Dig. §786.]

2. CRIMINAL LAW §786 — INSTRUCTIONS—CREDIBILITY OF ACCUSED.

It is error for the trial court to single out the defendant, and, mentioning him by name, instruct the jury upon his credibility as a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1896-1901, 1960, 1984; Dec. Dig. §786.]

Appeal from County Court, Blaine County; R. J. Puderbaugh, Special Judge.

George H. Doud was convicted of pointing a pistol, and appeals. Reversed.

I. H. Lookabaugh, of Watonga, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was tried and convicted upon an information charging that in Blaine county, on the 9th day of February, 1914, he (George H. Doud) "did then and there unlawfully, willfully, and maliciously point at Raymond Whiteshield, a person then and there being, a deadly weapon, to wit, a pistol, contrary," etc., and his punishment fixed at a fine of \$50 and imprisonment in the county jail for a period of 3 months. From the judgment rendered in pursuance of the verdict, the defendant appeals.

The evidence shows that Whiteshield, a Cheyenne Indian, 22 years old, and another Indian boy, on the date alleged, borrowed \$5 of the defendant, by pawning a saddle, and that evening they returned to the defendant's home and demanded \$3 more on the saddle, finally accepting \$2.50 additional as the purchase price of the saddle.

The complaining witness Whiteshield testified that in the dispute the defendant took from a drawer a pistol and pointed it at him. The other Indian and another white man who were present, as witnesses for the state, did not testify that the defendant pointed the pistol.

The defendant's grown daughter and son testified that Whiteshield used profane and threatening language, and said he had a gun and threatened to shoot the defendant and his son; that the defendant then took his gun from a drawer and told Whiteshield to leave, but did not point the gun at Whiteshield. To the same effect was the testimony of the defendant as a witness in his own behalf. The evidence tended to show that Whiteshield was drunk at the time.

Of the numerous errors assigned we deem it only necessary to notice those predicated upon the instructions given, and those requested and refused.

[2] Among others the court gave the following instructions:

"You are instructed that if you find that any witness has willfully testified falsely, to any material matter on trial, you are at liberty to disregard the whole of such witness' testimony."

"You are further instructed that evidence of the general reputation of the defendant, George H. Doud, for truth and veracity is proper for

your consideration, and you will give it such weight as you think it entitled to, and that if you find that such reputation is established as bad, you have the right to disregard the whole of his testimony."

The Attorney General confesses that the giving of these instructions under the evidence in this case constitutes reversible error—citing *Billingsley v. State*, 4 Okl. Cr. 587, 113 Pac. 241, and *Hendrix v. State*, 4 Okl. Cr. 611, 113 Pac. 244, as to the first instruction above quoted, and *Green v. United States*, 2 Okl. Cr. 55, 101 Pac. 112, *Fletcher v. State*, 2 Okl. Cr. 300, 101 Pac. 599, 23 L. R. A. (N. S.) 581, *Hughes v. State*, 3 Okl. Cr. 387, 106 Pac. 546, and *Heacock v. State*, 4 Okl. Cr. 606, 112 Pac. 949, as to the second instruction above quoted.

We think the confession of error is well founded, and should be sustained.

[1] The defendant further contends that the court erred in failing to instruct the jury upon the law applicable to the case. It appears that the court wholly failed to instruct upon the law of self-defense, although the defendant requested such an instruction, which was refused and exception allowed.

Upon a careful examination of the record we are inclined to think that there is no merit in this prosecution. For the reasons stated, the judgment is reversed.

(97 Kan. 161)

CLARK v. TOWNSEND. (No. 18971.)

(Supreme Court of Kansas. Feb. 12, 1916.)

On petition for rehearing. Rehearing denied.

For former opinion, see 153 Pac. 555.

MASON, J. In a petition for a rehearing the plaintiff complains of the failure of the opinion already filed to refer to his contention that the trial court erred in giving a particular instruction. This instruction was to the effect that the verdict should be for the defendant if the jury found that there was an agreement that the plaintiff was to receive compensation for his services in some other form than a commission, and that he had received such other compensation. It is objected to on three grounds: (1) As inconsistent with the claim that the services were gratuitous; (2) as inadmissible under a general denial; and (3) because under it a verdict for the defendant might have resulted from six jurors believing the services to have been rendered without charge, while the other six believed they had been paid for according to a special contract.

We think all the objections untenable. The plaintiff's theory was that there was no express agreement as to the amount he was to receive for his services, and therefore that he was entitled to their reasonable value. The defendant could without incon-

sistency endeavor to meet this by showing a special agreement covering the matter, whether it was that the services were to be literally gratuitous, or that they were to be regarded as compensated by some advantage he had received in his other dealings with the plaintiff, so that he was to receive no additional payment. As was intimated in the original opinion, the question whether, under a general denial, the defendant should have been permitted to prove a special agreement as to the character of the plaintiff's compensation, is substantially the same as whether proof should have been allowed of an understanding that they were to be gratuitous. The ruling of the trial court in that respect, whether technically correct or not, is regarded as nonprejudicial, because it does not appear that the plaintiff was taken by surprise by the defense presented, or that the state of the pleadings in any way hampered him in meeting it. No error was committed in instructing that a verdict for the defendant might be rendered upon either one of two theories. By submitting special questions the plaintiff could have guarded against such a verdict being the result of some jurors accepting one theory and the rest the other. It often happens that a party to litigation may prevail upon the establishing of any one of several allegations, and a general verdict cannot disclose whether the jury were united with respect to any particular one of them. That can be determined, where desired, by the submission of special questions. *Barker v. Railway Co.*, 89 Kan. 573, 132 Pac. 156. No such questions were submitted, nor was any instruction asked regarding the matter.

The petition for a rehearing is denied. All the Justices concurring.

(97 Kan. 375)

KUTER v. STATE BANK OF HOLTON. (No. 19471.)

(Supreme Court of Kansas. Feb. 12, 1916.)

On application for modification of judgment. Application allowed.

For former opinion, see 96 Kan. 485, 152 Pac. 662.

PER CURIAM. On November 6, 1915, the judgment of the district court in this case was reversed, with direction to render judgment in defendant's favor. *Kuter v. Bank*, 96 Kan. 485, 152 Pac. 662. An application for a modification of that order has been considered, and the court is of the opinion that it should be allowed.

The judgment will be reversed, and a new trial ordered, with direction to permit amended pleadings to be filed and such additional parties brought in as may be necessary, to the end that the court may finally determine in this action the right of the plaintiff to the fund in the possession of the bank.

(97 Kan. 193)

NICHOLAS v. TOPEKA RY. CO.
(No. 19711.)

(Supreme Court of Kansas. Feb. 12, 1916.)

On petition for rehearing. Rehearing denied.

For former opinion, see 153 Pac. 506.

MARSHALL, J. The plaintiff files a petition for rehearing. The opinion (Nicholas v. Topeka Railway Co., 153 Pac. 506) cites notes in 52 L. R. A. 448 and 15 L. R. A. (N. S.) 840, and says:

"A logical deduction from the cases there collated is that, where the defect in the street is caused by the city as an active agency, and over which the railway company has no control and with which it has no right to interfere, the company is not liable for injuries caused by that defect."

Each case cited in these notes on the liability of a street railway company for defects in track or street not caused by the company has been examined. The notes correctly state the law as declared in each case there cited. In each case, where the defective condition was produced by the city, the railway company was not held liable. These cases are Snell v. Rochester Railway Co., 64 Hun, 476, 19 N. Y. Supp. 496; Citizens' Pass. Ry. Co. v. Ketcham, 122 Pa. 228, 15 Atl. 733; Campbell v. Railway Co., 139 Pa. 522, 21 Atl. 92. Other cases holding the railroad not liable, although the defect was not caused by the city are Egan v. Forty-Second St. M. & St. N. A. R. Co. (Super.) 4 N. Y. Supp. 530; Silberstein v. Houston, etc., R. R. Co., 117 N. Y. 293, 22 N. E. 951; Eddy v. Ottawa City Passenger Railway Co., 31 U. C. Q. B. 569.

In most of the cases cited in the notes the defective conditions in the streets were produced by natural causes, use, or wear. The cities do not appear to have in any way produced the defective conditions, and in most of the cases the street railway companies were under contract or franchise obligation to repair the streets.

In the petition for rehearing the plaintiff says:

"Please bear in mind that this court is bound to say that the original construction of this track, never having been altered or changed, was at the start a negligent and improper construction and in direct violation of its franchise, as given by the county board, as required by the laws on our statute books, against the entire decisions of this court and against its duty to the public, for whose use the streets are primarily made, and none of which duties or liabilities can be ignored or immuned by any ordinance or contract of franchise the city of Oakland could make with it."

The evidence showed that the track at Sardou avenue, other than the crosswalk, was in the same condition as when first constructed. This construction was according to the franchise given by the county commissioners, was according to law as it then existed, was not against the decisions of this court, nor against its duty to the public.

The plaintiff contends that a street railway company must always keep its tracks in a safe condition. There is no doubt about the correctness of this rule. The difficulty in this case is not that the defendant did not keep its tracks in a safe condition, but that the city produced an unsafe condition, and the defendant could not under the law interfere with that condition. It appears in evidence that at other places in the city of Oakland where crosswalks were built by the city over the track of the defendant company the walks were built level with the top of the rails.

The judgment of this court is adhered to, and the petition for rehearing is denied. All the Justices concurring.

(97 Kan. 195)

YOUNG v. BUCK et al. (No. 19794.)
(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS \Leftrightarrow 65—**CONVEYANCE OF LAND—PENDENCY OF SUIT—COMMENCEMENT OF LIMITATION PERIOD.**

Although during the pendency of an action for the recovery of money the defendant makes a conveyance of real estate which is at once recorded, the circumstances being such as to charge the plaintiff immediately with notice of its execution and of its fraudulent character, the statute of limitations (requiring actions for relief on the ground of fraud to be brought within two years from the discovery of the fraud) does not begin to run against an action to subject the land conveyed to the payment of the plaintiff's claim until judgment has been rendered in the original action, provided it is prosecuted with reasonable diligence.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 261, 345-350; Dec. Dig. \Leftrightarrow 65.]

2. FRAUDULENT CONVEYANCES \Leftrightarrow 226 — **RIGHTS OF JUDGMENT CREDITOR—ATTACHMENT.**

The fact that a plaintiff has not resorted to attachment does not affect his rights with respect to subjecting to the payment of his judgment land fraudulently conveyed by his debtor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 658; Dec. Dig. \Leftrightarrow 226.]

On petition for rehearing. Rehearing denied.

For former opinion, see 154 Pac. 213.

MASON, J. [1] 1. In the original opinion in this case it was said that an action in the nature of a creditors' bill cannot be brought until the claim on which it is based is reduced to judgment, but that suit on the original demand—that is, the effort to put it in judgment—must be brought within a reasonable time after the discovery of the fraud, not exceeding two years. It was assumed without further discussion that the period of limitation (with respect to actions for relief on the ground of fraud) did not run during the pendency of an action the purpose of which was to procure the neces-

sary judgment. A text was cited which declares upon the authority of many cases, including some from Kansas, that a plaintiff cannot indefinitely suspend the running of the statute by delaying to take a step necessary to the completion of his right of action. The implication that the operation of the statute might be suspended for a limited time was regarded as too clear to require statement. In a petition for a rehearing the defendant urges that this court had never previously decided that the delay occasioned by the necessity of reducing the plaintiff's demand to judgment could authorize an action to set aside a deed on the ground of fraud to be brought more than two years after its discovery, and that such decision in effect nullifies the statute creating that limitation. Civ. Code, § 3 (Gen. St. 1909, § 5596). It is true that in this state no express decision had previously been made on the exact point referred to, but the rule applied was deemed to follow from what had been said on the general subject. In holding that, where one action cannot be begun until judgment has been obtained in another, the statute of limitations does not run during the pendency of the first action, if it is brought and prosecuted with due diligence, we but follow the established practice in other jurisdictions, as well as the intimations of prior decisions of this court. 12 Cyc. 43; 25 Cyc. 1200; *Montgomery Iron Works et al. v. Capital City Insurance Co.*, 137 Ala. 134, 34 South. 210; *Finch v. Kent*, 24 Mont. 268, 61 Pac. 653; *Ainsworth v. Roubal*, 74 Neb. 723, 105 N. W. 248, 2 L. R. A. (N. S.) 988; *Blackwell v. Hatch*, 13 Okl. 169, 73 Pac. 933; *Williams v. Commercial Nat. Bank*, 49 Or. 492, 90 Pac. 1012, 91 Pac. 443, 11 L. R. A. (N. S.) 857; *Watt v. Morrow et al.*, 19 S. D. 317, 103 N. W. 45. See, also, *Taylor v. Lander*, 61 Kan. 588, 60 Pac. 320.

In *Railway Co. v. Grain Co.*, 68 Kan. 585, 75 Pac. 1051, 1 Ann. Cas. 639, it is said that the enumeration by the Legislature of specific exceptions to a statute of limitations by implication excludes all others. Such is the general rule, as shown by the note to the case cited in 1 Ann. Cas. 643. What was there decided, however, was that the fraudulent concealment of facts giving rise to a cause of action on contract does not suspend the operation of the statute, a matter of disagreement in other jurisdictions. 25 Cyc. 1214. The general language of the opinion has been said not to admit of universal application. *Coal Co. v. Miller*, 88 Kan. 763, 129 Pac. 1170. But the question here presented does not involve any implied exception to the statute of limitations. It is often said that a cause of action for relief on the

ground of fraud accrues when the fraud is discovered, or when, in the exercise of reasonable diligence, it should have been discovered. Such a statement is substantially, but not absolutely accurate. It is sufficiently exact to answer the purpose of the cases in which it has been employed. The statute, however, does not say that an action for relief on the ground of fraud is barred in two years from the time the fraud is discovered. It says that it is barred in two years from the time it shall have accrued. Civ. Code, § 17, subd. 3 (Gen. St. 1909, § 5610). It does not say that all actions for relief on the ground of fraud shall be deemed to accrue upon the discovery of the fraud, but that no such action shall be deemed to accrue until the fraud is discovered. Its exact language is:

"The cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

Under these provisions the action accrues when the fraud is discovered, provided it is already complete in every other respect. But an action by a creditor to set aside a fraudulent conveyance of his debtor does not accrue in any event until his claim is reduced to a judgment. *Bank v. Chatten*, 59 Kan. 303, 52 Pac. 893; 12 Cyc. 9. If, when the judgment is obtained, the fraud has been discovered, actually or constructively, his cause of action then accrues. If not, it accrues at such later time as the fraud is discovered. It cannot accrue until he has a right to bring his action (25 Cyc. 1065-1067), and until that time the statute of limitations cannot begin to run.

[2] 2. The argument is also advanced that the pendency of the original action should not have suspended the running of the statute against the action to set aside as fraudulent the conveyance of the defendant's property, because the plaintiff had a right to attach the land without waiting for judgment to be rendered. She was not required to invoke the remedy by attachment. *Rose v. Dunklee*, 12 Colo. App. 403, 56 Pac. 342. A contrary holding in *Gillespie v. Cooper*, 36 Neb. 775, 55 N. W. 302, was overruled in *Ainsworth v. Roubal*, 74 Neb. 723, 105 N. W. 248, 2 L. R. A. (N. S.) 988. She was not bound to anticipate the deeding away of the defendant's land, and after the deed had been executed an attachment against the grantor would not have been in itself a complete remedy. Nor could the existence of an attachment before judgment be made a basis of a creditor's bill. *Tennent v. Battey*, 18 Kan. 324.

The petition for a rehearing is denied. All the Justices concurring.

(97 Kan. 203)

WYANDOTTE COAL & LIME CO. v. WYANDOTTE PAVING & CONSTRUCTION CO. et al. (two cases). (Nos. 19872, 20162.) * (Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. PAYMENT \Leftrightarrow 47—APPLICATION—CONTROL BY PERSONS SECONDARILY LIABLE.

Third persons such as guarantors, sureties, indorsers, and the like, secondarily liable on one of several debts, cannot control the application which either the debtor or the creditor makes of a payment, and neither the debtor nor the creditor need apply the payment in the manner most beneficial to such persons.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 127-129; Dec. Dig. \Leftrightarrow 47.]

2. PAYMENT \Leftrightarrow 75—APPLICATION—SUFFICIENCY OF EVIDENCE—SURETY—RIGHT TO COMPLAIN.

A surety company guaranteed payment for materials used by a construction company in paving certain streets. Another construction company with the same officers and the same general manager had a contract for paving certain other streets, and each company purchased its materials from plaintiff. *Held*, that the evidence is sufficient to support a finding that certain checks signed by the first construction company and delivered to plaintiff by the manager of both companies, with direction to credit the same to the account of the second company, were properly applied as directed, and that under the circumstances in evidence the surety company cannot complain.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 239; Dec. Dig. \Leftrightarrow 75.]

Appeal from District Court, Wyandotte County.

Action by the Wyandotte Coal & Lime Company against the Wyandotte Paving & Construction Company and others. From judgment for plaintiff, the Southern Surety Company appeals. Affirmed.

Fontron & Cosgrove, of Kansas City, Mo., and Stanley & Stanley, of Kansas City, Kan., John P. McCammon, of St. Louis, Mo., and Thomas B. Wagstaff, of Independence, for appellant. McFadden & Chaffin, of Kansas City, Kan., for appellee.

PORTER, J. These actions, though tried in different divisions of the district court, have been consolidated here because they involve the same questions of law and substantially the same facts. The Wyandotte Coal & Lime Company brought both actions against the Wyandotte Paving & Construction Company to recover for materials furnished in paving certain streets in Kansas City, Kan. The construction company made no defense. The Southern Surety Company furnished the bond required by statute guaranteeing the payment for materials, and was joined as defendant. Each case was tried without a jury, and judgment was rendered against the surety company, which appeals.

[2] Separate suits were brought because the materials were furnished under different contracts. In the first suit plaintiff claimed a balance due of \$630.23. The surety com-

pany claimed to be entitled to a credit of \$900, represented by a canceled check which it offered in evidence. In the second case plaintiff sued to recover a balance of \$2,198.14, and the only question involved in that case is whether the surety company is entitled to a credit of \$600, which it claims was paid on the account.

The Wyandotte Paving & Construction Company and the Rackliffe-Gibson Construction Company each entered into contracts with the city of Kansas City for the improvement of streets. Mr. Rackliffe was president of both companies, and Gracia Knowles was secretary treasurer of the Rackliffe-Gibson Company, and also secretary of the Wyandotte Paving & Construction Company. Mr. Fenton was the superintendent of both companies, and had charge of the work of improving the streets under the various contracts between the city and each company. It also appears that the principal office of both construction companies was in the same suite of rooms in St. Joseph, Mo.

The question of law in the first case turns upon the proper application of a check for \$900, which the surety company claims was paid by the Wyandotte Paving & Construction Company, and wrongfully credited by plaintiff to the account of the Rackliffe-Gibson Construction Company. Mr. Merstetter, the general manager of the plaintiff company, after testifying to the value of the material furnished in that case, the credits given and the amounts remaining due, further testified that the Rackliffe-Gibson Construction Company was indebted to the plaintiff for material furnished in carrying out certain contracts not involved in these actions; that on January 23, 1914, he received from that company a check for \$1,000, with directions to apply it to the account of the Rackliffe-Gibson Company; that he applied the payment as directed, and deposited the check in the bank; that some days later the check was dishonored for want of funds, and he communicated by telephone with the offices of the Rackliffe-Gibson Company at St. Joseph and was assured that they would attend to the matter promptly; also, that he talked about it to Mr. Fenton, and a few days later, February 2d, Fenton met him in the street and said, "Here are two checks to take up the check for \$1,000;" that one of the checks was for \$100 and the other for \$900, both payable to the Wyandotte Coal & Lime Company; that they went immediately to the bank where he indorsed the two checks, and the dishonored check was surrendered to Fenton; that he made no change on the books, but allowed the original credit of \$1,000 to the Rackliffe-Gibson Company to stand as it was given the day the \$1,000 check was received.

It appears that the Southern Surety Company, which was surety on the bond of the

Wyandotte Paving & Construction Company in the Georgia avenue, and Yecker avenue contracts, had arranged with the Commercial National Bank that no checks drawn by the Wyandotte Paving & Construction Company would be cashed without the counter signature of the surety company. Both the \$900 and \$100 checks which were produced at the trial were countersigned by the surety company, and bore the words "Georgia Avenue Account" and "Yecker Avenue Account," respectively. It is the contention of the surety company that these memoranda and the countersignature of the surety company were notice to the plaintiff that the checks were to be applied as payments upon the particular contracts therein referred to. Mr. Merstetter testified, however, that he did not see any countersignature on either check; that he was not aware at that time that the Southern Surety Company was surety for the Wyandotte Paving & Construction Company on either the Georgia or Yecker avenue contracts; that he did not see the memoranda, and that his attention was not directed to them. His testimony was that he had no knowledge of any arrangement between the bank and the Southern Surety Company with respect to the manner in which the checks should be signed.

The circumstances under which these two checks were received are corroborative of the testimony of Mr. Merstetter to the effect that his attention was not challenged to the manner in which they were indorsed nor the memoranda upon them. They were handed to him on the street, and with the statement of the manager of the Rackliffe Company that they were given to take up the check that had been dishonored. He and Fenton went at once to the bank for that purpose; all that was necessary for him to do was to place the indorsement of his company on the checks, and to see that the dishonored check was taken care of. It was the natural thing for him to regard the incident as closed, and to allow the account on the books to remain as though the first check had been paid when it first reached the bank. Moreover, it appears that when the check for \$900 was given, the amount due on the Yecker avenue contract was only about \$600. All these circumstances were doubtless given weight by the trial court in finding generally in favor of the plaintiff.

Both paving companies were indebted to the plaintiff for material. Both were represented by the same superintendent and manager. That the two checks were signed by the Wyandotte Paving & Construction Company, even if he had noticed the fact, was not, we think, sufficient as a matter of law to put Merstetter upon inquiry, in view of all the circumstances and particularly in view of the fact that both companies were managed and conducted by the same officers. The manager of the company which had given the dishonored check informed him that

the two checks were for the specific purpose of taking up the one that had been dishonored. We think that the general judgment in plaintiff's favor must be sustained.

In the other case the surety company claims that the account sued upon should have been credited with the amount of two checks, one for \$100, and one for \$500. The check for \$100 is one of the two checks which plaintiff claims was given for the purpose of taking up the \$1,000 dishonored check. That has been disposed of in the other case, and need not be again considered. The check for \$500 was one which plaintiff credited to the account of the Rackliffe-Gibson Company, and in addition to being drawn in the same way in which the other two checks were drawn, it bore in one corner the word "cement." Mr. Merstetter testified that he credited that check according to specific directions received in a letter which was introduced in evidence and which reads:

"As per your wire of today we have sent a check payable to your order for \$500. Kindly apply this on your old account and we will send you another check very shortly. Rackliffe-Gibson Construction Co., by Gracia Knowles, Secy. and Treas."

As contended by plaintiff, there was no street or contract for paving to which the word "cement" could apply, nor was there a separate account kept by plaintiff for cement furnished. It further appears from the testimony of Mr. Merstetter that he never noticed the memorandum "cement" on the check, and merely followed the directions contained in the letter and credited it to the account of the Rackliffe-Gibson Company.

There is another point suggested which we think applies with equal force to both claims of the surety company, which is, that there is no privity of contract between the plaintiff and the surety company. The latter was not the owner of the fund out of which the payments were made. The right of appropriation of payments belongs exclusively to the debtor and creditor, and a third party cannot be heard to complain of a different appropriation from that agreed upon by the debtor and creditor. The surety company had an arrangement with the bank that it should have the privilege of countersigning checks given by the Wyandotte Paving & Construction Company. But we are at a loss to understand how the plaintiff, who was a stranger to that transaction, could be bound by it. It was aware that the two paving companies were managed by the same officers, and when it was offered a check by the manager of both companies and told to apply the check to the satisfaction of a debt owing to it from one of them, it was not obliged, although the check was signed by the other company, to inquire by what authority the company making the payment used the check of the other.

[1] Since, under all the circumstances shown by the evidence in these cases, the

Wyandotte Paving & Construction Company made no direction to apply the checks in controversy to its own indebtedness, and on the contrary permitted its own officers to apply them to the payment of the debts of the other company, the surety has no right to complain. In the language of Judge Story:

"This right of appropriation is one strictly existing between the original parties; and no third person has any authority to insist upon an appropriation of such money in his own favor, where neither the debtor nor the creditor have made or required any such appropriation." *Gordon v. Hobart*, 2 Story, 243, 264, 10 Fed. Cas. 787, 794.

"Third persons, such as guarantors, sureties, indorsers, and the like, secondarily liable on one of the debts, cannot control the application of a payment by either the debtor or the creditor, and neither the debtor or the creditor need apply the payment in the manner most beneficial to such persons." 30 Cyc. 1251, and cases cited in the notes.

This is the rule applied in case of an ordinary accommodation surety; and certainly an insurance company engaged in the business of writing surety bonds for a compensation has no right to insist upon a more favorable one.

The judgments are affirmed. All the Justices concurring.

(97 Kan. 327)

BAILEY v. CITY OF TOPEKA et al.

(No. 20102.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(*Syllabus by the Court.*)

1. MUNICIPAL CORPORATIONS — 721 — PARKS — PUBLIC USE — DEED OF GIFT.

The action of a city in granting to individuals, for pay, exclusive rights within a public park to operate refreshment and lunch stands, and to rent boats and bathing suits and towels and dressing rooms, does not constitute a use of the park for other than public purposes, nor is it in conflict with provisions of the deed of gift by which the city acquired the property, to the effect that it should be used for the benefit of the public, and should be inalienable by deed, gift, lease, or other method.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1542-1544; Dec. Dig. ¶ 721.]

2. MUNICIPAL CORPORATIONS — 721 — POWERS — USE OF PARKS — EXCLUSIVE GRANT.

Sufficient power for the purpose indicated is conferred by statutes authorizing the city authorities to "regulate" parks.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1542-1544; Dec. Dig. ¶ 721.]

Original proceedings in quo warranto by Luther O. Bailey against the City of Topeka and others. Judgment for defendants.

A. M. Harvey and J. El. Addington, both of Topeka, for plaintiff. George P. Hayden and A. O. Bartell, both of Topeka, for defendants.

MASON, J. The city of Topeka accepted a tract of land given to it for the purpose and on the condition that it should be used as a public park, "for the benefit of the health,

comfort, and recreation of the citizens of Topeka and their friends, and such other orderly persons as may resort thereto." The deed of gift contained a provision that "said real estate shall be inalienable by said city of Topeka, either by way of deed, conveyance, lease, or in any other manner, and shall be forever held and used for the purposes aforesaid." Luther C. Bailey, who owns land facing on that referred to, brings an original action in this court in the nature of quo warranto, asking that the city and its officers be ousted from the power which they are undertaking to exercise of using the park for other than public purposes, and in such a manner as to violate the terms of its dedication. The case is submitted upon the pleadings.

Prior to answering the city filed a motion to dismiss, on the grounds: (1) That the court had no jurisdiction to hear the case; (2) that the allegations of the petition did not show an illegal exercise of power; and (3) that the plaintiff had no peculiar or specific interest different from the citizens of Topeka as a whole. The motion was overruled; the first ground being regarded as not well taken, and the others as involving the sufficiency of the petition, and proper to be raised rather by a demurrer than by a motion to dismiss. Whether the plaintiff has or claims any such peculiar interest in the use to which the park is put as to enable him to maintain an action to restrain the city from wrongful conduct in its management may well be doubted. An abutting owner may sometimes sue to prevent a diversion of public property from the uses for which it was acquired. *County of Franklin v. Lathrop*, 9 Kan. 453; note 1 L. R. A. 725. But whether the plaintiff is within that rule need not be determined, by reason of the conclusion reached on the other branch of the case.

[1] 1. The action of the city of which complaint is made consists of the granting to individuals, for pay, of exclusive rights within the park to operate refreshment and lunch stands, and to rent boats and provide suits, towels, and rooms for bathers, at fixed prices. A free dressing pavilion is provided for bathers using their own suits and towels. Apparently there is nothing to prevent any one from using his own boat on the pond, should he so desire. We see nothing in the conduct referred to that is inconsistent with the public character of the park, or that conflicts with the terms of the gift. The exclusive character of the privilege conferred is not the basis of any legitimate objection; for, as no one has a right to engage in the activities referred to except by permission of the city, no one is wronged by the monopoly created. The concessions granted do not amount to the leasing of any part of the park. *State ex rel. Attorney General v. Schweickardt*, 109 Mo. 496, 19 S. W. 47. Nor do they involve

the loss of control over it by the public officers. Clearly it is not inconsistent with the conditions imposed by the donor of the property that visitors to the park should be afforded facilities for obtaining refreshments, for boating, and for bathing. No reason exists why they should not pay a fair price for what they eat or drink, or for the boating or bathing equipment they use. The city might through its employes furnish these conveniences directly, collecting reasonable charges therefor. The fact that a profit resulted would not render the transaction objectionable. The incidental revenue would not characterize the transaction as commercial rather than governmental. Substantially the same result is accomplished by authorizing certain individuals to attend to the business of supplying the wants of the public with respect to the matters referred to, retaining so much of the proceeds as will fairly compensate them for their services and investment, and turning the residue over to the city. The following text, and the cases supporting it, are in point at least to the extent of indicating that the facilities undertaken to be supplied are appropriate to the conduct of a public park:

"Under a power to control and regulate parks the municipal authorities may provide for the pleasure, amusement, comfort, and refreshment of persons frequenting them, which in their discretion they may do by granting privileges to private persons to furnish food or refreshments, or means of innocent entertainment, with the right to erect necessary structures incident thereto which will not interfere with the rights of the public, and may give a license to use a building in a park for the purpose of a restaurant, which rights and privileges may be made exclusive, the municipality in all cases retaining the right of regulation and control over the manner of conducting the business." 28 Cyc. 938.

The suggestion is made that, if the present course of the city officers is held to be legitimate, there is nothing to prevent them at their pleasure from turning the park into a mere amusement resort, abounding in alluring catchpenny devices and dominated by a spirit of commercialism. This does not follow. That the power of regulation and management might be so abused as to warrant the interference of a court may be conceded. But we find in what has already been done no close approach to the danger line.

[2] 2. It is argued that special statutory authority would be required to enable the city to pursue the course of which complaint is made. A member of the city commission is designated as the "commissioner of parks and public property." Gen. Stat. 1909, § 1235, amended by Laws 1913, c. 84, § 2. The commission is empowered to "regulate" parks. Gen. Stat. 1909, § 1280. "A park may be devoted to any use which tends to promote popular enjoyment and recreation." 3 Dillon's Municipal Corporations (5th Ed.) § 1096, p. 1749. The furnishing of the conveniences referred to is a proper incident to the management of

the park, and the method followed is so naturally adapted to the desired end that it must be regarded as a matter of administrative detail, not necessary to be specifically authorized by the Legislature.

Judgment is rendered for the defendants. All the Justices concurring.

(97 Kan. 362)

STATE v. VAN SICKLE. (No. 20294.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW — § 814 — INSTRUCTIONS — EVIDENCE—RAPE.

In a prosecution for rape, before it becomes necessary for the court to instruct the jury that if the woman charged to have been ravished is the wife of the defendant, he cannot be convicted, there must be evidence tending to prove that the parties were husband and wife.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.]

2. RAPE — § 51 — PRIMA FACIE CASE — HUSBAND AND WIFE.

In a prosecution for rape, to make out a prima facie case, it is not necessary for the state to prove that the accused and the woman were not husband and wife.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.]

Appeal from District Court, Shawnee County.

William H. Van Sickle was convicted of rape, and appeals. Affirmed.

W. S. Kretsinger and W. N. Smelser, both of Emporia, for appellant. S. M. Brewster, Atty. Gen., W. E. Atchison, of Topeka, and Alonzo C. McCarty, of Emporia, for the State.

MARSHALL, J. The defendant appeals from a judgment of conviction of rape by having carnal knowledge of Alma Stevenson, a female under the age of 18 years. No defense other than not guilty was set up by the defendant. During the argument of counsel for the defendant, he requested and the court refused to give this instruction:

"You are instructed that some evidence has been introduced in this case tending to show that the defendant and prosecuting witness are married, and are husband and wife, and the state has also introduced evidence to show that the defendant and prosecuting witness lived and cohabited together as man and wife. In this regard I instruct you that a man cannot commit rape upon his own wife. The mere cohabitation of two persons of different sexes, and their behavior in other respects as husband and wife, always furnishes an inference of greater or less strength that a marriage has been solemnized between them. The conduct being susceptible of two opposite explanations you are bound to assume it to be moral rather than immoral. The burden of proof is upon the state to establish to you, beyond a reasonable doubt, that the sexual relations existing between the defendant and prosecuting witness, if you find they did exist, were unlawful and illicit, and that the defendant was not the husband of said prosecuting witness, and if the state fails to prove this to you beyond a reasonable doubt, you must acquit the defendant."

The defendant did not, during the introduction of evidence, contend that he and Alma Stevenson were husband and wife. The evidence fairly tended to show that they were not. To us it does not appear that there was any evidence that tended to show that they were.

[1, 2] The defendant's argument is that the burden was on the state to prove that Alma Stevenson was not his wife, and that for that reason it was the duty of the court to instruct the jury concerning this matter.

We disagree with the defendant in his statement that there was evidence tending to show that Alma Stevenson was the wife of the defendant. We are unable to find such evidence in the abstracts before us. There is not even a contention that they were husband and wife. This being true, it was not incumbent on the court to instruct concerning the lack of marriage relation between the defendant and Alma Stevenson. Marriage of the defendant and Alma Stevenson was a matter of defense which must have appeared in the evidence in some way before the state was compelled to prove that the relation did not exist. In an information charging rape it is not necessary to state that the person ravished was not the wife of the defendant. *State v. White*, 44 Kan. 514, 25 Pac. 33; 33 Cyc. 1440; note, 16 Ann. Cas. 902. It follows that the prosecution to make out a prima facie case is not required to prove that the accused and the woman were not husband and wife. *State v. Hooks*, 69 Wls. 182, 33 N. W. 57, 2 Am. St. Rep. 723, 730; note, Ann. Cas. 1912B, 114.

There are many matters of defense in criminal prosecutions that the state need not anticipate, and until they appear in evidence in some way, it is not incumbent on the state to disprove them. Insanity and self-defense are good illustrations of this rule.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 289)

OGALLAH ELEVATOR CO. v. HARRISON.*
(No. 19935.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §61—EARNINGS OF SERVANT—ACCOUNTING TO MASTER.

The rule that a servant must account to his master for earnings received from outside employment ordinarily relates to employment in the same kind of business in which his master is engaged, and does not relate to the servant's earnings in another kind of business in which his master is not interested and which is not inimical or prejudicial to his master's business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 70; Dec. Dig. §61.]

2. MASTER AND SERVANT §61—EARNINGS OF SERVANT—ACCOUNTING TO MASTER.

The plaintiff employed the defendant to manage its business of buying and selling grain and coal, and to keep open during business hours its offices and warehouses, and to keep its books

and accounts. The defendant with the knowledge and acquiescence of plaintiff undertook for another employer the business of selling flour, a business which the plaintiff had considered and decided not to engage in. No complaint was made that the defendant neglected plaintiff's business on account of the other employment. *Held*, that the defendant's earnings in the sale of flour are his own property, and the plaintiff has no legal claim thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 70; Dec. Dig. §61.]

3. MASTER AND SERVANT §53—MANAGER—LIABILITY FOR UNCOLLECTABLE DEBTS.

Ordinarily a manager of a business is not a guarantor of its credits extended nor an insurer against mistakes, and in the absence of negligence he is not personally liable for an uncollectable debt.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 67; Dec. Dig. §53.]

4. MASTER AND SERVANT §61—ACTION FOR MONEY RECEIVED — SUFFICIENCY OF EVIDENCE.

Where an elevator company lays claim to moneys earned and collected by its manager for the use of its scales, and the jury finds that the amount collected was somewhere between \$12 and \$30, and that the manager paid out between \$10 and \$25 for help in operating the scales, and that the manager retained no part of the earnings to his own use, the plaintiff fails to establish its cause of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 70; Dec. Dig. §61.]

5. APPEAL AND ERROR §1050 — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Prejudicial error cannot be based upon the admission of incompetent testimony when it is not shown to have improperly affected the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. §1050.]

Appeal from District Court, Trego County.

Action by the Ogallah Elevator Company against Fred Harrison. From a judgment for defendant, plaintiff appeals. Affirmed.

Herman Long, of Wakeeney, for appellant.
E. A. Rea, of Hays, and Monroe, McClure & Monroe, of Topeka, for appellee.

DAWSON, J. The Ogallah Elevator Company brought this action against Fred Harrison, who served as its manager from November, 1909, until March, 1912, to recover \$40.90 which he had paid to one Jeff Belveal without authority, and to collect from Harrison \$180 which he has earned and received for the sale of flour for a rival elevator company while in the plaintiff's employment, and also to collect from defendant \$40 which he had collected from various persons for the use of plaintiff's scales.

The defendant answered by pleading the statute of limitations and an audit and settlement as to the Belveal item, that the money received for the use of plaintiff's scales had been paid out with plaintiff's consent for work and labor, and that the sale of flour for the rival elevator did not interfere with his duty to plaintiff, and that plaintiff lost nothing thereby, and that he had done this

work with the knowledge and consent of plaintiff and its officers.

Plaintiff replied that any settlement touching the Belveal item and for the use of the scales had been procured by defendant's fraud and concealment, and made without authority and without its knowledge or ratification; and that if any officer consented to or acquiesced in defendant's employment to sell the rival elevator's flour, it was without authority from plaintiff.

The special findings and general verdict were in favor of defendant. The defendant assigns many errors in the admission and exclusion of evidence, in the instructions, and in the general result. Such of these as may have been of sufficient consequence to affect the final result will be noted.

[1, 2] 1. Much of appellant's brief is devoted to its claim to the \$180 earned by the defendant in the sale of flour for a rival elevator. The plaintiff was engaged in dealing in grain and coal. It was not engaged or concerned in the business of dealing in flour. It had considered the advisability of doing so, but on account of lack of funds it decided not to undertake it. The defendant's employment required him to attend to its business and keep its funds and accounts, and its offices and warehouses were to be opened for business from 7 o'clock a. m. until 6 o'clock p. m., or later, if business demanded it. It was clearly shown that the plaintiff knew, through the only way a corporation can know, by notice to its president and directors, that the defendant was handling this flour, and it took no action to stop it as inimical to its business. If the plaintiff had any grievance on this account, its action would be for breach of contract or in tort. It certainly has no legal claim to defendant's earnings. The case is not to be considered as if the plaintiff itself were dealing in flour and had employed the defendant for that purpose. The president of the plaintiff company testified:

"I remember the occasion of his [defendant's] accepting employment from the Wheatland Elevator Company; before he accepted that employment there had been talk about handling flour by the directors of the Ogallah Elevator Company at a meeting that they held; it had been discussed at different times while I was on the board, and the company was financially embarrassed, and wasn't able to build a building, so that they could handle this stuff, and they didn't feel as though they would like to go in debt in order to handle it; we supposed naturally that the sale of flour would draw trade for our other business; we were buying wheat, some corn, and handling coal. * * * I can recollect it, it had been talked through the board, and we all understood it, and the stockholders all knew it, and I said, as far as I am personally concerned, that you can handle that flour, providing that it don't interfere with our other business; I don't know how soon he commenced handling the flour after that; I did learn of it after he commenced; I understood all the time he was handling it that he was getting pay from the Wheatland Elevator Company and I understood that he was keeping that pay for himself; I never made any objections to this because it

was talked among the board, and a number of the board, and while they didn't all of them, didn't sanction it, they didn't say for him not to handle it. They all knew it and they never objected; that is, to the board. It wasn't brought up before the board as I remember; the reason for this was talked over among themselves that he wasn't getting hardly enough wages to justify him in staying there, and he had a position offered him for more wages, and we, I think part of the board, perhaps all of it, I couldn't say, agreed to let him—agreed that if he handled that, he could use—collect the money for his own affairs. I got that started wrong. The intention was to help out his salary, and he was talking of leaving, and I says: 'We can't afford to let Fred go; we have had him here ever since the elevator started, and he knows more about the business, and he came here green and inexperienced, and he didn't know anything about bookkeeping, and had to learn everything, and after we had learned him, or he had learned himself rather, that I thought best that we keep him right on the job, and by helping his salary out on the side by handling this flour, why, he was willing to stay with us a little while longer. This was talked over in a general way. I don't say it was talked over at the board, but in a general way, and the outsiders and the stockholders all knew of this thing, because I talked with different ones, both stockholders and directors.'"

Whether this situation of affairs is viewed as an acquiescence on the part of the plaintiff as found by the jury (10 Cyc. 1065; 16 Cyc. 714), or as showing the nature of plaintiff's claim to defendant's earnings in the sale of the flour, the result was correct (Wheeler & Tappan Co. v. Dahms, 50 Ill. App. 531; Hillsboro National Bank v. Hyde, 7 N. Dak. 400, 75 N. W. 781; Clarke v. Kelsey, 41 Neb. 766, 60 N. W. 138; 26 Cyc. 1020; Labatt's Master and Servant [2d Ed.] § 2037).

The gist of the cases just cited is to the effect that the employer cannot claim as his own the earnings of his servant from an independent employment on an unrelated business. The appellant recognizes this rule, but has been led astray in its application. Its idea appears to have been that since the dealing in flour could have been associated conveniently with the plaintiff's grain and coal business, it was entitled to the earnings on the flour business. Moreover, plaintiff's long acquiescence in defendant's outside employment estops it to claim his outside earnings.

[3-5] 2. Turning next to the item of \$40.90 which was alleged to have been paid to Belveal without authority. While not directly pleaded by defendant that it was paid out by mistake, the plaintiff was apprised of that fact. Plaintiff's counsel said as much in his opening statement to the jury. The evidence showed that the plaintiff owed Belveal for wheat, and Belveal owed the plaintiff for coal, and in settling accounts the defendant as agent for the plaintiff paid Belveal \$40.90 too much. It was clearly shown to have been an innocent mistake, and when discovered it was charged against Belveal's account. No fair interpretation of defendant's contract of employment bound him as a guarantor of the credits extended by the plain-

tiff. Technically, counsel for appellant is right in his contention that defendant should have pleaded that he paid out this money by mistake. But when plaintiff knew this fact, as shown by the opening statement of its counsel, and it was clearly established and uncontroverted by the evidence, shall we now, on account of defendant's failure to plead the mistake, reverse this case and send it back to the trial court which would in furtherance of justice permit him to amend his answer in that particular? Since there is no dispute as to the fact, and plaintiff does not even suggest that he was misled and does affirmatively show that he was fully apprized of the facts, the revised Code (Civ. Code, §§ 141, 581 [Gen. St. 1909, §§ 5734, 6176]) forbids a reversal on such a ground (Root v. Packing Co., 94 Kan. 339, 345, 147 Pac. 69; Hamilton v. Railway Co., 95 Kan. 353, 359, 360, 148 Pac. 648).

3. Appellant has some slight ground for his complaint touching the rulings of the court on the admission of evidence relating to the moneys collected by the defendant for the use of the scales. The authorities cited, which show that the plaintiff was not entitled to defendant's earnings in the sale of flour, an independent business from that in which the plaintiff was engaged, are just as precise and definite to the effect that defendant's earnings within the scope of the employer's business belong to his employer. Moreover, the keeping of an accurate account of the moneys which in any way pertained to plaintiff's business was one of the matters clearly covered by defendant's employment, and this duty and obligation ought not to be lightly excused by informal assent on the part of individual officers or directors. But the facts based upon competent testimony are shown by the findings of the jury:

"(7) Did the defendant during his employment by the plaintiff do certain weighing for compensation on plaintiff's scales without accounting to said association for such compensation? Answer: Yes.

"(8) If you answer No. 7 'Yes,' how much money did he receive for such weighing? Answer: Amount not shown to be less than twelve or more than thirty dollars.

"(9) How much money did Fred Harrison pay out on account of help in the matter of weighing hay? Answer: Amount not shown to be less than ten or more than twenty-five dollars.

"(10) Did Fred Harrison retain for his own use any of the money taken by him on account of weighing hay? If so, how much? Answer: No."

These findings fall to show that the defendant owed the plaintiff anything on this item. He did fail to keep an account. He did not appropriate the scale earnings to his own use. So said the jury. How then can it be material whether the evidence which was introduced was competent or incompetent to show whether the plaintiff had authorized by positive sanction or by acquiescence the appropriation of the scales' earnings to defendant's personal use?

We have carefully considered the other questions presented, but do not deem it necessary to comment on them. We note the appellant's criticisms of the trial court's many adverse rulings to plaintiff's objections to the evidence. Most of the evidence objected to covered the action of the board of directors ordering a dismissal of this suit, and the attitude of individual officers and directors towards the appropriation of the scales' moneys by the defendant. As we view the case, the evidence was probably incompetent, but we fail to trace prejudicial error to its admission.

In the voluminous abstracts and copious briefs which show clearly the diligence and zeal with which counsel for both litigants have presented this cause, these controlling facts appear: (a) The plaintiff has no legal claim on defendant's earnings on the sale of the Wheatland Company's flour; (b) the defendant was not personally liable for the money paid to Belveal by mistake; and (c) while defendant was bound by his contract of employment to keep an accurate account of the scales' earnings and failed to do so, he did have authority to pay out these moneys, and did pay them out for services in plaintiff's behalf, and the jury found that none of the scales' moneys were appropriated to the defendant's private use.

Thus the issuable and controlling facts have all been settled by the jury adversely to plaintiff's contention; and since no prejudicial error can be detected, the judgment must be affirmed. All the Justices concurring.

(97 Kan. 176)

HAAS v. WILSON et al. (No. 19693.)
(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS \S 329—
PUBLIC LANDS—PATENT ISSUED TO HEIRS.

The rule announced in *Byerly v. Eadie*, 95 Kan. 400, 148 Pac. 757, is adhered to.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1052, 1059, 1342, 1350-1364; Dec. Dig. \S 329.]

2. ADVERSE POSSESSION \S 16—ACQUISITION
OF TITLE—WILD AND UNOCCUPIED LAND.

Title to real property cannot be acquired by adverse possession where the land is in a wild state, vacant, unoccupied, and no apparent acts of ownership have been performed thereon.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 82-89; Dec. Dig. \S 16.]

Appeal from District Court, Greeley County.

Action by J. J. Haas against Clement L. Wilson and others. From judgment for plaintiff, defendants appeal. Reversed and remanded.

Clement L. Wilson, of Tribune, and Mayo Thomas, of Kansas City, Mo., for appellants. W. M. Glenn, of Tribune, and W. C. Dickey, of Leoti, for appellee.

MARSHALL, J. This is an action to quiet title to real property. The plaintiff recovered judgment. The defendants appeal.

John W. Gray filed on government land in Greeley county, but died before making final proof. He left as his heirs Robert J. Gray, Narcissus A. Kelly, Callie T. Gray, Lilla E. Samish, and George W. Gray. Narcissus A. Kelly made final proof, and a patent was issued by the government to the heirs of John W. Gray. P. J. Donahue was appointed administrator of the estate of John W. Gray, and under an order of the probate court conveyed the land to J. C. V. Kelly, the husband of Narcissus A. Kelly. Afterwards Kelly and his wife conveyed the land by warranty deed to Clarence L. White, who in turn conveyed it to the plaintiff in April, 1889. Robert J. Gray died in 1912, intestate, leaving as his only heir his grandson, Rex Williams. In August, 1912, Rex Williams conveyed by quitclaim all his right, title, and interest in the land to Clement L. Wilson. In 1911 Callie T. Gray, Lilla E. Samish, George W. Gray, and Narcissus A. Kelly by quitclaim deed conveyed all their right, title, and interest in the land to the defendant Virginia Lee Byerly.

The land was continuously vacant, unoccupied, and in a wild state from 1889 until 1912, when defendants Clement L. Wilson and Virginia Lee Byerly went on the land and plowed around it. John W. Gray was buried on the land, and his body remained there until 1912, when it was removed therefrom by the defendants. The plaintiff has paid the taxes on the land from the time of acquiring his deed in 1889 to the present time. The defendants do not now claim title to the whole of the land. They claim four-fifths of it, and ask that it be divided.

[1] 1. Byerly v. Eadle, 95 Kan. 400, 148 Pac. 757, disposes of the administrator's deed, and its validity as against the grantees of the patentees is not now urged. The deed from Narcissus A. Kelly and her husband to Clarence L. White conveyed to him the title acquired by her under the patent from the government. The deed from White to the plaintiff conveyed that title to him. The plaintiff and the defendants then became tenants in common of the land in controversy.

[2] 2. The principal question for our consideration is: Did the plaintiff acquire title to this land by adverse possession; the land being vacant and in a wild state, and no apparent acts of ownership having been exercised thereon? This question has been disposed of by numerous decisions of this court. In Dickinson v. Bales, 59 Kan. 224, 52 Pac. 447, this court said:

"To constitute adverse possession of land, it is not absolutely necessary that there should be inclosure, buildings, or cultivation, but the acts done must be such as to give unequivocal notice of the claim to the land, adverse to the claims of all others, and must be of such a character and so openly done that the real own-

er will be presumed to know that a possession adverse to his title has been taken." Syl. par. 1.

See, also, Taylor v. Miles, 5 Kan. 498, 514, 7 Am. Rep. 558; Myers v. Coonratt, 28 Kan. 211, 215; Board of Regents v. Linscott, 30 Kan. 240, 264, 1 Pac. 81; Case v. Frazier, 30 Kan. 343, 2 Pac. 519; Walker v. Boh, 32 Kan. 354, 357, 4 Pac. 272; Harris v. Curran, 32 Kan. 580, 4 Pac. 1044; Craven v. Bradley, 51 Kan. 336, 339, 32 Pac. 1112; Clafin v. Case, 53 Kan. 580, 36 Pac. 1062.

The plaintiff's possession, if he can be said to have been in possession, was neither open nor notorious. It did not have those elements that ripen into title by 15 years' continuous duration. No one was in such possession of the land as would enable him to acquire title by adverse possession. It was vacant, unimproved, unoccupied, and it is not shown that any one performed any acts of ownership on the land after it was patented until defendants Wilson and Byerly plowed around it.

The judgment is reversed. The action is remanded, with direction to proceed in accordance with the views herein expressed. All the Justices concurring.

(97 Kan. 184)

FREEMAN v. SCHERER et al. (No. 19698.)
(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. INJUNCTION — RIGHT TO REMEDY — MAINTENANCE OF DITCH.

A ditch was dug in a highway by a landowner and the public officers to drain water from the highway as well as from the adjoining land, and an embankment or dike was made on the side of the ditch which served to prevent the water from passing upon the land on that side of the highway. After the enactment of chapter 175 of the Laws of 1911, which related to drainage, the ditch was deepened and the dike enlarged by the owners of the adjoining lands, the better to serve the purpose for which they were originally made. Another landowner brought an action to prevent the maintenance of the dike, alleging that it interfered with the flow of surface water from his land. It appeared that the maintenance of the ditch had not resulted in injury to his land since the dike was rebuilt, and that there was no reasonable probability that it would do so. *Held*, that the mere apprehension or possibility of injury did not warrant the granting of an injunction, nor is a party entitled to that remedy unless he satisfactorily shows that the injury is likely to occur and that his remedy at law is inadequate.

[Ed.—Note.—For other cases, see Injunction, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.]

2. INJUNCTION — RIGHT TO RELIEF — EQUITY.

One who seeks equity must do equity, and, if an applicant for an injunction has encouraged, invited, or contributed to the injury and loss sought to be enjoined, or acted wrongfully and illegally in respect to it, he is not entitled to the relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 19; Dec. Dig. § 21.]

Appeal from District Court, Dickinson County.

Suit by A. J. Freeman against C. A. Scherer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Thomas Dever, of Junction City, for appellant. Hurd & Hurd, of Abilene, for appellees.

JOHNSTON, C. J. A. J. Freeman brought suit against the defendants asking for a mandatory injunction directing the defendants to remove a dike built by them in April, 1911, after chapter 175 of the Laws of 1911 took effect, which dike Freeman alleged was so placed as to interfere with the natural course of drainage down the valley from his land. The lands involved in the suit all lie between two streams—one on the west called Crute branch, and one on the east called Chapman creek—and on both sides of a road running east and west on the line between sections 1 and 12. Freeman's land consists of the southeast quarter of section 1, north of the road, and the east one-half of the northeast quarter of section 12 (containing 80 acres), south of the road; and Chapman creek meanders in a southerly direction down through his land and across the road, where there is a bridge. Defendant Scherer's land is the west one-half of the northeast quarter of section 12, and lies just west of plaintiff's south 80 acres; while the land of Sarah E. Marts is the quarter section lying just west of the Scherer land. All of the land of the defendants lies south of the road. The land of the plaintiff which lies north of the road and on the west of Chapman creek slopes in a general southerly direction, and the natural course of surface water is down across the road and over the lands of the defendants. The road mentioned was established in 1893 and to carry off the water that accumulated on the road, as well as on the adjoining land, the public authorities and an adjoining owner of land made a ditch along the road, which was designed to improve the road and to carry the water to Chapman creek. The dirt taken from this ditch was thrown mostly on the south side of the ditch and formed a sort of embankment. At a later time the ditch was enlarged and raised to some extent. The dike is about one-half mile long, and extends along the south edge of the road on the north line of the lands of the defendants.

The answers of the defendants Scherer and Theodore Marts alleged, among other things, that there had been a ditch along the roadside which had properly taken care of the drainage for many years and until it was filled up in 1910 by Freeman, and that any damage he may have suffered to his land was due to this act. In response to this claim Freeman alleged that the ditch was unauthorized, and that he had a right to close it. Marts alleged and insisted that the rights of Freeman with regard to this dike had been

litigated and determined in a former suit tried in 1912, and that the only injury sustained by him resulted from his fault. The case to which reference was made was between plaintiff and one of the defendants herein and many of the facts and contentions in the present case were under consideration in that one. *Marts v. Freeman*, 91 Kan. 106, 136 Pac. 943.

The trial herein was before the court without a jury, and there was evidence which tended to show that the road mentioned was established in 1893; that in wet periods the surface water flowed from the north upon the road as well as upon the lands of the defendants on the south side of the road. To prevent injury to the road, and also to the land south of it, the public authorities and landowners jointly dug a ditch on the south side of the road from a slough which was near the center of the valley, eastward about half a mile to Chapman creek. It also appeared that plaintiff had recognized that the ditch was for the purpose of drainage and to carry water not only from the road, but also from the lands north of the road, by digging lateral ditches from his land to the ditch, and he had further applied to the township officers to put in a tile or drain across the road to carry the water from his farm to the ditch. In 1910 the plaintiff filled up the ditch, and thereby caused injury to the land of Marts, for which the latter asked a recovery of damages. In that action plaintiff denied liability, and insisted that the ditch was not dug for the benefit of the public, that the embankment or dike south of the ditch unlawfully obstructed the natural flow of the water, and that it had operated to injure him. He asked to enjoin Marts from maintaining the ditch and embankment. That action resulted in a judgment in favor of Marts for damages, and the injunction for which Freeman had asked was denied. Upon an appeal the judgment of the district court was affirmed. *Marts v. Freeman*, supra. It was there held that:

The fact "that the improvements were urged by and resulted in benefits to a landowner did not impair the right of the constituted authorities, acting in good faith, to make it for the use and benefit of the public." Syl. par. 3.

And it was further held that:

"The fact that a water course so created is an artificial one affords no justification for obstructing it, where it exists by lawful authority, although the obstruction causes the water to flow where it did before the ditch was opened." Syl. par. 4.

[1] It appears that in the spring of 1911 the ditch was deepened and the dike raised, and that this was done after the enactment of chapter 175 of the Laws of 1911, which authorizes the owners of land in certain cases to construct drains. It does not appear from the evidence, however, that the defendant has since that time suffered any injury from the maintenance of the dike and the ditch.

When the plaintiff made his opening statement the defendants moved for judgment in their favor on the pleadings and the opening statement, but the court reserved its rulings on these motions, and, after the plaintiff had introduced his testimony, the court, on the demurrer of defendants, as well as on the motion for judgment on the opening statement, rendered judgment in favor of the defendants. The plaintiff insists that there was some evidence which tended to support the material allegations of his petition, and that, under the rules applicable where the evidence is challenged by a demurrer, the ruling of the court was erroneous. This was an equity case triable without a jury, in which the issues of fact as well as of law were for the determination of the court. It differs little from a case which is finally submitted to the court upon the testimony of the plaintiff alone. However, taking the plaintiff's testimony uncontradicted as it was and drawing all the inferences in favor of plaintiff where the testimony was open to more than one inference, the court, we think, was justified in holding that the plaintiff could not recover. A public highway existed upon which the ditch was made. That ditch had been constructed under public supervision, and had served as an artificial channel to carry the water to the creek. It had been recognized and used by the plaintiff as a means of draining his adjoining lands, and the embankment or dike appears to have been an incident of the making of the ditch and really a part of it.

It is urged by plaintiff that, as the ditch and dike were rebuilt after the act of 1911 relating to drainage was in force, the rebuilding of the same constituted a violation of the provisions of that act as much as if the ditch and dike had been originally constructed at that time. The act, among other things, prohibits the lower proprietor of land from constructing a dam or levee that will obstruct the flow of surface water onto his land to the damage of an upper proprietor. The ditch in question, as we have seen, had been in use for a great many years, and had become an established artificial channel that carried off the surface water. The work done upon it in 1911 did not change its course nor divert it from the purposes for which it was originally dug. It is true the dike was enlarged, and that more earth was used in making part of it than was taken from the ditch. It was done, however, with the manifest purpose of confining the water in the ditch and carrying it to Chapman creek. But it is contended that the ditch was not, in fact, open when the law of 1911 was enacted, and therefore it should be treated as an original improvement. It appears that plaintiff filled up the ditch and purposely obstructed the flow of water some time in 1910 not long before the enactment of the law of 1911. Although it was determined in *Marts v. Freeman*, 91 Kan. 106, 138 Pac. 943, that the

plaintiff was not justified in closing the ditch, he admits that he did so, and hence he voluntarily took the risk of the injury that might result to him from holding back the water that might have flowed through the ditch to the creek. If the reconstructed ditch, however, is to be treated as a new construction within the meaning of the act of 1911 the court was nevertheless warranted in denying the injunction. While plaintiff's land was overflowed during the exceptional floods of 1903 and 1908, when all the lowlands in that region were under water, it appears that no injury or loss has been suffered by him since the reconstruction of the dike or the enactment of the law of 1911. The fact that the land was overflowed during the exceptional floods does not warrant the inference that such floods will become common nor require the issuance of an injunction. Experience has demonstrated that injury from floods is not likely to recur, and that the provisions already made for drainage are ordinarily sufficient. Injunction is not to be used to prevent a prospective injury unless it appears that there is a reasonable probability of injury and that the law will not afford an adequate remedy.

"Mere apprehension or a possibility of wrong and injury by a defendant is ordinarily not enough to warrant the granting of an injunction." *Hurd v. Railway Co.*, 73 Kan. 83, Syl. par. 3, 84 Pac. 553; 22 Cyc. 769.

In *Whitehair v. Brown*, 80 Kan. 297, 300, 102 Pac. 783, 784, 18 Ann. Cas. 218, an action was brought to obtain an injunction to prevent the building of a dam which it was alleged would obstruct the flow of waters, and the court said that:

"To establish their right to an injunction it was necessary for the plaintiffs to satisfy the court that there were reasonable grounds to fear the recurrence of the new injury with such frequency as seriously to affect the value of their lands, or that other considerations rendered their remedy at law inadequate."

Also see *Hagge v. Kansas City S. Ry. Co.* (C. C.) 104 Fed. 391, and 2 *Farnham's Water and Water Rights*, § 582a, and cases there cited.

If damage should result to plaintiff from the maintenance of the dike, it would appear that an action for damages would afford him an adequate remedy in which each of the parties would have an opportunity to have his rights determined by a jury. The ditch and dike appears to have served the purpose reasonably well until it was obstructed by the plaintiff himself. The only injury that can come to him from the maintenance of the dike was that it might hold the surface water upon his land. He practically invited this result when he filled up the ditch and prevented the flow of water into the creek.

[2] One who asks for an injunction is governed by the usual equitable rules, and one of them is that: "He who seeks equity must do equity." If he has acted wrongfully and illegally in the matter, he is hardly entitled to ask for equitable relief by injunction.

He did act illegally and wrongfully when he closed the ditch and obstructed the passage of water through it. In a sense he invited and permitted the injury which he anticipates may result to him from the ditch and dike.

"A party cannot invite and encourage a wrong, and then ask a court of equity to protect him by an injunction from the consequences of that wrong." *Stewart v. Com'rs of Wyandotte Co.*, 45 Kan. 708, Syl. par. 2, 26 Pac. 683, 23 Am. St. Rep. 746; *Downs v. Com'rs of Wyandotte Co.*, 48 Kan. 640, 29 Pac. 1077; 22 Cyc. 776.

Some objections are made to the rulings of the court excluding testimony, but, in view of the facts related in behalf of the plaintiff in the opening statement of the case and the testimony of the plaintiff himself, none of the objections appear to be material.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 285)

FRAZIER v. MISSOURI PAC. RY. CO.*
(No. 19933.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(*Syllabus by the Court.*)

1. RELEASE ¶58—FRAUD—EVIDENCE—QUESTION FOR JURY—RATIFICATION OF SETTLEMENT.

The plaintiff was injured by the defendant's negligence. While yet under the influence of anesthetics he settled his claim for damages. Afterward he wrote a letter to the defendant's superintendent ratifying the settlement and asking for a position on the road. The evidence showed that this letter was written at the suggestion and in the presence of a special agent of the defendant and was delivered to him; that he gave the letter to the superintendent, who referred it to the claim agent that made the settlement, and endeavored to find a position for the plaintiff, but when this action was commenced had not succeeded. This evidence was not sufficient to warrant the court in submitting to the jury the question of fraud in procuring the letter to be written.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. ¶58.]

2. RELEASE ¶21—RATIFICATION—PERSONAL INJURIES.

A letter containing this language, "I would like some kind of position with your company, as I settled fairly with the company and without any trouble," voluntarily written after recovery from injuries sustained and with full knowledge of all circumstances, is a ratification of the settlement therein mentioned.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 37, 38; Dec. Dig. ¶21.]

Appeal from District Court, Sedgwick County.

Action by Thomas A. Frazier against the Missouri Pacific Railway Company. From judgment for plaintiff, defendant appeals. Reversed, and judgment directed for defendant.

W. P. Waggener and A. E. Crane, both of Atchison, and O. H. Bentley, of Wichita, for appellant. Dale, Amidon & Madalene and S. A. Buckland, all of Wichita, for appellee.

MARSHALL, J. The plaintiff recovered a judgment for \$8,000 for the loss of two fingers and an injury to a third one on his left hand, caused by the defendant's negligence. The defendant appeals.

The plaintiff was injured while attempting to board one of the defendant's passenger trains. On the next day, about 12 hours after the injury, and while the plaintiff was under the influence of anesthetics administered to him during the amputation of his fingers, the defendant's claim agent went to the hospital to see the plaintiff, and informed him that when he desired to settle the claim against the company to call him, the claim agent. The afternoon of that day the claim agent was called, and settlement was made by which the defendant paid the plaintiff \$450 and agreed to pay his doctor bills and hospital charges. The plaintiff was then still under the influence of anesthetics and knew nothing of this settlement. About two weeks thereafter he was discharged from the hospital, and was informed of the settlement by his wife. Two months after being discharged from the hospital the plaintiff wrote A. H. Webb, the defendant's superintendent at Wichita, as follows:

"I am the man that was hurt in Wichita yard at station. And I was advised to write you in regards to position. As I only have one hand at present it is impossible for me to hold the place as order clerk, at Wichita Wholesale Groc. Co., and I would like some kind of position with your company, as I settled fairly with the company and without any trouble. I have several friends on the Mo. Pac. Ry. for reference."

[1] 1. The defendant argues that this letter ratified and confirmed the settlement. The plaintiff contends that he was induced to write this letter by fraud on the part of the defendant. The evidence on this question shows that the plaintiff wrote the letter at the suggestion and in the presence of Bruce Cornet, who stated to the plaintiff that he was the special agent of the defendant, and said, in substance, that if the plaintiff would write to Superintendent Webb, he could probably place the plaintiff in a position in the service of the company. The letter was delivered to Bruce Cornet, and by him given to Webb. Webb referred the letter to the claim agent that made the settlement for the defendant and tried to find a position for the plaintiff. No position was found for him. This action was begun two months later. There was no evidence that any promise of a position of any kind was made to the plaintiff to induce him to write the letter; neither was there any evidence to show that any suggestion was made as to what the letter should contain. Was there evidence sufficient to warrant the court in submitting to the jury the question of fraud in inducing the plaintiff to write the letter? What circumstance shows fraud? None that we can see. The suggestion might have been fraudulently made, but there is no evidence of any

kind to show that it was so made. "Good faith is presumed, and need not be proved." *Weybrick & Co. v. Harris*, 31 Kan. 92 (Syl. par. 3), 1 Pac. 271. Fraud is never presumed. It must be established by evidence. *Long Bros. v. West & Co.*, 31 Kan. 293, 1 Pac. 545; *Baughman, Sheriff, v. Penn.*, 33 Kan. 504, 6 Pac. 890; *Bliss v. Couch*, 46 Kan. 400, 403, 26 Pac. 706; *Gleason v. Willson*, 48 Kan. 500, 29 Pac. 698; *Hasle v. Connor*, 53 Kan. 713, 720, 37 Pac. 128; *Richolson v. Freeman*, 56 Kan. 463, 466, 43 Pac. 772; *Gilmore v. Swisher*, 59 Kan. 172, 52 Pac. 426.

We are not unmindful of the fact that fraud is rarely susceptible of positive proof, but that does not dispense with the necessity of producing evidence to show that fraud existed. It is not enough to produce evidence to show that fraud might have been practiced. Evidence must be introduced to show that fraud was practiced. That evidence need not be direct; it may be circumstantial, but it must be sufficient to convince a reasonable man that fraud existed. 6 *Encyclopædia of Evidence*, 50, 51.

"A charge of fraud cannot be sustained by mere insinuation and suspicion, strained inference, doubtful or suspicious circumstances, or mere conjecture; and evidence which produces a vague misgiving is not enough. Where the evidence is capable of an interpretation which makes it equally as consistent with defendant's innocence as with his guilt, that meaning must be ascribed to it which accords with his innocence." 20 *Cyc.* 121.

Applying these rules, we must conclude that there was not evidence sufficient to warrant the court in submitting to the jury the question of fraud in inducing the plaintiff to write the letter to Webb.

[2] 2. What was the effect of the letter? The plaintiff said: "I would like some kind of position with your company, as I settled fairly with the company and without any trouble." A shorter statement is: "I settled with the company." The defendant contends that this constitutes a ratification of the release signed by the plaintiff. The court, in effect, instructed the jury that the letter ratified the settlement unless the letter was procured to be written by fraud.

"A ratification is defined to be the confirmation of a previous act done either by the party himself or by another; it is the confirmation of a voidable act. 23 *Am. & Eng. Encycl. L.* 889. And a confirmation necessarily supposes a knowledge of the thing ratified. *Blen v. Bear River, etc., Mining Co.*, 20 Cal. 613 [81 *Am. Dec.* 132]; *San Diego Railroad Co. v. Pacific Beach Co.*, 112 Cal. 53 [44 *Pac.* 333, 33 *L. R. A.* 788]. It follows, then, that in order to constitute a ratification there must be an acceptance of the results of the act with an intent to ratify and with full knowledge of all the material circumstances. *Ansonia v. Cooper*, 64 Conn. 544 [30 *Atl.* 760]." *Russell v. Erie Railroad Co.*, 70 N. J. Law, 808, 816, 59 *Atl.* 150, 153, 67 *L. R. A.* 433, 437, 1 *Ann. Cas.* 672.

The letter is before us. Its language is clear and plain. Parol evidence is generally inadmissible for the purpose of showing that

the words used were not intended to have the legal effect ordinarily following their use. *Gowans v. Pierce*, 57 Kan. 180, 45 *Pac.* 586.

"The construction of written instruments is a question of law for the court, and ordinarily it is error to submit such a question to the jury." *Shear Co. v. Thompson*, 80 Kan. 467 (Syl. par. 1), 102 *Pac.* 848.

See, also, *Warner v. Thompson*, 35 Kan. 27, 10 *Pac.* 110; *Bell v. Keepers*, 37 Kan. 64, 14 *Pac.* 542; *Cosper v. Nesbit*, 45 Kan. 457, 25 *Pac.* 866; *Ellis v. Woodruff*, 88 Kan. 734, 738, 129 *Pac.* 1193; 9 *Cyc.* 591.

"But, where the construction of a written contract depends upon extrinsic facts as to which there is a dispute its construction is a mixed question of law and fact, and is for the jury under proper instructions from the court." 9 *Cyc.* 591.

The construction of this letter does not depend on any extrinsic fact about which there is a dispute. The plaintiff made the settlement. At the time he made it he was under the influence of anæsthetics. That fact does not modify the meaning to be attached to the language used in the letter written when not under the influence of anæsthetics. What did the plaintiff mean when he said: "I would like some kind of position with your company, as I settled fairly with the company and without any trouble?" There is only one answer. That answer is: "I settled with the company." If he settled with the company, this action is at an end. By using that language the plaintiff in effect said: "Any claim I may have had against the company has been settled." He then recognized that he had settled with the defendant, acknowledged that settlement as such, and confirmed and ratified it.

The judgment is reversed. It is directed that judgment be entered for the defendant. All the Justices concurring.

(37 Kan. 247)

JACOBS v. ATCHISON, T. & S. F. RY. CO.*
(No. 19909.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. RAILROADS — 330 — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE.

It is such negligence as will prevent a recovery for injuries sustained for a driver of an automobile to attempt to cross a railroad track at a grade crossing without looking or listening for the approach of a train, although an electric warning bell is maintained at the crossing and the bell is not ringing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1074; Dec. Dig. — 330.]

2. RAILROADS — 339 — CROSSING ACCIDENT — WANTONNESS.

Engine men in charge of a locomotive attached to a passenger train who cut off the steam and apply the air one-quarter of a mile before reaching a street crossing in a small city, and who suppose that an electric warning bell stationed at the crossing is ringing, are not guilty of wantonness, although they fail to ring the engine bell or sound the whistle for the

crossing, and although they go through the city at the rate of 45 miles per hour.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1085, 1100, 1101; Dec. Dig. § 339.]

Appeal from District Court, Sedgwick County.

Action by Mary J. Jacobs against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, defendant appeals. Reversed, with directions to enter judgment for defendant.

W. R. Smith, O. J. Wood, A. A. Scott, and Harlow Hurley, all of Topeka, for appellant. Adams & Adams, of Wichita, for appellee.

MARSHALL, J. In this action the plaintiff seeks to recover for the death of her husband caused by the negligence of the defendant. The defense was contributory negligence on the part of the deceased. The plaintiff recovered judgment. The defendant appeals.

John H. Jacobs, the husband of the plaintiff, met his death by driving his automobile on the defendant's tracks in front of a swiftly moving passenger train. This occurred on Saturday afternoon at the crossing of the principal street in Valley Center. The defendant maintained an electric bell at this crossing. The jury made special findings of fact as follows:

"(2) For how long a distance east of the railroad track at the crossing in question could one traveling on the highway continuously have in sight a train stationed a quarter of a mile northward of the crossing? Ans. Twenty-eight feet."

"(6) Was the electric bell at the crossing in question ringing when the said train approached said crossing? Ans. No.

"(7) Were the engineer and fireman each at his post of duty and in his particular place on the engine as the train in question approached and passed over the crossing in question? Ans. Yes.

"(8) How far was the engine from the crossing in question when the fireman first discovered that the automobile would probably not be stopped in time to avoid a collision with the engine? Ans. One hundred fifty feet.

"(9) How far was the automobile from the crossing when the fireman first discovered that said automobile would probably not be stopped before it got on the crossing in the way of the engine? Ans. Fifteen feet.

"(10) After the fireman on the engine discovered, if he did discover, that the automobile would probably go upon the crossing in the way of the engine, what could have been done by him or the engineer that was not done to prevent the collision in question? Ans. Nothing.

"(11) How far was the automobile in question from the crossing when the fireman first saw it approaching the crossing? Ans. Fifty feet.

"(12) What particular place on the pilot or engine first came in contact with the automobile? Ans. Side of pilot back three feet from the point.

"(13) How far from the crossing did the engineer make his service application of air as the train approached Valley Center, if same was made at all? Ans. One-quarter mile.

"(14) What, if anything, would have prevented said Jacobs from seeing or hearing the ap-

proaching train in time to have avoided the collision if he had taken the pains to look and listen for same when he was about twenty-five feet from the crossing? Ans. Nothing.

"(15) If you find that the engineer cut off steam before he came to the crossing, state how far from said crossing he made such cut-off? Ans. One-quarter mile.

"(16) If you find that the negligence of those in charge of the engine caused the injury and death in question, state in what such negligence consisted? Ans. Excessive speed.

"(17) What was the usual rate of speed at which this mail train in question usually passed over the crossing in question at Valley Center prior to the date of the collision in question? Ans. Thirty-five miles.

"(18) Was the said Jacobs guilty of negligence on his own part which contributed to his injury and death at the time and place in question? Ans. No.

"(19) Did the engineer and fireman, as they approached the crossing in question, suppose that the electric bell at the crossing would ring automatically as the engine approached the said crossing? Ans. Yes."

"(21) Give speed of train at time of collision in question. Ans. Forty-five miles."

"(24) At what rate of speed was the automobile running when twenty feet from the crossing? Ans. Ten miles.

"(25) Name the different signals given of the approach to the crossing in question by the train in question. Ans. None."

[1] 1. The fourteenth finding establishes that the deceased did not look or listen for the approach of a train before driving on the track. *Beech v. Railway Co.*, 85 Kan. 90, 116 Pac. 213; *Cleveland, etc., R. Co. v. Coffman*, 30 Ind. App. 462, 64 N. E. 233, 235, 66 N. E. 179; *Tobias v. Railroad Co.*, 103 Mich. 330, 61 N. W. 514, 518.

The vital question in this case is: Did the failure of the electric bell to ring relieve the deceased of the obligation to look and listen before attempting to cross the track? The plaintiff seeks to have the rule in *McClain v. Railway Co.*, 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914C, 699, applied in this case. There this court said:

"Ordinarily if a traveler proceeds across a railroad track without taking the precaution to ascertain if there is a train in dangerous proximity he does so at his peril. The application of this rule is modified to some extent by the circumstance that gates have been erected and watchmen employed at crossings. In such case a traveler is not required to exercise the same vigilance when he approaches a track as he would at crossings not so guarded." 89 Kan. 30, 130 Pac. 648 (Ann. Cas. 1914C, 699).

Human intelligence guarded the crossing and operated the gate in that case. In the present case an electrical, mechanical device was intended to give warning of approaching trains. Sometimes this bell would not ring when trains were passing, and at other times it rang when no train was in sight. An electric bell, which at most can be nothing but a warning of an approaching train to those who listen, cannot be classed with a gate thrown across a street to prevent passing over railroad tracks; neither can it be classed with a flagman who stands in the street and stops those who desire to cross when there is danger. It is more nearly analogous to the locomotive bell and whistle. Failure

to ring the engine bell or sound the whistle does not relieve a traveler from the duty to look and listen before attempting to cross a railroad track. If the plaintiff's contention in this respect is correct, a railroad increases its responsibility and liability by putting in electric bells at highway and street crossings. The object in putting in electric bells is to promote public safety, not to increase railroad liability. Silence of such a bell is not an invitation to cross railroad tracks without taking the ordinary precautions.

In *McSweeney v. Erie Railroad Co.*, 93 App. Div. 496, 498, 87 N. Y. Supp. 836, 838, an action for damages for injuries sustained at a crossing where there was an electric bell, the court said:

"The exercise of due care required the deceased, under the circumstances, to look and listen for an approaching train, and the mere fact that the stationary signal bell was not ringing did not relieve him of the imputation of negligence if he failed to exercise this degree of care."

In that case judgment for the railroad was rendered at the close of the plaintiff's evidence. To the same effect is *Cleveland, etc., R. Co. v. Heine*, 28 Ind. App. 163, 62 N. E. 455. *Cleveland, etc., R. Co. v. Coffman*, supra, supports this position, although a new trial was ordered. But a new trial was requested by the defendant, not judgment on the findings. The plaintiff cites *Tobias v. Railroad Co.*, supra, to support his contention that it was the province of the jury to determine whether or not the deceased was guilty of contributory negligence in attempting to cross the railroad track without looking or listening when the electric bell was not ringing. The Supreme Court of Michigan there said that the question of contributory negligence should have been given to the jury, and reversed a judgment for the defendant because it was not given. A dissenting opinion in that case argues that the court should have directed a verdict for the defendant. *Wabash R. Co. v. McNown*, 53 Ind. App. 116, 99 N. E. 126, 129, 100 N. E. 383, supports the majority opinion in the *Tobias* Case, supra. We think the better rule is that the failure of an electric bell to ring does not relieve one about to cross a railroad track of the imperative duty to look and listen before crossing; if he fails to do so, he is guilty of such contributory negligence as will prevent his recovery for any injuries sustained, and there is nothing to submit to the jury.

It has been held that it is the positive duty of the driver of an automobile to stop, look, and listen before crossing railroad tracks. *A. C. L. R. R. Co. v. Weir*, 63 Fla. 69, 58 South. 641, 41 L. R. A. (N. S.) 307, Ann. Cas. 1913E, 753; *Earle v. Phila. & R. Ry. Co.*, 248 Pa. 193, 93 Atl. 1001; *Craig v. Penna. R. R. Co.*, 243 Pa. 455, 90 Atl. 135; *Brommer v. Penna. R. R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *New York Cent. & H. R. R. Co. v. Maidment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794; *Bason v.*

Ala. G. S. R. R. Co., 179 Ala. 299, 60 South. 922; 2 R. C. L. 1206. On the other hand, it has been held that the driver of an automobile is not under all circumstances as a matter of law required to stop before crossing a railroad track. *Dickinson v. Erie R. Co.*, 81 N. J. Law, 464, 81 Atl. 104, 37 L. R. A. (N. S.) 150; *Pendroy v. Great Northern Ry. Co.*, 17 N. D. 433, 117 N. W. 531; *Hull v. Seattle, Renton & Southern R. Co.*, 60 Wash. 162, 110 Pac. 804; 2 R. C. L. 1206.

This state follows the rule last stated. *Denton v. Railway Co.*, 90 Kan. 51, 56, 133 Pac. 558, 47 L. R. A. (N. S.) 820, Ann. Cas. 1915B, 639. See, also, *A. T. & S. F. Rd. Co. v. Hague*, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278; *O. R. I. & P. Ry. Co. v. Williams*, 56 Kan. 333, 43 Pac. 246; *O. R. I. & P. Ry. Co. v. Hinds*, 56 Kan. 758, 762, 44 Pac. 993; *Railroad Co. v. Powers*, 58 Kan. 544, 550, 50 Pac. 452; *Railroad Co. v. Holland*, 60 Kan. 209, 216, 56 Pac. 6; *Railroad Co. v. Willey*, 60 Kan. 819, 822, 58 Pac. 472; *Johnson v. Railroad Co.*, 80 Kan. 456, 461, 103 Pac. 90. More than a dozen times this court has said that a traveler must look and listen for approaching trains before attempting to cross railroad tracks, and that if he fails to do so, and is injured in consequence thereof, damages cannot be recovered for such injury. *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426; *U. P. Ry. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529; *Clark v. Mo. Pac. Ry. Co.*, 35 Kan. 350, 355, 11 Pac. 134; *A. T. & S. F. Rd. Co. v. Townsend*, 39 Kan. 115, 119, 17 Pac. 804; *A. T. & S. F. Rd. Co. v. Priest*, 50 Kan. 16, 22, 31 Pac. 674; *Roach v. St. J. & I. Rd. Co.*, 55 Kan. 654, 658, 41 Pac. 964; *Railroad Co. v. Willey*, 60 Kan. 819, 58 Pac. 472; *Burns v. Railway Co.*, 66 Kan. 188, 191, 71 Pac. 244; *Railway Co. v. Ryan*, 69 Kan. 538, 540, 77 Pac. 267; *Hoopes v. Railway Co.*, 72 Kan. 422, 83 Pac. 987; *Railroad Co. v. Entsminger*, 76 Kan. 748, 749, 92 Pac. 1095; *Railway Co. v. Wheeler*, 80 Kan. 187, 191, 101 Pac. 1001; *Beech v. Railway Co.*, 85 Kan. 90, 116 Pac. 213; *Adams v. Railway Co.*, 93 Kan. 475, 144 Pac. 999; *Butts v. Railway Co.*, 94 Kan. 328, 146 Pac. 1142.

The driver of an automobile is under the same or a more imperative duty to look and listen before crossing railroad tracks. *Gage v. Railway Co.*, 91 Kan. 253, 137 Pac. 938, Ann. Cas. 1915B, 410; *Northern Pac. Ry. Co. v. Tripp*, 220 Fed. 286, 136 C. C. A. 302; *Horandt v. Central Railroad Co.*, 78 N. J. Law, 190, 73 Atl. 93; *Elder v. P., C. & St. L. Ry. Co.*, 186 Ill. App. 199; *Glick v. Cumb. & W. Elec. Ry. Co.*, 124 Md. 308, 92 Atl. 773; *Ft. Wayne, etc., Traction Co. v. Schoeff*, 56 Ind. App. 540, 105 N. E. 924; *Allison v. Chicago, Milwaukee & St. P. R. R. Co.*, 83 Wash. 591, 145 Pac. 608. The rule requiring one about to cross a railroad track to look and listen applies in a city as well as in the country. *Burns v. Railway Co.*, 66 Kan. 191, 71 Pac. 244; *Railway Co. v. Ryan*, 69 Kan. 538, 540, 77 Pac. 267; *Northern Pac. Ry. Co. v. Tripp*,

220 Fed. 286, 136 C. C. A. 302; *Horandt v. Central Railroad Co.*, 78 N. J. Law, 190, 73 Atl. 93; *Elder v. P., C., C. & St. L. Ry. Co.*, 186 Ill. App. 199; *Allison v. Chicago, Milwaukee & S. P. R. Co.*, 83 Wash. 591, 145 Pac. 608. The deceased was guilty of contributory negligence, such as will prevent the plaintiff's recovery in this action, unless those in charge of the engine were guilty of wantonness.

[2] 2. The plaintiff contends that the deceased lost his life through the wanton conduct of those in charge of the engine. This contention is based on the failure of the enginemen to ring the bell and sound the whistle, and on the high rate of speed at which the train was run through Valley Center. Against this the jury found that the service application of air was applied and the steam cut off one-quarter of a mile before reaching the crossing, and that the enginemen supposed the electric bell at the crossing was ringing. Although contributory negligence on the part of the deceased will excuse the defendant for its negligence, yet wantonness on the part of the defendant will avoid the deceased's contributory negligence and render the defendant liable. *Kansas Cent. Ry. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *U. P. Ry. Co. v. Adams*, 33 Kan. 427, 429, 6 Pac. 529; *K. O. Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 14 Pac. 172, 59 Am. Rep. 596; *U. P. Ry. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501; *K. P. Ry. Co. v. Whipple*, 39 Kan. 531, 540, 18 Pac. 730; *Tennis v. Rapid Transit Ry. Co.*, 45 Kan. 503, 25 Pac. 876; *A., T. & S. F. Rd. Co. v. Todd*, 54 Kan. 551, 559, 38 Pac. 804; *Railway Co. v. Cooper*, 57 Kan. 185, 190, 45 Pac. 587; *Cummings v. Railroad Co.*, 68 Kan. 218, 220, 74 Pac. 1104, 1 Ann. Cas. 708; *Tempfer v. Street Railway Co.*, 89 Kan. 374, 379, 131 Pac. 592.

Negligence is not presumed. It must be proved. *Missouri Pac. Ry. Co. v. Haley*, 25 Kan. 35; *Jackson v. K. O. L. & S. K. Rd. Co.*, 31 Kan. 761, 3 Pac. 501; *Railroad Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; *Byland v. Powder Co.*, 93 Kan. 288, 294, 144 Pac. 251, L. R. A. 1915F, 1000; *Willis v. Skinner*, 94 Kan. 621, 624, 147 Pac. 60; *U. P. Ry. Co. v. Mahaffy*, 4 Kan. App. 88, 46 Pac. 187. Wantonness, like negligence, is not presumed, but must be proved. *Railway Co. v. Lacy*, 78 Kan. 622, 626, 97 Pac. 1025. This court has often said that whether negligence in a particular case is shown is ordinarily a question for the jury, but when the facts are undisputed or are definitely found by the jury and only one conclusion can be drawn therefrom, it becomes a question of law for the court. *Kansas Pac. Ry. Co. v. Butts*, 7 Kan. 308, *Wade v. Electric Co.*, 94 Kan. 462, 469, 147 Pac. 63, and numerous cases intervening. The same rule applies when wantonness is the issue. *Campbell v. K. O. Ft. S. & M. R. Co.*, 55 Kan. 536, 543, 40 Pac. 997; *Railway Co. v. Cooper*, 57 Kan. 185, 191, 45 Pac. 587; *Railway Co. v. Lacy*, su-

pra; *Gilbert v. Railway Co.*, 91 Kan. 711, 139 Pac. 380.

This court has reversed judgments in several cases because there was not sufficient evidence to justify the finding of the jury that the injury was caused by wantonness. *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347, 359, 33 Am. Rep. 167; *K. P. Ry. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *K. C. Ft. S. & G. Rd. Co. v. Kler*, 41 Kan. 671, 21 Pac. 770, 13 Am. St. Rep. 311; *Railway Co. v. Cooper*, 57 Kan. 185, 191, 45 Pac. 587; *Railway Co. v. Lacy*, supra; *Gilbert v. Railway Co.*, supra; *McCullough v. Railway Co.*, 94 Kan. 349, 146 Pac. 1005. This court has sustained a judgment where the trial court denied relief to the plaintiff for the reason that the evidence was not sufficient to establish wantonness. *Campbell v. K. C., Ft. S. & M. Rd. Co.*, supra. In *Railway Co. v. Lacy*, 78 Kan. 622, 97 Pac. 1025, this court said:

"To constitute willful negligence there must be a design, purpose, or intent to do wrong or to cause the injury." 78 Kan. 629, 97 Pac. 1028.

"Reckless disregard of security, wantonness, or other equivalent of bad faith and the willful or malicious disposition to injure all involve something else than negligence." *Railway Co. v. Walters*, 78 Kan. 39, 41, 96 Pac. 348, 347.

"The conduct of the employees in charge of an engine in failing to take measures for the protection of a person upon the track can be characterized as 'wanton,' in the sense in which that word is used in this connection, only when they actually know of his presence, or when the situation is substantially the same as though they had such knowledge—when such knowledge may fairly be imputed to them. It is not enough for that purpose that the exercise of ordinary diligence would have advised them of the fact, for their omission of duty in that regard amounts only to negligence. Nor is it enough that they know some one might be in the place of danger; the probability must be so great—its obviousness to the employees so insistent—that they must be deemed to realize the likelihood that a catastrophe is imminent and yet to omit reasonable effort to prevent it because indifferent to the consequences." *Railway Co. v. Baker*, 79 Kan. 183, 187, 98 Pac. 804, 806 [21 L. R. A. (N. S.) 427].

In *U. P. Ry. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244, this court approved an instruction which defined reckless conduct as an indifference to the rights of others, an indifference whether wrong is done or not, and which told the jury that the defendant could be held liable only for injuries inflicted which were willful, wanton, or malicious, or which were so grossly negligent as to amount to wantonness. Many of our courts hold that wantonness precluding a defense of contributory negligence cannot be predicated on the omission of a duty before the discovery of a person in a position of peril on a railroad track. Note, 21 L. R. A. (N. S.) 427-442.

Why did the enginemen make the service application of air? Why did they cut off the steam when a quarter of a mile away from the crossing? What effect shall be given to their supposition that the electric bell was ringing? The only answer to these questions is that they did consider the possibility of

persons attempting to cross the railroad track, and had regard for their safety.

Taking into consideration the facts found by the jury in this case—the failure of the enginemen to ring the bell and sound the whistle, the rate of speed at which they were accustomed to go through Valley Center, the rate at which they went through on the day of the accident, the application of the air, the cutting off of steam, the supposition that the electric bell was ringing, and the conditions existing at the crossing—we are compelled to say as a matter of law that the enginemen were not guilty of wantonness. *Gilbert v. Railway Co.*, supra, supports this conclusion.

The judgment is reversed, with direction to the trial court to enter judgment for the defendant. All the Justices concurring.

(97 Kan. 318)

RODGERS v. CHICAGO, R. I. & P. RY. CO.
et al. (No. 19947.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

CARRIERS — 318 — INJURY TO PASSENGER — NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

The plaintiff alleged that her husband was a passenger on one of defendant's trains, and that upon arrival at his destination he undertook to walk alongside the train, and, while walking past a water tank, he slipped upon ice which had been negligently allowed to accumulate there, fell under the wheels of the train, and was killed. His lifeless body was found on one side of the track, and his severed legs between the rails of the track. He had expressed a purpose to come to the place where he was killed, on one of defendant's trains. No one saw him upon the train, nor leaving it; nor was there any evidence that he had purchased a ticket for passage upon the train. No proof was produced as to how he happened to be killed, outside of the circumstances of the location of his body and the conditions existing there. *Held*, that the evidence in the case, only a part of which has been stated, was not sufficient to show that the defendant failed to perform any duty which it owed to him, and that his death was the proximate result of defendant's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. 318.]

Appeal from District Court, Riley County.

Action by Amelia Rodgers against the Chicago, Rock Island & Pacific Railway Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. S. Roark, of Junction City, for appellant. Paul E. Walker and Luther Burns, both of Topeka, for appellees.

JOHNSTON, C. J. Amelia Rodgers brought this action against the Chicago, Rock Island & Pacific Railway Company to recover the sum of \$10,000 as damages for the death of her husband, John W. Rodgers, on or about the 22 day of December, 1911, which it was alleged was caused by the negligence of the company.

In her petition she alleged that Rodgers was a passenger on an east-bound train of the defendant, which arrived at Manhattan on the morning of December 22, 1911, and that a water tank near the west end of the station platform was permitted to be in a leaky and defective condition, with the result that ice accumulated in the trough of the tank at the side of the railroad, and that Rodgers, who alighted from the train before daylight and when the station platform was not properly lighted, passed along the side of the train, slipped on this dangerous accumulation of ice, fell under the train, and was killed. The answer of the defendant was a denial of the averments of the petition and a charge of contributory negligence. A trial was had with a jury, and after plaintiff had introduced her evidence, a demurrer to the same was sustained, and judgment given for the defendant.

From the testimony of plaintiff it appeared that Rodgers was an able-bodied man of good habits, about 50 years old, and a resident of Manhattan. The day before the casualty he was at Clifton, a station about 52 miles west of Manhattan on defendant's railroad. The evening before his death he expressed a purpose to return to Manhattan on a coming train, and early the next morning his dead body was discovered at Manhattan between the west end of the station platform and the water tank of the company. The body was north of the rails, and his legs, which were severed below the knees, were lying between the rails of the track, about 4 or 5 feet from the drip trough of the water tank, which was thickly coated with ice. The body lay on his traveling bag, and did not appear to have been dragged.

There are two railroads on which Rodgers might have traveled from Clifton to Manhattan, but the shorter and more direct route and the one he had expressed a purpose to take is defendant's railroad. There is no proof that he purchased a ticket at defendant's station, and no witness saw him enter the train at Clifton. Two of defendant's trains were scheduled to pass east between Clifton and Manhattan that night, one due at Manhattan at 1 a. m., and the other at 5:25 a. m., but there is nothing to show that Rodgers was seen upon either of them, nor was he seen to leave any of defendant's trains.

The station is near Fourth street, which runs north and south, and steps leading to the station from that street as well as from one on the north are provided. West of the station there are some steps leading from the street on the north side, but most of the people entered and left over the steps near the east end of the station on Fourth street. The station platform extends 217 feet west of the station, and the water tank is located between 9 and 10 feet west of the platform, and 50 feet beyond the platform is Fifth

street. Persons on east-bound trains sometimes alighted west of the tank, and occasionally some of them walked between the track and the tank to the west end of the platform, although there is a large sign placed opposite the water tank with the warning: "No Thoroughfare. Walking on or across tracks is strictly prohibited." The body of Rodgers was found 5 feet from the platform, or about half way between it and the water tank; but, beyond the location of his body and an expressed purpose to return home on that night, nothing indicating the cause of his death was shown. We think the evidence produced failed to make a *prima facie* showing that the death of Rodgers resulted from the negligence of the defendant. Negligence cannot be rested upon mere presumption, nor can a finding of negligence ever be made without evidence. No one is required to pay damages until it has been shown that he is in fault. In the absence of evidence the presumption is that the defendant is free from negligence. *Mo. P. Ry. Co. v. Haley, Adm'r, etc.*, 25 Kan. 35; *Railroad Co. v. Tindall*, 57 Kan. 719, 48 Pac. 12; *Byland v. Powder Co.*, 93 Kan. 288, 144 Pac. 251, L. R. A. 1915F, 1000.

In this case it was not enough to prove that Rodgers was found lifeless upon the track of the defendant's railroad, nor even that there is a strong possibility that a train of the defendant ran over and killed him. It devolved on the plaintiff to show by competent evidence that he was killed by the action of the defendant; that the company did something which should not have been done; or omitted to do something in the discharge of its duty towards him which, under the circumstances, should have been done; and further that his injury and death resulted from such failure of the defendant. These findings cannot be made, unless there is either direct or circumstantial evidence to prove the essential facts of negligence on the part of the defendant, and that such negligence caused the deplorable death of Rodgers. Neither fact can be based upon mere possibilities or surmises, nor even upon circumstances which are merely consistent with such fact where they are open to different inferences. *Carruthers v. C., R. I. & P. Ry. Co.*, 55 Kan. 600, 40 Pac. 915; *Duncan v. Railway Co.*, 82 Kan. 230, 108 Pac. 101.

Now, it has not been proven that Rodgers was a passenger on defendant's train on the night of his death. He contemplated taking the train, but, as we have seen, no witness saw him board it, upon it, or leaving it. The plaintiff's theory or inference is that he was a passenger; that he alighted from the train when he reached Manhattan, and, as he walked alongside the train, he slipped on the icy trough of the tank, fell under the train, and was killed. A possibility suggested by the defendant is that he came to Manhattan on the Union Pacific Railroad which has a longer line from Clifton to Manhattan; and in going to his home, went upon the track of

the defendant and was struck by one of defendant's trains at the place where his body was found. This supposition, however, like others suggested in the case, is not founded on sufficient evidence. If we assume, as the trial court appears to have done, that he was in fact a passenger on one of defendant's trains, the evidence is still lacking as to how his death occurred and whether the defendant neglected any duty which it owed to him. It might be supposed, as plaintiff has done, that he alighted from the train at the station, and as he walked west along the side of the train while it was in motion, he lost his footing on the ice and was thrown under the train. Other surmises may be made as suggested in the argument. He may have undertaken to drop from the train before it had stopped at the station in an attempt to shorten his journey home, and have fallen under the wheels. Whether he was traveling east towards the platform, or whether he alighted on the platform and was traveling west, cannot be determined from any evidence in the case. If it be assumed that he did not attempt to leave the train until it stopped, and that he alighted on the platform, another theory is suggested that after the train had passed, he started west and across the track on his way home, and was struck by a second train of the defendant. This, too, is conjectural. Another suggestion made by the defendant is that as he sometimes had fainting spells, he may have fallen on the track and was dead when a train ran over him. There may be more probability in some of the suggested theories than in others, but all of them are mere conjectures without a sufficient basis to warrant the inference that the defendant was guilty of negligence which occasioned the fatal accident.

The case falls fairly within a number of former decisions in which it was held that there was not sufficient proof of culpable negligence or liability. In *Railway Co. v. Young*, 57 Kan. 168, 171, 45 Pac. 580, 581, a child who was playing near a track had his hand cut off by a moving train. In an action by his parents it was contended that the railway company had failed to have a proper lookout, or to take necessary precautions for the safety of the boy and other children who were playing near the track. No one saw the accident in that instance. Upon the assumption that the railroad company should have had a lookout on the moving cars, it was said:

"It is not enough that the company may have failed to take necessary precautions in moving the train, but before there can be a recovery it must show that the boy was hurt in consequence of such failure. How he was hurt and whether due care would have avoided the casualty rest upon conjecture rather than upon established facts, and we conclude that the testimony is insufficient to support the verdict, and that a new trial should have been granted."

In *Hart v. Railroad Co.*, 80 Kan. 699, 102 Pac. 1101, a passenger in good health and accustomed to traveling on railroads appears to have fallen from the train, as his mangled

and lifeless body was found on the side of the track the day after he was seen on the train, near a station on defendant's railroad. It was a vestibuled train, and the custom was to keep the doors closed between stations. The plaintiff insisted that as deceased was in possession of his faculties, it could not be inferred that he committed suicide or failed to take proper care of himself, and that the only way to account for his death was the negligence of the railway company. It was said that the passenger may have been too warm and opened a vestibule in order to get fresh air, but it was added that this was speculation, and the finding of negligence without testimony as to how the door was opened and how the accident occurred could not be sustained.

Some of the features of the case of *Brown v. Railroad Co.*, 81 Kan. 701, 106 Pac. 1001, 29 L. R. A. (N. S.) 808, are similar to those of the present one. A person who had been riding on a passenger train was found dead about 300 feet from a station of the railroad company. His dead body was found on the side of the track and his dis severed legs between the rails. It was a vestibuled train, and it was supposed that he or some one else had opened the vestibule before the train arrived at the station. Although, indulging the presumption that the deceased was in the possession of his usual faculties, and in the exercise of due care for his own safety, it was decided that in the absence of evidence as to who had opened the vestibule or how the deceased happened to fall under the train, a finding that his death occurred through the fault of the railroad company was not justified.

It is insisted that the watering of locomotives through a water tank is not the best method, but that it can better be done through a crane, thereby avoiding accumulations of water or ice near the track. It may be that the presence of ice at that place was a lack of due care as to some persons, but since it is not shown that the ice near the track was the proximate cause of the accident which may have resulted from other causes, it is unnecessary to consider whether the use of a tank instead of a crane was negligence. The plaintiff alleged that the accident and death were the proximate results of the defendant's negligence. It devolved upon her to produce evidence accounting for the accident and death of Rodgers, also that there was a breach of the company's duty towards him, and that his death was due to its fault. Unless substantial proof of these elements is produced, the plaintiff cannot recover. If it be assumed that Rodgers was a passenger on defendant's train, it must still be presumed that he alighted with care, and did not undertake to leave the train before it had stopped, and fell between the wheels when trying to alight. And then it must be presumed that

he undertook to walk towards or away from the station over the icy place near the track while that train or another one was passing the station and without any want of care on his part. That would be building one presumption upon another; a process which does not afford a basis for an inference of negligence. *Duncan v. Railway Company*, 82 Kan. 230, 108 Pac. 101; *Duncan v. Railway Co.*, 86 Kan. 112, 119 Pac. 356, 51 L. R. A. (N. S.) 565; *Byland v. Powder Co.*, 93 Kan. 288, 144 Pac. 251, L. R. A. 1915F, 1000. We may give full force to the presumption of care on the part of Rodgers, but this presumption furnishes no basis for inferring negligence on the part of the defendant. Until proof to the contrary is introduced, the defendant is entitled to the presumption that it was exercising care and performing its duty toward the deceased. *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564. Inferences of negligence may be based on circumstances, but the circumstances must be drawn from premises that are reasonably certain and point clearly to the negligence asserted. In this respect the testimony of the plaintiff fails. As was said in *Railroad Co. v. Aderhold*, 58 Kan. 293, 298, 49 Pac. 83, 85:

"The accident may be accounted for in several ways, and other and more plausible theories of the collision may be * * * suggested; but liability cannot be fixed on a bare guess, nor can a verdict rest on mere conjecture."

Being satisfied that the evidence does not establish *prima facie* that the defendant was guilty of negligence and that the casualty was the result of its negligence, the judgment of the trial court is affirmed. All the Justices concurring.

(97 Kan. 304)

BOARD OF COM'RS OF WYANDOTTE
COUNTY v. HASKELL et al.
(No. 19941.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — §513 — SEWER
ASSESSMENT—DEFENSE.

A special assessment to construct a sewer was levied on land which it is claimed could not be drained or benefited by such sewer. *Held* that, having let the 30-day period elapse for instituting an action to set aside or in any way contest or enjoin the levy, such defense is now barred.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1188-1193, 1195-1206; Dec. Dig. §513.]

Appeal from District Court, Wyandotte County.

Action by the Board of County Commissioners of Wyandotte County against W. W. Haskell and others. From a judgment for plaintiff, defendants appeal. *Affirmed*.

McAnany & Alden and T. M. Van Cleave, all of Kansas City, for appellants. R. J. Higgins, of Kansas City, for appellee.

WEST, J. This was an action to foreclose a tax lien for special sewer assessments. The land was adjudged subject to the lien, and the owners appeal.

It was found that the special assessments were ascertained and levied in 1903, and that no suit or action was instituted to set aside or in any way contest or enjoin the levy until the answer on this action was filed, more than eight years after such ascertainment and levy. The statute (Gen. Stat. 1909, § 994) covering this case provides that:

"No suit nor action of any kind shall be maintained in any court to set aside or in any way contest or enjoin the levy * * * after the expiration of thirty days from the time the amount due * * * is ascertained."

Authorities are cited to show that no right existed to assess the land in question because it could not be drained or benefited by the sewer, but under the rule now well established in this state it is too late to raise that question. *Rockwell v. Junction City*, 92 Kan. 513, 141 Pac. 299; *Rockwell v. Junction City*, 93 Kan. 1, 142 Pac. 268; *Railway Co. v. City of Chanute*, 95 Kan. 161, 147 Pac. 836; *Arment v. Dodge City*, 154 Pac. 219.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 312)

HICKS v. DAVIS, State Auditor. (No. 19943.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW § 70, 77—LEGISLATIVE POWER—REVIEW BY COURTS OR EXECUTIVE.

Rule followed that within the limits of the Constitution the Legislature is supreme in its own sphere, and its discretion cannot be challenged or reviewed by the executive or judicial departments of the state government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137, 141; Dec. Dig. § 70, 77.]

2. CONSTITUTIONAL LAW § 77—LEGISLATIVE POWER — APPROPRIATIONS — VALIDITY — DETERMINATION.

When the Legislature, by a regular statutory enactment, makes an appropriation to pay a person a sum of money under a claim for traveling expenses while in the state's service, the legal, equitable, and moral aspects of the claim concern the Legislature alone, and cannot be reviewed by the auditor of state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 141; Dec. Dig. § 77.]

3. STATES § 132 — APPROPRIATIONS — TRAVELING EXPENSES OF EMPLOYE — DUTY OF AUDITOR.

The petitioner worked in the state grain department at Kansas City for three years and four months at a salary of \$60 per month. During the period of his employment there was no statutory provision for his traveling expenses. The Legislature of 1913 appropriated a sum of money to be paid out of the "grain inspection fee fund" to reimburse the petitioner for traveling expenses while he was employed by the state. *Held*, that the Legislature had full and exclusive control of the subject, and the law pertaining thereto leaves no duty imposed on the auditor of state, except the ministerial

one of executing the expressed will of the Legislature.

[Ed. Note.—For other cases, see States, Cent. Dig. § 130; Dec. Dig. § 132.]

4. MANDAMUS § 109 — PAYMENT OF CLAIM FROM APPROPRIATION—RIGHT TO RELIEF.

When a lawful appropriation has been made by the Legislature, and the person entitled thereto presents a voucher therefor in due form, and when, upon the auditor's refusal to honor the voucher, the claimant seeks redress in court, he cannot be deprived of relief because of the termination of the fiscal year and the closing of the year's accounts before his action is finally adjudicated.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 227-229, 232-235, 237; Dec. Dig. § 109.]

5. STATUTES § 130; § 150, New, vol. 2 Key- No. Series — ENACTMENT — AMENDATORY OR REPEALING ACT.

An act of the Legislature which attempts expressly to amend or repeal a prior act must conform to the procedure prescribed by the Constitution. Const. art. 2, § 16.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 198; Dec. Dig. § 130.]

6. STATUTES § 141—REPEALING STATUTES—REQUISITES AND VALIDITY — APPROPRIATIONS.

In the body of a section of a statute enacted by the Legislature of 1913 was an item appropriating a sum of money to the petitioner. The Legislature of 1915 sought to abrogate that item by an act purporting to repeal the act of 1913 "in so far as it relates to item 106 of section 1 of said chapter." *Held*, that the later act wholly disregarded article 2 of section 16 of the Constitution, and is consequently void.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 48, 198, 209; Dec. Dig. § 141.]

Original proceeding for mandamus by L. M. Hicks against W. E. Davis, Auditor of the State of Kansas. Writ allowed.

W. A. Snook, of Kansas City, for plaintiff. S. M. Brewster, Atty. Gen., and J. L. Hunt, of Topeka, for defendant.

DAWSON, J. The plaintiff asks for a writ of mandamus to compel the auditor of state to draw a warrant in his favor against the "state grain inspection fee fund" in the custody of the state treasurer, pursuant to an appropriation item in "an act making appropriations to pay sundry claims against the state," which took effect on March 19, 1913. Laws 1913, c. 61. The item reads:

"Item 106. To L. M. Hicks, for money expended for traveling expenses while in employ of state grain inspection department from February, 1909, to June 11, 1912, \$384.60, to be paid out of the state grain inspection fee fund."

The petition and answer alike show that the plaintiff was employed as a helper in the state grain inspection department at Kansas City from February, 1909, until June, 1912. His salary in 1909 and 1910, and until the enactment of chapter 199 of the Laws of 1911, was fixed by the statute at \$60 per month. Gen. Stat. 1909, § 3337. There was no statute authorizing any allowance for expenses. Chapter 199 of the Laws of 1911, amending section 3337 of the General Stat-

utes of 1909, provided that the chief inspector, subject to the approval of the grain grading commission, might fix the salaries of his subordinates in any sum not in excess of the salaries prescribed by the older act. The lawful salary of the petitioner therefore continued to be \$60 per month until he left the state's service in 1912. The later act did not contemplate or provide for traveling expenses for such employes as the petitioner.

The auditor of state contends that the state owed the petitioner nothing for expenses, either legally or morally, at the time the Legislature made the appropriation under which the plaintiff now claims. The auditor also calls attention to chapter 14 of the Laws of 1915, which purports to repeal the item under which the petitioner claims. The auditor asserts that the "traveling expenses" for which the Legislature provided in the appropriation item were only incurred by the petitioner between his home and his place of employment, both in Kansas City.

[1] 1. It is elementary law that the government of Kansas is conferred upon three co-ordinate departments, the legislative, the executive, and the judicial. Each is supreme within its own sphere, subject only to our constitutional limitations. Neither can trench upon the field of the other. The Legislature makes the laws. The executive, of whom the auditor of state is one of the most important officers, must execute and administer the laws. The function of the judiciary is to interpret, explain, and to apply the laws to controversies concerning rights, wrongs, duties, and obligations arising under the laws. How far may an executive officer like the auditor of state look beneath the surface of a legislative enactment? His counsel cite some decisions to the effect that, where there is no legal, equitable, or moral claim upon the state's bounty, an appropriation making a mere gift of money is void. The chief limitations upon the power of our Legislature to dispose of public funds or other state property are these:

(a) Free governments are founded by the people for their equal protection and benefit, and special privileges granted by the Legislature may likewise be revoked by it. Bill of Rights, § 2.

(b) Hereditary emoluments must not be granted. Bill of Rights, § 19.

(c) Restrictions on change of salaries of constitutional officers, members of the Legislature, and the judiciary. Const. art. 1, § 15; article 2, § 3; article 3, § 13.

(d) The preservation and use of the school funds. Const. art. 6, §§ 3-8.

(e) Limiting and regulating the state's indebtedness. Const. art. 11, §§ 5-7.

(f) "No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law, and no appropri-

ation shall be for a longer term than two years." Const. art. 2, § 6; article 11, § 3.

(g) State funds cannot be devoted to internal improvements. Const. art. 11, § 8.

Within these limitations, the control and disbursement of the revenues of the state are subject to the will of the Legislature, unfettered by interference by the executive or the judiciary. And in scrutinizing this statute we must proceed on the assumption that it is valid, unless it contravenes some express inhibition of the Constitution or one necessarily implied from some express affirmative provision of that instrument. *Prouty v. Stover*, 11 Kan. 235; *State v. Weiss*, 84 Kan. 165, 168, 113 Pac. 388, 36 L. R. A. (N. S.) 73; *Winters v. Myers*, 92 Kan. 414, 420, 421, 428, 140 Pac. 1033.

[2, 3] 2. Conceding that the Legislature cannot make a grant of funds to a private citizen, where there is no legal, equitable, or moral claim thereto (*Winters v. Myers*, supra; *Loan Association v. Topeka*, 87 U. S. [20 Wall.] 655, 664, 22 L. Ed. 455), who is to determine such question? In the old days, when special laws were frequently enacted, notwithstanding the constitutional provision that, "in all cases where a general law can be made applicable, no special law shall be enacted" (Const. art. 2, original § 17) it was said by the first Chief Justice of this state:

"Ewing, C. J. * * * The Legislature must necessarily determine whether their purpose can or cannot be expediently accomplished by a general law. Their discretion and sense of duty are the chief, if not the only, securities of the public for an intelligent compliance with that provision of the Constitution. Whether we could, in any conceivable case, presenting a flagrant abuse of that discretion, hold a private law invalid as contrary to that provision of the Constitution, we need not here decide; but we would certainly not hold such a law invalid merely because it would, in our opinion, have been possible to frame a general law under which the same purpose could have been accomplished." *State ex rel. v. Hitchcock*, 1 Kan. 178, 185, 81 Am. Dec. 503.

In *Beach v. Leahy*, 11 Kan. 23, 27, Mr. Justice Brewer, in discussing the challenged validity of a special law, said:

"It may be conceded that this is a special law. * * * It is evident, also, that the result could be accomplished by a general law. * * * Why this distinction was made we do not know, and there is nothing in the record to enlighten us thereon. We may imagine many reasons, but it is useless to speculate. It is enough * * * that there may have been good and sufficient reasons."

To the same effect were *Hughes v. Milligan*, 42 Kan. 396, 399, 22 Pac. 313, and *State ex rel. v. Lewelling*, 51 Kan. 562, 565, 33 Pac. 425.

Although the validity of special legislation may now be judicially reviewed under the amendment of 1906 (Const. art. 2, § 17; *Anderson v. Cloud County*, 77 Kan. 721, 95 Pac. 583), yet the general principle stated in the foregoing cases as to other matters within legislative control, and not thus hampered by a judicial review, is as potent and

logical now as ever. The courts cannot impeach the legislative discretion, neither can an executive officer. Paraphrasing the language of Justice Brewer, we must say it is enough that the petitioner presented to the Legislature a bill for traveling expenses while in the service of the state, that presumably the legislative committee and the Legislature considered the claim, found it reasonable and proper, and supported by some moral claim to the state's justice, and regularly and lawfully ordained that it be paid.

If we might take judicial cognizance of the enormous area of Kansas City, the metropolis of this state, with its far-flung suburbs, its hundreds of miles of railroad switch tracks, side tracks, and warehouse and elevator tracks, its public and private elevators towering to the sky, some of them at long distance from others, it would probably be no more difficult a task to convince us than it was to convince the Legislature that it was not only proper, but wise and economical, for the petitioner, in pursuing his business of grain inspection, to use any reasonable and available means of transportation to reach the various places where his services were required. Apparently the Legislature so determined, and its determination cannot be gainsaid.

It must be obvious that, if the theory of the auditor is correct, it would be bound to apply to all cases where public officers and their subordinates had incurred expenses not previously authorized by the Legislature. Of course no officer, great or small, may lawfully obligate the state to pay any sum whatsoever, unless there is a statute therefor, and the Legislature in its discretion might refuse to compensate the state's servants for any and all such expenses. But suppose the auditor of state, or the secretary of state, or any one of the state's official boards and commissions, were dragged into a lawsuit, the expenses of which could not be borne by their limited contingent funds; would it be said that, since the Legislature had made no provision in advance for the payment of such expenses, and the officers and commissioners had accepted their official positions with their attendant advantages and disadvantages at a definitely fixed compensation, they could not afterwards be reimbursed by the Legislature? The case at bar is of little consequence, but the principle involved touches the fundamental sovereignty of the state.

Moreover, the Legislature was not even technically giving away the state's general funds when it appropriated this particular item. It decreed that it should be paid out of the grain inspection fee fund—a fund exacted from the owners of grain solely for

the proper expenses of inspection, and not justifiably exacted from them for any other purpose.

[4] 3. And this presents possibly another question. The auditor suggests that there is no money in the grain inspection fee fund to pay this claim. We assume that this is because the books for the fiscal year ending June 30, 1915, have been closed, and that any balances then existing in that fund have reverted to the general revenue funds of the state. But the books were open when the petitioner filed this action. That crystallized the status of the fund as of that date, and if there were moneys in the grain inspection fee fund at that time, the closing of the books will not bar the petitioner. There is no magic in bookkeeping. Books which have been closed in derogation of a lawful outstanding claim which had been provided for by the Legislature must be reopened and the claim paid, and the proper entries made to recite the pertinent facts.

[5, 6] 4. Many objections are made by counsel for the petitioner to chapter 14 of the Laws of 1915, but it is needless to follow his somewhat abstruse and complicated philosophy. The Constitution plainly instructs the Legislature as to its procedure when it deliberately sets out to amend or repeal a specific statute or a section of a statute. Of course, when the Legislature is legislating directly on any subject, it may close its eyes, and frequently does, to all earlier legislation, and a later act, as the last expression of the legislative will, will supersede and repeal by implication all inconsistent earlier legislation. But when the legislation has a direct and special purpose in view, as it had when it attempted to revoke and expunge item 106 in the act of 1913, it was bound to amend the section in which it was incorporated. This it could only do by rewriting the section to suit its determination. In Congress, and perhaps in some of the states, the method of repeal attempted here would be valid. It is not so in Kansas. Article 2, section 16, of the Constitution of Kansas provides:

"No law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed."

The section of the act carrying the item appropriated to the petitioner (Laws 1913, c. 61, § 1) contains many matters which the Legislature of 1915 had no intention to meddle with. Therefore the only way to eliminate the item appropriated for petitioner was to rewrite the section. So says the Constitution, and consequently the act of 1915 is plainly, palpably, and utterly void.

The writ is allowed. All the Justices concurring.

(97 Kan. 218)

HANSON v. MISSOURI PAC. RY. CO.*
(No. 19882.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

CONTINUANCE ¶6—GROUNDS—TIME TO PRODUCE EVIDENCE.

Where a plaintiff moves for a continuance on the ground that on account of his poverty he has not been able to look up the evidence and find witnesses to prove his case, a denial of the motion is justified by evidence that he had brought a previous action on the same cause, which he had dismissed when it was brought to trial, suing again just before the expiration of a year.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 6-11, 16, 83, 35, 117; Dec. Dig. ¶6.]

Appeal from District Court, McPherson County.

Action by John F. Hanson against the Missouri Pacific Railway Company. From judgment for defendant, plaintiff appeals. Affirmed.

John F. Hanson, of Lindsborg, for appellant. Frank O. Johnson, of McPherson, and W. P. Waggener and W. E. Brown, both of Atchison, for appellee.

MASON, J. John F. Hanson sued the Missouri Pacific Railway Company before a justice of the peace, on account of property alleged to have been destroyed in the spring of 1910, by fire caused by its negligence. No appearance was made by the defendant, and judgment was rendered for the plaintiff. An appeal to the district court was taken on August 5, 1913. On December 2, 1913, the plaintiff moved for a continuance over the term on the ground, supported by his affidavit, that by reason of his poverty he had been "unable to look up all the evidence in the case and find suitable witnesses to prove the issues," or to pay the expenses of witnesses, or to take depositions. On the same day, the defendant's attorney orally stated some facts with regard to the history of the case, and the court overruled the motion. Five days later, the defendant's attorney, with the consent of the court, filed an affidavit purporting to cover the same ground as his oral statement. Hanson filed a counter affidavit. On December 10, 1913, the day on which the case had been set for trial, it was called, and, as the plaintiff did not appear, it was dismissed for want of prosecution. The plaintiff appeals.

The substance of the statement made in behalf of the defendant is this: About April, 1912, the plaintiff sued the defendant upon the same cause of action before a justice of the peace. The case was continued twice, the second continuance being at the request of the plaintiff to give him time to obtain his evidence. At the trial the plaintiff introduced some hearsay evidence, but, perceiving

that the justice was going to rule against him, dismissed the case without prejudice. The present action was brought a few days short of a year after the dismissal.

Complaint is made because the defendant's attorney was permitted to file his affidavit after the motion for a continuance had been denied. It was proper to consider the attorney's oral statement at the hearing of the motion, and to allow it later to be reduced to writing, verified, and filed. The evidence warranted the conclusion that reasonable diligence had not been shown in preparing for trial. The refusal of a continuance was clearly within the discretion of the trial court, and the dismissal was the necessary result of the plaintiff's failure to prosecute.

The judgment is affirmed. All the Justices concurring.

(97 Kan. 306)

WELLS v. HANSEN et al. (No. 19942.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT ¶189—PERSONAL INJURIES—ACTION AGAINST RENTAL AGENT—PLEADING.

A cause of action against an agent for the renting of real property is stated in a petition which alleges that the agent contracted at the time of renting the property to repair a walk thereon; that afterward, being requested by the tenant to repair the walk, the agent employed a man to do the work whom he knew to be careless, negligent, and incompetent; that after some repairs had been made the agent informed the plaintiff, wife of the tenant, that the walk had been inspected and repaired and was all right and safe for her use, although after being repaired the walk was in a dangerous and unsafe condition; and that the dangerous condition of the walk caused her to fall and break her arm.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 713-717; Dec. Dig. ¶189.]

2. NEGLIGENCE ¶108—DEFECTIVE PREMISES—PERSONAL INJURIES—ACTION AGAINST WORKMAN—PLEADING.

In such a case, a cause of action is stated against the workman, where the petition alleges that the workman employed to make the repairs, after making some repairs, informed the plaintiff, the tenant's wife, that the walk had been inspected and repaired and was all right and safe for her use; alleges that the walk after being repaired was in a dangerous and unsafe condition; and that the plaintiff was injured by reason of the defect in the walk.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 174, 175, 179, 180; Dec. Dig. ¶108.]

3. PLEADING ¶243—RIGHT TO AMEND—JURISDICTION.

A petition which fails to state a cause of action may be amended so as to make it state a cause of action, although some of the defendants may not be residents of the county in which the petition is filed and may be attacking the jurisdiction of the court because of such residence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 648-651, 820-822; Dec. Dig. ¶243.]

(Additional Syllabus by Editorial Staff.)

4. WORDS AND PHRASES—"MISFEASANCE."

"Misfeasance" is the improper doing of an act which a person might lawfully do. It is a failure to use, in the performance of a duty owing to an individual, that degree of care, skill, and diligence which the circumstances of the case reasonably demanded (citing Words and Phrases, Misfeasance).

Appeal from District Court, Wyandotte County.

Action by Emily J. Wells against Matilda Hansen and others. From judgment for defendants, plaintiff appeals. Reversed, with directions.

David F. Carson, James T. Cochran, and T. A. Pollock, all of Kansas City, Kan., for appellant. Jamison, Hutchison & Ostergard, of Kansas City, Mo., and Thomas J. White, of Kansas City, Kan., for appellees.

MARSHALL, J. In this action, the sufficiency of the petition and the jurisdiction of the court are attacked. During the times mentioned in the pleadings, defendants J. R. Richey and Thomas Kent were residents of Wyandotte county, and defendants Matilda Hansen and Nels Hansen were residents of Johnson county. December 21, 1912, the plaintiff filed her petition in the Wyandotte county district court and caused summons to be served on the Hansens in Johnson county on December 23, 1912. January 17, 1913, defendants Hansen appeared specially and moved the court to set aside the service of summons on them on the ground that they were served in Johnson county; that defendants J. R. Richey and Thomas Kent had no interest in the subject-matter of the action; that judgment could not be rendered against them; and that they had been made parties to give to the court color of jurisdiction so that summons might appear to be properly made on defendants Hansen. This motion was denied February 15, 1913. February 19, 1913, defendants Hansen filed a plea in abatement, setting out the same grounds as in the motion. May 10, 1913, this plea, on the motion of the plaintiff, was stricken from the files. March 15, 1913, the plaintiff filed an amended petition. May 14, 1913, defendants Hansen filed their answer to the plaintiff's petition, attacking the jurisdiction of the court and alleging the same matters set out in their motion. May 16, 1913, the plaintiff filed her demurrer to the answer of defendants Hansen. This demurrer was overruled April 4, 1914. The plaintiff filed no further pleading to this answer. March 15, 1914, defendants Richey and Kent filed separate demurrers to the amended petition. These demurrers were sustained July 25, 1914. December 18, 1914, judgment on the demurrers was rendered in favor of defendants Richey and Kent, and the action was dismissed as to defendants Hansen. The plaintiff appeals from the judgment in favor of defendants Richey and Kent and from the judgment

dismissing the action as to defendants Hansen.

The amended petition in substance alleges that defendants Hansen were the owners of certain real property in Wyandotte county; that defendant Richey was their agent for the real property and had authority to make repairs, including repairs of walks, and received as compensation for his services a percentage of the rents collected by him; that the plaintiff's husband leased the property from defendants Richey and Hansen for a residence for himself and family and so occupied it; that defendant Richey, at the time of leasing the property and as a part of the contract, agreed to repair a walk thereon; that after entering on the property the plaintiff and her husband requested defendants Richey and Hansen to inspect and repair the walk; that defendants Richey and Hansen undertook to repair the walk and employed defendant Thomas Kent to do the work; that Kent was not a competent person to repair the walk; that he was careless and negligent in repairing and inspecting the walk; that defendants Richey and Hansen knew that Kent was a careless, negligent, and incompetent workman; that defendant Kent undertook to make the repairs, but left the walk in a dangerous and unsafe condition; that the defendants said to and informed the plaintiff that the walk had been inspected and repaired and was all right and safe for the plaintiff's use; that the defendants knew or by the exercise of care could and should have known that the walk had not been placed in a safe condition; that afterward the plaintiff by reason of the defective condition of the walk fell and broke her arm; and that she was damaged in the sum of \$3,000.

Three questions are presented for consideration: First, did the amended petition state a cause of action against defendant Richey; second, did it state a cause of action against defendant Kent; and, third, did the court have jurisdiction of defendants Hansen?

[1] 1. The petition charges specific misconduct on the part of defendant Richey, in employing a workman whom he knew to be careless, negligent, and incompetent to make the repairs; and in informing the plaintiff, after the work was done, that the walk had been inspected and repaired and was all right and safe for her use, although, after being repaired, the walk was in a dangerous and unsafe condition. Does the fact that Richey was the agent of defendants Hansen excuse him from liability for injuries sustained by reason of the defective repairs? In *Dowell v. Railway Co.*, 83 Kan. 562, 565, 112 Pac. 136, 138, this court said:

"The contention is that no cause of action was stated against Johnson. * * * It is argued that Johnson, being the agent and servant of the railway company, is not liable for mere acts of nonfeasance, and this appears to be bas-

ed on the theory that agents are responsible only to their principals, and, while they may be held for misfeasance, they are not liable to third parties for mere omission of duty. This contention overlooks the theory that a servant owes duties to third persons as well as to his master. A servant or employé of a corporation cannot well escape liability for the nonperformance of a duty which he owes to an injured third party. The distinctions between liabilities of agents and servants for acts of nonfeasance and misfeasance, as well as their liability for the omission of their duties to persons other than their principals and masters, are fully discussed and the authorities cited in case notes appended to *Mayer v. Thompson-Hutchison Building Co.*, 28 L. R. A. 433; *Ward v. Pullman Co.*, 25 L. R. A. (N. S.) 343; and *Hagerty v. Montana Ore Pur. Co. et al.*, 25 L. R. A. (N. S.) 356."

The authorities hold that an agent is liable for his misfeasance. 2 C. J. 826. In *Schlosser v. Great Northern R. Co.*, 20 N. D. 406, 411, 127 N. W. 502, 504, the court said:

"Where an agent is guilty of misfeasance, that is, where he has actually entered upon the performance of his duties to his principal, and in doing so fails to respect the rights of others, by doing some wrong, as where he fails or neglects to use reasonable care and diligence in the performance of his duties, he will be personally responsible to a third person who is injured by reason of his misfeasance. An agent's liability in such cases is not based upon the ground of his agency, but on the ground that he is a wrongdoer, and, as such, is responsible for any injury he may cause."

[4] What is meant by "misfeasance"?

"Misfeasance" is the improper doing of an act which a person might lawfully do. It is a failure to use, in the performance of a duty owing to an individual, that degree of care, skill, and diligence which the circumstances of the case reasonably demanded. *State, to Use of Cardin, v. McClellan*, 113 Tenn. 616, 85 S. W. 267, 268, 3 Ann. Cas. 992." 3 Words and Phrases, Second Series, 409.

"A 'misfeasance' is the failure to do something imposed upon the person by law as a reasonable member of society, or the failure to use reasonable care and diligence in the performance of a duty imposed by contract which results in an injury to a third person. *Irvin v. Callaway*, 127 Ga. 246, 55 S. E. 1039, 1040, citing *Southern Ry. Co. v. Grizzle*, 124 Ga. 737, 53 S. E. 244, 110 Am. St. Rep. 191." 3 Words and Phrases, Second Series, 409.

"Misfeasance" is the performance of an act in an improper manner, whereby some one receives an injury. *Williams v. Dean*, 134 Iowa, 216, 111 N. W. 931, 933, 11 L. R. A. (N. S.) 410." 3 Words and Phrases, Second Series, 409.

"Misfeasance" is the improper doing of an act, as distinguished from nonfeasance, which is the total omission to do an act. * * * It has been held that misfeasance may involve to some extent the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it is his duty to do under the circumstances, as, for instance, when he does not exercise that care which a due regard for the right of the other party requires. Such negligence as would be actionable in any relation of life is misfeasance by not doing. *Southern Ry. Co. v. Rowe*, 2 Ga. App. 557, 59 S. E. 462, 466." 3 Words and Phrases, Second Series, 410.

"An agent is liable to third persons when he is negligent in the performance of his duties, whether such act is termed 'misfeasance' or 'nonfeasance.'" Headnote 3, 94 Am. St. Rep. 848, to *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802.

"An agent having charge of a building, with

authority to make repairs and employ servants, is personally liable for injuries to a passenger, due to the negligent operation or repair of the elevator." Headnote 6, 8 L. R. A. (N. S.) 930, to *Orcutt v. Century Bldg. Co.*, 201 Mo. 425, 99 S. W. 1062.

"A servant or agent is liable for a negligent omission or nonfeasance causing injury to a third person where he would be liable if acting as principal." Headnote 2, 28 L. R. A. 433, to *Mayer v. Thompson-Hutchison Building Co.*, 104 Ala. 611, 16 South. 620, 53 Am. St. Rep. 88.

"A car inspector who, after inspection and approval, sends out a car which he knows, or by the exercise of ordinary care could have known, was defective, is liable in damages to a brakeman who, because of the defect, is injured in attempting to use it in the ordinary manner, in the absence of contributory negligence on his part." Headnote 1, 25 L. R. A. (N. S.) 343, to *Ward v. Pullman Car Corporation, et al.*, 131 Ky. 142, 114 S. W. 764.

"A servant is personally liable to third persons when his wrongful act in the course of his employment is the direct and proximate cause of their injury, whether such wrongful act be one of nonfeasance or misfeasance." Headnote 1, 2 L. R. A. (N. S.) 378, to *Ellis v. Railway*, 72 S. C. 465, 52 S. E. 228.

"An agent who has complete control and management of real property of a nonresident is personally liable for injuries sustained by a third person in consequence of the dangerous condition of the premises at the time when they were leased by him to a tenant." Headnote, 7 L. R. A. 123, to *Baird et al. v. Shipman*, 132 Ill. 16, 23 N. E. 384, 22 Am. St. Rep. 504.

"* * * Where an agent undertook to build a trapdoor, but did the work so negligently as to cause the injury complained of, action would lie by the injured party not only against the principal but the agent also." *Harriman et al. v. Stowe*, 57 Mo. 93, Syl., par. 4.

"Where an agent has complete control of a tenement house, and constructs a new walk in the court, leaving a large hole in the walk, and plaintiff, a new tenant, without previous knowledge of the existence of the hole, stepped into it after dark and was severely injured, it is misfeasance of the agent rendering him liable, and not a mere nonfeasance." Headnote 2, 105 S. W. 1088, to *Carson v. Quinn*, 127 Mo. App. 525. See, *Bannigan v. Woodbury*, 158 Mich. 206, 122 N. W. 531, 133 Am. St. Rep. 371.

"An agent having complete control and management of his principal's business, with the power to do what is reasonably necessary to protect third persons against injuries from omissions or commissions in the conduct of the same, is under obligation to so use that which he controls as not to injure another, and will be liable in damages to any third person for a failure to discharge such duty." *Stiwell v. Borman*, 63 Ark. 30, Syl., par. 4, 37 S. W. 404.

"Agent is guilty of misfeasance in negligently directing water to be admitted to water pipes in a room in a house owned by his principal, but which is under his general management, without first examining the condition of such pipes, by reason of which injury results, and he is liable to the tenant of the shop below for damage therefrom; and the fact that the room in which the pipes are is let to a tenant at that time does not release him from liability." Headnote, *Bell v. Josselyn*, 63 Am. Dec. 741, 3 Gray (69 Mass.) 309.

"For a misfeasance done by an agent, in the line of his agency, both the principal and agent are liable." *Martin v. Benoist*, 20 Mo. App. 262, 263, Syl., par. 3.

Under the allegations of the amended petition, defendant Richey's active misconduct renders him liable to the plaintiff. The

amended petition states a cause of action against him.

[2] 2. The allegations of the amended petition against defendant Kent are that he was employed to repair the walk; that he made some repairs; that he informed the plaintiff that the walk had been inspected and repaired and was all right and safe for her use; and that, after being repaired, the walk at the place where the plaintiff was injured was in a dangerous and unsafe condition. This constituted misfeasance on the part of defendant Kent, for which, if proven, he is liable in damages to the plaintiff. The petition states a cause of action against defendant Kent.

[3] 3. Did the court have jurisdiction of defendants Hansen? The conclusion reached concerning the sufficiency of the petition as to defendants Richey and Kent makes this question easy to answer. But one cause of action is stated in the petition. If the allegations of the petition are true, each of the defendants is liable to the plaintiff. All were properly joined as defendants. Civ. Code, § 35 (Gen. St. 1909, § 5628); *Dowell v. Railway Co.*, supra. Summons was properly served on defendants Hansen in Johnson county. Civ. Code, § 61. But if, as stated by defendants Hansen in their motion, their plea in abatement, and their answer, no cause of action exists as to defendants Richey and Kent, and they were made parties simply to give color of jurisdiction to the district court of Wyandotte county in this action, another question presents itself. That question was not argued, is not presented in the briefs, is not now before this court, and will not be further discussed.

Defendants Hansen never attacked the amended petition. Their motion, plea in abatement, and answer, were directed against the original petition. This does not change their situation. The plaintiff, by permission of court, had the right to amend her petition so as to make it state a cause of action against any one or more of the defendants if it did not state a cause of action as first filed. Until defendants Hansen were discharged they were bound to take notice of all the pleadings filed in the action.

The judgment is reversed, with directions to overrule the demurrers of defendants Richey and Kent, and set aside the order of dismissal as to defendants Hansen, and proceed with the cause as herein indicated. All the Justices concurring.

(17 Ariz. 476)

CRANE v FRANKLIN (No. 1432.)

(Supreme Court of Arizona. Feb. 10, 1916.)

1. WORK AND LABOR ⇨22—PLEADING.

Where a complaint stated a good cause of action in quantum meruit for services, and quantum valebant for supplies furnished, a general demurrer must be overruled.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. § 41; Dec. Dig. ⇨22.]

2. APPEAL AND ERROR ⇨1170 — REVIEW — HARMLESS ERROR.

The filing of an unnecessary reply is a technical defect which will not, under Const. art. 6, § 22, warrant reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4032, 4066, 4075, 4088, 4101, 4454, 4540-4545; Dec. Dig. ⇨1170.]

3. FRAUDS, STATUTE OF ⇨123 — TENANCIES FROM YEAR TO YEAR—IMPLIED TENANCY.

Where an oral agreement for a lease for five years was made, and the tenant went into possession under the agreement and continued in possession, but the parties were unable to agree upon the terms of the written lease, which was to be executed, no implied tenancy for a yearly term was created, for the oral agreement for the lease being void under the statute of frauds, there being no meeting of the minds as to the covenants governing such tenancy.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 272-274; Dec. Dig. ⇨123.]

4. FRAUDS, STATUTE OF ⇨138 — LEASE — BREACH OF ORAL AGREEMENT — RECOVERY FOR LABOR.

Where defendant orally agreed to lease his premises to plaintiff for five years, and plaintiff entered on the premises, cultivating and improving the same, and defendant refused to execute the lease, and demanded possession at the end of the year, plaintiff could recover the reasonable value of his services, together with the value of moneys expended for supplies necessary to cultivate the land.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 327-333; Dec. Dig. ⇨138.]

5. COMPROMISE AND SETTLEMENT ⇨5 — EFFECT OF SAME.

Where, though an equal division of the crops was agreed on, plaintiff declined to accept a share of the crops in payment for his services, he may recover their monetary value.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 10-16; Dec. Dig. ⇨5.]

6. FRAUDS, STATUTE OF ⇨138 — IMPLIED AGREEMENTS—ACTIONS.

Plaintiff might recover the value of the services rendered up to the time that he was ousted from the premises, though the lessor prior to that time informed plaintiff that he would not perform the agreement.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 327-333; Dec. Dig. ⇨138.]

7. APPEAL AND ERROR ⇨1001 — REVIEW — VERDICT.

A verdict supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. ⇨1001.]

Appeal from Superior Court, Yavapai County; Frank O. Smith, Judge.

On motion for rehearing. Former opinion reversed, and judgment for plaintiff affirmed.

For former opinion, see 16 Ariz. 501, 147 Pac. 718.

Anderson & Lamson, of Prescott, for appellant. Norris & Mitchell, of Prescott, for appellee.

ROSS, C. J. The appellee instituted suit against the appellant for the reasonable value of his services as laborer as farm hand up-

on the ranch of the defendant for the period of 13 months, which he fixes at \$100 a month; also for the reasonable value of certain seed, horse feed, and farm supplies furnished the defendant, valued at \$102, making an aggregate for services and supplies of \$1,402.

The defendant appellant filed a general demurrer and a general denial, and answered in bar of the action that the defendant verbally leased his ranch to the plaintiff for a term of one year or a season, by the terms of which lease plaintiff agreed to occupy and cultivate the premises in a good and farmer-like manner and to raise alfalfa, corn, and hogs, and agreed to furnish all necessary seed, except alfalfa seed; that the plaintiff agreed to sow in alfalfa 30 acres, to prune the orchard on said ranch and care for the same; that the defendant agreed to furnish the tools then on the ranch and the necessary number of horses and alfalfa seed; the crops raised to be equally divided between the plaintiff and defendant on the ranch, and that said crops were divided according to that agreement, plaintiff receiving one-half thereof in full settlement of all labor and services performed by him and all supplies furnished by him. Then follows the allegation of full performance on the part of the defendant and the failure of performance on the part of the plaintiff.

The plaintiff replied, denying the allegations in the answer concerning the lease and alleging that the plaintiff and defendant on or about the 5th day of December, 1912, entered into a verbal agreement, by the terms of which defendant agreed to give the plaintiff a lease for a period of 5 years upon defendant's ranch and set forth his understanding of the terms of the proposed lease; that he went upon the ranch of the defendant pursuant to said understanding and labored thereon from the said 5th day of December, 1912, until the 5th day of January, 1914; that no written lease was ever entered into between the plaintiff and defendant.

The defendant moved the court to strike that part of the plaintiff's reply pertaining to the agreement for lease, on the ground of departure from the original cause of action. The demurrer to the complaint and the motion to strike were both overruled. Upon the issues thus formed the case was tried to a jury, and the verdict of the jury was in favor of the plaintiff for the sum of \$540, upon which judgment was entered.

[1, 2] It is too evident to need argument that the plaintiff presented in his complaint a good cause of action in quantum meruit for services and labor and quantum valent for supplies furnished. Therefore the general demurrer was properly overruled. Neither do we think that error was committed by the court in refusing to strike the plaintiff's reply, on the grounds of departure. We adhere to the statement of law on that point as contained in our former opinion re-

ported in 16 Ariz. 501-505, 147 Pac. 718. The reply showed upon its face that there was merely an agreement for a lease for 5 years, and at most the reply would amount to no more than an explanation of the reason why the plaintiff entered into the possession of the defendant's ranch and occupied it and labored thereon for 13 months. We do not think any reply was necessary; at most it was but a technical error in pleading, and did not in any way prejudice the rights of the defendant, and could not because for reversal under our Constitution. Article 6, section 22.

The real milk in the cocoanut is as to whether the plaintiff is entitled to recover in the form of action that he has adopted and upon the facts as disclosed by the pleadings and evidence.

[3] The evidence is undisputed that in December, 1912, there was entered into between the plaintiff and defendant a verbal agreement, in which the defendant agreed to lease his ranch to the plaintiff for a term of 5 years, and that in pursuance of such verbal agreement the plaintiff moved upon the premises and began the work of clearing and improving the ground preparatory to planting crops. The dispute between the parties was as to the terms and conditions of the proposed lease. It very early developed that their understandings as to what the lease should contain widely differed, and, although they frequently tried to come to an agreement, each submitting to the other a form or forms of lease, these negotiations continuing during most of the year of 1913, it all ended in a failure to agree. Defendant notified the plaintiff in writing to vacate the ranch at the expiration of the year, and thereafter instituted suit against the plaintiff for the possession thereof, whereupon plaintiff left the place.

From these undisputed facts it will be seen that the minds of the parties never did come together or meet. Even if it be determined that their understanding was mutual when they first talked of the 5-year lease, it not being reduced to writing, would be void as in violation of the statute of frauds. For that reason the plaintiff could not enforce specific performance, neither could he sue for damages for breach of contract. The defendant, however, in his answer characterizes the relation established between him and the plaintiff, under the facts related, as that of landlord and tenant, and pleads a tenancy for one year in recognition of the law which permits a verbal lease of realty for a period not exceeding one year. If there was a lease between them for one year, it arises by force of law, and not by any contract.

Our understanding of the law is that if a verbal lease for a longer period than one year is agreed upon, in which the rental value is determined, the terms, agreements, and covenants fully understood, and possession is

taken thereunder, and rent paid or services rendered instead, by the lessee, although the lease may be void as a whole under the statute of frauds, the law, in order to protect the rights of the parties, will convert it into a lease from year to year. *Taylor's Landlord and Tenant* (9th Ed.) § 56. And "during the time which the tenant occupies the premises or in case a yearly tenancy is implied by law, the tenant will be bound to perform the terms of the agreement on his part." *McAdam on Landlord and Tenant* (4th Ed.) § 28; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567.

But in a case like this one, where the covenants, terms, and agreements to be incorporated in the lease were never fully settled or agreed upon by the parties, even though possession was taken thereunder, there is no basis or foundation for holding or declaring a tenancy from year to year.

The plaintiff entered into possession of the premises under a tentative understanding that he should have a lease thereof for a term of 5 years, but the other conditions, terms, and covenants, such as which should furnish farming implements, their kind, quality, and number, wagons and horses and their number, seeds for planting, their kind and quantity, the number of rooms in the farmhouse defendant was to retain, and the number the plaintiff was to have, were never agreed upon, but continued the subject-matter of dispute during the whole time plaintiff was on defendant's premises.

A lease, being the subject-matter of contract, can arise in two ways: By express agreement, and by implication of law. Under the facts no one may lay claim to a lease by express contract, nor do we think the facts give rise to a lease by implication of law, for the reason that there never was any meeting of the minds of the parties. Possession was taken under a void contract for a lease, and was continued until further negotiations made it evident that no agreement could ever be reached.

The relations between the parties did not, therefore, create a tenancy, and the law of landlord and tenant may not be applied to the facts in this case in arriving at the respective rights of the plaintiff and defendant.

[4, 5] Whether the relation be that of employer and employé or master and servant, the fact remains that the plaintiff under the arrangements detailed worked and labored on defendant's premises for upwards of 12 months, and furnished supplies with the consent, acquiescence, and permission of the defendant. On this state of facts it seems to us that the plaintiff should be entitled to recover the reasonable value of his labor and of any supplies he furnished toward the improving of defendant's property. *Tiffany's Landlord and Tenant*, § 66, states what we believe to be the law:

"It is well established that, although a contract is unenforceable because not evidenced by

writing as required by the fourth section of the Statute of Frauds, an action will lie to recover money or property delivered under the contract, or for the value of services rendered thereunder. In accordance with this rule, it has been held that if the proposed lessee makes repairs or improvements on the premises in accordance with the provisions of an oral contract for a lease, he may recover the cost thereof on the owner's refusal to make the lease."

Duncan v. Blake, 9 Lea (77 Tenn.) 534, was a case in which the lessor agreed that the lessee might have the use of the land for a term of 3 years for the clearing of it. The lessee was dispossessed at the suit of the lessor after he had done work and labor on the land for about one year, on the ground that the lease was void, it not having been reduced to writing. The lessee thereupon sued for the value of his work and labor and was permitted to recover less reasonable rent.

Upon a state of facts somewhat analogous to the facts of this case, in *Wonsettler v. Lee*, 40 Kan. 367, 19 Pac. 862, it was decided by that court (quoting from syllabus):

"A party who performs labor for another under a verbal contract not capable of performance within one year, and which the other party refuses to carry out, cannot enforce such agreement; but the party refusing to perform, and who has received the benefits of the labor, is liable for the same upon a quantum meruit."

It is contended by the defendant that plaintiff received one-half of the crops raised during the year 1913 in full settlement of all labor and services performed by him and all supplies furnished by him. Whatever rights the plaintiff acquired by reason of his year's services and advancements were a subject of barter and sale, and if as a matter of fact the crops for the year, however small or worthless, were divided and the plaintiff accepted one-half thereof in full settlement, it would amount to satisfaction and accord. But this was one of the issues that was submitted to the jury, and the jury found against the contention of the defendant. An examination of the evidence upon this issue discloses that the crops were divided upon the premises into two equal parts, with the evident intention to settle upon that basis, but about the time that this was done the defendant served the plaintiff with written notice to vacate the premises, and shortly thereafter instituted a suit in ejectment, whereupon the plaintiff left the premises and also all of the crops.

We think, under these facts, that the verdict of the jury was justified. Under the principle of law announced in the above cases, to the effect that where one renders services or makes advancements for another at his request or under a contract void for violating the statute of frauds, the law imposes an obligation upon the party receiving the benefit of such labor and services or advancements to repay the same. Unless such principle can be invoked under the facts in this case, the plaintiff would be remediless.

[6] In the former opinion of this court we held that the plaintiff was entitled to recov-

er on the common count for labor and services up to the 25th day of May, 1913, but not thereafter. On the reargument it was urged that the court had misapprehended the issues as made by the pleadings as by also the evidence, it being contended that if plaintiff was entitled to recover to May 25th, he was entitled to recover for the full time he remained and worked and labored upon the premises of defendant. We think now that we ought to yield to that suggestion, for the defendant by his answer recognizes and admits that the relation between the plaintiff and defendant remained unchanged during the year. The relation, whatever it be, therefore, began, continued, and ended under the same state of facts and conditions. This was not only recognized in the answer of the defendant, but also in his notice of the termination of the relation. In the trial of the case there was no suggestion that the relations had been changed on the 25th day of May, nor was any such issue before the court or the jury, nor has any assignment of error presented such a question to this court. The case was tried out before a jury upon the theory that the same relation existed between the plaintiff and defendant during the whole year, and it was brought here on appeal upon the same theory.

[7] The plaintiff sued for \$1,402. Evidence of his damages ranged from that amount down to \$600. The verdict of \$540 it would seem to us is supported by the evidence. We have many times decided that where substantial evidence supports the verdict of the jury, this court will not disturb it.

Judgment of the lower court is affirmed.

FRANKLIN, J., concurs.

CUNNINGHAM, J. I adhere to the former opinion in this case, and to the facts stated therein as borne out by the record of the case. I am of the opinion the law therein stated was correctly applied to the case.

(17 Ariz. 433)

HAMILTON v. STATE. (No. 391.)

(Supreme Court of Arizona. Feb. 10, 1916.)

1. CRIMINAL LAW §1121—APPEAL—RECORD—SUFFICIENCY.

Under Civ. Code 1913, par. 614, a reporter's transcript of the evidence cannot be considered as such, where not certified by the trial judge as correct; so an assignment depending on the evidence cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2581, 2582; Dec. Dig. § 1121.]

2. CRIMINAL LAW §1105—APPEAL—RECORD—SUFFICIENCY.

A reporter's transcript of the evidence, not authenticated by the trial judge or certified as

correct by the parties, cannot be considered as a bill of exceptions or statement of facts; so an assignment depending on evidence cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2563; Dec. Dig. § 1105.]

Appeal from Superior Court, Cochise County; A. G. McAlister, Judge.

James M. Hamilton was convicted of a misdemeanor, and he appeals. Affirmed.

Doan & Doan, of Douglas, and Kibbey, Bennett & Bennett, of Phoenix, for appellant. Wiley E. Jones, Atty. Gen., Leslie C. Hardy and Geo. W. Harben, Asst. Attys. Gen., and John F. Ross, of Douglas, Co. Atty., for the State.

PER CURIAM. The county attorney of Cochise county filed an information against the appellant, charging him with the crime of a misdemeanor, to wit, the selling and disposing of beer in violation of the prohibition amendment to the Constitution. The appellant pleaded not guilty, whereupon a trial was had before the court without a jury, in which evidence was offered on behalf of the respondent and also the appellant. From a judgment of conviction this appeal is taken.

The appellant makes two assignments of error: First, that the court erred in finding that the beverage sold by the defendant was beer within the meaning of the prohibition amendment to the Constitution of Arizona; and, second, that the judgment of the court is not supported by the evidence in the case and is contrary to the evidence.

[1, 2] The appellant has attempted to present to this court the evidence taken at the trial in the form of the reporter's transcript. What purports, however, to be a transcript of the testimony as taken by the court reporter, is not properly or legally authenticated. It lacks the certificate of its correctness by the trial judge. Neither can we regard it as a statement of facts or bill of exceptions, for the reason that it is not certified to by the judge is correct, nor is it signed and certified to be correct by the parties. There is nothing, therefore, before the court upon which to base the two assignments made by appellant. The statute requires that the trial judge shall certify that the reporter's transcript is correct. Paragraph 614, Civil Code 1913. And we have held, without such certification, that it forms no part of the record of the case. Kinney v. Neils, 14 Ariz. 318, 127 Pac. 719.

We have examined the record in other respects for fundamental errors, and, finding none, the judgment of the lower court is affirmed.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(17 Ariz. 484)

SLAUGHTER v. BANK OF BISBEE.
(No. 1476.)

(Supreme Court of Arizona. Feb. 10, 1916.)

BILLS AND NOTES \S 165—NEGOTIABLE INSTRUMENTS—CONDITIONAL PROMISE.

To an ordinary promissory note there was added a notation under the maker's signature "for payment under contract of even date." Civ. Code 1913, par. 4146, provides that a negotiable instrument must contain an unconditional promise or order to pay a sum certain in money, while paragraph 4148 declares that there may be inserted in a promissory note, without destroying its negotiability, a statement of the transaction which gives rise to the instrument. *Held*, that as the instrument was otherwise negotiable, the notation must be construed as a mere statement or reference to a transaction for the purpose of identification, and that the collection of the instrument was not made to depend upon the maker's performance of the contract, this being particularly true in view of the fact that the contract called for the execution of promissory notes, which are always negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 416; Dec. Dig. \S 165.]

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Action by the Bank of Bisbee, a corporation, against R. L. Slaughter. From a judgment for plaintiff, defendant appeals. Affirmed.

Richardson & White, of Douglas, for appellant. Ellinwood & Ross, of Bisbee, and S. H. Morris, of Globe, for appellee.

ROSS, C. J. The questions presented to this court for solution are involved in the following note:

"Douglas, Arizona, April 9, 1918.

"Six months after date, for value received, we promise to pay to the order of Geo. F. Woodward, twenty-seven thousand one hundred and eighty-seven 50/100 dollars, at the Bank of Douglas, Douglas, Arizona, with interest thereon from date until paid, at the rate of six per cent. per annum; the said interest, if not so paid, to be added to and become a part of the principal, and bear the same rate of interest. And in case suit or action is instituted to collect this note or any portion thereof, we promise to pay, besides the costs and disbursements allowed by law, such additional sum as the court may adjudge reasonable as attorney's fees in such suit or action.

W. B. Slaughter.

"Geo. N. Slaughter.

"R. L. Slaughter.

"For payment under contract of even date."

The appellee, claiming said instrument to be a negotiable note and claiming to be the owner and holder thereof in due course, instituted this proceeding against the makers and the payee and indorser, Geo. F. Woodward, to collect the principal amount and interest due thereon.

The only one of the defendants that appeared and filed an answer was R. L. Slaughter, one of the makers of the note. He defended the action on the ground that the note was given in consideration of the performance of a certain executory contract entered into between the makers and the

payee, Woodward. It is alleged that the contract was not performed by the payee, and hence a failure of consideration for the note. The theory of the defense being that the note was a nonnegotiable instrument and therefore subject to that defense, for the reason that there appears on the face of the note words that conditioned its payment, the words being: "For payment under contract of even date." The plea of failure of consideration was stricken upon the motion of appellee, the trial court holding that the note was negotiable.

It was also alleged in the answer that the appellee took the note with full notice and knowledge of the purpose for which the same was given and the consideration thereof, and of all the circumstances under which said note was made. Evidence, upon this issue made by the answer, was introduced at the trial, the appellant on his part offering, among other evidence, the contract pleaded in his answer and out of which transaction the note sued upon originated. The contract involved the purchase from Woodward by appellant and his comakers of a ranch and cattle situated in Mexico for a consideration of \$108,750, to be paid as follows, to wit:

"The sum of \$27,187.50 cash, in hand paid, the receipt whereof is hereby acknowledged by the party of the first part and the further sum of \$27,187.50 three months from date hereof. And the further sum of \$27,187.50 six months from the date hereof, and the further sum of \$27,187.50 nine months from date hereof. Each of the deferred payments being evidenced by a promissory note of even date herewith, due three months, six months and nine months from the date hereof, bearing interest at the rate of 6 per cent. per annum from date until paid. Said notes to be payable at the Bank of Douglas, in the city of Douglas, county of Cochise, state of Arizona."

The judgment being in favor of the appellee, the appellant, R. L. Slaughter, prosecutes his appeal therefrom and assigns ten specifications of error. We think, however, that there is but one question involved—that is, the negotiability or nonnegotiability of the instrument sued upon. If it is a commercial paper under the law merchant or under the Negotiable Instrument Law of this state, the judgment of the lower court must be upheld.

One of the requisites to a negotiable instrument is that "it must contain an unconditional promise or order to pay a sum certain in money." Civil Code 1913, par. 4146. The appellant earnestly contends that the words, "for payment under contract of even date" indorsed upon the note qualifies and conditions the promise to pay and makes the obligation to pay contingent upon the terms of the contract therein referred to. No case has been cited by counsel, nor have we been able to discover any, after a very thorough search, in which language such as is here involved was passed upon or discussed, although the books are full of cases based upon "conditional paper, distinctly conditional in

form." Many of such cases are cited in 7 Cyc. 575, note 82. Also note to Klots Throwing Co. v. Manufacturers' Commercial Co., 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40.

It seems to us that the expression "for payment under contract of even date" is far from being "distinctly conditional." Giving it the implication of a condition, it is at best conjectural and misty. The instrument is signed by the maker, in which he promises to pay a sum certain in money at a fixed time and payable to the order of a named person; and the promise to pay is certainly unconditional, unless the words in question shall be construed to qualify and make conditional the promise. Under the Negotiable Instrument Act, par. 4148, there may be inserted in a promissory note, without destroying its negotiability or qualifying the promise to pay: "* * * (2) A statement of the transaction which gives rise to the instrument."

A promissory note, therefore, is not divested of its negotiable character if in addition to its ordinary provisions there is inserted a reference to the transaction out of which it arose, or a recital of the consideration for which it was given. The usual way to condition or to make contingent a promise to pay is to use language clearly carrying that intention and purpose either by direct expression or by reference to some extrinsic contract in such manner as to make the payment of the note subject to the terms and conditions of the contract. In 3 R. C. L. 883, § 60, the idea we have in mind is very well expressed in this language:

"It may be stated as the general rule that wherever a bill of exchange or promissory note contains a reference to some extrinsic contract in such a way as to make it subject to the terms of that contract, as distinguished from a reference importing merely that the extrinsic agreement was the origin of the transaction, or constitutes the consideration of the bill or note, the negotiability of the paper is destroyed."

If it can be said that the expression "for payment under contract of even date" fairly or reasonably means that the note was given and its payment was to be made "subject to the terms of the contract," therein referred to, it would follow that, if the contract was executory, the payment of the note was subject to its conditions. There is nothing in the language to indicate that the contract referred to was an unexecuted contract. From what appears in the expression the contract may have been fully performed and executed. It has neither subject nor predicate; it does not assert or affirm anything—it is a mere combination of words from which it may be inferred that a contract had been entered into between somebody on its date. We cannot enter into the speculation of inserting or supplying omitted words, as appellant would have us do, in order to give it the force and effect of limiting and qualifying the unconditional promise of the makers

as contained in the body of the note—we must accept the words actually used, which do not declare anything, or assert anything, or affirm anything, but are a mere allusion to or sign post of the transaction out of which the note originated. It does not mean the same, as suggested by appellant, as the expression, "this note is made subject to contract of even date," for in the latter expression there is carried the idea of a subsisting and unfulfilled contract, an executory contract.

In Klots Throwing Co. v. Manufacturers' Commercial Co., supra, a note containing this language, "Value received, subject to terms of contract between maker and payee of October 25, 1905," was held to be nonnegotiable, the court stating that in its opinion "the special stipulation in the present note limits and qualifies the obligation to pay so that it is not absolute" and with that conclusion we agree. It further said:

"Manifestly, if the provision 'subject to terms of contract between maker and payee' constitutes merely a reference to the agreement or a statement of the consideration for the note, it does not impair the negotiability of the latter. So, if it merely constitutes notice of the existence of the contract, and not of the breach thereof, it would not affect negotiability."

In that case reference to the "extrinsic agreement" was certain and unerring, and contained words qualifying the promise to pay. In the case at bar there is an absence of language to indicate that this note was to be burdened with the conditions of any agreement. At most it is a mere reference to the origin of the transaction and "constitutes notice of the existence of the contract," but "not of the breach thereof." We are of the opinion that the expression indorsed on the margin of the note was intended as a mere statement of or reference to the transaction for the purpose of identification, and that it did not, therefore, affect the negotiability of the note sued upon.

We are further confirmed in this view by reference to the contract. That instrument provides that the consideration for the property to be transferred to the makers of the note was to be paid in part cash and in part by promissory notes of even date, due three months, six months, and nine months from date. Here is the promise of the makers of this note that it shall be a negotiable note, for all promissory notes are negotiable. Indeed, the appellant in his answer describes the instrument sued upon as "said promissory note." As was said by Lord Campbell, C. J., in *Jury v. Barker*, El. Bl. & El. 459, where the promise to pay in the note was "as per memorandum of agreement":

"The note here is an absolute and unconditional promise as to the payer, the payee, the amount, and the date. If the addition of the words in question make the promise conditional, it is on the defendant to show that, and he has not done so."

In the present case, the appellant not only failed to show that the promise was condi-

tional, but actually showed that it was unconditional and unqualified, both by the contract referred to and in his answer. It further appears from the evidence that the appellee purchased the note, paying full value, within a very few days after its execution and long before any claimed breach of the executory contract attempted to be interposed in appellant's answer.

Judgment affirmed.

FRANKLIN and CUNNINGHAM, JJ., concur.

(17 Ariz. 490)

SLAUGHTER v. SLAUGHTER. (No. 1475.) (Supreme Court of Arizona. Feb. 10, 1916.)

Appeal from Superior Court, Cochise County; Alfred C. Lockwood, Judge.

Action by John H. Slaughter against R. L. Slaughter. From a judgment for plaintiff, defendant appeals. Affirmed.

Richardson & White, of Douglas, for appellant. Ellinwood & Ross, of Bisbee, and S. H. Morris, of Globe, for appellee.

PER CURIAM. The parties have stipulated that this case shall abide the decision and judgment in case numbered 1476, 154 Pac. 1040, just decided. The record is the same as in that case, except in the date of maturity of note and party plaintiff.

Judgment is accordingly affirmed.

(17 Ariz. 491)

BRUTINEL v. NYGREN. (No. 1469.)

(Supreme Court of Arizona. Feb. 10, 1916.)

1. PRINCIPAL AND AGENT §124—ACTION FOR COMPENSATION—QUESTION OF LAW OR FACT.

In an action to recover for effecting the sale of defendant's property, where the inferences to be reasonably drawn from the undisputed facts were such that men might not reasonably differ concerning them, the question was one of law for the court.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. §124.]

2. APPEAL AND ERROR §1001 — REVIEW — VERDICT.

In such case, if there was any evidence reasonably tending to support the judgment for plaintiff, it ought to be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. §1001.]

3. PRINCIPAL AND AGENT §155—ACTS OF AGENT—AUTHORITY.

A principal is not responsible for contracts which he has neither directly nor indirectly authorized, since the primary object of an agency is to bring the principal into contractual relations with third parties.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 574-582; Dec. Dig. §155.]

4. APPEAL AND ERROR §970—TRIAL §59 —HARMLESS ERROR—ORDER OF PROOF.

The mere order of proof is not vital, but is within the legal discretion of the trial judge, and his allowance of evidence of the agent's acts before proof of the agency to do the particular act in question, was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. §970; Trial, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. §59.]

5. PRINCIPAL AND AGENT §123—AGENT'S AUTHORITY—PROOF.

The nature and extent of an agent's authority must ultimately be established only by tracing it to its source in some word or act of the alleged principal, as the agent cannot confer authority upon himself, or make himself agent, merely by acting as such, or saying that he is an agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. §123.]

6. PRINCIPAL AND AGENT §1 — NATURE OF RELATION—"AGENCY."

"Agency" has its conception in something lawful that a person may do, and a delegation by such person to another of the power lawfully to do that thing.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 1; Dec. Dig. §1.]

For other definitions, see Words and Phrases, First and Second Series, Agency.]

7. PRINCIPAL AND AGENT §93—"GENERAL AGENCY."

A "general agency" does not confer upon the agent a universal or unlimited authority, or make him alter ego; but the exercise of his authority is limited to that which is expressly conferred, broadened by the apparent authority, upon which third persons exercising due care may rely, to do all acts within the ordinary and usual scope of the business he is empowered to transact. The scope of a general agency is ordinarily much less restricted than that of a special agency, though the distinction from a special agency is not a distinction of principle, but merely a difference in the actual measure of authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 247; Dec. Dig. §93.]

For other definitions, see Words and Phrases, First and Second Series, General Agency.]

8. PRINCIPAL AND AGENT §94 — "SPECIAL AGENCY."

The authority to do a single thing, perhaps in a specific way, is a "special agency," the scope of which is ordinarily much more restricted than that of a general agency, though the principal's liability for acts within the agent's power is the same as that of a general agent; the difference being merely in the actual measure of the agent's power.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 248, 249; Dec. Dig. §94.]

For other definitions, see Words and Phrases, First and Second Series, Special Agency.]

9. PRINCIPAL AND AGENT §147—RIGHTS OF THIRD PARTIES—EXTENT OF AGENT'S AUTHORITY.

The mere fact that one is dealing with an agent, whether the agency is general or special, is a danger signal; and one dealing with an agent, if he would bind the principal is bound to ascertain, not only the fact of the agency, but the nature and extent of the authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 528-533; Dec. Dig. §147.]

10. PRINCIPAL AND AGENT §119 — RIGHTS OF THIRD PARTIES—EXTENT OF AUTHORITY—BURDEN OF PROOF.

In such case, if either the nature or the extent of the agent's authority is controverted, the burden is on the third party dealing with him to establish it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 391-401; Dec. Dig. §119.]

11. PRINCIPAL AND AGENT ¶102 — SPECIAL AGENCY—DELEGATION OF AUTHORITY.

An agent employed to manage a drug store, and during the course of such employment specially authorized to offer it for sale, while impliedly authorized to do all the acts naturally and ordinarily done in such cases, had no implied authority to employ a subagent to sell the drug store, good will, and fixtures at the expense of his principal, as such act was not naturally and ordinarily done in such cases, in the absence of any custom or course of dealing between the parties justifying the extension of the agency to include such power.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 274-277, 347; Dec. Dig. ¶102.]

12. PRINCIPAL AND AGENT ¶166—RATIFICATION—KNOWLEDGE OF FACTS.

In such case the principal, who was ignorant of the fact that the agent had employed a subagent to sell the drug store at the principal's expense, could not be bound by the doctrine of ratification, since ratification rests upon knowledge of the facts or thing to be ratified and voluntary action on the part of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 627-633; Dec. Dig. ¶166.]

13. ESTOPPEL ¶56—CHANGE OF POSITION.

In such case the principal was not liable on the ground of estoppel where the subagent had not changed his situation to his detriment in his reliance upon the principal's conduct.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 142; Dec. Dig. ¶56.]

14. PRINCIPAL AND AGENT ¶194 — ACTION FOR COMMISSIONS—INSTRUCTIONS.

In an action by one employed by defendant's special agent to sell defendant's drug store, where the issue was whether defendant had authorized the special agent to employ plaintiff at her expense, the jury should have been instructed to find a verdict for the defendant, if such employment was not so authorized, unless the employment, if unauthorized, was ratified by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 727-731; Dec. Dig. ¶194.]

15. APPEAL AND ERROR ¶1066 — PREJUDICIAL ERROR—INSTRUCTION—IGNORING ISSUES.

In such action, an instruction that the sole question was whether plaintiff had earned a commission according to the terms of the contract, and that, if he had, it was the jury's duty to determine the amount, was prejudicial, as excluding from the jury's consideration the issue of the authority of defendant's special agent to employ plaintiff, and in fact authorizing the jury to determine whether they thought it just or desirable that defendant should be held liable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. ¶1066.]

Appeal from Superior Court, Greenlee County; A. G. McAllister, Judge.

Action by J. E. Nygren against Mrs. M. Brutinel. Judgment for plaintiff, motion for new trial denied, and defendant appeals. Reversed and remanded.

L. Kearney, of Clifton, for appellant. E. V. Horton, of Clifton, for appellee.

FRANKLIN, J. Two important doctrines familiar to the law of agency come forward for consideration in this case: The one has

to do with the appointment of an agent and the nature and extent of his authority; the other relates to the doctrine of ratification and agency by estoppel. In order to make this judgment intelligible in principle and in results, we shall first try to ascertain and summarize the ultimate or cardinal facts to be gleaned from the record, without an attempt to give even a moderate proportion of the details. Then we shall discuss and apply the law as we understand it. The court in this case, and properly so, allowed great latitude in the admission of testimony from which the existence of an agency and the authority of such agent to do the particular act in controversy may be inferred. It is our duty to give this evidence its full scope, with every fair and reasonable inference that may be derived from it, and then say whether the judgment is supported by the law and the facts.

The appellant, Mrs. M. Brutinel, is a French woman, with but little knowledge of the English language. She was the owner of a drug store on Chase creek in the town of Clifton. Mr. C. P. Dunn, a druggist by profession, is her son-in-law. Mr. Dunn induced Mrs. Brutinel to purchase the drug store, and on the faith of his promise to manage the business she invested her money in it. Some time after the purchase of the drug store Mr. Dunn decided to leave Clifton to engage in other business. Because he had been instrumental in getting Mrs. Brutinel to go into the drug business on his promise to manage it for her, and having decided to leave Clifton, Mr. Dunn wished to obtain for Mrs. Brutinel the return of her investment. To this end he induced Mrs. Brutinel to allow him to find a purchaser for the business, which she did, with the understanding that any purchaser he might procure would buy it upon terms and conditions satisfactory to her. In the latter part of May, 1913, Mrs. Brutinel sold the drug store to Mr. David Robbins and Mr. W. A. Riker for \$4,000, executing to them her bill of sale conveying the property; the purchase money in part being evidenced by promissory notes secured by a chattel mortgage. The appellee, Mr. J. E. Nygren, who is also engaged in the drug business, claiming that Mrs. Brutinel is indebted to him on account of the transaction, brought this action to recover \$1,450 for his services. The employment of Mr. Nygren had its origin in the following letter written to him by Mr. Dunn:

"Clifton Drug Company, Mrs. M. Brutinel, Prop.

"Clifton, Arizona, February 13—12.
"Mr. Nygren: Received your letter to-night. Also the other reached me some time ago, which I immediately answered by wire, care Owl Drug Store. I figured that anyway Wayland would know just where to reach you. Not receiving answer to the wire, I concluded you had decided to call it off. In the wire I quoted you a price of \$50.00 on the fixtures exclusive of jewelry

fixtures. These together with space I have rented to Mr. Miller, and he is open and doing business. Of course, since quoting you the above price, I have continued making preparations to open up, and now expect to open about next Tuesday or Wednesday. The outlook is certainly very favorable here. Every one seems to be kicking at the new manager down below. I have gone to considerable expense in making the store presentable, repainted and papered throughout, put in new linoleum and new set wiring and new electric fixtures. The store will be as good as new and will look better than it ever did when we reopen. I feel now it would not justify me to take less than \$1,000.00 for fixtures, and stock to be invoiced at wholesale cost. If you cared to make this deal on this basis, would allow you 5%, or if you can get over \$1,000 for fixtures, which you should be able to do, you could have all above this amount. The fixtures and fountain together cost originally at least \$2,500.00. The stock I have bought since is only staple goods and in moderate quantities. Probably stock will run \$1,000.00 in all, making the whole a \$2,000.00 proposition. I do not think the outfit, everything considered, could be beat at this price anywhere, and I feel confident I could do some better in short time if I hold it. If you decide to do anything let me know at once, as I am carrying ads in several big daily papers and will sell first favorable opportunity. Will make terms on half, if desired, and if party is reliable. With best wishes, I am, Yours truly, C. P. Dunn.

"Miller pays \$25.00 mo. rent. This would make drug dept. rent \$80.00 month."

Mrs. Brutinel was never informed of the contents of this letter. She had no knowledge whatever that it had been written. She never knew anything at all at any time about any contract or promise or transaction which Mr. Dunn had or was having with Mr. Nygren. Indeed, she never knew of Mr. Nygren, or that he was claiming any remuneration from her, until the summons and complaint were served upon her in this action. She never employed the plaintiff, but he was employed by Mr. Dunn. True it is that Dunn was her agent, authorized to manage her drug business; and true it is that he was her agent specially authorized to find a purchaser for the business, the sale to be made upon terms and conditions satisfactory to appellant. Dunn had no special authority and no power to conclude a contract for the sale and purchase of the drug business. His authority was expressly limited to finding a purchaser satisfactory to the principal. The distinction is here to be noted between the authority given to an agent to sell, and the authority given to an agent merely to offer for sale. There is not a scintilla of evidence that the authority of Dunn included the authority to employ the appellee at the expense of the appellant, unless such a power may be implied from his agency to manage the drug business and his subsequent special authority to find a satisfactory purchaser for it. Mr. Dunn testified that when he wrote the letter to Mr. Nygren, which is copied herein, he was not acting for Mrs. Brutinel, but solely on his own initiative, for himself alone; that he never told her anything about it, and if there was any obligation incurred it was his

own, and not Mrs. Brutinel's. Among other instructions, the court gave the following:

"You are instructed that if you believe from the evidence that the plaintiff was employed to find a purchaser for the property of defendant, and pursuant thereto did find a purchaser who, through the efforts of the plaintiff, purchased defendant's property in question upon the terms specified, or upon terms agreed to between the defendant and such purchaser, and that the plaintiff was the procuring cause of the sale, then your verdict will be for the plaintiff."

"As the case is presented to you, the sole question is whether or not the plaintiff has earned a commission according to the terms of the contract, and in case you decide he has it is your duty to determine the amount of that."

The case was tried to a jury, which gave the appellee a verdict for \$1,250. Judgment followed the verdict. The appeal is from the judgment and order denying the motion for a new trial.

At the close of the plaintiff's evidence, and again at the close of all the evidence in the case, the defendant requested an instruction in the nature of a demurrer to the evidence. The court refused to grant either of these requests, and the ruling is assigned as error—the ground being in substance that there is no evidence tending to show that Mr. Dunn was authorized to act for the defendant, or that he ever did act for the defendant in employing the plaintiff; that if he did so act his action was unauthorized and unratified by defendant. Error is also predicated upon the instructions given.

[1, 2] A careful review of the record discloses that the facts are not disputed. It is only the inferences which can reasonably be drawn from them that give rise to the contentions here, and we are of opinion that the inferences to be drawn from the facts in this case are such that men may not reasonably differ concerning them. The question is therefore one of law for the court. However, if there be any evidence reasonably tending to support the judgment it ought to be sustained.

[3] The primary object of an agency is to bring the principal into contractual relations with third parties—into privity with them; and it is elementary, therefore, to say that a principal is not responsible for contracts which he has neither directly nor indirectly authorized.

"It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent cannot create in himself an authority to do a particular act by its performance; and that the authority of an agent cannot be proved by his own statement that he is such." *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568.

[4, 5] Of course, the mere order of proof is not vital. This is within the legal discretion of the trial judge, and if he allows evidence of the agent's acts before proof of the agency to do the particular act in question, it will not be reversible error, provided proof of such agency is established at some stage of the trial. But where the nature and extent of an agent's authority is directly in

volved, it must never be lost sight of; and this cannot be too strongly emphasized, that it ultimately may be established only by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself, or make himself agent, merely by acting as such, or saying that he is one. Mr. Mechem says:

"The agent's authority, moreover, may not be shown merely by proving that he acted as agent. A person can no more make himself agent by his own acts only than he can by his own declarations or statements. If his acts can be connected with the principal in some way, as by showing that the principal knew of them and assented to them, a different result ensues; and, where the acts are of such a public or intimate nature, so notorious, or so long continued as reasonably to justify the inference that the principal must have known of them, and would not have permitted them to continue if they were unauthorized, evidence of them is admissible as against the alleged principal." Mechem on Agency, § 289.

[8-8] The fundamental idea, therefore, or seed grain, so to speak, of agency, has its conception in something lawful that a person may do, and a delegation by such person to another of the power lawfully to do that thing. So this agency has been catalogued according to its kind, as either general or special. The basic error of appellee's case is in giving a broader application to the term "general agency" than its significance warrants.

"If by express appointment, or by long acquiescence, recognition, or course of dealing, one man has conferred upon another the character of one possessing the requisite authority to represent him in a general way during some more or less continuous period in the transaction of all of his business of a certain kind, or at a particular place, or to perform all acts of a certain kind or class, he must be held to have conferred upon him the attributes and powers inherent in the character so bestowed. Such an agent the law denominates, for convenience sake, a general agent. But if, on the other hand, in a single instance, either by express terms or by his conduct, he confers upon the other the character of one having authority to do a single thing, perhaps in a specific way, he must be held to have conferred upon him those attributes and powers, and those only, which are inherent in that character. This agent, for the same convenience, is termed a special agent." Mechem on Agency, § 737.

The distinction ordinarily drawn between a general and special agency is often artificial and unsatisfactory. The scope of the authority of a special agent is ordinarily much more restricted than that of a general agent; but when it is said that "if the special agent exceeds his instructions the principal is not bound," while "if the general agent exceeds his instructions, the principal will be bound," the statement is entirely misleading. So far as the authority of an agent involves the rights of innocent third persons, who have relied upon the character bestowed upon the agent, the principal is bound equally by the authority which he actually gives and by that which by his own act he appears to give, and this is true, whether we call the agency a special or general one. The general agent's authori-

ty is not universal; it is not an unlimited one. He is not alter ego, but the exercise of his authority is limited to that which is expressly conferred, broadened by the apparent authority, upon which third persons exercising due care may rely, to all acts within the ordinary and usual scope of the business he was empowered to transact. In other words, every agency is so far general that it must cover, not only the precise thing to be done, but whatever usually and rationally belongs to the doing of it. To be a general agent one does not have to be one of unlimited powers. As said by Mr. Mechem: -

"It is none the less true, however, as has been seen, that the scope of the general agent's authority must not be exceeded. Each acting within the scope of the authority conferred, binds his principal; each acting beyond that scope binds himself only or no one. But while these rules applying to the two classes are alike in kind, they differ, as has been shown, in degree. It is believed, however, that this difference is one of degree only, and not of principle." Mechem on Agency, § 742.

In a New York case Mr. Justice Comstock says:

"There are in the books many loose expressions concerning the distinction between a general and special agency. The distinction itself is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. It is not profitable to dwell upon that distinction. Underlying the whole subject there is this fundamental proposition: That a principal is bound only by the authorized acts of his agent. This authority may be proved by the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. * * * But, in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other. These principles, I think, are elementary." *Mechanics' Bank v. New York & New Haven R. R. Co.*, 13 N. Y. 599.

An excellent statement of the matter is to be had in a quotation from 1 Minor's Institutes, 206, found in the case of *Cross v. A., T. & S. F. R. R. Co.*, 141 Mo. at page 147, 42 S. W. at page 679, as follows:

"Whether the authority be general or limited, the servant (agent) cannot charge the master (principal) if he exceeds it. He is, of course, more likely to transcend the bounds of a narrow than of an extended power; but the principle in either case is the same. Within his commission, he binds his master (principal); beyond it, he does not. Whilst, then, we must distinguish clearly between a general agent and a special agent, it is not because there is a diversity in the leading principle which determines the master's (principal's) liability, but merely in order to adjust the actual measure of it."

See, also, *Gore v. Canada Life Assur. Co.*, 119 Mich. 136, 77 N. W. 650.

[9, 10] The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the duty to "stop, look, and listen," and if he would bind

the principal is bound to ascertain, not only the fact of agency, but the nature and extent of the authority, and in case either is controverted the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises.

"* * * Unusual and unnatural acts are not to be tolerated, strained constructions are to be avoided, inferences of facts are to be limited to those which are reasonable, natural and ordinary, and, as has been so often pointed out, inferences are to be drawn only from facts for which the principal is responsible, and not from mere considerations of convenience or policy. The mere fact that one is found to be a general agent justifies neither the court nor jury in guessing that given acts are within the scope of his authority." *Id.* § 740.

Conceding, for the purposes of this case only, that when Mr. Dunn employed the plaintiff to find a purchaser for the drug business, he was acting as the agent of Mrs. Brutinel, and not on his own account, a concession which is by no means justified as an inference from the disclosed facts, is the act in controversy fairly included within the limits, or as it is ordinarily stated within the scope of Dunn's authority either express or implied? If it is, the principal is bound; if it is not, the act of the agent binds himself alone or no one. In other words, do the facts and circumstances of this case justify this inference that Mr. Nygren was employed as the principal's agent under such circumstances as to reasonably warrant the conclusion that Mrs. Brutinel has taken the subagent as her agent and become liable for his compensation?

[11] This inference is sought to be justified from the fact, and the only facts traceable in the record to any word or conduct of hers, that Mrs. Brutinel employed Mr. Dunn as her agent to manage the drug business, and during the course of such employment specially authorized him to offer the same for sale. Thus an express authority is given by the principal to Mr. Dunn to manage the drug store, and this express authority carries with it every power necessary and proper to be done in the case in hand to effectuate the purpose for which the authority in question was created. Where nothing is indicated to the contrary, there are many things connected with such duties involving discretion, judgment and choice of methods that it would not be unreasonable for third persons dealing with such an agent to rely upon the presumption that he possessed those powers commensurate with his undertaking, and which are usually and properly exercised by other similar agents under like circumstances. In other words, it carries with it the implied power to do all those acts naturally and ordinarily done in such cases. But such an implied agency is not to be extended by construction beyond the obvious purposes for which it is apparently created. Clearly such an agency cannot imply the authority in Mr. Dunn to employ a subagent to sell the drug store, good will, and fixtures at the

expense of Mrs. Brutinel, because such acts are not naturally and ordinarily done in such cases, and there is nothing in the record to show any usage and custom prevailing in similar cases, or any course of dealing between the parties, that would justify the extension of the agency to include any such power. So with the special authority given to Mr. Dunn to find a purchaser for the business. Here his authority was expressly limited to the power to find a purchaser satisfactory to the principal. From such authority it cannot be implied as a matter of law that Mr. Dunn had the power to bind his principal by an agreement to pay another commission for making a sale, because the agent must have special authority to bind his principal by the promise to pay commissions, and the evidence fails to disclose any fact, either by word or conduct, or any usage and custom prevailing in similar cases, or any course of dealing between the parties that would justify any presumption that Mrs. Brutinel authorized Mr. Dunn to perform the act in question, or that she has by any conduct logically and rationally tending to that end led Mr. Nygren, who must himself exercise due care and caution in the premises, reasonably to believe that such authority had been conferred and accordingly to act upon such belief. In fine, the fact that Dunn was her general agent in managing the drug store and her special agent to offer it for sale would not justify Mr. Nygren in guessing that the act of Mr. Dunn in employing him as subagent at the expense of Mrs. Brutinel was within the scope of Mr. Dunn's authority.

There is an utter failure to trace the source of his reliance, if he did so rely, to any word or act of the principal that would justify him in concluding that Mrs. Brutinel is liable by reason of her consent to, or concurrence in, the employment. Notwithstanding the difficulty in some cases of ascertaining the extent of an agent's power, the general rule is that a person dealing with an agent takes the risk. To the objection that no one would be willing to deal with an agent upon this basis Chief Justice Shaw said:

"This objection, we think, is answered by the consideration, that no one is bound to deal with the agent. Whoever does so is admonished of the extent and limitation of the agent's authority, and must, at his own peril, ascertain the fact, upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent, who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of the goods trusts the agent, and if he is deceived by him he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and therefore the maxim, that where one of two innocent persons must suffer, he who reposed confidence in the wrongdoer must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods." *Mussey v. Beecher*, 3 Cush. (57 Mass.) 511.

Concerning this "maxim" Mr. Mechem says:

"There are, as has elsewhere been pointed out, many loose statements to be found in the books to the effect that there is a general principle of the law that, where one of two innocent persons must suffer by the act of a third, that one should bear the loss by whose act the loss was made possible; or who enabled the wrongful act to be committed, or who first reposed trust and confidence in the wrongdoer, and the like. As a matter of fact, notwithstanding these general statements, there is no such general principle as that which is thus declared. Like many other alleged maxims, this one contains only a half truth at most, and its use seems to be resorted to only to cover loose reasoning or to span a gap without noticing it." Mechem on Agency, § 1986.

[12] But it is urged that Mrs. Brutinel is bound upon the doctrine of ratification. Ratification must necessarily rest upon knowledge of the facts or thing to be ratified. Knowledge of the facts and voluntary action, however, are as essential here as elsewhere, and the principal, by accepting what he was entitled to from the agent, in ignorance that a subagent had been employed, does not ratify his appointment. But, conceding that Dunn attempted to act for Mrs. Brutinel in employing Nygren, she was in entire ignorance of that fact when she consummated the sale with Riker and Robbins. See *Servant v. McCampbell*, 46 Colo. 292, 104 Pac. 394; *Rice v. Post*, 78 Hun, 547, 29 N. Y. Supp. 553; *Craver v. House*, 138 Mo. App. 251, 120 S. W. 686; *Ballentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037; *Benham v. Ferris*, 159 Mich. 632, 124 N. W. 538; *Hanback v. Corrigan*, 7 Kan. App. 489, 54 Pac. 129; *Sims v. St. John*, 105 Ark. 680, 152 S. W. 284, 43 L. R. A. (N. S.) 796; *Carroll v. Tucker*, 2 Misc. Rep. 397, 21 N. Y. Supp. 952.

In one jurisdiction it is said:

"The right of sale is one of the most valuable rights incident to the ownership of property, and it ought not to be restricted for other than cogent reasons. Unless some public interest or paramount private right renders a curtailment necessary, the owner of any character of property should have the unhampered right to sell it, with the entire world as a market. If another person, unauthorized by the owner, assists an agent in making a sale, is it right and just to hold that, if apprised of what has been done by such assistant or subagent, and the fact that the agent has promised compensation by the owner, the latter cannot accept the terms offered by the purchaser without becoming liable to such subagent? Under such circumstances, it cannot be claimed that the owner has misled the subagent; nor will consummation of the sale without compensating him place him in any worse position than he would be in if the sale should be abandoned. It is true that one cannot adopt part of an unauthorized contract without adopting the whole; but the contract submitted to Mrs. Williams, and the one she adopted, was the contract for the sale of the land, and not the contract between Miller and Straub. It was not stipulated in the contract of sale that she should pay Straub for services rendered. It is true, when she adopted that contract, she had knowledge of the other contract and of the services rendered by Straub; but as the latter contract was unauthorized by her, as she had done nothing to induce Straub to render the services, as her consummating the sale without remuner-

ating him would place him in no worse position than he was already in, and as she had the power and right, independent of that contract, to sell her land to the proposed purchaser, she had the right, in the forum of conscience as well as at the bar of the law, to accept the terms of the contract of sale without ratifying the contract between Miller and Straub, either upon the ground of adoption or estoppel." *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953.

But this authority goes somewhat farther than the holding in most jurisdictions as to what amounts to the ratification of an unauthorized contract, but under the facts of that case it may correctly be placed upon the failure to establish an agency by estoppel.

"The general rule of law is that if an agent, in the conduct of his agency, employs a subagent, without authority to bind his principal, expressly given or fairly presumptive from the particular circumstances or the usage of business, the subagent must look to his immediate employer for his pay, and has no claim for compensation against the agent's principal, between whom and the subagent no privity exists." *Jenkins v. Funk* (C. C.) 33 Fed. 915; *Jones v. Brand*, 106 Ky. 410, 60 S. W. 879; *Bonwell v. Howes*, 2 N. Y. Supp. 717; *Rice v. Post*, 78 Hun, 547, 29 N. Y. Supp. 553; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; 2 O. J. p. 778, § 445; Mechem on Agency, § 1701.

[13] Nor has the plaintiff established an estoppel, for he has not changed his situation to his detriment in reliance upon the principal's conduct.

"The estoppel works in favor of the third party who has dealt in good faith with the agent upon the strength of the representations made by the principal." 4 Modern American Law, p. 20, § 24.

[14] The learned judge of the trial court misapprehended the law in his charge to the jury. In submitting the first instruction quoted, the right of the plaintiff to recover was not made to depend upon whether Mrs. Brutinel had agreed directly or indirectly to pay him a commission or not. The issue whether or not Mrs. Brutinel authorized Dunn either directly or indirectly to employ Nygren at her expense was so important that the jury should have been instructed to find a verdict for the defendant, if such employment was not so authorized, unless the employment, if unauthorized, was in some way ratified by Mrs. Brutinel. The agreement of Dunn with the plaintiff would not bind the defendant, unless she authorized him to contract for her or ratified the contract when made, or by reason of her representations to the plaintiff, who relied thereupon to his detriment, she is estopped to deny the employment.

[15] The last instruction quoted is particularly prejudicial, for it excluded from the jury a consideration of the most important issue in the case, and in effect authorized the jury to determine whether in their judgment they thought it just or desirable that the defendant should be held liable in this case. No other parts of the charge did or could cure these errors.

"The court, however, in cases of this sort, should carefully instruct the jury as to their function in the matter, and as to the rules of

law by which they are to be guided. That function is not to determine whether the jury think it might be just or desirable or appropriate or convenient that the alleged principal should be held in the given case, but to decide whether, according to the rules of law, the alleged principal has in fact by word or conduct authorized the assumed agent to perform the act in question, or has, by conduct rationally and logically tending to that end, led the other party, who has himself exercised due care and caution, reasonably to believe that such authority has been conferred and to act upon such belief. What the legal rules are which govern such situations should be explained by the court; and it is the duty of the jury to apply to the facts in the case the rules of law given them by the court. It is not for juries to make the law of agency." *Mechem on Agency*, § 297.

Upon the uncontroverted evidence in the record the plaintiff's employment was by Dunn, and between the plaintiff and defendant no privity, express or implied, exists, and neither by ratification nor estoppel is she under any obligation to compensate him. To sustain the judgment in this case it would be necessary to hold that the jury in arriving at their verdict have a legal right, in the absence of any evidence in regard thereto, to conjecture and assume necessary and controlling facts, which, under the law, is beyond the province of a jury. The plaintiff may have a valid claim for remuneration. If he has, the wrong defendant has been selected to pay it. It follows, from the views we have expressed, that the request for an instructed verdict should have been given. On the facts contained in the record, no judgment should have been rendered against the defendant.

For the reasons given, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

ROSS, C. J., and CUNNINGHAM, J., concur.

(17 Ariz. 506)

TROUTNER v. STATE. (No. 394.)

(Supreme Court of Arizona. Feb. 10, 1916.)

INTOXICATING LIQUORS — 131 — OFFENSES — UNLAWFUL SALE — INTENT.

Const. art. 23, § 1, declares that every person who sells any intoxicating liquor shall be guilty of a misdemeanor. Pen. Code 1913, § 24, subd. 4, defining the classes of persons capable of committing crimes, excepts those who commit the act under a mistake of fact which disproves any criminal intent. Accused, charged with selling intoxicating liquors, asserted that he did not know of the intoxicating nature of the liquors. *Held*, that while, as respects crimes involving moral turpitude, criminal intent or guilty knowledge is an essential element, that rule does not apply to a violation of the prohibition amendment.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 140, 161; Dec. Dig. § 131.]

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

I. E. Troutner was convicted of selling and disposing of intoxicating liquors, and he appeals. Affirmed.

J. J. Cox and James E. Nelson, both of Phoenix, for appellant. Wiley E. Jones, Atty. Gen., and Leslie C. Hardy and Geo. W. Harben, Asst. Attys. Gen., for the State.

ROSS, C. J. Appellant was tried and convicted upon an information charging him with the crime of selling, exchanging, giving, bartering, and disposing of certain intoxicating liquors. He was tried by a jury and found guilty. From the judgment of conviction he appeals.

The appellant asked the court to instruct the jury as follows:

"If you believe from the evidence in this case, beyond a reasonable doubt, that the drink sold in this case was intoxicating as alleged in the information, but still further believe that at the time defendant sold the same he sold it honestly believing it was not intoxicating, then, in such event, the defendant would not be guilty, and it will become your duty to acquit him."

This requested instruction was refused by the court, and the jury was told by the court:

"That the law of this state does not permit one to sell intoxicating liquor and then be heard to say that he did not know that the liquor was intoxicating. He is bound under the law to know. The law presumes that when he sells liquor he knows what he is selling: that is, whether it is intoxicating or not. The prohibition amendment is intended to prevent any traffic in intoxicating liquors. No excuses are recognized or permitted. If one sells intoxicating liquor, he is liable. It is his duty to know what he sells, and he cannot guess at it or rely upon some one else's statement."

The appellant complains of the court's refusal to give the requested instruction and of the submission to the jury as the law of this state of the converse of the proposition contained in his request.

The prohibition amendment (article 23, § 1) reads:

"Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind to any person in the state of Arizona, * * * shall be guilty of a misdemeanor. * * *"

In crimes involving moral turpitude, criminal intent or guilty knowledge is, of course, generally recognized as an essential element. This is true whether the offense be one at common law or by statute. Society has so developed and extended that it has become necessary, in order to protect it, to pass many laws forbidding things to be done or commanding things to be done, the neglect to do or the doing whereof had theretofore been regarded as innocent and permissible. Most crimes falling under this head are designated as *malum prohibitum* in contradistinction to those crimes that are bad in themselves and in which criminal intent or guilty knowledge is essential.

That the Legislature may make the doing of an act or the neglect to do something a crime in the absence of criminal intent is well settled. The intent of the Legislature therefore, in any given piece of legislation,

is the controlling factor. It is said in 8 R. C. L. 62:

"Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design. There are many instances in recent times where the Legislature in the exercise of the police power has prohibited, under penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute."

In *Commonwealth v. Weiss*, 139 Pa. 247, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182, the defendant was charged with violating a law forbidding the sale of oleomargarine, and he defended on the ground of ignorance of the nature and quality of the article sold. The court stated the rule we are now considering so well that we quote at some length:

"Whether a criminal intent, or a guilty knowledge, is a necessary ingredient of a statutory offense, therefore, is a matter of construction. It is for the Legislature to determine whether the public injury, threatened in any particular matter, is such and so great as to justify an absolute and indiscriminate prohibition. Even if, in the honest prosecution of any particular trade or business, conducted for the manufacture of articles of food, the product is healthful and nutritious, yet, if the opportunities for fraud and adulteration are such as threaten the public health, it is undoubtedly in the power of the Legislature, either to punish those who knowingly traffic in the fraudulent article, or, by a sweeping provision to that effect, to prohibit the manufacture and sale altogether. The question for us to decide, therefore, is whether or not, from the language of the statute, and in view of the manifest purpose and design of the same, the Legislature intended that the legality or illegality of the sale should depend upon the ignorance or knowledge of the party charged. The statute in question was an exercise of the police power, and the act was sustained upon this ground, not only in this court, but also in the Supreme Court of the United States. *Powell v. Com.*, 5 Cent. Rep. 890, 114 Pa. 265 [7 Atl. 913, 60 Am. Rep. 350]; *Powell v. Pennsylvania*, 127 U. S. 678 [8 Sup. Ct. 992], 32 L. Ed. 253. The prohibition is absolute and general; it could not be expressed in terms more explicit and comprehensive. The statutory definition of the offense embraces no word implying that the forbidden act shall be done knowingly or willfully, and, if it did, the design and purpose of the act would be practically defeated. The intention of the Legislature is plain, that persons engaged in the traffic shall engage in it at their peril, and that they cannot set up their ignorance of the nature and qualities of the commodities they sell, as a defense."

The language in our prohibition amendment is "absolute and general." "Every person" who (not he who knowingly or with guilty knowledge) sells intoxicating liquor "shall be guilty." It is all comprehensive—it excludes none. It makes the act of sale of the forbidden article a crime. He who would avoid any violation of its terms must not sell intoxicating liquor, and, having done the

thing forbidden, he may not excuse his act upon ignorance of the fact of its intoxicating quality. He is irrebuttably presumed to know the quality of the article sold, and if it turns out to be intoxicating he may not escape upon the plea of ignorance. To construe the prohibition amendment otherwise we would have to insert words not found therein.

In ascertaining the intent of the lawmaking body in the enactment of this prohibition law, sight of its purpose should not be overlooked. Unquestionably, the purpose was to place a ban upon the traffic in intoxicating liquors, and this purpose would be frustrated, if not entirely destroyed, if ignorance of the intoxicating quality of the article sold could be interposed as a defense. Ignorance of the law never excuses, and the rule is as absolute that ignorance of the fact never excuses if that be the declaration of the law-making body.

The rule announced has been almost universally the one adopted by the courts of the country in the construction of similar statutes. The courts that have adopted a different rule have either been influenced by special statutes, or have, in our opinion, pursued an erroneous course of reasoning. Where ignorance of the fact has been held a good defense, we think too much stress has been given to the rights of the defendant and too little consideration of the rights of society. While it may seem a serious hardship to inflict punishment upon one who has acted innocently, yet the fact remains that the act was of his own volition, generally fruitful of benefits to him and inimical to the rights of the general public. He, then, in our opinion, should suffer and the general policy of the law prevail. This can be only when the rule is unbending.

The courts holding that the maxim of the criminal law, "*Ignorantia facti excusat*," applies seem to be limited to Ohio, North Carolina, and Texas. *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614; *State v. Powell*, 141 N. C. 780, 53 S. E. 515, 6 L. R. A. (N. S.) 477; *Walker v. State*, 50 Tex. Cr. R. 495, 98 S. W. 843.

Texas has a general statute providing that: "If a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense." *Vernon's Ann. Pen. Code* 1916, art. 46.

And it was held in *Patrick v. State*, 45 Tex. Cr. R. 537, 78 S. W. 947, that this statute was applicable to all offenses, unless specially excepted. We find no fault with that holding; the language of the statute is broad enough to apply to crimes both *malum prohibitum* and *malum in se*. The Texas decisions, however, are relied upon by appellant for a reversal, because he says subdivision 4 of section 24, Penal Code 1913, is like the Texas statute just quoted. Section 24 provides that:

"All persons are capable of committing crimes except those belonging to the following classes:

* * * (4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent."

This clearly has reference to crimes in which "criminal intent" or guilty knowledge is an essential ingredient. It is manifest by the language itself as also by the whole context of section 24. The other "persons" mentioned in section 24 as incapable of committing crimes are children under 14 years of age, not knowing the wrongfulness of their acts, and idiots, lunatics, and insane persons etc.—persons incapable of having or entertaining a criminal intent. Persons of sound mind and unquestioned mental competency, and therefore capable of committing crimes, may, in those cases in which a criminal intent is essential, plead as a defense ignorance or mistake of fact for the purpose of disproving any criminal intent. They are, for the purposes of their defense, placed in the same category with persons mentally incompetent to form a criminal intent, but, in that class of acts the mere doing of which is made by law the crime regardless of the purpose or intent, persons of sound mind are not entitled to immunity because of ignorance or mistake of fact. Therefore subdivision 4 can only have reference to those crimes in which a "criminal intent" is necessary. 12 Cyc. 147.

In *United States v. Stofello*, 8 Ariz. 461, 76 Pac. 611, the defendant was charged with selling intoxicating liquor to an Indian in violation of the laws of Congress. The court held the ignorance of the defendant that the person to whom the sale was made was an Indian was no defense, in this language:

"It will be noted that the statute, in plain terms, makes the selling, giving, or disposing of intoxicating liquor to an Indian, a ward of the government, under the charge of an Indian superintendent or agent, a crime. The word 'knowingly' is not used in the act, nor is any word of similar import found therein. An examination of the authorities has satisfied us that the offense created by the statute is of that class of crimes in which knowledge or guilty intent is not an essential ingredient, and need not be proven. The doing of the prohibited thing is made an offense, without regard to the purpose or intent. Such crimes are in the nature of police regulations, imposing criminal penalties for their violation, without regard to purpose or intent. The object of such statutes is to require such diligence as will render their violation impossible; the end sought being the protection of the public"—citing cases.

We have in our statutes many laws for the protection of children; thus it is a crime to sell or give to any minor intoxicating liquor, or to permit a minor under 16 years of age to enter any saloon or place of entertainment where intoxicating liquors are sold, or to sell, give, or furnish to any minor under 18 years of age cigars, cigarettes, cigarette paper, smoking or chewing tobacco of any kind or character, or to use vulgar or obscene language in the presence of any child, and, if it be required that guilty knowl-

edge or criminal intent is essential to a conviction under these statutes, it would result in few convictions and would largely nullify and defeat the purpose of the laws.

Haynes v. State, 118 Tenn. 709, 105 S. W. 251, 13 L. R. A. (N. S.) 559, 121 Am. St. Rep. 1055, 12 Ann. Cas. 470, is a leading case in which the court discusses both views here contended for, but sustains the proposition that ignorance of fact is no defense in cases of this character. In that case the court said:

"It is the sale of intoxicating liquors without license which the statute prohibits, and it is unlawful to sell intoxicating liquor of any character without license. This being so, the seller must find out at his peril whether the liquor he proposes to sell is intoxicating or not. Guilty knowledge is not by the statute made an ingredient of the offense."

In the case and the note thereto (12 Ann. Cas. 471, 472) the cases bearing upon the point show that the great weight of authority sustains the proposition quoted in the decision. We are well satisfied that the court did not err in its refusal to give the instruction requested by appellant, and that it correctly stated the law in the instruction given. Judgment is, accordingly, affirmed.

FRANKLIN and CUNNINGHAM, JJ., concur.

(17 Ariz. 513)

STURGEON v. STATE. (No. 393.)

(Supreme Court of Arizona. Feb. 12, 1916.)

1. COMMERCE ⇄ 14—INTOXICATING LIQUORS ⇄ 17—INTERSTATE COMMERCE—PROHIBITION.

The Webb-Kenyon Act (Act Cong. March 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1913, § 8739]), having divested intoxicating liquors of their interstate character, they become subject to the state police power, and Const. art. 23, § 1, prohibiting the disposal or introduction into the state of intoxicating liquors, is valid, not being an interference with interstate commerce, notwithstanding Congress alone can regulate such commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 30, 92; Dec. Dig. ⇄ 14; *Intoxicating Liquors*, Cent. Dig. §§ 21-23; Dec. Dig. ⇄ 17.]

2. INTOXICATING LIQUORS ⇄ 139—OFFENSES—INTRODUCTION INTO STATE.

As Const. art. 23, § 1, prohibiting the sale of intoxicating liquors or the introduction into the state, does not make the drinking of intoxicants an offense, the introduction into the state of intoxicating liquors intended for accused's own use is not an offense, and the fact that they were intended for his own use may be shown as a defense.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 149; Dec. Dig. ⇄ 139.]

3. INDICTMENT AND INFORMATION ⇄ 125—DUPLICITY—"BRING"—"INTRODUCE."

An information charging that accused did unlawfully "bring" and "introduce" intoxicating liquor into the state from outside is not duplicious as charging the offense of bringing, and the offense of introducing, intoxicating liquor into the state, for in view of Pen. Code, § 941, requiring words to be construed in their usual acceptance, the two words must be construed as

synonymous, charging the single offense, denounced by Const. art. 23, § 1, of introducing intoxicating liquor into the state.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. ¶ 125.

For other definitions, see Words and Phrases, First and Second Series, Bring; Introduce.]

4. INTOXICATING LIQUORS ¶ 222 — INDIOTMENT—NEGATIVE OFFENSES.

As Const. art. 23, § 1, prohibiting the bringing into the state of intoxicating liquors, does not specifically except intoxicants intended for personal use, though the bringing of such liquors is not an offense, an information charging the bringing into the state of intoxicants need not negative that they were intended for personal use; that being a matter of defense to be urged.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 240-248; Dec. Dig. ¶ 222.]

5. INTOXICATING LIQUORS ¶ 205—OFFENSES—INFORMATION—SUFFICIENCY.

Under Pen. Code 1913, §§ 943, 944, requiring words in an information to be construed in their ordinary sense, and providing that no information is insufficient by reason of any defect in form which does not tend to the prejudice of a substantial right of the defendant, an information charging that accused on or about a certain day before the filing of the information did then and there unlawfully bring and introduce into the state, from outside, intoxicating liquors, to wit, one quart of wine, is sufficient to state an offense under Const. art. 23, § 1, prohibiting the introduction into the state of intoxicants, for it apprises accused of the charge against him.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 225; Dec. Dig. ¶ 205.]

6. INTOXICATING LIQUORS ¶ 238—OFFENSES—DEFENSES.

One bringing intoxicants into the state does so at his peril, it being a matter for the jury to determine whether they were intended for his own use.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. ¶ 238.]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

W. J. Sturgeon was convicted of bringing and introducing into the state intoxicating liquor, and he appeals. Reversed and remanded.

Wupperman & Wupperman, of Yuma, for appellant. Wiley E. Jones, Atty. Gen., and Leslie C. Hardy and Geo. W. Harben, Asst. Attys. Gen., for the State. John H. Campbell and S. L. Kingan, both of Tucson, amici curiæ.

PER CURIAM. The appellant was tried and convicted under an information that charged him with bringing and introducing into the state of Arizona from outside the limits of said state intoxicating liquor, to wit, one quart of wine. He demurred to the information on the ground that it did not negative that it was introduced for his personal use. The demurrer was overruled. On the trial he offered to prove that he brought the intoxicating liquor into the state for his personal use. This offer of proof was denied by

the court. From the judgment of conviction this appeal is prosecuted, the appellant assigning as errors the order overruling his demurrer and the refusal of his offer of evidence of intended personal use. The question, then, as to whether one may introduce into the state of Arizona intoxicating liquors for his personal use, is squarely presented for decision.

[1] The prohibition amendment to the Constitution (article 23, § 1) reads as follows:

"Ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall not be manufactured in or introduced into the state of Arizona under any pretense. Every person who sells, exchanges, gives, barter, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind to any person in the state of Arizona, or who manufactures, or introduces into, or attempts to introduce into the state of Arizona any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, shall be guilty of a misdemeanor and upon conviction shall be imprisoned for not less than ten days nor more than two years and fined not less than twenty-five dollars and costs nor more than three hundred dollars and costs for each offense; provided, that nothing in this amendment contained shall apply to the manufacture or sale of denatured alcohol."

Three crimes are defined and denounced by this section: (1) The traffic in intoxicating liquors; (2) the manufacture of intoxicating liquors; and (3) the introducing or attempt to introduce into the state of intoxicating liquors.

The offense with which the appellant is charged falls within the third class. It is his contention that the provisions of the constitutional amendment making it a crime to introduce into the state intoxicating liquors is unconstitutional as an attempt to regulate interstate commerce. There can be no mistaking the meaning of the language used in the amendment with regard to the introduction of intoxicating liquors; it plainly and clearly attempts to forbid and punish every person "who * * * introduces into, or attempts to introduce into the state of Arizona" intoxicating liquors.

In *Brown v. State*, 17 Ariz. —, 152 Pac. 578, we had occasion to refer to the source from which our prohibition amendment to the Constitution was taken. It was found to be a rescript, with such modifications as to make it applicable to the state, from the act of Congress regulating trade and intercourse with the Indian tribes.

In *United States v. Holliday*, 3 Wall. 407-416 (18 L. Ed. 182), Justice Miller, in searching for the meaning of the congressional act which we adopted, said:

"The act in question, although it may partake of some of the qualities of those acts passed by state Legislatures, which have been referred to the police powers of the states, is, we think, still more clearly entitled to be called a regulation of commerce. 'Commerce,' says Chief Justice Marshall, in the opinion in *Gibbons v. Ogden* [9 Wheat. 1, 6 L. Ed. 23], to which we so often turn with profit when this clause of the Constitution is under consideration, 'com-

merce undoubtedly is traffic, but it is something more; it is intercourse.' The law before us professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one.

"If the act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: 'Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provisions."

That feature of our constitutional amendment, therefore, that undertakes to make it a crime to introduce or attempt to introduce intoxicating liquors into the state, under the federal decisions, pertains to commerce, the regulation of which with foreign countries and between the states and with the Indian tribes is exclusively lodged in the Congress.

It has been many times decided by the courts that intoxicating liquors are subjects of interstate commerce to be regulated by congressional legislation, and exempt from state interference. 7 Cyc. 437, and authorities under note 19; *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *L. & N. Railroad Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 180, 56 L. Ed. 355.

Until 1890, when the Wilson Act was passed (Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1913, § 8738]), the interstate character of intoxicating liquors had been considered and treated as that of other commodities of interstate traffic. Thus, it has been held that a state prohibition law did not reach or affect intoxicating liquors as long as they remained in the original package. *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128. The Wilson Act worked a radical change in the law, and therefore those decisions rendered by the United States courts prior to its enactment are no longer applicable and need not be considered in determining the power of the state to suppress the liquor traffic. Under the Wilson Act, intoxicating liquors when imported into one state from another immediately upon delivery to the consignee, whether in the original package or not, become subject to the law of the state. As was said in *Delameter v. South Dakota*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733:

"In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the states over intoxicating liquor, by the Wilson Act adopted a special rule enabling the states to extend their authority as to such liquor shipped from other states before it became commingled

with the mass of other property in the state by a sale in the original package."

The Wilson Act did not divest, or attempt to divest, intoxicating liquors of their interstate commerce character further than to make them subject to the local laws at an earlier date. Prohibition in one state was no impediment, under the Wilson Act, to the shipping or transporting of intoxicating liquors therein, and the interstate traffic in intoxicating liquors, it is well known, continued to thrive and prosper with little abatement in "dry" territory, notwithstanding the Wilson Act.

If it be held that the introduction clause of the amendment is effective, it can only be on account of decided changes wrought in the federal laws in regard to interstate shipments of intoxicating liquors. Before the passage of the Webb-Kenyon Act, under all the decisions, it would be ineffectual, and the question is: How far and to what extent does the Webb-Kenyon Act alter the law as it formerly existed? That act, including its title, passed on March 1, 1913, omitting extraneous words, reads as follows:

"An act divesting intoxicating liquors of their interstate character in certain cases.

" * * * The shipment or transportation * * * of * * * intoxicating liquor, * * * from one state * * * into any other state, * * * which * * * intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, * * * is hereby prohibited." U. S. Stats. 62d Congress, Sess. 3, c. 90.

As to the purpose and meaning of the Webb-Kenyon Act, we fall back upon the opinion of the United States Supreme Court, as expressed by Justice Day, in *Adams Express Company v. Kentucky*, 238 U. S. 190-198, 35 Sup. Ct. 824, 826 (59 L. Ed. 1267, Ann. Cas. 1915D, 1167):

"That the act did not assume to deal with all interstate commerce shipments of intoxicating liquors into prohibitory territory in the states is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in *certain cases*. What such cases should be was left to the *test of the act* to develop. * * *

"It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. *Such shipments are prohibited only when such person interested intends that they shall be possessed, sold, or used in violation of any law of the state wherein they are received.* Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the *sole jurisdiction of Congress* under the federal Constitution." (Italics ours.)

In *Ghera v. State*, 16 Ariz. 344, 146 Pac. 494, we said, concerning the prohibition amendment:

"Evidently the main purpose and controlling principle pervading the amendment is to prohibit the manufacture in Arizona, and to prohibit the disposal thereof to any person in Arizona in any way, of ardent spirits, ale, beer, wine, or intoxicating liquor of any kind. It is not questioned in this case that the state may, in the proper exercise of its police powers, enact such legislation. The power to regulate, restrain, or prohibit whatever is injurious to the public health and morals is universally recognized."

It being settled that traffic in intoxicating liquor in this state is a crime, it follows that the shipment, transportation, or introduction of intoxicating liquor into the state with the intention to sell, barter, exchange, give away, or dispose of, divests, under the Webb-Kenyon Act, such intoxicating liquor of its interstate commerce character, and leaves the state free in the exercise of its police powers to denounce such introduction as a crime and to prescribe penalties for its commission. In other words, one who introduces intoxicating liquor into the state with the purpose and intention of violating the laws of the state by disposing of the same may not now interpose the defense that he is engaged in interstate commerce, for the reason that the article that he is handling has been divested of its interstate character by the Webb-Kenyon Act. Intoxicating liquor in the aspect of being "received, possessed, or kept, or in some way used in a manner prohibited by the laws of the state to which it is to be, or is in fact, imported," is an out-law and divested of its interstate character and withdrawn from interstate protection at the hands of the federal government. *Southern Express Company v. State*, 188 Ala. 454, 66 South. 115. We quote further from the same case:

"For the reasons above stated, we are of the opinion that interstate commerce cannot, since the passage by Congress of the Webb law, be used as a subterfuge by common carriers or other corporations, firms, or persons for having in their possession or for delivering to any other person liquors intended to be used, not for lawful, but for unlawful, purposes in the state. That which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States." *Peirce v. New Hampshire*, 5 How. 504, 12 L. Ed. 256; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. Intoxicating liquors and beverages intended for unlawful use in Alabama are, in so far as the state of Alabama is concerned, since the passage of the Webb bill, not articles of commerce, and cannot claim protection as such."

What is said by the Alabama court concerning the status of intoxicating liquor in that state fittingly applies and well defines its status in Arizona. We are of the opinion that, when any person introduces or attempts to introduce intoxicating liquor into this state with the purpose and intention of violating any law of the state, such liquor no longer "belongs to commerce" and "is within the

jurisdiction of the police power of the state," and that such person may be punished for his act as of a crime.

[2] The appellant sought to show by evidence that the liquor with which he was charged with introducing into the state was for his personal use, upon the theory that the prohibition amendment to the Constitution does not denounce or define personal use of intoxicating liquors as a crime. He contends that it is not unlawful in this state to have in possession or to drink intoxicating liquors; that the Webb-Kenyon Act does not divest or attempt to divest intoxicating liquors of their interstate character when shipped, transported, or introduced into the state from without the state to be possessed or used for a lawful purpose.

Search the prohibition amendment as you will, there is no suggestion or intimation in any form contained therein prohibiting the possession or individual consumption of intoxicating liquors in Arizona. Indeed, it was freely admitted, upon the argument by counsel who appeared as *amici curiæ*, that it is not a crime to possess or drink intoxicating liquors in Arizona, and while the Attorney General, at least in his brief, insists that the use or possession is a crime, he fails to cite us to a single instance where a prosecution has been begun in any county of the state against any person for drinking intoxicating liquors or having it in his possession. The records of the courts throughout the state evidence many prosecutions for the sale of intoxicating liquors since the prohibition amendment went into effect. It is common knowledge that personal use has been more or less prevalent throughout the state, and the effort has been, not to punish the user, but the seller thereof. The bootlegger, and not his patrons, have had the attention of the prosecuting officers of the state.

We think it is the consensus of opinion, not only of the legal profession, but of the general public, that it is not a crime to possess or drink intoxicating liquors in this state. This universal and, no doubt, correct construction of the prohibition amendment, may easily account for the lack of effort upon the part of the prosecuting officers of the state to punish for the mere drinking or possession of intoxicating liquors. So far as the enforcement of the prohibitory law is concerned, that this has been the general usage and practical construction of the law by the officers of this state may not be gainsaid and is so admitted by the Attorney General. If it had been made a crime to use and possess intoxicating liquors in this state, its introduction for that purpose would relieve it of its interstate commerce character, so that its denouncement as a crime would fall within the police power of the state. Like sale and barter, then use and possession would be in violation of the laws of the state. The *amici curiæ* say in their brief:

"Nor is there any doubt but that the people of the state by their Constitution may prohibit the use of intoxicants within the state."

Although there are some courts holding the contrary view, we are inclined to agree with counsel in this proposition. In *Ex parte Crane*, 27 Idaho, 871, 151 Pac. 1006, decided September 11, 1915, the court upheld a statute of Idaho making "possession" of intoxicating liquors a crime, and gave reasons in support of that judgment that appear to us to be pregnant with common sense and logic. However, it is not a question of what the law might be, but what it is. Counsel further say:

"Its (the Webb-Kenyon law) purpose was to enable the states to meet intoxicating liquors at their borders and to prevent such liquors from becoming a part of the general property of the state."

This proposition may be granted also, but the purpose of the state has so much to do with the effectiveness of the Webb-Kenyon Act as applied to its laws that the Webb-Kenyon Act may have no effect whatever, except as it may co-ordinate and dovetail with the state legislation concerning the liquor traffic. In other words, if the state takes no action towards suppressing the liquor traffic, the Webb-Kenyon law can have no application; if it does take action, the Webb-Kenyon law comes to its aid to the extent that the state's laws invoke its provisions and no further.

One of the cases most relied upon by the respondent is *State of West Virginia v. Adams Express Company*, 219 Fed. 794, 135 C. C. A. 464. However, the question we have to decide was not before that court, as will be seen from the following quotation:

"We are not concerned in this case with the question whether the state Legislature or the state Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another state and bring them into the state of West Virginia for his own consumption; but with the very different question whether the state may forbid the sale of liquor in its borders and makes the delivery by a carrier a sale at the place of delivery, and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the state."

The real question involved in the *West Virginia Case* was whether the Legislature of that state could change the common-law rule so as to make the place of delivery in the state the place of sale. That question was decided by the court in the affirmative.

State v. United States Express Co., 164 Iowa, 112, 145 N. W. 452, was an "action in equity to enjoin an alleged liquor nuisance; to enjoin defendant from distributing or delivering intoxicating liquors, or aiding in the distribution * * * thereof, contrary to law, from transporting, conveying, and carrying, or distributing liquors, either in cars, wagons, or otherwise, contrary to law, in Wapello county, Iowa. * * * The defendant answered, pleading in sub-

stance that it is a common carrier, engaged in interstate commerce. * * * The injunction prayed for was granted, but in the course of the opinion the court said:

"Eliminating, as we must for the purposes of this case, the question as to an interstate shipment for the personal use of the buyer and the consignee, there is no room for doubt as to the proper interpretation of the act."

Palmer v. Southern Express Co., 129 Tenn. 116, 165 S. W. 236, was a case involving the construction of the prohibition laws of Tennessee in conjunction with the Webb-Kenyon Act. The court said:

"It is perceived that the thing which the act prohibits is the interstate shipment or transportation of the liquors mentioned therein, when intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of the state, etc., into which the shipment is made."

"It is enough to say, for the disposition of the case before us, that it does not appear that the liquors shipped were intended to be sold or used in violation of any law of the state; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill, confessed by the demurrer, and agreed to on the record at the hearing in the court below, that the liquors were purchased for the personal use of complainant and his family. This was a lawful use, and indeed permitted by the statute in question."

Adams Express Company v. Kentucky, supra, was heard in the Court of Appeals of Kentucky upon a stipulation:

"That the liquors were intended by said consignees for their personal use and were so used by them, and were not intended by them to be sold contrary to law, and were not so sold by them."

That court, speaking of this stipulation, said:

"This being the purpose for which the liquor was intended to be received, possessed, and used, it is clear that the consignees who received from the carrier the liquor did not, in so doing, violate or intend to violate any law of this state, because there is not and never has been any law of this state that prohibited the citizen from purchasing, where it was lawful to sell it, intoxicating liquor for his personal use, or from having in his possession for such use liquor so purchased. * * * 'It therefore appears that the issue in this case really comes down to this: Was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the Constitution and laws of the state, and the opinions of this court, that it was not.'"

The Supreme Court of the United States, taking the above-recited facts found in the opinion of the Court of Appeals of Kentucky as true, made the following deduction:

"It therefore follows that, inasmuch as the facts of this case show that the liquor was not to be used in violation of the laws of the state of Kentucky, as such laws are construed by the highest court of that state, the Webb-Kenyon Law has no application and no effect to change the general rule that the states may not regulate commerce wholly interstate."

The Kentucky prohibitory statute made it unlawful to bring into, deliver, or distribute

into local option districts intoxicating liquors. It can readily be seen that its features pertaining to interstate commerce are very similar to our constitutional amendment in that regard. The facts stipulated are identical with those that the appellant offered to prove as a defense in this case. The bearing of the Webb-Kenyon Act upon the two cases it may be said is identical. Counsel have not attempted to distinguish this case from the Adams Express Company Case, but offer to suggest that, if this court determines that personal use or possession of intoxicating liquors in this state is unlawful, its decision will not be disturbed by the Supreme Court of the United States. If we had any predilection in the case, it would have to yield to the law. We must announce the law as we find it and may not judicially legislate. Legislation is the function of a separate department of the government.

In so far as the decision in Adams Express Company v. Kentucky has influenced our determination, we wish it to be understood that it was not the announcement of the law of the highest court of Kentucky, but of the Supreme Court of the United States, to which we have given most credence. Upon the stipulation in that case that the liquor was shipped into Kentucky for the personal use of the consignees, and such use not being a crime under the laws of Kentucky, neither that court nor the Supreme Court of the United States could have reached a different conclusion. It was upon the ascertained fact that the liquor imported into Kentucky was to be put to a use recognized as lawful in that state that the highest court of the land held that the prohibition of the Webb-Kenyon Act did not apply, and the decision by the Kentucky court is in accord with and influenced by repeated adjudications on the subject by the federal court.

It is true the Court of Appeals of Kentucky went further than was necessary in that case, and quoted a dictum taken from a prior opinion of that court in which it is observed that under the Constitution of that state the Legislature was not competent to "prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public." We do not go so far in this case. It was not so decided in the Kentucky Case, and is not so decided here. We will say, however, that the Idaho court, in a well-considered case based on facts calling for a decision of the question, has held contrary to the dictum in the Kentucky Case; its decision being based, as we conceive it, upon sound, healthy, and convincing reasons, and supported by a line of decisions.

We have not discussed the constitutionality of the Webb-Kenyon Act, as it was not raised by the appellant. We assume that it is constitutional; it has been so decided to be by many of the state courts and the federal Circuit and District Courts.

The evil that all liquor laws are directed toward is the drink habit. But two states, so far as we have been able to discover, have taken decisive and drastic steps to that end by forbidding to its citizens the right to possess or drink intoxicating liquors. These two states are Idaho and South Carolina. The highest court of the former state has held the law a proper exercise of its police power. *Ex parte Crahe, supra*. The South Carolina law was passed in 1915 and has not been before the courts to our knowledge. While legislation has been directed to suppress the traffic in liquor, it is apparent that a sale of liquor is in itself harmless; neither can possession hurt any one—it is the use of it that is deleterious to the individual and society and thus sanctions prohibiting liquor laws as an exercise of police regulations established by the lawmaking power for the prevention of intemperance, pauperism, and crime.

It not being unlawful in the state of Arizona to have or personally use intoxicating liquors, its introduction into the state for personal use is not prohibited by the Webb-Kenyon Act, and the prohibition amendment, in so far as it attempts to interdict its shipment, transportation, or introduction into the state for a lawful purpose, is ineffectual as an attempt to regulate interstate commerce. It follows that the lower court committed error in refusing appellant's offer of evidence to show that he had brought the liquor into the state for his personal use.

[3] The charging part of the information filed by the county attorney is as follows, to wit:

"The said W. J. Sturgeon, on or about the 14th day of August, 1915, and before the filing of this information, at and in the county of Yuma, state of Arizona, did then and there willfully and unlawfully bring and introduce into the state of Arizona, from outside the limits of said state, intoxicating liquor, to wit, one quart of wine, in violation of the provisions of the Constitution of the state of Arizona, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the state of Arizona."

The defendant says that the information is bad for duplicity, because it charges the alleged offense of "bringing" with the offense of "introducing" intoxicating liquor into the state, the word "bring" not appearing in the prohibitory law. In answer to this, it is sufficient to say that the word "introduce" as used in the law is not a technical word. It is one of ordinary meaning and common acceptance, and is used as such in the constitutional amendment. "Introduce" is a verb transitive, derived from the latin words "intro," within, plus "ducere," to lead, meaning to lead or bring in. Webster's Dictionary. Introduce: (L. introduce, lead in, bring into practice, bring forward) To lead or bring in, conduct or usher in, as, to introduce foreign produce into a country. Century Dictionary. Introduce:

To bring, lead or put in. Standard Dictionary. The words "bring" and "introduce" as used in the information are synonyms. It is a Code provision that:

"The words used in an indictment or information are construed in their usual acceptance in common language, except such words and phrases as are defined by law, which are construed according to their legal meaning." Section 941, Penal Code 1913.

[4] It is urged against the sufficiency of the indictment that it does not negative any exemption of a lawful use to which intoxicating liquor may be put; that under the laws of Arizona it is not unlawful for one to drink intoxicating liquor, or have such liquor in his possession for his individual consumption; therefore the information is obnoxious to a demurrer because it does not negative such possession or lawful use. The constitutional amendment does not in terms relieve any specified acts or persons from the general operation of the prohibitory words of the law, and such not entering into a description of the offense, or as a qualification of the language defining or creating the offense, a negative averment of matter of exemption is not necessary. If an exemption exists, it is a matter of defense which the prosecution need not anticipate. *Ferrell v. State*, 45 Fla. 26, 34 South. 220; *Com. v. Davis*, 121 Mass. 352; *Com. v. Shannihan*, 145 Mass. 99, 13 N. E. 347; *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432; *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655; *In the Matter of Kate Lieritz*, 166 Cal. 298, 135 Pac. 1129; *People v. Dial* (Cal. App.) 153 Pac. 970; *Bishop's New Criminal Law* (2d Ed.) pars. 513-631.

[5] The information is not objectionable on this ground. If the point is available at all, it is a matter of defense to be taken advantage of by evidence on the trial of the case. The information is entitled in a court having authority to receive it. It was returned and presented to the court by the county attorney of the county in which the court was held. The defendant is named, and the offense charged was committed at a place within the jurisdiction of the court, and before the filing of the information. The offense charged is clearly and distinctly set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and the offense charged is stated with such degree of certainty as to enable the court to pronounce judgment of conviction according to the right of the case. Under the provisions of the Code, these tests determine the

sufficiency of the information. Section 943, Penal Code 1913. The Code further says.

"No indictment or information is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." Section 944, Penal Code 1913.

From these provisions of the Code, and the views which we have expressed, it follows that the information is sufficient to state a public offense under the constitutional amendment, and the demurrer was properly overruled.

[6] From what has been said it must not be understood that the mere claim that intoxicating liquor has been brought in by one for his personal use renders such a person immune from prosecution. Any one bringing intoxicating liquor into Arizona from outside the limits of the state does so at his peril. Whether he subjects himself to punishment or not depends on the use to which the intoxicating liquor is intended to be put. If the jury, under appropriate instructions as to what use would be a violation of the law of this state, are convinced beyond a reasonable doubt from all the evidence and circumstances in the case that such intoxicating liquor is intended by any person interested therein to be "received, possessed, sold, or in any manner used" in violation of any law of Arizona, it would be their duty to convict. If the use intended violates no law of this state, then no offense has been committed.

The guilt or innocence of a person so charged would become a question of fact in each case, to be determined as other disputed questions of fact are determined under the law.

The trial court erred to the prejudice of the defendant in rejecting the testimony offered as to the use he intended to put the liquor he is charged with unlawfully bringing into the state. The judgment of conviction must therefore be reversed, and the cause remanded, with directions to grant the defendant a new trial.

Before concluding, it may be properly observed that, so long as the law accords to the citizen the privilege of possessing and using intoxicating liquors for his individual consumption, this privilege may not be used as a license to violate the law by invoking that privilege as a subterfuge for an illicit introduction or use, nor should he consider it an invitation to pass the danger line lest he find himself wrecked, for the way of the transgressor is hard.

Reversed and remanded.

(171 Cal. 761)

GUYER v. STERLING LAUNDRY CO.
(L. A. 3498.)(Supreme Court of California. Jan. 27, 1916.
Rehearing Denied Feb. 24, 1916.)

1. MASTER AND SERVANT §155, 219—INJURIES TO SERVANT—LIABILITY OF MASTER—WARNING OF DANGER.

A master is not liable for failure to warn the servant of an obvious danger, since the employé ordinarily assumes the known risks and dangers of his occupation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 310, 610-624; Dec. Dig. §155, 219.]

2. MASTER AND SERVANT §101, 102—INJURIES TO SERVANT—LIABILITY OF MASTER—DUTIES.

An employer is not bound to furnish the safest machinery or the best methods and appliances for the conduct of his business, but this rule applies only to his duty as to employé who have arrived at majority or at maturity of judgment or discretion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §101, 102.]

3. MASTER AND SERVANT §101, 102—INJURIES TO SERVANT—LIABILITY OF MASTER—DUTIES.

The duty of an employer is only to furnish reasonably safe machinery for his employé, but what is reasonably safe depends upon the maturity and discretion of the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §101, 102.]

4. MASTER AND SERVANT §121—INJURIES TO SERVANT—LIABILITY OF MASTER—NEGLIGENCE.

To place an immature boy or girl at work upon a laundry mangle unprotected by a guard is negligence, and shows failure of the employer to supply the employé with a reasonably safe appliance as demanded by the law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. §121.]

5. MASTER AND SERVANT §121—INJURIES TO SERVANT—LIABILITY OF MASTER—NEGLIGENCE.

Where a particular type of laundry mangle is ordinarily equipped with a guard, and the employer's attention was called to the fact that one used by his operative was not so equipped, it was negligence on his part to fail to have it so equipped, for which he was liable to the operative who was injured because of the absence of the guard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. §121.]

6. MASTER AND SERVANT §289—INJURIES TO SERVANT—ACTIONS—QUESTION FOR JURY.

Whether contributory negligence was shown in a servant's action for injuries is a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. §289.]

Department 2. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Maud Guyer against The Sterling Laundry Company, a copartnership consisting of Charles H. Clay and William V. Clay. From a judgment for plaintiff and

order denying a motion for new trial, defendants appeal. Affirmed.

Morton, Holzfet & Morton, of Los Angeles, for appellants. R. A. Dunnigan and E. B. Drake, both of Los Angeles, for respondent.

HENSHAW, J. Plaintiff, a young woman 19 years of age, sustained severe injury to her hand while in the employ of defendant. She was engaged in operating a machine known as a "baby mangle," a rapidly revolving heated cylinder about six feet long, used for the purpose of drying and pressing thin, soft fabrics such as handkerchiefs, towels, etc. Plaintiff had been operating this machine for about two months before the accident happened. The machine itself appears to have been in perfect working order. At the time of the accident, plaintiff was holding an apron in her hands and was stretching the apron to its limit to take out a crease so that it would be pressed smoothly. While thus engaged her right hand was caught, drawn under the steam-heated roller, crushed, and burned. The injury further resulted in the contraction of the tendons of the fingers so as to incapacitate her from earning her livelihood at her chosen vocation, which was that of seamstress and dressmaker. The machine at which she was employed was not provided with any guard. The guard for such a machine is a rod of brass or other metal so placed in front of the revolving cylinder as to admit the clothes sought to be pressed, but preventing the catching and drawing in of the operator's hands. The complaint charged a failure upon the part of the defendant to provide plaintiff with a machine reasonably suitable and safe for her work, and specifically in failing to see that the machine was equipped with a guard such as has been described. Trial was had before a jury, whose verdict was for the plaintiff. From the judgment which followed and from the denial of defendant's motion for a new trial, it prosecutes this appeal.

[1-3] Many propositions which appellant here advances may promptly be resolved in its favor. Thus it is true that the master is not liable for failure to warn the servant of the danger where that danger is obvious, and that the employé ordinarily assumes the known risks and dangers of his occupation. Also, the evidence shows that plaintiff was sufficiently intelligent to have and did have a realization, indeed, a full appreciation, of the fact that injury to her would certainly result if her hand were caught and drawn under this rapidly revolving steam heated roller. So also it is true, speaking now generally, that so far as concerns an employer's duty to his employé the former is not bound to furnish the safest machinery or the best methods and appliances for the conduct of the particular

operation in which the employé may be engaged. *Sweeney v. Berlin, etc., Co.*, 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *Wormell v. Maine, etc., R. Co.*, 79 Me. 397, 10 Atl. 49, 1 Am. St. Rep. 321. But there is a limitation to this doctrine dictated by humanity, demanded by experience and declared by this court. The cases pronouncing the general doctrine have had to do largely not only with employés who have attained their legal majority, but with employés who have arrived at the maturity of judgment and discretion. In our own books will be found many such cases, as *Bresette v. E. B., etc., Stone Co.*, 182 Cal. 74, 121 Pac. 312. The time fixed by our law for attaining full legal majority—18 years for the girl, 21 years for the boy—embodies a useful and indeed a necessary declaration of the law, since some time must be named when the individual will become entitled to the full rights of the adult and be charged with his full duties and responsibilities. But the law itself cannot change the facts of existence, and no one will argue that merely because a girl of 18 or a boy of 21 has attained legal majority they have thus and thereby been endowed with the care and discretion and judgment of full maturity. Physically they may be fully mature. Mentally a tremendous growth must take place and usually does take place before knowledge has ripened into wisdom and wisdom coupled with experience has developed a sound and sane judgment. A girl of 19 is still in her youth. Youth is ever the time of heedlessness, of impulsiveness, and of forgetfulness. Lacking power of continuous application and concentration, it will, upon the other hand, center its thought for a brief time and to its peril upon one matter to the exclusion of all else. Those who employ young girls and young women in and about machinery which may inflict injury are properly chargeable by the law with knowledge of these self-evident truths, and it becomes therefore their duty to guard youth against its own inevitable shortcomings. The employer in such a case is still charged only with the duty of furnishing reasonably safe machinery for his employés, but an appliance or machine to be reasonably safe in the case of a girl 18 or 19 years of age may properly require more safeguards than would be demanded in the exercise of reasonable care where the employé is a man of mature years and judgment, trained and skilled to his finger tips in the matter of the occupation in which he is engaged.

[4] This court has declared, in the case of another young girl of the same age and injured in like manner in the operation of an imperfectly guarded mangle, that such a machine is inherently dangerous and that it was the duty of the employer, in view of the fact that it was operated by a young girl, to see that there were safety guards and that

they were in good condition. *Quinn v. Electric Laundry*, 155 Cal. 500, 101 Pac. 794, 17 Ann. Cas. 1100. The same declaration is made in another case where a young girl was injured by a like machine. *Larsen v. Bloemer*, 156 Cal. 752, 106 Pac. 62. In the latter case also it happened to the young girl that:

"While attempting to smooth the cloth on the rollers thereof, and without fault on her part, her fingers were caught between the rollers."

And it is in this case laid down as a sound proposition, quoting from *Sibbert v. Scotland Cotton Mills*, 145 N. C. 308, 59 S. E. 79, that:

"Recognizing the danger of such accidents, employers use such safety appliances as are in general use, either to avert the danger or to stop the machine in the event that an injury is imminent."

The too frequent recurrence of accidents such as this, in the operation of mangles, has led to the declaration of law which we repeat and approve, that to set a young girl or young boy at work at such a machine unprotected by a guard is a failure of the employer to supply his operative with the reasonably safe appliance which the law demands.

[5] But to supplement the law the evidence in this case shows, by at least one witness with knowledge of laundry machinery, and experience in various laundries, that all such mangles have guards on them, that this particular mangle was made with a guard, that he put the machine in position for work and called the attention of defendant to the fact that the guard was not on the machine where it should have been, and was told not to mind and not to put it on. We hold therefore that negligence was shown upon the part of defendant.

[6] Whether contributory negligence upon the part of plaintiff was shown, that is to say, whether, as a young girl of 19 years of age, she did not comport herself with the care and prudence due from one of her years and experience, was strictly a question for the jury, and was resolved against defendant's contention.

The judgment and order appealed from are therefore affirmed.

We concur: MELVIN, J.; LORIGAN, J.

(71 Cal. 765)

PLANT v. PLANT et al. (L. A. 3604.)

(Supreme Court of California. Jan. 28, 1916.)

1. TRUSTS §198—SALE OF TRUST PROPERTY—PURCHASE BY TRUSTEE.

The inhibition upon a trustee from purchasing at his own sale is removed by the determination of a court of equity that he may be such purchaser, and a sale under direction of and by officers of such court is not a sale by the trustee, so that there is nothing to prevent him from becoming a purchaser.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 258-265; Dec. Dig. §198.]

2. JUDGMENT \S 822—FOREIGN JUDGMENT—CONCLUSIVENESS—DISTRIBUTION OF ESTATE.

Where the estate of one dying in California was distributed to the heirs "in trust" to use the rent during their lives or until they should mutually agree to sell the property and divide the proceeds equally among the testator's children and the heirs of deceased children, and the testator's Illinois realty was distributed to the testamentary trustees, a judgment of the circuit court of Cook county, Ill., on a bill in equity by defendants herein against the other heirs, including plaintiff, resulting in a decree adjudging that the property be sold for cash to the highest bidder, permitting any of the parties to become purchasers, and in which defendant in good faith purchased the property, and plaintiff received his share of the proceeds, was res judicata and could not be disturbed by the courts of this state upon a collateral attack merely because the decree in this state distributed the property "in trust."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488-1490, 1496-1500; Dec. Dig. \S 822.]

3. TENANCY IN COMMON \S 19—PURCHASE BY COVENANT—JUDICIAL SALES.

A cotenant, who may not purchase and assert an outstanding title against his cotenants, may purchase their own titles at a judicial sale.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 56-59; Dec. Dig. \S 19.]

Department 2. Appeal from Superior Court, Los Angeles County; M. T. Doolling, Judge.

Suit by George W. Plant, a minor, etc., against Charles Plant and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Bernard Potter, of Los Angeles, for appellant. Anderson & Anderson, and Tanner, Taft & Odell, all of Los Angeles, for respondents. D. K. Trask and Trask, Norton & Brown, all of Los Angeles, for executrix.

MELVIN, J. Plaintiff appeals from an adverse judgment. The suit was brought on behalf of the minor, George Washington Plant, by his guardian, for the purpose of having the court decide and declare that the defendants were trustees of certain funds received by them from the rentals and sale of certain property which they had purchased from the estate of their deceased father (plaintiff's grandfather), Roger Plant. The court made findings to the effect that Roger Plant died testate in California on February 19, 1894; that his will was probated in the following month; that Charles Plant, one of the defendants, was duly made executor; that the estate was duly settled and the executor was discharged. Other findings were in substance as follows:

In March, 1895, the superior court made and entered its decree by which the real property of the estate was distributed to William Plant, Susan Plant Tweedy, Roger Plant, Henry Plant, Phoebe Plant, David Walter Plant, George Washington Plant, Richmond

Plant, and Charles Plant, children of deceased, all over the age of 21 years. This distribution was "share and share alike," but as the decree recited "in trust nevertheless they to use the net rents and profits during their lives, or until such time after 10 years from the date of the death of said Roger Plant as that all of his said children or in case any of them shall be dead, then all said children then surviving and the heirs of the body of said deceased children, shall mutually agree in writing to sell said real property and divide the proceeds, when the same shall be sold and the proceeds divided equally among said children." The findings recite proceedings in the probate court of Cook county, Ill., where the will had also been admitted to probate and letters had been duly issued to Henry Plant in 1894. As a result of these proceedings an order was there entered declaring the estate settled and discharging the executor. At the time of his death Roger Plant was seised in fee of certain valuable real property in Cook county, Ill. By the decree of distribution this property was distributed to the trustees named in the will of Roger Plant. In September, 1905, the same persons named as defendants in this action (except the administratrix of David Walter Plant's estate, for he was then living) filed their bill in equity against the other heirs of Roger Plant, including the minor, George Washington Plant, whereby they petitioned the said court to make a decree distributing the property of the estate in Cook county, giving to each heir his or her allotted proper share in accordance with the will of their common ancestor. Two of the defendants in that action were sued as surviving trustees under the will of Roger Plant, deceased, but in the present suit the court found that they were not in fact trustees at the time of the sale of the property in Illinois. The superior court in this action also made the following finding:

"That no express or formal appearance in said partition suit was made by the plaintiff in person, and that plaintiff never directly authorized any person or persons to appear for or on behalf of plaintiff in said proceeding; but that plaintiff did duly and regularly appear in said proceeding by and through his duly appointed, qualified and acting guardian ad litem, and was represented therein and throughout said proceeding by counsel duly authorized by said guardian ad litem to appear and act for him; and that said circuit court of Cook county, Ill., acquired jurisdiction of all parties to said proceeding, including plaintiff herein."

There was never any agreement in writing among the children of Roger Plant to sell any of the property in Cook county and to divide the proceeds.

According to the findings the suit in equity resulted in 1907 in a decree that the property could not be physically divided without prejudice to the persons interested, and it was adjudged that the premises be sold for cash to the highest bidder, provided the amount

offered should equal at least two-thirds of the valuation of \$135,000 put upon the property by the commissioners. By said decree it was also provided that after due notice the master in chancery should sell the property, and that any of the parties to the proceeding might become purchaser or purchasers. The sale was made in conformity with the decree. There was competitive bidding, and Charles Plant acted for himself and his brothers Henry, Richmond, William, and David Walter Plant. He and they acted in good faith and for the best interest of all persons concerned. Their bid, \$99,500, was the highest and best one that could have been obtained for the property at the sale, and after due confirmation of said sale by the circuit court the master in chancery made a deed of the property to Charles Plant, in accordance with the court's directions. It was further found that Charles Plant raised \$50,000 by a loan secured by a trust deed to the property; that a large part of this money was divided among those entitled to share in the estate, other than purchasers at the sale, George Washington Plant (the plaintiff here) receiving approximately \$12,000. The purchasers receipted for their shares of the amount bid for the property, but received no money. The property was sold in June, 1908, by the defendants in this action for \$127,700 after they had received by way of rents a net sum not in excess of \$10,000. There were further findings that the defendants were not at the time of the sale acting as trustees or in any fiduciary relation towards the plaintiff, and that they have not since and do not now hold the property or the proceeds in trust for the said plaintiff. There were elaborate findings negating the allegations of the complaint whereby defendants were charged with conspiracy to conceal their joint interest in the purchase of the property, to keep down the price by deterring others from bidding at the probate sale, and to do certain alleged dishonest acts. It was also found that while plaintiff had no direct notice of the date of the sale, he was nevertheless a party thereto represented throughout the proceedings by his guardian ad litem and attorney, and although not until April, 1909, did he receive notice of the fact that Charles Plant had made such purchase that fact and the circumstance of the subsequent sale were not concealed from him by the defendants. There is another finding that:

"It is true that the plaintiff, through his guardian, Julia L. Woods, and attorney for said guardian, Bernard Potter, received notice of the fact that said sale had been made shortly after the same had been consummated, and received and accepted his pro rata share of the proceeds of said sale."

No attack is made upon the foregoing findings, except in those particulars in which they relate to the absence of trust relations between the defendants and the minor and the

propriety and legality of the acts of said defendants in the premises.

[1, 2] Respondents rely upon the rule as declared in *Felton v. Le Breton*, 92 Cal. 466, 28 Pac. 490, where it is held that the inhibition upon a trustee from purchasing at his own sale is removed by the determination of a court of equity that he may be such purchaser. When the sale is made under the direction of a court of equity by officers appointed by the court, it is not a sale by the trustee, and there is no rule or principle preventing him from becoming a purchaser. This is the doctrine of the *Le Breton* Case, and appellant has not succeeded in his effort to convince us that it does not apply here. Plaintiff admits in his pleading that the circuit court of Cook county, Ill., acquired jurisdiction of all parties to the partition proceedings, and that this plaintiff was one of them. The decree of that court therefore is res judicata and absolutely binding upon plaintiff. The court determined in advance of the sale that certain of the heirs might become purchasers, and confirmed the sale to them through Charles Plant. The defendants had ceased to be trustees, and by ordering the sale to them by the master in chancery the court so found. Such finding may not be collaterally attacked in this suit. The property was in Chicago. The court had jurisdiction of the parties to that proceeding and of the subject-matter. Under such circumstances the courts of this state may not disturb the judgment upon a collateral attack merely because the decree in the estate of Roger Plant in this state distributes the property "in trust." The judgment of the court of Illinois is absolutely binding upon the plaintiff herein. 23 Cyc. 1055; *Reed v. Cross*, 116 Cal. 484, 48 Pac. 491; *Estate of Harrington*, 147 Cal. 124, 81 Pac. 546, 109 Am. St. Rep. 118.

It is argued that the case of *Felton v. Le Breton*, supra, is authority only where the trusteeship is coupled with a power of sale. We do not think such limitation may be placed upon it. Indeed the opinion in that case (92 Cal. at page 467, 28 Pac. 490) discusses the reason for the rule announced which is that, where a trustee is also a beneficiary, the court should consider his rights under the latter capacity as well as his duties under the former office.

[3] Even a cotenant, who may not purchase and assert an outstanding title against his cotenants, may purchase their own titles at a judicial sale. *McNutt v. Nuevo Land Co.*, 167 Cal. 466, 140 Pac. 6, in which, by the way, *Felton v. Le Breton* is incorrectly cited as *Felten v. Le Breton*.

It follows from the foregoing discussion that the judgment must be affirmed; and it is so ordered.

We concur: HENSHAW, J.; LORIGAN, J.

(29 Cal. A. 186)

PEOPLE v. CARIDIS. (Cr. 578.)

(District Court of Appeal, First District, California. Dec. 14, 1915.)

1. LARCENY — 23 — ELEMENTS — VALUE OF STOLEN ARTICLE.

It is essential to the crime of grand larceny that the thing stolen be intrinsically worth in excess of \$50, unless taken from the person of another.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 50-52; Dec. Dig. — 23.]

2. LARCENY — 5 — INFORMATION — SUFFICIENCY — VALUE.

An information under Pen. Code, § 492, fixing the value of a stolen evidence of indebtedness as the amount recoverable thereon, which charged the larceny of a lottery ticket, charged no crime, since a lottery ticket cannot evidence a valid indebtedness for it exists in violation of law and is valueless, nor did the subsequent payment of a prize for the ticket make it legally of value so as to support the information.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 11-17; Dec. Dig. — 5.]

3. LARCENY — 28 — INFORMATION — SUFFICIENCY — TIME.

In such case, the subsequent payment, even if valid, could not affect the sufficiency of the information, which depends on facts existing at the time of the offense and not on subsequent occurrences.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 58, 59, 62, 99, 101; Dec. Dig. — 28.]

4. LARCENY — 5 — ELEMENTS OF OFFENSE — VALUE OF STOLEN ARTICLE.

While a lottery ticket is of no value as an evidence of indebtedness, its value as a paper will support an information charging petty larceny, however small its actual worth.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 11-17; Dec. Dig. — 5.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Antonio Caridis was charged with the crime of grand larceny, and demurred to the information. The demurrer was allowed, and the action dismissed, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and Frank L. Gucrena and John H. Riordan, Deputy Attys. Gen., for the People. M. L. Choyinski and Jos. T. O'Connor, both of San Francisco, for respondent.

LENNON, P. J. The defendant in this case was, by an information filed in the superior court of the city and county of San Francisco, charged with the crime of grand larceny, alleged to have been committed as follows:

"The said Antonio Caridis on the 29th day of July, A. D. 1914, at the said city and county of San Francisco, state of California, did then and there willfully, unlawfully, and feloniously steal, take, and carry away one lottery ticket of the Original Nacional Company, No. 16235; that theretofore, and on the 27th day of July, 1914, the said ticket was, after a drawing held by said Original Nacional Company, and its officers, representatives, and agents, declared by said Original Nacional Company and its officers, representatives, and agents, to be one of the

winning tickets of the said Original Nacional Company, and its officers, representatives, and agents, after said drawing aforesaid, did become liable for and did promise to pay to the holder of said ticket the sum of \$1,250 in gold coin of the United States of America, and did then and there promise to pay to the holder of said ticket the sum of \$1,250 in gold coin of the United States of America; that thereafter, and on the 30th day of July, 1914, the said Antonio Caridis did present said ticket to said Original Nacional Company and to its officers, representatives, and agents, and did receive from said Original Nacional Company, and its officers, representatives, and agents, the sum of \$1,250 in gold coin of the United States of America therefor; that at all of said times the said lottery ticket was the personal property of Jim Papas and was of the value of \$1,250 in gold coin of the United States of America."

[1] A demurrer to the information was allowed upon the ground that the facts stated did not constitute a public offense in the particular that it affirmatively appeared that the subject-matter of the alleged larceny had no legitimate value. The action was thereupon dismissed, and the people have appealed from the order allowing the demurrer.

The ruling of the court below was correct. It is essential to the commission of the crime of larceny that the property alleged to have been stolen have some value—intrinsic or relative—which, where grand larceny is charged and the property was not taken from the person of another, must exceed the sum of \$50. Penal Code, § 847. *Payne v. People*, 6 Johns. (N. Y.) 108; *Culp v. State*, 1 Port. (Ala.) 33, 26 Am. Dec. 357; *Wharton's Criminal Law*, p. 1333.

[2, 3] Evidently the information in the present case was framed to fit the requirements of section 492 of the Penal Code, which fixes the value in cases of the larceny of written instruments by providing that:

"If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen."

Clearly this section contemplates and controls the value to be placed only upon written instruments which create some legal right and constitute a subsisting and an enforceable evidence of a debt. *People v. Dadmun*, 23 Cal. App. 293, 137 Pac. 1071; *State v. Campbell*, 103 N. C. 344, 9 S. E. 410; *McCarty v. State*, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; *Wilson v. State*, 1 Port. (Ala.) 118.

The lottery ticket which was the subject-matter of the larceny charged in the present case had no relative value save, as affirmatively alleged in the information, as the evidence of a debt due from an enterprise which was denounced by law and which apparently existed and was conducted by its promoters in defiance of the law. Penal Code, § 319 et seq. It is a well-settled principle that an ob-

litation which exists in defiance of a law which denounces it has, in the eyes of the law, neither validity nor value. An instance of the application of this principle is to be found in the analogous case of *Culp v. State*, supra, where the court held that an indictment charging the larceny of several "bills of credit of the United States Bank," which were alleged to be of the aggregate value of \$310, could not be sustained because each of the bills was for a sum less than the bank was authorized by its charter to issue, and consequently could not, in contemplation of law, be the subject-matter of a larceny.

The fact, as alleged in the information, that the drawing had taken place prior to the alleged larceny of the ticket, and that the defendant ultimately collected thereon the sum of \$1,250 from the lottery company, added nothing to the validity or value of the ticket. Being a void and valueless obligation in the eyes of the law from its very inception, it could not be transformed into a legitimate and valuable thing by a voluntary payment, which in itself was a contravention of the law. *Crutchfield v. Rambo*, 38 Tex. Civ. App. 579, 86 S. W. 950. Moreover, the sufficiency of the information must be determined by the facts as they existed at the time of the alleged taking, and not by anything that may have occurred subsequently. *People v. Stevens*, 38 Hun (N. Y.) 62.

[4] Considered as a mere piece of paper, the lottery ticket in question possessed perhaps some slight intrinsic value, which, however small, would have sufficed to make the wrongful taking of it petit larceny, and, if that had been the charge preferred against the defendant, it doubtless would have stood the test of demurrer. 1 McClain on Criminal Law, § 543.

The order appealed from is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

(29 Cal. A. 200)

CONGDON v. CALIFORNIA DRUG & CHEMICAL CO. (Civ. 1419.)

(District Court of Appeal, Third District, California. Dec. 18, 1915. Rehearing Denied by Supreme Court Feb. 14, 1916.)

1. MASTER AND SERVANT §278, 281—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action by the driver of a delivery wagon for injuries sustained when the cork came out of a demijohn, and the concentrated ammonia therein flew into his face, evidence held sufficient, in connection with the allegations or admissions of the answer as to the character of such ammonia, its liability to explode, and the necessity of securing the cork, to warrant jury findings that the employer was negligent in sending out the demijohn without securely fastening the cork, and that plaintiff was not guilty of contributory negligence in driving the wagon or in handling the demijohn.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977, 987-996; Dec. Dig. §278, 281.]

2. APPEAL AND ERROR §1064—HARMLESS ERROR—INSTRUCTIONS.

In a delivery wagon driver's action for injuries sustained when the cork came out of a demijohn and the concentrated ammonia therein flew into his face and eyes, the evidence showed that he was 20 years old, had received a grammar school education and a business course in high school, and had been driving a delivery truck or wagon for four months. Held, that while, in view of the nature of plaintiff's employment, his intelligence, and his experience in the kind of work he was doing, the fact of his minority should not have been presented to the jury as an element affecting his responsibility, the jury could not have been influenced in any material degree by being reminded in the instructions that plaintiff was a minor, where they were also told that his conduct was to be judged by his knowledge, experience, and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. §1064.]

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Leland Congdon, a minor, by H. W. Congdon, his guardian, against the California Drug & Chemical Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant. H. P. Brown, of Fresno, and Earl Rogers, of Los Angeles, for respondent.

CHIPMAN, P. J. Plaintiff brings the action, by his guardian ad litem, to recover damages for injuries alleged to have been suffered while in the employ of defendant. He recovered judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

It is alleged in the complaint that in the month of February, 1912, plaintiff, who was then of the age of 19 years, was employed by defendant in the work of driving an automobile truck and the delivery of packages from defendant's place of business to its various customers in Los Angeles county, and that, after so working for about four months, defendant shifted plaintiff's employment to driving a delivery wagon drawn by a horse; that at no time during said employment did plaintiff have any knowledge of drugs and chemicals of any kind, nor did he understand the natural dangers of said employment or dangers of handling the drugs and chemicals placed in his possession for delivery. The circumstances attending the injury are stated as follows:

"That on the 28th day of June, 1912, and while so engaged as aforesaid with the said defendant, the said defendant caused to be placed in said wagon aforesaid for delivery a gallon demijohn filled with and labeled concentrated ammonia, to be by said Leland Congdon delivered to one of its customers in said city of Los Angeles; that the said Leland Congdon thereafter started on his way with said horse and wagon and said demijohn so labeled concentrated ammonia to deliver the same as directed by said defendant; that in the course of the trip from the said place of business of the said defendant, then located at Nos. 843 and 855 Stephen-

son avenue, said city of Los Angeles, the jolting of said wagon in passing over the rough places in the street caused the said demijohn to be turned over on its side, and it was shifting about in the bottom of said wagon, when the said Leland Congdon halted said horse and alighted from the said wagon, and took hold of the said demijohn, and was about to place the same in a box and place some excelsior around it to prevent it from again turning over or working about in said wagon, when the cork in said demijohn, which had not been secured in any way, or tied down, popped out of the said demijohn, and the contents of said demijohn, to wit, the ammonia therein, shot out of the demijohn and into the face and eyes of the said Leland Congdon."

Then follows a detailed statement of medical treatment given in an effort to preserve Leland Congdon's eyesight, despite which he suffered the total loss of his left eye and serious injury to his right eye. It is alleged:

That "none of the agents or representatives of said defendant ever at any time or at all in any way warned or advised the said Leland Congdon of the dangers incident to the handling of ammonia put up in the way that the same was put up in said demijohn, or the dangers of being employed in or about the drugs and chemicals, which he was required to handle and deliver as aforesaid," and that by reason of his youth and inexperience and lack of knowledge "he did not know, appreciate, or understand the difficulties and dangers of his said employment;" that in preparing said ammonia for delivery by plaintiff defendant "placed in the hole in the neck of said demijohn a common cork, and did not secure said cork by seal, wire, or other means, and by reason of the action of said ammonia in said demijohn by being jolted around in said wagon, and by reason of the action of the warm weather thereon, the said ammonia did expand, and the cork in said demijohn, not being secured as aforesaid, popped out of said demijohn, and the said ammonia flew therefrom into the face and eyes of the said Leland Congdon, with the result as hereinabove alleged;" that said cork "should have been secured in said demijohn by seal, wire, or other means, so as to have prevented its being so forced out as aforesaid, and that the failure of said defendant to so secure said cork was neglect and carelessness and want of ordinary care on its part," and "said injury was wholly caused by reason of said wrongful acts, carelessness, neglect, and want of ordinary care on the part of said defendant."

The answer admits the minority of plaintiff as alleged; admits his employment as alleged, but denies the averments of plaintiff's want of knowledge of drugs and chemicals and the danger attending the handling of the same; admits that on June 28, 1912, "defendant did cause to be placed in said delivery wagon a gallon demijohn filled with and labeled concentrated ammonia, to be delivered by plaintiff to one of defendant's customers," alleges that plaintiff "did at said time know the character of said concentrated ammonia, and did know its liability to explode, and did know that the same was dangerous;" admits the facts set out in the complaint as to the jolting about of the demijohn, and alleges that said "shifting was caused by the careless manner in which the said Leland Congdon placed the same in said wagon;" admits that plaintiff "was about to place the same in a box and was about to

place some excelsior around it to prevent it from again turning over or working about in said wagon," and alleges that he should have so secured it at the time he placed it in the wagon, and that he was careless and negligent in not doing so, and that he well knew at that time that he should have so secured the demijohn; "admits that the cork in said demijohn did come out," but on information denies that the cork was not tied down or secured in any manner; denies that the ammonia struck the face and eyes of plaintiff, and denies the alleged result of the escape of ammonia; alleges that defendant "did at all times inform plaintiff of the nature and character of the work required of him to be done and of the danger by him incurred, and did in particular inform said Leland Congdon of the danger of carrying ammonia in a demijohn in a delivery wagon, and did warn and instruct said Leland Congdon at all times to see that the same was securely packed in a box with excelsior surrounding it to prevent any jarring of the same"; denies that plaintiff by reason of inexperience or want of knowledge did not appreciate the danger of his said employment. It is further alleged that:

When plaintiff "picked up said demijohn and did place the same in said delivery wagon, the cork of the same had not yet been secured, and that he did know that the same should not be placed in said delivery wagon without having said cork secured. Defendant admits that by reason of the action of said ammonia in said demijohn by being jolted around in said wagon, and by reason of the action of the warm weather thereon, the said ammonia did expand, and the cork in said demijohn not being secured, did pop out of said demijohn, and the said ammonia flew therefrom, but as to whether or not said ammonia flew into the face or into the eyes or into either eye of said Leland Congdon this defendant is not informed. This defendant admits that said cork should have been secured in said demijohn by seal, wire, or other means so as to prevent its being forced out. This defendant denies that the failure of this defendant to so secure said cork was neglect or carelessness or want of ordinary care on its part. Defendant alleges that said demijohn had not at said time been prepared for transportation in the said delivery wagon, and that said Leland Congdon did take the same and did place the same in said wagon before the same was fully prepared for transportation therein by this defendant, and that he did know the same was dangerous, and did know that the cork in the same had not been secured, and that he did place the same in said delivery wagon without instructions from this defendant or any of its officers, and purely upon his own responsibility."

Summing up the defense, it is alleged that plaintiff's injury was caused solely by his carelessness and negligent act: First, in placing the demijohn in the wagon before it was ready for transportation; second, in failing to place it in a box surrounded with excelsior; third, in driving the wagon negligently so as to cause the demijohn to be jolted and moved about in the wagon; and, fourth, in attempting to lift the demijohn in such manner that its opening where the cork was situated was directed towards plaintiff.

[1] We have given the pleadings somewhat at length; for it will thus be seen that the issues are thereby considerably narrowed.

The answer alleges that plaintiff "did know the character of said concentrated ammonia, and did know its liability to explode, and did know that the same was dangerous." If plaintiff knew these facts, it must be assumed that defendant believed them to exist.

The answer admits that plaintiff took hold of said demijohn, "and was about to place the same in a box, and was about to place some excelsior around it to prevent it from again turning over or working about in said wagon." The answer also admitted that "by being jolted around in said wagon, and by reason of the action of the warm weather thereon, the said ammonia did expand, and the cork, not being secured, did pop out of said demijohn, and the said ammonia flew therefrom." The answer admits "that said cork should have been secured in said demijohn by seal, wire, or other means so as to prevent its being forced out."

The controverted issues of fact may be reduced to the following: Was it defendant's duty to see to it that the liquid in the demijohn, or concentrated ammonia, was secured by a cork sealed, wired or otherwise fastened before being placed in the wagon? Was the failure properly to secure the cork in the demijohn the proximate cause of the injury? Was plaintiff guilty of contributory negligence either by reckless driving or careless handling of the packages he was hauling, or in handling the demijohn at the time of the accident? Was plaintiff sufficiently instructed as to the dangerous character of the concentrated ammonia, or was he of such mature age and experience as not to require any instruction in his employment? Was the defendant guilty of culpable negligence?

The uncontroverted evidence was that plaintiff was 20 years old in June, 1912; had received a grammar school education and business course in high school; "just took bookkeeping, but knew nothing of chemistry." He entered defendant's employment as driver of a gasoline delivery truck in February, 1912, and later changed to driving a horse and wagon and continued in defendant's service until June 28, 1912, the day of the accident.

Plaintiff testified that he reported to Mr. Bryant, defendant's shipping clerk, for duty, and that nothing special was said about his work:

"He give me my orders to take goods to a certain place. He just give me a bill of goods to deliver. He give me some tissue with the numbers of boxes, and I carried the boxes out and put them in the truck and delivered the goods. The goods were put up in the boxes by him and turned over to me. I took the boxes and put them in the truck and delivered them pursuant to what instructions were on the tissues. These tissues were the same as bills, tissue paper, and there was a bill for each box. The address was on it. * * * This manner of employment

continued right along during the time that I was in the employ of the defendant. Each day I would receive these orders and these boxes and go out and deliver them. * * * Q. Now, in the course of your employment there did any of these gentlemen ever say anything to you about any of these packages that you were delivering? A. They did not, nor did they call my attention to any particular manner in which any of them should be packed, particularly the demijohns. We did not have anything to do with the packing at all. My duties did not involve the preparation of any of these packages for delivery. Q. And what was the general custom there in setting these packages out for delivery; were they placed in a particular place for you to receive them? A. Yes; they had a place they put all the boxes and demijohns, and we would carry them out and put them on the platform on the back of our wagon. Sometimes they would put them on the back, and we would load them up on the front end when we were starting. On the 28th day of June, 1912, when I started from defendant's shipping department, I had a load of boxes in the back and I had a demijohn of ammonia under the seat. That's the only way. I had a big load. There was a cork in the demijohn. It was just pushed in the neck of the bottle. It was not secured by anything. I think I placed the demijohn in the wagon. It was set out to be delivered, and had a tag to deliver it to a certain place. That had been the custom that prevailed there ever since I had been there. I had not seen any different custom. They never placed in my charge a demijohn containing this concentrated ammonia, that had a cork secured in it, or that was packed in excelsior."

He was asked to explain how he "came to receive this shot of ammonia in the eye or eyes."

"A. I noticed that it had shifted, and when I made my first stop I had an empty box, and I went to take hold of it. I had delivered a box of goods, and was returning with the empty box, was putting the empty box in the wagon, and I took hold of the demijohn to put the concentrate of ammonia in. Just as I got hold of it the cork flew out and went in my face. That is all I remember. I could not see after that. I crawled in the drug store there, and the druggist helped me. I could not walk hardly. I could not see anything. I got down on my hands and knees and crawled for a ways. I got up, I think, before I got to the door. He helped me to the wash basin to wash it off, and washed my face and eyes out."

He then describes the treatment given him and the effort made to preserve his eyesight. His left eye was finally removed, and a glass eye substituted.

"Q. Now, then, this glass eye you have, is this a source of annoyance and trouble to you? A. Yes; I have to take it out every night, and it hurts during the day sometimes, and, if I go out in the evening, it hurts. In riding the pressure of the wind makes it hurt. It makes a mucous, and it dries on there. It has more or less matter or accumulation there each day. I wash it two or three times a day sometimes. When I am out in the field engaged in any kind of work or riding along the road, this eye dries and causes a sticky substance and a painful feeling. In the evening it is worse, and in a cold wind. I take it out and clean it two or three times a day if I am where I can. I always do it at night. The loss of this eye interferes with the performance of my usual duties on the farm. I cannot see so good on that side naturally. In working around anybody I have to be very careful. Q. Now, Mr. Congdon, have you ever had any education or instruction of any kind in regard to drugs or

chemicals? A. No, sir; I have never had any instructions in any school in relation to such matters. Q. As I understand you, the defendant in this case never told you it was a dangerous matter to be handling these demijohns full of ammonia? A. No, sir. Q. And did the defendant or any of its officers ever tell you that you should securely fasten those corks in the ammonia bottles? A. No, sir. Q. Did they ever say anything at all about it? A. No, sir. Q. And you had had no previous experience—A. No, sir. Q. In handling ammonia, had you? A. No, sir. Q. You had never seen a bottle of ammonia from which the cork was blown out on account of the accumulated gases inside? A. No, sir; never heard of it. Q. Never heard of it before? A. No, sir. Q. And did not know at the time there was any danger in handling this demijohn of ammonia? A. No, sir. * * * Q. Just state to the jury what effect, if any, the ammonia had on your face. A. Well, on my eyelids it made the skin come off, and burn my hands, and give me an awful headache. It had an effect on the right eye. I could not see out of it for a long time; not to amount to anything; not as well as I could. I could hold it open for a little while at a time. That eye bothered me for a little while after I had the left one removed—that is, for about two months. Before the accident happened I could see out of the left eye as well as I could out of the right eye. The left eye had not been previously damaged. Q. And the only affection that you have had that has caused the loss of it has been the ammonia in your eye, as far as you know? A. Yes, sir. Q. Had you any knowledge or information about this occupation you had being a dangerous one? A. No, sir."

His cross-examination developed nothing to materially affect his testimony in chief. As to the method of loading the wagon he testified:

"Sometimes Mr. Bryant put them in the back and we would load them up at the front end. We would place them in the truck in the way we wanted to carry them out. A few articles were packed in boxes with excelsior around them, glass and such things. Sometimes the bottles were in boxes, and there was not any excelsior around them. Q. You mention in your complaint when you started to take out the demijohn you started to put it in a box? A. Yes, sir. Q. What occurred for you to want to pack that in a box with excelsior in it? A. Well, I did not want it shaking around in the bottom of the wagon. I had not seen other demijohns or bottles packed in boxes with excelsior around them. I did not want it to break, so I put it in there, and there happened to be some excelsior in there. The excelsior was around some articles I had already delivered."

He testified that Mr. Bryant assisted him in loading the wagon on the day of the accident.

"Q. Now, then, you had made one delivery from the wagon on that trip? A. Yes; to this drug store where the injury occurred. Q. And then, when you came out to the wagon, was that where you first saw the demijohn lying on its side? A. No, sir; I picked it up once before, but I did not have no box to put it in. When I got there I thought I would put it in the box. Q. When you started out and put the demijohn under the seat of the wagon, did you put any box or anything against it to keep it from falling? A. No, sir; I do not know as to that. Q. What was the custom in the way of packing your articles in the wagon in that regard? A. Well, if we could fix them in that way, we did. I do not think we could do it in this case. I had such a big load that day. I do not think I could get the boxes under the seat. The load was mostly boxes with open tops and

articles in them. The demijohn was about a foot tall. I could slip it under the seat. The demijohn was in the corner of the wagon when I started. I could not shove a box up against it. It was too big. I had some big boxes. I had some small boxes, but we loaded them in so they would come out in order. Q. Well, you could have, with a change in the method of putting in the boxes, have packed the boxes up against it? A. I do not think that I could or I would have. I don't think there was room in there. It was only about that wide (indicating) under the seat. Right in front where I had the demijohn the seat came over around. The seat was the full length of the wagon. I had boxes under half of the seat, and there was a vacant space left for the demijohn. I don't think I could have shoved those boxes up against the demijohn because there was not room enough."

He was asked further to explain what occurred when the cork blew out of the demijohn, and he answered:

"I just picked the demijohn up, and I had not got it anywhere nears out when the cork blew out. I had the box on the ground with excelsior in it. I was intending to put the demijohn in the box. I reached over into the wagon and took the demijohn and started to pull it towards me. As I started to pull it towards me the cork came out. * * * Q. Now, you are absolutely positive that nobody told you to be careful of these articles as they were taken out? A. Yes, sir; I never had any bottle or box break while I was delivering. I dropped a bottle in the store itself. I was not cautioned at that time by anybody. I do not know anything of other drivers having bottles blow out on them or spilled in any way. I never heard Mr. Bryant mention to the drivers to be careful with these articles. I never heard Mr. Clendenen tell them or Mr. Blumenberg or anybody during the entire four months say anything about any danger."

He testified that it was a very hot day, but did not think the sun shone on the demijohn.

"Q. Now, just before your eye was taken out had there been any change in the situation? Was it aggravating or hurting you more? A. Well, they thought it was getting better. Then the day before or two or three days before they took the eye out my eye began to get weak again. That is the right eye. They said they would have to remove the left eye to save the right eye. Then I was put under ether or something, and the eye was removed, and I remained there another week for treatment."

We do not deem it necessary to give the testimony of the different physicians who treated plaintiff. There was abundant evidence to show that he was given proper medical attention, and that the injury complained of was the direct result of the accident, and in no wise was attributable to improper treatment.

Some testimony was submitted by defendant tending to show that concentrated ammonia is not explosive; that, when the cork is removed from the container, fumes pass out, but no liquid; that it is not caustic, and will not burn the cuticle when in contact with it; that general instructions were given to drivers of delivery wagons to use care in handling chemicals, but no witness was able to say that plaintiff had been personally instructed. Whatever the character of ammonia may be as to explosiveness or as to whether it burns the skin when in contact

with it, the undisputed fact is that in the present instance it burned the skin around plaintiff's eyes, and so burned his left eye that he lost the use of it, and that he was at the trial still suffering from the necessity of using a glass eye. We think, in view of the admissions of the answer and the testimony of plaintiff—and he alone was able to describe the accident and the circumstances surrounding it—the jury were warranted in the implied findings; that defendant was guilty of negligence in sending out the demijohn of concentrated ammonia without securely fastening the cork; that plaintiff was not guilty of contributory negligence in the way he loaded his wagon or in driving it or in handling the demijohn when he took hold of it to place it in a box.

It is urged that the law would impute to plaintiff the knowledge that "almost any drug or chemical is injurious when brought in direct contact with the eyeball" and that, "as matter of law, the defendant had a right to assume that plaintiff was possessed of common knowledge, and, as a matter of law, the defendant was not obliged to instruct the plaintiff as to any matter of which he had knowledge or presumed knowledge." It may be that plaintiff knew ammonia brought in contact with the eyeball would injure it, and that he needed no instruction on that fact; still there remained to be considered by the jury the question whether in sending out the demijohn of ammonia without properly securing the cork defendant was not negligent, and whether or not such negligence contributed to the injury.

[2] In this connection it is claimed that the court erred in giving instructions to the jury which held the plaintiff—

"to a different degree of care for his own preservation than he would have been if he were a year older, whereas there is nothing in the proof or the circumstances which would justify the inference that the plaintiff was under any disability by reason of his age."

One of the instructions was as follows:

"You are further instructed that the conduct of a minor and the question as to whether he acted negligently or not must in the nature of the case be a question of fact for the jury, rather than of law, as it is the province of the jury to determine whether or not the minor duly exercised such judgment as he possessed, taking into consideration his years, experience, and ability. The ordinary care which a minor of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which an adult would be called upon to use under the same circumstances."

Other instructions followed in which this difference of responsibility is pointed out, the court saying:

"His [plaintiff's] conduct is to be judged in accordance with the knowledge, experience, and judgment he may possess when called upon to act. And it is a question for you, gentlemen of the jury, to say whether in the performance of his task Leland Congdon duly exercised such judgment as he should possess, taking into consideration his years, his experience, and his

ability in connection with his employment, and the risks and dangers thereof."

Defendant cites *Lemasters v. Southern Pacific Co.*, 131 Cal. 105, 63 Pac. 128.

When we consider the nature of plaintiff's employment, his intelligence, and his experience in the kind of work he was doing, we do not think the fact of his minority (he was 20 years old) should have been presented to the jury as an element affecting his responsibility. Coupled, however, with the qualification that he "exercised such judgment as he possessed, taking into consideration his years, experience, and ability," and further stating that "his conduct is to be judged in accordance with the knowledge, experience, and judgment he may possess when called upon to act, * * * taking into consideration his years, his experience, and his ability in connection with his employment, and the risks and dangers thereof," we feel assured that the jury were not influenced in any material degree by being reminded by the court of the fact that plaintiff was a minor; for, notwithstanding that fact, the jury were told that his conduct was to be judged by "the knowledge, experience, and judgment he possessed."

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

(33 Cal. A. 124)

WILEY B. ALLEN CO. v. EDWARDS.
(Civ. 1584.)

(District Court of Appeal, First District, California. Dec. 15, 1915.)

1. GIFTS ~~49~~—INTENT—SUFFICIENCY OF EVIDENCE.

In an action of claim and delivery for the possession of a piano, evidence held to show defendant's intent to make a gift of it to his stepdaughter, plaintiff's assignor.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. ~~49~~.]

2. GIFTS ~~19~~—"DELIVERY"—SUFFICIENCY.

In such case, where there was never any formal delivery of the piano to defendant's stepdaughter, but it was in exclusive use in their home under a claim of ownership by her, there was a sufficient actual "delivery" to constitute a valid gift.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 34, 38; Dec. Dig. ~~19~~.]

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

Appeal from Superior Court, City and County of San Francisco; Marcel E. Cerf, Judge.

Action of claim and delivery by the Wiley B. Allen Company against R. L. Edwards. Judgment for plaintiff, and defendant appeals upon a statement of the case. Affirmed.

John Ralph Wilson, of San Francisco, for appellant. Fred J. Goble, of Oakland, for respondent.

KERRIGAN, J. This is an action in claim and delivery for the possession of a Mason

& Hamlin piano, or its value, conceded to be \$1,200. The appeal is taken by the defendant from the judgment, and is before this court upon a statement of the case.

[1, 2] From the evidence it appears that at a time perhaps as far back as 20 years ago the defendant married the mother of Eloise Edwards, a widow, and in the year 1894, when Eloise was about 5 years old, Mrs. Edwards bought in her name a Knabe piano, which was paid for by the defendant. The piano was purchased to be used by Eloise, who, even at that early age, had shown considerable musical talent, and who later, and at the time this case was tried, was generally recognized as a talented musician. In the year 1911 Eloise and her mother entered into negotiations with the plaintiff for the purchase of a new piano, which negotiations culminated in a written contract between Eloise and the plaintiff, whereby the former agreed to purchase the piano in dispute in this action. The old piano was to be taken in part payment of the new one, the sum of \$450 being credited therefor upon the price of the latter, and the balance of the purchase price was to be paid in monthly installments. In January, 1912, Mrs. Edwards died, and the following year defendant and Eloise quarreled and became estranged. Prior to that time and since she was a little child Miss Edwards had lived with the defendant as his own daughter, being entirely dependent upon him for her support, and occupying as to him in every respect the position of daughter. All the monthly payments on account of the new piano were made either by Eloise or her mother or by the defendant, but in every instance with money earned by the defendant. There is still due on account of the purchase price thereof a small amount. No default in payment, however, has been made and none is claimed. Prior to the commencement of the action Eloise assigned her interest in the piano to the plaintiff, and plaintiff's right to recover herein is based entirely upon Miss Edwards' right to the possession of the instrument as its owner. While too much stress must not be attached to the fact that this piano was purchased for the exclusive use of Miss Edwards, and was constantly referred to by the members of the family as her piano, it is of considerable significance when correlated with the other facts in the case that the contract for the purchase of the instrument was made in her name, and that it was delivered to her personally at the residence of her mother and stepfather. All that was done with reference to the purchase of the first piano and with reference to its exchange and the purchase of the second one was with the knowledge and acquiescence of the defendant.

We think from the evidence in the case that it is clear that the defendant intended to make a gift of the new piano to his step-

daughter; and we think, too, that, while there was never any formal delivery to her of the piano, there was nevertheless under the circumstances of the case a sufficient actual delivery thereof to constitute a valid and subsisting gift. 14 Am. & Eng. Enc. of Law, 1020, 1033. The piano being bulky forbade manual delivery; and the only possession its nature admitted of, so far as defendant's stepdaughter was concerned, consisted in its exclusive use in her home under a claim of ownership. *Ross v. Draper*, 55 Vt. 404, 45 Am. Rep. 624. Miss Edwards was regarded in every respect by the defendant as his child; and, while in the case of one's child the necessity of a delivery is not dispensed with in order to constitute a gift, the formal ceremony of a delivery is not absolutely necessary, but it is sufficient if it appears that the donor intended an actual gift at the time, and evidenced his intention by some act which may be fairly construed into a delivery. 29 Cyc. 1659; *Colby v. Portman*, 115 Mich. 95, 72 N. W. 1098; *Bennett v. Cook*, 28 S. C. 353, 6 S. E. 28.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

(29 Cal. A. 187)

ELSEA v. FASSLER. (Civ. 1433.)

(District Court of Appeal, Third District, California. Dec. 16, 1915.)

1. BROKERS \S 50—REAL ESTATE BROKERS—OPTION TO SELL—CONSTRUCTION.

An option on lands to real estate brokers, providing that it should remain in full force for 90 days from date, and that, if the owner sold to any one, within 90 days after the expiration of the option, to whom the property had been recommended by the agents or their assigns, the owner would pay a commission of 5 per cent., limited to 90 days the time during which the agents' authority to sell or negotiate a sale should exist.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. \S 68; Dec. Dig. \S 50.]

2. BROKERS \S 50—REAL ESTATE BROKERS—OPTION TO SELL—CONSTRUCTION.

An option given by the owner of lands to real estate brokers, providing that it should remain in force for 90 days from date, and that, if the owner sold within 90 days from expiration of the option to one to whom the property was recommended by the agents, he would pay a commission of 5 per cent., was an agreement to pay the brokers a commission of 5 per cent. on the gross amount for which the owner, within 90 days from expiration of the option, might sell the property to one to whom the brokers had recommended it during the 90-day life of the option.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. \S 68; Dec. Dig. \S 50.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by J. B. Elsea against Joseph Fassler. From a judgment for defendant and an order denying his motion for new trial, plaintiff appeals. Judgment and order affirmed.

Albert H. Elliott, Guy C. Calden, and Clarence E. Todd, all of San Francisco, for appellant. John T. Carey, of San Francisco, for respondent.

HART, J. This is an action to recover the sum of \$3,100 alleged to be due the plaintiff as for a broker's commission on the exchange of real estate. Judgment passed in favor of the defendant, and the plaintiff prosecutes this appeal therefrom and from the order denying his motion for a new trial.

The basis of this action is the following "option to sell" the property therein described:

"Option to Sell.

"San Francisco, Cal., Jan. 5th, 1910.

"For and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I hereby give to Chandler & Bourn, of this city, the exclusive right to sell for me at the net price of one hundred and eighteen and $\frac{70}{100}$ dollars (\$118.75) the following described property, to wit: [Describing it.]

"This option to remain in full force for a period of ninety (90) days from date hereof. I agree to grant all necessary time in which to examine the title to said property, and to give a good and sufficient deed free and clear of all incumbrance. I authorize said agents, or their assigns, to accept for me and in my name, a deposit on account of the sale of said property, and in the event of the title proving defective I agree that they are to return the said deposit, providing that the said defects cannot be cleared within sixty days after notice thereof to me in writing. If I sell to any one within ninety days after the expiration of this option to whom said property has been recommended by said agents or their assigns, I agree to pay them a commission of five (5) per cent. of the amount of said sale.

"Said agents are hereby authorized to contract for me and in my name accordingly.

"Witness my hand this 5th day of January, 1910. Jos. Fassler.

"Witness: F. E. Ware."

On the day upon which the foregoing instrument was executed Chandler & Bourn, to whom said option was given by the defendant, assigned a two-thirds interest in the said agreement to J. B. Elsea and F. E. Ware, who were copartners doing business under the firm name of the "Golden Gate Land Company." Neither Chandler & Bourn nor Elsea and Ware succeeded in selling or procuring a purchaser of the land described in said agreement during the life thereof. It appears, however, that after the expiration of the 90 days during which the option was to retain vitality and force Ware succeeded in interesting one Dr. Maxson in the property to which the said agreement related, with the final result that Fassler exchanged said property with said Maxson for an apartment house in the city of San Francisco.

It is not claimed that the evidence does not support the findings, but the contention of the plaintiff is that he is entitled to judgment upon the findings as made by the court. This contention is founded upon the theory that the trial court's conception of the meaning and scope of the option agreement, as indi-

cated by its findings and the conclusion of law therefrom, is erroneous.

The court found that the agreement as pleaded was made and entered into between Fassler, owner of the property, and Chandler & Bourn; that the latter assigned the same or an interest therein to Elsea and Ware, and that finally the entire interest in the agreement was assigned to Ware; that on the 29th day of May, 1910, a contract was entered into between Fassler and Maxson whereby they agreed to exchange the properties above mentioned, and that they did subsequently make said exchange; that the said Chandler, Bourn, Elsea, and Ware "did not recommend the property of the defendant described in said contract to the said W. H. Maxson prior to the expiration of 90 days from and after the 5th day of January, 1910, but did recommend said property to said W. H. Maxson prior to May 27, 1910, and urged said property upon said W. H. Maxson, and procured the said W. H. Maxson to enter into the said contract or agreement of exchange between said W. H. Maxson and said defendant, and recommended the property of said defendant to said W. H. Maxson, and urged said property of defendant upon said W. H. Maxson, and rendered services to said defendant in and about the procuring of the exchange of said properties."

The court further found that the value of the apartment house for which Fassler exchanged the land described in the option agreement was at the time of said exchange the sum of \$62,000 over and above a certain mortgage existing on said property in the sum of \$45,000.

As suggested, the controversy between the plaintiff and the defendant arises out of a difference of opinion as to the true meaning and scope of the option agreement.

It is the position of the plaintiff that he is entitled, under the terms of the concluding covenant of said agreement, to a commission of 5 per cent. on the value, as found by the court, of the property for which Fassler exchanged the land referred to and described in said agreement.

On the other hand, the defendant contends:

(1) That the exchange of the properties did not constitute a sale within the meaning of the concluding covenant of the agreement; (2) that said part of the agreement contemplated and meant that the property should have been sold by Fassler to a party recommended by the plaintiff and his associates or some of them during the life of the option agreement.

The court made no special finding upon the question whether the transaction involved a sale of the property, but adopted the construction put upon the contract by the defendant as to the time within which the plaintiff and copartners in the agreement should have negotiated the transfer of the property to have justified them in claiming compensation for such service.

[1] The plaintiff construes the instrument as one involving two separate and distinct contracts or agreements, viz.: The one giving to the plaintiff and his assignors the exclusive right or option to sell, within 90 days from the date of the agreement the 465 acres of land described in the instrument for the net sum of approximately \$55,000, they to receive as their compensation therefor all money obtained for the land in excess of that amount; (2) the other, by the terms of which the plaintiff and those interested with him in the agreement were to receive a broker's commission of 5 per cent. on the gross amount for which the land might be sold by them or through their negotiations within 90 days from and after the time of the expiration of the so-called option agreement. This construction is predicated mainly upon the consideration that the agreement provides for two different bases of compensation to the plaintiff and his co-obligees for effectuating a sale, and particularly upon this language of the contract:

"If I sell to any one within ninety days after the expiration of this option to whom said property has been recommended by said agents or their assigns, I agree to pay them a commission of 5 per cent. of the amount of said sale."

But the construction so given the agreement is, in our opinion, contrary to its general tenor. It will be noted that the right conferred upon the plaintiff and his associates by the agreement to sell the property is expressly limited by the instrument to exist for the period of 90 days from the date thereof, while the construction to which the plaintiff subjects the writing would obviously have the effect of extending or prolonging its life 90 days beyond the period of time to which it was so limited. In other words, if the plaintiff's construction be correct, then certainly it was intended by the parties that the agreement should possess vitality and force for the term of 180 days in the place of the period of time specifically fixed therein as the term during which it should exist. Indeed, if the plaintiff's notion of the meaning of the language of the writing be well conceived and sound, the provision expressly designating the period of time during which the agreement should remain in force would be wholly meaningless and entirely supererogatory. But no such meaning can reasonably be extracted from the language of the agreement. It must be assumed that the provision expressly fixing a time to which the existence of the right under the option is restricted was intended to express the idea which its language naturally implies, and the only reasonably permissible construction of that language is that thus the parties intended to limit the time during which the authority of the plaintiff and his associates to sell or negotiate the sale of the land should exist. This construction is only in consonance with the prudent methods which ordinarily characterize business transactions of

importance to all the parties connected therewith.

It results from the views thus ventured as to the meaning and scope of the agreement that upon the expiration of the 90 days during which the option was to exist the said agreement became *functus officio*, so to speak, and by necessary consequence all authority of the plaintiff and his associates in the agreement to sell or negotiate the sale of the property of Fassler under the terms of the said instrument ceased to exist or was terminated. It follows, therefore, that any act or step done or taken by the plaintiff and his partner and assignors or by any one of them looking to a sale or transfer of said property was wholly without authority from Fassler, so far as the agreement involved here is concerned.

[2] What, then, was evidently intended by the language of the agreement, "If I sell to any one within ninety days after the expiration of this option to whom said property has been recommended by said agents," etc., was that, if Fassler himself sold the property within the time so specified to any party to whom it had been recommended by the plaintiff and his associates during the life of the option agreement—that is, if the property had been so recommended while the plaintiff and his associates still had the authority to sell or negotiate the sale of the property under the provision expressly limiting their right so to do to the term of 90 days—then, in that case only, he would pay the brokers a commission of 5 per cent. on the gross amount for which he might so sell the property.

Upon undisputed evidence the court found, as seen, that the negotiations for the exchange of Fassler's property for that of Maxson was initiated by the plaintiff within 90 days after the expiration of the 90 days within which the plaintiff and his associates in the agreement were authorized to sell the property, and thus it is to be observed that the plaintiff performed no service in the transaction eventuating in the exchange of the properties for which the plaintiff would be entitled to be compensated by the defendant under the terms of the written agreement involved here, even if it be conceded that the transaction amounted to a sale of the property or to be of a character which, had it taken place within the 90 days within which the authority of the plaintiff and associates to sell was expressly circumscribed, would entitle them to compensation on the basis of 5 per cent. on the ascertained value of the property received by Fassler in the exchange.

Upon the foregoing considerations, an affirmation of the judgment and the order may rest, and therefore, and in further consideration of the fact that the court made no specific finding upon that issue, it is not necessary to consider the point urged here by the defendant that the terms of the agreement

were in no event performed by the plaintiff and his associates, for the reason that they did not sell the property or procure a purchaser ready, able, and willing to buy the same.

No other points are raised on this appeal. The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

STATE v. SECURITY SAV. BANK. (Civ. 1518.)

(District Court of Appeal, First District, California. Jan. 26, 1915. Petition for Rehearing Dismissed by Stipulation Sept. 13, 1915.)

1. ESCHEAT — PROPERTY SUBJECT TO ESCHEAT—“UNCLAIMED PROPERTY.”

The state possesses the right and power to assume control of such property as shall have lain unclaimed for such a period of time as to raise the reasonable inference that it has been abandoned by its owner, and is either in danger of being lost to such owner, or is the proper subject of escheat, and such “unclaimed property” includes savings bank deposits for which no claimant is known, or the depositor cannot be found, where no withdrawals or deposits have been made for 20 years.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 3-5; Dec. Dig. § 3.]

2. CONSTITUTIONAL LAW — ESCHEAT — UNCLAIMED DEPOSITS — REQUIRING PAYMENT INTO STATE TREASURY.

Bank Act (St. 1909, p. 87) § 15, as amended in 1913 (St. 1913, p. 145, § 16), requiring the president or managing officer of every bank to make and return to the superintendent of banks annually a sworn statement showing the names of depositors known to be dead or who have not made any further deposits or withdrawn any moneys for over 20 years, and providing that such deposits for which no claimant is known or the depositor cannot be found shall be deposited with the state treasurer, does not deny due process of law, so far as the bank's rights as a depository are concerned, because of the lack of any provision for notice by the state prior to the exercise of its right to the delivery of the unclaimed deposits, as a bank is not entitled to any previous notice of the exercise by the state of its right to lay hold of the funds of depositors whenever in the interests of public policy the state assumes to exercise control over such funds, and moreover as the state's right to enforce payment into its treasury is predicated upon the bank's report, it is difficult to see what useful purpose would be served by any further notification to the bank.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-838, 840-846; Dec. Dig. § 296; Escheat, Cent. Dig. § 2; Dec. Dig. § 2.]

3. CONSTITUTIONAL LAW — ESCHEAT — UNCLAIMED DEPOSITS — REQUIRING PAYMENT INTO STATE TREASURY.

Bank Act (St. 1909, p. 87) § 15, as amended in 1913 (St. 1913, p. 145, § 16), provides for the payment into the state treasury of bank deposits where no claimant is known or the depositor cannot be found and no deposits or withdrawals have been made for 20 years, and provides that such deposit shall be subject to the same distribution as is provided for in section 1234 of the Code of Civil Procedure, and that the bank shall not be liable to any person

for such deposits, and that any action brought by any person against the bank shall be defended by the Attorney General without cost to the bank. Code Civ. Proc. § 1234, provides, relative to the voluntary dissolution of corporations, that if the applicant is a savings and loan association and there is any unclaimed deposit or dividend in its hands belonging to unknown persons, the application must state the facts, and such facts must be stated in the notice of the application to be published by the clerk, and that if before the expiration of the time of publication any person files a claim to such deposit or dividend, the court must determine the claim, and, if it is established, order such money to be paid to him, and that deposits or dividends not so claimed, or as to which no claim shall be established, must be paid into the state treasury and be received, invested, accounted for, and paid out as is provided by law in the case of escheat estates. Held, that the lack of any provision in the Bank Act for notice to the depositors before requiring payment of unclaimed deposits to the state treasurer, does not result in a denial of due process of law to the depositor and leave the bank liable to the depositor and entitled to retain the deposit, as the Bank Act contemplates no change of ownership of the deposits, but deals with possession only, and leaves the matter of ownership to be determined by proceedings embracing such notice to depositors as satisfies the constitutional requirements as to due process of law, and when the state, from motives of public policy, seizes and temporarily sequesters private property to await the inception or determination of a more formal proceeding affecting its title and ownership, neither the actual owner nor the immediate possessor can object that such seizure is accomplished without such notice as would constitute due process of law, and hence the fact that the property is in the custody of the law would be a perfect defense to the bank.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-838, 840-846; Dec. Dig. § 296; Escheat, Cent. Dig. § 2; Dec. Dig. § 2.]

4. ESCHEAT — UNCLAIMED DEPOSITS — REQUIRING PAYMENT INTO STATE TREASURY.

The bank cannot rely upon the possible detriment to the depositor resulting from any loss of interest as a defense to a proceeding to compel it to pay the deposit into the state treasury, as it is relieved from liability and placed in a position to defend against any suit by the depositor for the interest as well as the amount of the deposit.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. §§ 20-22; Dec. Dig. § 3.]

Original application by the State for a writ of mandate against the Security Savings Bank. Peremptory writ issued.

U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for the State. McCutchen, Olney & Willard, of San Francisco, for respondent. Francis J. Sullivan, of San Francisco, amicus curiae.

RICHARDS, J. This is an original application for a writ of mandate, requiring the respondent, a savings bank corporation organized and doing business as such under the Constitution and laws of the state of California, and having its principal place of business in the city and county of San Francisco, to deposit with the state treasurer

the sum of \$7,425.16, the same being the aggregate of a number of deposits in various sums which have remained unclaimed in said bank for more than 20 years, according to the verified statement of its officials made to the superintendent of banks during the month of January, 1914, in accordance with section 15 of the Bank Act of the state of California, as amended in 1913. The respondent opposes the issuance of the writ upon the ground of the asserted unconstitutionality of this section of the Bank Act.

Section 15 of the act as amended in 1913 in substance provides that, within 15 days after the 1st of January of each year, the president or managing officer of every bank must make and return to the superintendent of banks a sworn statement, showing the names of depositors known to be dead, or who have not made any further deposits or withdrawn any moneys during the preceding 20 years, together with the last-known place of residence of such depositors, and the amount of their deposits with the accrued interest, if any, thereon; and further provides that such deposits for which no claimant is known, or the depositor cannot be found, shall, together with the increment thereof, be deposited with the state treasurer in the same manner and subject to the same distribution as is provided for in section 1234 of the Code of Civil Procedure. The section also provides for the release from further liability to such depositors of all such banks as shall have paid the said deposits into the state treasury pursuant to the requirements of the section.

The chief contention of the respondent is that, since by the provisions of said section of the Bank Act the state may require banking institutions of the quality of respondent to pay into the state treasury the money of depositors which has been unclaimed by them for more than 20 years, without notice of any kind having been first given to the bank or to such depositors, it by so doing deprives such banks of a property right which they have in such deposits, by divesting them of the opportunity to earn such profits from such deposits as their possession would imply, and also by taking from them that which the depositor might demand of them at any time, and to which demand they could interpose no defense for the reason that the deposit had been removed from their custody without any such notice to the depositor as would constitute due process of law; and in this regard the respondent contends that the provision of the section which assumes to declare that the bank shall be no longer liable to its depositors for such deposits after their transfer to the state treasury, does not accomplish its avowed object, because the depositor, not having been given any such notice of the change of possession of such funds as would amount to due process of law, cannot be bound by this provision of the act.

[1] It may not be seriously disputed that the deposits which are the subjects of this proceeding, and to which the section of the act in question is intended to apply, are such as come within the designation of "unclaimed property," as that term is generally understood in law; neither can it be seriously contended, but on the contrary in this case it is freely conceded, that the state possesses the right and power to assume control of such property as shall have lain unclaimed for such a period of time as to raise the reasonable inference that it has been abandoned by its owner, and is either in danger of being entirely lost to such owner, or is the proper subject of escheat. In the exercise of this admitted and long-established right the Legislatures of most of our states have enacted laws embracing the procedure by which the state may assert its right of control over such property, and in so doing may not only terminate the right of its immediate possessor to the continued custody of such property, but may also put an end to its former ownership, and may even terminate the right of such absentee owner if perchance he should appear, before an escheat had been accomplished, to demand his property from the depositary to whom he had intrusted its possession. In construing and upholding enactments of this character courts have held with much uniformity that the depositary of such unclaimed property as is in question here is only entitled to insist that in the course of the procedure on the part of the estate for the escheat or other transfer of the ownership of unclaimed property, such notice shall be given to the depositary and the absentee or unknown owner as shall constitute due process of law. A fair example of such legislation and judicial construction will be found in the cases of *Nelson v. Blinn*, 197 Mass. 279, 83 N. E. 889, 15 L. R. A. (N. S.) 651, 125 Am. St. Rep. 364, 14 Ann. Cas. 147; *Cunnius v. Reading School Dist.*, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121; *Malone v. Provident, etc.*, 201 Mass. 23, 86 N. E. 912; *Provident, etc., v. Malone*, 221 U. S. 660, 31 Sup. Ct. 661, 55 L. Ed. 899, 84 L. R. A. (N. S.) 1129.

[2] It is the contention of the respondent in the light of the foregoing course of legislation and of judicial construction in other states, that in each instance where the state has undertaken to lay hold upon the unclaimed property of absentees, and either administer upon it or work an escheat, the law has provided and the courts have required some sufficient form of notice to the depositary and the absentee owner as shall satisfy the constitutional requirement as to due process of law; and the respondent insists that in the section of the Bank Act under review in this proceeding no such notice, and in fact no notice whatever, is required to be given by the state prior to the exercise of its asserted right to the delivery of these

unclaimed deposits into the possession of the state treasury, and hence that the section of the Bank Act is obnoxious to the constitutional requirement as to due process of law.

With respect to the rights of the respondent arising solely out of its interest as a depository of these unclaimed deposits, we do not think that this contention can be sustained. By the terms of the section under review the right of the state to enforce payment into its treasury of the moneys which make up the sum of the present demand is predicated upon the verified statement and report of the respondent already made to the proper state official, that it is possessed of these several sums of money, and that they have taken on the quality of unclaimed deposits defined in the act. This being so, it is difficult to see what useful purpose any further notification on the part of the state to turn over these deposits to its treasurer would subserve than that which has already been given by the terms of the statute, and acted upon by the respondent in making its verified statement in accordance therewith. But in addition to this, it has been definitely determined that a bank as a mere depository is not entitled to previous notice of the exercise on the part of the state of its right to lay hold of the funds of depositors in its hands whenever, in the interests of public policy, the state assumes to exercise control over such funds. The state of California has for years exercised that right; and in the recently decided case of *State Savings & Commercial Bank v. Anderson*, 165 Cal. 437, 132 Pac. 755, L. R. A. 1915E, 675, the right and power of the state so to do in proper cases has been fully vindicated. In that case, involving the summary seizure by the superintendent of banks of the property and funds of a bank which had been found by such official to be in an unsafe or unsound condition, the same objection to the constitutionality of the section of the Bank Act in question there was presented as is now urged against the section of the same act in question here. In deciding that question Mr. Justice Lorrigan very clearly and convincingly showed that under our modern methods of business banks have ceased to be merely private agencies for the accommodation of their customers, but that by virtue of their charters as well as of the public nature of the patronage which they invite and receive, the banks of the present have become in a just sense trustees of the fiscal affairs of the people and of the state; and this being so, the business and property of such banks may be subjected to such reasonable regulation and control as the state, in the exercise of its police power, may see fit to impose; and that in the course of such control the state may, without any such notice as might under other circumstances be held to constitute due process of law, lay hold of the funds of depositors in the possession of banking insti-

tutions, and take the same into its own possession whenever a reasonable consideration of the public interest requires such action. In the foregoing case the superintendent of banks had taken possession of the funds of a bank in falling circumstances under the express terms of section 136 of the Bank Act; in so doing he was assuming to act in the interest of the depositors of such bank who might be unable adequately to protect themselves in private actions against losses which might follow upon the failure of the bank. In the case at bar the state is essaying to exercise the same right in relation to the unclaimed deposits of those who, through misfortune or unexplained absence extending over a long period of years, or who, by reason of death, have been rendered unable to exert a personal control over their deposits. We can perceive no difference as to the rights of the state in either case where the right of ownership of the deposit is in any likelihood of being lost either through the threatened failure of the bank on the one hand, or through the prolonged absence or possible death of the depositor upon the other. We think, therefore, that the contention of the respondent, in so far as the same is predicated solely upon its property right as a depository, cannot be sustained.

[3] It is, however, further and more seriously contended on behalf of the respondent that the chief defect in this section of the Bank Act lies in the fact that it does not require such notice to be given to the depositors of the fund in question as would constitute as to each of them due process of law. The respondent does not go to the extent of seriously insisting that it is entitled to raise this objection on behalf of its absentee depositors; but its contention is that, since the depositors are, under this section of the act, required to be given no sort of notice prior to the change in the custodian of their deposit, they cannot be bound by the action of the state in that regard, and hence may at any time appear and demand their deposit from the bank and may sue it to recover the same; and that against such demands and suit the bank would have no defense, and might therefore be required to pay to the depositor the amount of his deposit which it had already been compelled to turn over to the state; and that in order to be placed in a position to defend against such demand or suit the respondent has a right to insist that the depositor shall have been given such notice of the contemplated transfer of his property as would constitute due process of law before the bank can be required to pay over the amount of such deposit to the state.

In the consideration of this question it is to be noted at the outset that the section of the Bank Act under review does not contemplate any change in the ownership of the funds in question. It purports to deal with possession only, and to leave the matter of

their ultimate ownership to be determined by such subsequent proceedings as are provided through the reference in the section to the provisions of section 1234 of the Code of Civil Procedure. When that section of the Code is examined it will be found to provide a procedure for the disposition of deposits in savings banks in process of liquidation, which embraces such notice to the owners of such deposits as would clearly satisfy the constitutional requirements as to due process of law, and that the procedure therein provided is adjustable to the conditions created by section 15 of the Bank Act. Reading section 15 of the Bank Act as a whole it must be evident that its only purpose and effect in providing for the summary taking over of unclaimed deposits by the state treasurer is to merely work a temporary change in their possession until such time as they may be claimed by their owners, or as the more ample procedure for their ultimate disposition outlined in section 1234, Code of Civil Procedure, can be set in motion; or, in other words, to place such unclaimed deposits in custodia legis until their ownership can be adjudicated by a proceeding taken upon such notice to all concerned as would amount to due process of law, and thus render the adjudication as to the ultimate control and ownership of the property in question binding upon all persons interested.

This view of the purpose and effect of section 15 of the Bank Act brings this case clearly within the principles laid down by the Supreme Court in the case of State Savings Bank v. Anderson, supra. When the state, from motives of public policy, enacts a law providing that private property may be summarily seized and temporarily sequestered to await the inception or determination of a more formal proceeding affecting the title and ownership of the property so taken, neither the immediate possessor nor the actual owner can be heard to urge the objection that the summary seizure of the property by properly constituted public authorities has been accomplished without such notice as would constitute due process of law. It follows that as to any action instituted by the owner of such property against his depositor during the temporary period that such funds are in the custody of the state treasurer pending the formal proceeding to determine their ultimate disposition provided for in section 1234, Code of Civil Procedure, the depositor could not maintain such suit against the depository for such property, for the reason that against such action the latter would have the right to interpose the defense that the property was in custodia legis. It is apparently this very defense which is contemplated by the terms of the section in question, which state:

"That any bank which shall make any deposit with the state treasurer in conformity with the provisions of this section shall not

thereafter be liable to any person for the same; and any action which may be brought by any person against any bank for money so deposited with the state treasurer shall be defended by the Attorney General without cost to such bank."

If these views are to be taken as a correct interpretation of the scope and effect of this section of the Bank Act, it necessarily follows that neither the bank nor the depositor can assert that the summary transfer of unclaimed deposits to the possession of the state treasurer, in contemplation of proceedings to be presently taken for the purpose of determining their ultimate disposition, has been accomplished without due process of law.

[4] The foregoing considerations also supply the answer to the suggestion of the respondent, that by the removal of these deposits from the possession of the bank the contractual right of the depositor to receive interest on his deposit has been impaired without due process of law. It does not appear that the depositors affected by this proceeding are entitled to receive any stated interest on their deposits; but, assuming that they are, the situation would not be changed, for if the bank is placed by the terms of this section relieving it from liability in a position to defend against the suit of the depositor for the amount of the deposit after the same has been paid over to the state, the defense would, of course, also extend to the incident of interest, and therefore the bank cannot, for the same reason, rely upon this possible detriment to the depositor as a defense to this proceeding. *Malone v. Provident, etc.*, 201 Mass. 23, 86 N. E. 913.

Let a peremptory writ issue as prayed for.

We concur: LENNON, P. J.; KERRIGAN, J.

(29 Cal. A. 197)

TAFT et al. v. WASHINGTON. (Civ. 1384.)

(District Court of Appeal, Second District, California. Dec. 18, 1915.)

1. INJUNCTION \S 128—INJURY TO PROPERTY — SUFFICIENCY OF EVIDENCE — PARTITION WALL.

In an action by the owners of the south half of an improved lot against the life tenant of the north half of the lot, in which plaintiffs had the remainder, to enjoin the completion and maintenance of a partition wall, evidence held to sustain a finding that a part of the wall was located upon plaintiffs' side of the dividing line.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. \S 278; Dec. Dig. \S 128.]

2. INJUNCTION \S 21—INCOMPLETE INJURY—POWER OF EQUIT.

In such action, the fact that the partition wall was complete before the service of any restraining order was no ground why its removal could not be compelled, as where an act sought to be enjoined is only partially completed, an injunction lies to restrain the threatened injury, and where suit is begun before the doing of the wrongful act and pending the suit the act is

done, the court is not thereby deprived of its jurisdiction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 19; Dec. Dig. ¶21.]

3. INJUNCTION ¶49—INJURY OR TRESPASS TO PROPERTY.

A court of equity has power to compel a cessation of an irreparable trespass of a continuing nature, so that obstructions placed by defendant upon the plaintiff's property, such as a partition wall, interference with stairways, etc., might be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 102; Dec. Dig. ¶49.]

4. LIFE ESTATES ¶11—INJURY TO INHERITANCE.

Under Civ. Code, § 818, declaring that the owner of a life estate may use the land in the same manner as the owner of the fee simple, except that he must not injure the inheritance, the acts of a life tenant in tearing up or disconnecting drain pipes, etc., justified an injunction, as the threatened act if accomplished would constitute an injury to the inheritance.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 29, 30, 42; Dec. Dig. ¶11.]

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Ellen Huddleston Taft and another against Harriet Washington. Judgment for plaintiffs, motion for new trial denied, and defendant appeals. Judgment and order affirmed.

John C. Stick, of Los Angeles, for appellant. Willis O. Tyler, of Los Angeles, for respondents.

CONREY, P. J. The plaintiffs are the owners of the south half of a lot which has a frontage of 60 feet and 6 inches on the west side of Spring street in the city of Los Angeles. The defendant is the owner of the north half of the lot for the term of her natural life, with remainder over to the plaintiffs. The entire frontage is covered by a two-story building, which was erected in the year 1885 by Biddy Mason, predecessor in title of the parties to this action. The lower story of the building is divided into three storerooms. The upper story contains a number of rooms to which access is obtained by a stairway located on the north side of the building. Plaintiffs alleged and the court has found that at the commencement of this action the defendant had under construction a wooden partition extending from front to rear of the middle storeroom through and near the center thereof and located partly on the south side of the true center line of the lot; also that the defendant threatened to tear up and disconnect certain sewer pipes and drain pipes which are located upon the north half of the premises and to destroy plaintiffs' access to the upper portion of the south half of the building by closing up the stairway; all of which was without the consent and was against the will of the plaintiffs. The judgment ordered the defendant to remove the said partition wall from plaintiffs' premises; that is to say, from the

south half of the lot, and enjoined the defendant from tearing down or removing said pipes and drains or interfering with said stairway or committing any waste to the inheritance of the plaintiffs. From this judgment, and from an order denying her motion for a new trial, the defendant appeals.

[1] Appellant now insists that in sundry specified particulars the evidence is insufficient to justify the findings of fact. None of these objections can be sustained. Defendant's answer did not deny that the partition was completed after the filing of the complaint herein. She merely alleged that it was already completed before any injunction issued herein was served upon her. The evidence is sufficient to establish the fact that a portion of the partition was, as found by the court, located upon the plaintiffs' side of the dividing line. The testimony of the surveyor, Le Roy I. Weeks, shows that the distance from the exterior line of the north wall of the building to the center of the south wall thereof is coincident with the width of the lot as claimed by both parties. The record shows that before erecting her building Mrs. Mason made a party wall agreement with the owner of the lot adjoining her lot on the south which permitted her to erect a 16-inch wall, of which one-half would be on said adjoining lot. The fact that she did erect the building in accordance with that party wall agreement is sufficiently shown. For the defendant did not claim that the north wall of the building varies from the true north line of the lot, nor that the total width of the lot is other than the width alleged in the complaint. Therefore, the court was authorized to find in accordance with the testimony of Weeks with respect to the true location of the line of division between the south half of the property and the north half thereof. This line being established, appellant does not contend that a portion of the partition erected by her was not placed south of the line as thus located by the court.

[2] There is no merit in the contention that, because the partition wall was completed before the service of any restraining order, removal of the wall cannot be compelled.

"Where the act sought to be enjoined is only partially completed, an injunction will lie to restrain the completion of the threatened injury. And where suit is begun before the doing of the wrongful act and during the pendency of the suit the act is done by the defendant, the court will not thereby be deprived of its jurisdiction." High on Injunctions (4th Ed.) § 23.

The cases cited by appellant's counsel to support his proposition that wrongs already perpetrated cannot be corrected by injunction, all refer to restraining orders or injunctions pendente lite, the usual purpose of which is to preserve conditions as they are until after trial and judgment.

[3] There is no doubt that a court of equity

has power to compel cessation of a trespass irreparable in its character and of a continuing nature and that, in the exercise of such power, removal of obstructions placed by the defendant upon the plaintiffs' property may be enforced. *Western, etc., Co. v. Knickerbocker*, 103 Cal. 111, 87 Pac. 192; *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828; *High on Injunctions* (4th Ed.) § 708.

[4] The injunction granted by the judgment herein with respect to the tearing up and disconnecting of drain pipes, etc., does not necessarily depend upon any easement right which the plaintiffs may have to the use of those appurtenances. It is sufficiently justified by the fact that the threatened acts, if accomplished, would constitute an injury to the inheritance of the plaintiffs in the north half of the property. The defendant has only a life interest in that property and is not authorized to do any act to the injury of the inheritance. *Civ. Code*, § 818; *Crescent City Wharf, etc., Co. v. Simpson*, 77 Cal. 286, 19 Pac. 426.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(29 Cal. A. 144)

BORGES v. HILLMAN et al. (Civ. 1405.)

(District Court of Appeal, Third District, California. Dec. 11, 1915.)

1. JUDGMENT \S 642 — CONCLUSIVENESS — ORDER OF APPELLATE COURT RESTING ON PRESUMPTION.

A decision on appeal affirming the appointment of a receiver, which decision, the record being such as to preclude a review of the merits, rested on the legal presumption of the regularity of the proceeding culminating in the order of appointment, involved a conclusive determination of the question of the propriety of the appointment, and was res adjudicata in the original plaintiff's action against the sureties on the bond of the original defendant given to secure a stay of execution of the order of appointment.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1156; Dec. Dig. \S 642.]

2. APPEAL AND ERROR \S 1243 — LIABILITIES ON BONDS — PARTY PLAINTIFF.

The plaintiff, in an action in which a receiver was appointed, the defendant therein having given a bond running to plaintiff to enable her to collect the rents of the realty in suit pending her appeal from the order appointing the receiver, could maintain an action against the sureties on such bond to recover for any damage resulting from the possession of the property and the collection of rents by the defendant, though the judgment in the main action had not become final when the action on the bond was brought so that the court had not discharged the receiver, who was not the proper party to sue.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4796; Dec. Dig. \S 1243.]

3. APPEAL AND ERROR \S 1243 — LIABILITIES ON BOND — TIME FOR BRINGING ACTION.

Under Code Civ. Proc. § 939, providing that an appeal may be taken from a final judgment within six months, and section 1049, providing that an action is pending from its commencement until the time for appeal has passed, an

action against the sureties on a bond given to secure a stay of execution of an order appointing a receiver, and to enable defendant to collect the rents of the real property in suit pending appeal from the order, which bond bound the sureties to hold the plaintiff free from loss, if he obtained judgment in the main suit against the defendant therein, by reason of the collection of moneys by her as rents pending the appeal from the order, was prematurely brought within 6 months of judgment in the action in which the receiver was appointed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4796; Dec. Dig. \S 1243.]

4. APPEAL AND ERROR \S 1239 — LIABILITIES ON BONDS — RIGHT OF ACTION.

Plaintiff, in an action in which a receiver was appointed and in which defendant therein gave bond to pay costs on appeal from such order, could maintain an action against the sureties on such bond before final judgment in the action in which the receiver was appointed, where the order appointing the receiver was affirmed on the appeal from it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4785, 4786; Dec. Dig. \S 1239.]

5. EVIDENCE \S 82 — PRESUMPTIONS — APPOINTMENT OF RECEIVER.

In the absence of a showing of an abuse of authority by the court in making an order appointing a receiver, the presumption, on appeal in another suit where the point is material, is that the appointment was proper in all respects.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 104; Dec. Dig. \S 82.]

6. APPEAL AND ERROR \S 1234 — APPEAL BOND — CONSTRUCTION.

A bond, given in a suit to declare a trust in realty, to secure defendant a stay of execution of an order appointing a receiver and to enable her to collect the rents of the property pending her appeal from such order, which bond provided that if defendant did not pay over rents received within 30 days after filing of the remittitur from the Supreme Court, judgment might be entered against the sureties on the bond for "said amount of said judgment" was intended, if final judgment on the merits was eventually obtained by plaintiff, to indemnify him against any damage which might result because the defendant was permitted to collect the rents pending determination of her appeal appointing the receiver.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4761-4777; Dec. Dig. \S 1234.]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Joseph F. Borges against E. C. Hillman and another. From a judgment for defendants on their demurrer, plaintiff appeals. Judgment affirmed.

Clarence N. Riggins, of Napa, for appellant. E. L. Webber, of Napa, for respondents.

HART, J. This action was brought by the plaintiff against the defendants as sureties upon a bond given to effectuate a stay pending an appeal from an order appointing a receiver made in a certain action wherein the plaintiff here was plaintiff and one Ida J. Dunham was the defendant. The court sustained the demurrer of the defendants and allowed the plaintiff 10 days within which to

amend the complaint. The plaintiff declined to amend and accordingly judgment passed for the defendants. The plaintiff brings this appeal here from said judgment.

The facts as stated in the complaint are substantially as follows: The plaintiff here instituted an action in the superior court of Napa county against said Ida J. Dunham for the purpose of obtaining a judgment adjudging and decreeing that he (said plaintiff) was the owner of a certain tract of land, embracing approximately 170 acres, said land being specifically described in the complaint, and that said Dunham "was holding the same, and had been holding said property ever since the 2d day of May, 1908, in trust, for the sole use and benefit of said plaintiff, and for an accounting of the rents and profits derived by her from said land since said date, and for judgment against her for any amount of money found by the court to be due plaintiff on account of said rents and profits derived by her from said lands."

After the filing of the complaint in said action of *Borges v. Dunham*, viz., on the 18th day of June, 1914, and at the trial of said action, but before the completion thereof, an order was made by the court before which it was pending appointing one Malcolm Brown as receiver in said action to receive the rents, issues, and profits of the real property described in the complaint in said action, and to hold the same during the pendency of said action, subject to the order of the court, and requiring said receiver to execute an undertaking, with two or more sureties, in the sum of \$500, "to the effect that he would faithfully discharge the duties of receiver in said action, and obey the orders of the court therein."

On the 22d day of June, 1914, said Malcolm Brown qualified as such receiver by taking and subscribing the required oath and executing the required undertaking, and said oath and bond were filed in the office of the county clerk on the succeeding day. Brown thereupon entered upon the discharge of his duties as said receiver, "and," so the complaint alleges, "continued therein until the giving of the bond on appeal hereinafter set out, and during the time that he was acting as said receiver, and prior to the giving of said last-named bond, said Malcolm Brown collected the sum of \$300, rents of the real property above described."

On the 23d day of July, 1914, said Ida J. Dunham took an appeal from the order appointing said receiver, and for the purpose of securing a stay of the execution of said order, and enabling her to collect the rents and income of and from said real property pending said appeal, and also for the purpose of obtaining an order from said court requiring said receiver to pay and turn over to her (Dunham) all moneys then in his possession and collected by him as such receiver as for rents and income of and from said

property during his incumbency in that office, the defendants in this action, E. C. and H. F. Hillman, executed a bond or undertaking, which is in the following language:

"Whereas, the defendant in the above-entitled action has appealed to the Supreme Court of the state of California, from that certain order made and entered into against said defendant in said action, in the said superior court above mentioned, in favor of plaintiff in which said order one Malcolm Brown was appointed a receiver of the property involved in said action, with full power to collect all of the rents and income from said property, which said order was made and entered into by said court on or about the 18th day of June, 1914:

"Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, E. C. Hillman and H. F. Hillman, of the said county of Napa, state of California, do hereby jointly and severally undertake and promise, on the part of the said appellant, that the said appellant will pay all damages and costs which may be awarded against her on appeal or on a dismissal thereof, not exceeding \$300 to which amount we acknowledge ourselves jointly and severally bound; and,

"Whereas, the appellant herein is desirous of collecting the rents, profits, and income from the property involved in the above-entitled action, and also of retaining that which has heretofore been collected by the receiver in the above-entitled cause, we, the undersigned, residents of the county of Napa, state of California, do in consideration thereof, and of the premises, jointly and severally promise and acknowledge ourselves jointly and severally bound in the sum of one thousand (\$1,000.00) dollars, gold coin of the United States, that if the said order appealed from, or any part thereof be affirmed, or the appeal dismissed, or if the said appellant commit or suffer to be committed any waste thereon or in said real property involved in the above cause, that the appellant will pay in United States gold coin a reasonable amount for the value of the use and occupation of the property, together with all rents collected by said appellant during the occupancy of said premises by said appellant, and all damages and costs which may be awarded against the appellant herein upon this appeal. That if the said appellant does not make such payment within 30 days after the filing of the remittitur from the Supreme Court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties, for the said amount of said judgment, together with the interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal."

Upon the filing of said bond, the court made an order directing and requiring the receiver to turn over to said Dunham (the appellant in said action) all moneys in his possession as such receiver and so collected by him as rent growing out of said real property since his appointment as receiver, and further "instructing said receiver to refrain from collecting any further rents from said real property pending said appeal from said order, and the said appellant thereafter, and in consideration of the giving of said bond, collected the rents of said real property pending the final determination of said appeal, and prior to the making and entry of the judgment in said action as hereinafter alleged, and in consequence and consideration of the giving of said bond by these defendants, the said receiver paid to said appellant

the sum of \$239 collected by him as rent of said real property since his appointment as said receiver, and the said appellant collected additional rents of said real property in the total sum, as plaintiff is informed and therefore alleges, of \$600 making \$839 in all."

On the 11th day of November, 1914, the action of the plaintiff here against Ida J. Dunham having been tried, judgment was rendered and entered adjudging that, since the 2d day of May, 1908, said Dunham held "and is holding" the land in dispute in trust, for the sole use and benefit of the said plaintiff, and awarding to the said plaintiff against said Dunham the sum of \$2,379.62, on account of rents, issues, and profits coming into her possession from said real property, said sum including "the \$239 so paid to Ida J. Dunham by said receiver and \$300 of the \$600 collected by her pending said appeal from said order appointing a receiver as above alleged. Thereafter, and on the 29th day of December, 1914, a judgment was duly made and entered in the Supreme Court of the state of California in the matter of said appeal from said order appointing said receiver, whereby said order was affirmed, and that the remittitur thereon was thereafter issued by the clerk of said Supreme Court, and was filed in the above-entitled superior court on the 1st day of February, 1915."

The demurrer objected to the complaint upon the grounds of misjoinder of parties defendant, the alleged incapacity of the plaintiff to maintain this action, that the court has no jurisdiction of the persons of the defendants, nor the subject of this action, for certain specified reasons, that the complaint is uncertain in specified particulars, and that there is a nonjoinder of parties defendant in that Malcolm Brown, as receiver, "is not made a party plaintiff to this action."

[1] Among the specific points made by the respondents in support of the judgment is that the court was without authority to appoint a receiver in the action of *Borges v. Dunham*, and that, therefore, the appellant cannot maintain the present action, because, as counsel states the proposition, "the order appointing a receiver was void, and being void the bond must fail." But a review of this question by this court in this action is foreclosed by the decision of the Supreme Court affirming the order appointing the receiver concerned here. *Borges v. Dunham*, etc., 169 Cal. 83, 145 Pac. 1011. While it is true that the record on appeal from said order was such as to preclude a review of the merits of the action of the court in making it, and the decision was therefore made to rest on the legal presumption of the due regularity of the proceeding culminating in the making of the order, yet the affirmance of the order involves a conclusive determination of the question and is consequently res adjudicata.

[2] The defendants further contend, how-

ever, that the plaintiff has no capacity to maintain this action, and that the same was prematurely brought. The first of these objections to the action is founded upon the proposition that, the judgment in the main action not having become final at the time the present action was instituted, and the court not having discharged the receiver, the latter is the proper and necessary party to bring and maintain this action, inasmuch as he is entitled, under the order appointing him the receiver, to the exclusive possession and custody of all the rents, issues, and profits accruing from the property in dispute in said action from the time he was so appointed.

But we are unable to perceive how the receiver may be held to be authorized to maintain an action on the undertaking here declared upon. The undertaking does not run to the receiver, but to the plaintiff. The action on the undertaking is not one to recover moneys from Mrs. Dunham, the defendant in the main action and the appellant from the order appointing a receiver, but its purpose is to recover for any damage resulting from the possession of the property and the collection of its rents, issues, and profits by Mrs. Dunham and against which damage the defendants here undertook by their bond to indemnify the plaintiff. We cannot perceive wherein the receiver could claim any damage against the defendants here by reason of their undertaking.

[3] We are of the opinion, however, that the point made by the defendants that this action was prematurely commenced is well taken.

This action was commenced on the 25th day of March, 1915, but at that time the judgment in the main action had not become final, said judgment having been entered on the 11th day of November, and, while it has not been made to appear whether or not an appeal has been taken therefrom, the right to appeal therefrom nevertheless existed for the period of 6 months from the time of the entry thereof, or, to be more specific, the time within which the defendant in said action was legally authorized to appeal from the judgment therein entered against her did not expire until the 12th day, of May, 1915. Section 939, Code Civ. Proc. It follows that said action, within the contemplation of section 1049 of the Code of Civil Procedure, was still pending, after the entry of judgment therein, for at least the period of 6 months. The section just referred to provides:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

It is obvious that a judgment rendered and entered in an action cannot become final so long as the action is pending within the meaning of the foregoing section. See *Naftzger v. Gregg*, 99 Cal. 83, 33 Pac. 757, 37 Am.

St. Rep. 23; In re Blythe's Estate, 99 Cal. 472, 34 Pac. 108; Story v. Story I. C. Co., 100 Cal. 41, 34 Pac. 675; Brown v. Campbell, 100 Cal. 635, 646, 35 Pac. 433, 38 Am. St. Rep. 314.

Now, the bond upon which the present action is founded, it will be noted, imposes upon the defendants two several and distinct obligations, viz.: The one whereby they have bound themselves in the sum of \$300 to indemnify the plaintiff in this action for the costs on appeal, and the other, whereby they have bound themselves in the sum of \$1,000 to hold the plaintiff free from loss, in the event that he should obtain judgment in the main action against the defendant therein, by reason of the moneys collected by the latter pending the appeal from the order as rents, issues, and profits growing out of the land. Whether this view of the undertaking be correct or not must depend, of course, upon the intention of the sureties, and this proposition must in turn be determined by a construction of the instrument.

[4, 5] While the relief asked by the plaintiff in this action is confined or limited by the complaint to the damage alleged to have been suffered by the plaintiff by reason of the rents, etc., coming into the hands of Mrs. Dunham pending the appeal from the order appointing a receiver, we may, nevertheless, express the opinion that the plaintiff is entitled to maintain an action in the proper forum upon the undertaking in so far as it obligates the defendants (sureties) to reimburse him for the costs on the appeal from said order. The receiver was appointed upon the application of the plaintiff, and, in the absence of a showing of an abuse of authority by the court in making the order of appointment, the presumption is that the appointment of a receiver was in all respects proper. The plaintiff was required, of course, to defend on the appeal from the order appointing the receiver the action of the trial court in that regard. He was necessarily the respondent in that appeal and, said order having been affirmed on appeal, he is entitled to be reimbursed by the appealing party—the party vanquished on the appeal—for the necessary or legal costs incurred by him in so defending the order.

[6] But, as stated, our conclusion is that this action upon that part of the undertaking referred to is premature, or, in other words, that the plaintiff was not, at the time of the commencement of the present action, legally authorized to maintain it. The conclusion thus declared is inspired by the conviction, based upon a construction of the undertaking by the light of all the circumstances surrounding its execution, that it was not the intention that the obligation of the undertaking upon which the plaintiff wholly relies for a recovery was to be discharged until there had been a judgment entered in favor of the plaintiff and the same had become final.

At the time of the execution of the undertaking the trial on the merits had not been completed, and consequently no judgment entered for the plaintiff. The issue submitted by the plaintiff by his complaint was whether the legal title to the land in dispute had been and was held by the defendant in trust for his benefit. The defendant answered the complaint denying specifically its allegations, and with her answer filed a cross-complaint in which she prayed for a decree quieting her title to the property described in the complaint. After issue joined, the plaintiff, upon notice duly given, applied to the trial court for an order for the appointment of a receiver to receive the rents, issues, and profits of the real property in controversy. The time for hearing the application was fixed for the day on which the action had been set down for trial, and, after taking some testimony, the court made the order appointing a receiver. *Borges v. Dunham*, 169 Cal. 83, 145 Pac. 1011. The question, then, at issue at the time the order for the appointment of a receiver was made, was whether the plaintiff was entitled to a cancellation of his deed to the property to the defendant and the property declared to be held in trust by the latter for the benefit of the former, or whether both the legal and equitable title to the property was in the defendant and she entitled to a decree quieting said title. It hence follows that the plaintiff, at the time of the appointment of the receiver and at the time of the execution of the undertaking, was not entitled to the possession of the property, nor to the rents, issues, and profits thereof.

Now, it will be noted that the undertaking, so far as it relates to the possession of the land and the collection of the rents, issues, and profits thereof by Mrs. Dunham, pending the decision on the appeal from the order appointing the receiver, provided, among other things, as follows:

"That if the said appellant does not make such payment within 30 days after the filing of the remittitur from the Supreme Court of the state of California, to which said appeal is taken, judgment may be entered upon the motion of the respondents, and in their favor, against the undersigned sureties for the said amount of said judgment, together with interest which may be due thereon, and the damages and costs which may be awarded against the appellant on appeal."

The meaning of the foregoing language is, it must be conceded, very obscure; but, considering that, at the time of the execution of the undertaking, there was pending no appeal the disallowance of which by the Supreme or appellate court would result in a judgment for any amount of money or a money judgment of any sort, we take it that what the sureties meant by that language is this: That they would not only guarantee the payment of the costs on appeal from the order appointing a receiver, but that, if a final judgment on the merits was eventually obtained by the plaintiff, they would in-

demnify him against any damage which might result to him by reason of the fact that, pending the determination of the appeal from the order, the defendant Mrs. Dunham was permitted to remain in possession of the property and to collect and retain the rents, issues, and profits thereof. This, it appears to us, is the correct interpretation of the language of the undertaking, above quoted, and of the intention of the sureties; for the only appeal actually pending when the undertaking was made and delivered was the appeal from the order appointing a receiver, and obviously there could result from said appeal no judgment other than one affirming or reversing the order, except in so far as the awarding of costs on said appeal may be treated as a judgment for an amount of money, and this we do not think can be truly said to be the case. Besides, as to the costs on said appeal, the undertaking, as before suggested, makes a separate and distinct provision.

The demurrer was, in our opinion, properly sustained, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(39 Wash. 587)

OECHSLI et ux. v. WASHINGTON ELECTRIC RY. CO. (No. 13037.)

(Supreme Court of Washington. Feb. 15, 1916.)

1. RAILROADS §82—RIGHTS OF WAY—DEEDS—CONSTRUCTION.

A right of way deed for an electric railroad declared that the right granted should be held and possessed by the grantee or his heirs and assigns, so long as the railroad should be maintained on the land, but that if the railroad should be abandoned all right should cease and the lands revert to the grantor or his heirs or assigns, but such right should not determine, in any event, prior to the expiration of the period of two years from the date thereof. *Held*, that the last clause was inserted for the grantee's benefit, being intended to preclude forfeiture even for a failure to commence work on the railroad for two years after the execution of the deed, and so the right of way could not be forfeited because the entire road had not been constructed at the expiration of two years and had not at that time been electrified.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. §82.]

2. RAILROADS §82 — OPERATION — FORFEITURE OF RIGHT OF WAY.

Where a deed for a right of way for an electric railroad provided for forfeiture in case of abandonment, unreasonable delay in electrifying the road does not warrant forfeiture; the road having been constructed and operated by steam.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. §82.]

3. RAILROADS §82 — RIGHTS OF WAY — EJECTMENT.

Where a railroad company enters upon and with knowledge of the landowner constructs its tracks over his property, the landowner can only recover damages, and cannot eject the corporation from the land. Therefore, where a railroad company under a franchise to construct an electric road constructed its right of way

across plaintiff's land, its unreasonable delay in electrifying the road will not entitle plaintiff to eject it or to enjoin operation of the road.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. §82.]

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by Ben Oechsli and another against the Washington Electric Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

W. A. Reynolds, of Chehalis, for appellants. Forney & Ponder, of Chehalis, and C. D. Cunningham, of Centralia, for respondent.

ELLIS, J. Action to cancel a deed of a right of way for an electric railway because of an alleged failure of the defendant, as successor in interest to the grantee, to comply with the terms of the grant. Plaintiffs also seek to enjoin the maintenance or operation of any railroad on the right of way and to recover damages for injury to the land caused by the construction of a roadbed across it.

Omitting acknowledgment and description, the deed reads:

"Know all men by these presents: That Ben Oechsli and Christiana Oechsli, husband and wife, in consideration of the sum of \$1.00 to them in hand paid, and the benefits to accrue to them by reason of the operation of an electric railroad over the lands herein described, do hereby grant and convey to George A. Robinson, his heirs, successors, or assigns, a right of way for the construction, operation and maintenance of a railroad; said right of way to be thirty-five feet wide on each side of center line of said railroad as the same shall be definitely located and constructed over and across the following described premises, to wit: [Describing property and location of right of way.]

"The right hereby granted shall be held and possessed by the party of the second part, heirs, successors, and assigns so long as he, or his successors, heirs, or assigns shall maintain and operate such railroad over and across the lands aforesaid, provided, however, that if said railroad shall be abandoned all right hereunder shall cease and the right in and to the lands hereby granted shall revert to the grantor herein, or his heirs or assigns without notice or declaration of forfeiture and the same as if this contract had not been made, but the rights hereby granted shall not determine in any event prior to the expiration of the period of two years from the date hereof.

"The right of way to be properly fenced on both sides and provision made for station at or near county road, if demanded, to have half acre of additional land for station purposes.

"Witness our hands and seals the 25th day of March, 1910.

Ben Oechsli.
"Christiana Oechsli."

It is conceded that the defendant is a public service corporation and has acquired the interest of Robinson. It has constructed a railroad from Chehalis for a distance of about 7½ miles running through the plaintiffs' land, which lies about 4 miles from Chehalis. It has acquired a right of way some distance further, and the railroad is still in process of construction. For about three years trains have been operated by steam over the road through plaintiffs' land mainly in connection

with construction work, but whatever freight is offered is hauled for hire. Poles for electrifying the road have been set from Chehalis through plaintiffs' land and have been distributed for setting to a considerable distance further. Copper plates are placed at the rail joints for use in operating the road by electricity. Of the plaintiffs' land one-half acre selected by them has been fenced for a station, and a switch has been constructed thereon. The entire right of way across plaintiffs' land has been fenced. Defendant for a considerable time has been negotiating for electrical current with a power company which has a high-power transmission line running alongside the road as far as the plaintiffs' land, but no contract has yet been consummated. The evidence shows that in order to use this current it would be necessary at great expense to install transformers at substations to reduce the voltage. It is fairly deducible from the evidence that the business which the road would get over the short distance to which it has been constructed would not justify the expense of electrifying it at the present time, but the defendant's president testified that it is the intention to do so when the road shall have been completed from Chehalis to Onalaska, where there is a large mill, and expressed the belief that this would be done within the next year and a half. He also testified that the work has been much delayed by financial conditions and by suits in condemnation for completing the right of way.

At the close of the evidence, the court, on defendant's motion, withdrew the case from the jury and dismissed it. Plaintiffs appeal.

[1] Appellants claim that the clause in the deed, declaring that the "rights hereby granted shall not determine in any event prior to the expiration of the period of two years from the date hereof," fixes a limitation within which the road must be built and in operation to avoid a forfeiture. We think not. This clause, when read in context, was clearly inserted for the grantee's benefit. It was intended to qualify the immediately preceding provision, that "if said railroad shall be abandoned all rights hereunder shall cease and the right in and to the lands hereby granted shall revert to the grantor herein," etc. The provision as a whole makes plain the intention of the parties that the only ground for a forfeiture shall be the abandonment of the railroad. The final clause was intended to preclude even the failure to commence work within two years from being construed as an abandonment. It is a limitation on the right to declare a forfeiture, not a limitation on the grant.

[2] It is next contended that the grant was for an electric railroad, and that there was sufficient evidence to take the case to the jury on the question whether a reasonable time had elapsed in which to electrify the road. This question is interesting, but foreign to the issues. The action was one for a

forfeiture, an injunction, and for damages to the land occasioned by the grading of the roadbed. None of these remedies is available under the deed for any delay in any detail of the work, but only for an abandonment of the railroad. The failure to electrify the road within a reasonable time, though it might be made ground for an action in damages for the additional servitude imposed by the use of steam as a motive power instead of electricity, is no ground for a forfeiture of the grant, nor for an injunction, and obviously neither augmented nor diminished the physical damage to the land occasioned by grading the roadbed. The deed does not provide for a forfeiture because of any delay in electrifying the road. The failure to employ electricity as a motive power was no evidence of an abandonment of the railroad, which was the only condition for a forfeiture. There was no evidence whatever of such abandonment. Whether therefore the deed be viewed as a grant with a condition subsequent, or of an estate limited upon a contingency, can make no difference. If viewed as the former, the condition is in process of performance. If as the latter, the contingency has not arisen. *Mouat v. Seattle, Lake Shore & Eastern Ry. Co.*, 16 Wash. 84, 47 Pac. 233. Neither was there any evidence of an abandonment of the intention ultimately to electrify the road, even if the deed could be so construed as to make the abandonment of that intention a ground of forfeiture. All of the evidence pointed the other way. The setting of the poles and the placing of copper plates for that purpose verify the president's testimony that such is the ultimate purpose. There was no evidence from which the jury could have inferred an abandonment of that purpose. By the terms of the deed, abandonment, not mere delay, is the only ground of forfeiture.

[3] In any view of the case, the respondent is certainly in no worse position than it would have been had it entered upon the appellants' land and constructed the railroad without any deed but with their knowledge. Being a public service corporation invested with the power of eminent domain, it could not be ejected from the land nor enjoined from the operation of its road. In such a case, under the rule to which this court is committed, the appellants' only remedy would be to recover damages in the value of the land taken and for injury to the land remaining. *Kakeldy v. Columbia & P. S. R. Co.*, 37 Wash. 675, 80 Pac. 205; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Thorberg v. Hoquiam*, 77 Wash. 679, 138 Pac. 304; *Domrese v. Roslyn*, 154 Pac. 140. But the respondent here entered and constructed its road under a grant of the right of way. Obviously and a fortiori, if it were conceded that it had violated the terms of the grant by permanently abandoning the intended use of electricity for that of steam, the appellants' remedy would be, as we have said, only the

damages, if any, to their land resulting from the added servitude. No such case was presented by the pleadings, and no evidence tending to prove such damages was introduced or offered so as to warrant a court amendment and a submission of that issue to the jury. Since no such issue was presented, nothing that we have said can be construed as *res judicata* of that issue should the respondent eventually abandon all intention to electrify the road or unreasonably delay that course to the appellants' damage.

The judgment is affirmed.

MORRIS, C. J., and MOUNT, FULLERTON, and CHADWICK, JJ., concur.

(89 Wash. 534)

TEMPLETON v. WARNER et ux.
(No. 12800.)

(Supreme Court of Washington. Feb. 10, 1916.)

1. APPEAL AND ERROR \S 337—APPEAL AFTER JUDGMENT.

The appeal is after judgment, the filing of it, under the statute part of the taking of an appeal, being after entry of the decree though the service of it, while after the signing, was before entry, of the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1877, 1878; Dec. Dig. \S 337.]

2. SPECIFIC PERFORMANCE \S 4 — SALE OF STOCK.

Plaintiff may not have specific performance of defendant's contract to buy stock and deliver a note in payment, he alleging no circumstances making a note peculiarly indispensable to his rights; but his grievance is a proper one for damages only.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 4; Dec. Dig. \S 4.]

3. CORPORATIONS \S 116—REPRESENTATIONS—OPINIONS.

Defendant cannot avoid his contract of purchase of stock because of plaintiff's representations, not shown to be anything more than mere opinions about value, or to have been relied on in making the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. \S 116.]

Parker, J., dissenting.

Department 2. Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by H. A. Templeton against John F. Warner and wife. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Trefethen & Grinstead, of Seattle, for appellant. McClure & McClure, of Seattle, and Robert McMurchie, of Everett, for respondents.

BAUSMAN, J. [1] The service of this appeal was after the signing, and before the entry, of the decree. Its filing was after that entry. The filing being a part of the taking of an appeal under our statute, we hold that there was here an appeal after, and not before, a judgment. A motion to

dismiss is consequently overruled. We also notice, but find it unnecessary to discuss, a motion to strike the statement of facts. That, too, is denied.

[2] This suit was begun in equity for specific performance, or damages as a mere alternative, of a written contract to buy shares of stock and to deliver a note in payment of them; but plaintiff has no standing in equity, as he alleges no circumstances making a note peculiarly indispensable to his rights. His grievance was a proper one for damages only, and so the court ruled. The case then proceeded at law without a jury, as neither side claimed one or objected to that procedure.

[3] We have here a shareholder agreeing in writing to buy the stock of another shareholder who was also manager. The defendant, while he did not know as much about its affairs as plaintiff, was very far from being ignorant of the condition, and six months before he had warned plaintiff to do better as manager. Entering into the agreement after long discontent, he would now escape by showing that plaintiff represented certain assets, the bills payable, to be worth substantially more than they were. The agreement itself contains no warranties or representations at all. We do not find in the whole testimony anything to prove that any representations were false, that the few so-called representations uttered were other than mere opinions about value, that any opinions were regarded as important or given as inducements; or that defendant went into the bargain because he relied on them.

What shall be said of a person who, endeavoring to brand another with fraud, can put his grievance so weakly as this:

"I know he told me the business was in good shape, and it appears to me he told me that the bills receivable and bills payable were about equal; but I will not say for sure he did."

It is not thus that fraud is to be put in another man's mouth, and he but pretends to have placed reliance on words who is not sure that they were ever uttered.

The lower court having sustained this defense, the judgment must be reversed, and since, sustaining the defendants, the learned trial judge did not feel called upon to measure plaintiff's damages, and the record here is not such that this court can do so, the cause is remanded for further proceedings not inconsistent with this opinion.

MORRIS, C. J., and MAIN and HOLCOMBE, JJ., concur.

PARKER, J. (dissenting). I am unable to view the facts as they are viewed by my Brethren in the foregoing opinion. I think the representations made by the appellant were false and such as to entitle respondent to avoid the sale contract, in view of appel-

lant's knowledge of the business affairs of the concern and respondents' want of knowledge thereof.

(89 Wash. 523)

BENN v. CHICAGO, M. & ST. P. RY. CO.
(No. 12992.)

(Supreme Court of Washington. Feb. 7, 1916.)

1. RAILROADS §446—ACTIONS FOR VALUE OF STOCK—QUESTIONS OF LAW OR FACT.

In an action for the value of colts struck by a freight train consisting of 16 cars, fairly light, and going at from 28 to 30 miles an hour, where the evidence showed a reasonable effort or an effort not shown to be unreasonable to stop the train, the court erred in holding as a matter of law that the train could have been stopped within 600 or 650 feet.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. §446.]

2. RAILROADS §443—ACTIONS FOR VALUE OF STOCK—QUESTIONS OF LAW OR FACT.

In an action for the value of colts struck by a train, evidence held insufficient to support trial judge's finding that the trainmen expected the horses to run off the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. §443.]

3. RAILROADS §425—LIABILITY FOR KILLING STOCK—STATUTORY PROVISIONS.

Rem. & Bal. Code, § 8730, provides that every railroad shall, outside of any corporate city or town, and outside the limits of any side track or switch, construct along the right of way a substantial fence, and at every road crossing a safe crossing must be maintained, and on each side of such crossing and at each end of such side track or switch outside of any incorporated city or town a sufficient cattle guard. Held that, as a company was not required to fence a depot and side track or switch outside an incorporated city or town, a cattle guard at each end of such side track would have served no purpose, and its absence was not the proximate cause of an injury to live stock which went upon the tracks at that point and were killed by a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1527-1533; Dec. Dig. §425.]

4. RAILROADS §441—ACTIONS FOR VALUE OF STOCK—QUESTIONS OF LAW OR FACT.

A railroad company's failure to comply with the statute as to constructing and maintaining fences and cattle guards merely requires the company when sued for injuries to live stock to meet a prima facie case or presumption of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1595; Dec. Dig. §441.]

Department 1. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Dave Benn against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

George W. Korte, of Seattle, for appellant.
E. S. Avey, of Elma, for respondent.

CHADWICK, J. Appellant maintains a flag station known as Balch in Chehalis county. The place is not incorporated, and is no more than a station house and a loading ground, which accommodates a side or pass-

ing track. At one end of this tract of land, which is 200 by about 1,900 feet, there is a county road. At the other end is a fence with a cattle guard. The respondent was the owner of three colts, which wandered from his field and were killed about 3 o'clock in the morning of November 1, 1913, by a freight train belonging to the appellant.

The only question in this case is whether the engineer did all that he could do to stop his train before striking the animals. The station ground is approached on a slight curve. The colts were observed first by the fireman. At that time they were about 200 feet in front of the locomotive. Because of the curve they were not seen by the engineer until the engine had straightened out on the track. When observed by the fireman he immediately called to the engineer, who shut off the steam and set the air. The testimony of the engineer and fireman would indicate that the colts ran about 400 feet before they were overtaken. The train was a freight train consisting of 16 cars, fairly light, and going at from 28 to 30 miles an hour.

[1] The court below held, as a matter of law, that the engineer should have stopped the train within 600 or 650 feet, and that if he had done so, the stock would not have been injured. A judgment for the value of the colts was entered in favor of the respondent. There was no testimony tending to show within what distance a train, running at the rate mentioned, could have been stopped so as to avoid the injury. While it is possible that a court would be warranted in holding that a train could be stopped within a distance so great that the minds of reasonable men would not differ upon the question, we cannot so hold in this case. Where a fact depends upon the application of some scientific principle or upon the use, or the consequences of the use, of machinery which requires skillful operation or manipulation, courts rarely ever indulge a presumption of law, or compel a conclusion of fact in the absence of positive testimony to sustain it. The only testimony in the case going to this point is that of the engineer. He said, in reply to the question:

"Q. In what distance can you stop with that size train, running at that rate of speed? A. Freight trains—some trains would stop in 500 feet, while 1,500 feet it would take to stop others. The braking power on freight trains is very variable and hard to state; but on a rule 1,000 feet."

But, granting that the stopping of a freight train consisting of a locomotive and 16 cars, going at about 30 miles an hour, is a matter of which the courts and, as is contended by respondent, juries, will take notice and find of their own knowledge, or, in other words, treat as a matter of legal conclusion or inference, we have found at least one case where it appears that a train consisting of a locomotive and two passenger coaches, go-

ing at 6 or 8 miles an hour, could be stopped in from 150 to 200 feet; at 35 miles an hour in from 700 to 800 feet. See *Anderson v. Chicago, St. P., M. & O. Ry. Co.*, 87 Wis. 195, 58 N. W. 79, 23 L. R. A. 203.

Counsel relies on *Timm v. Northern Pacific Ry. Co.*, 3 Wash. T. 299, 13 Pac. 415. Here the train consisted of 60 or 70 cars loaded with coal:

"What was the description of the train otherwise, or of the whistle blast, or of the railway grade, or of the engine, or how far from the cattle the train was when they could have been first sighted from it, or within what space the train could have been stopped, or how the speed of the train after sighting the cattle, or as it neared them, was as compared with its speed before, does not transpire."

Although negligence is not to be presumed and it was not, by any means, clear that the engineer was in fault, the court, after a consideration of the evidence, assumed that the train might have been stopped within the space of 270 yards, which is 810 feet. It is proper to draw conclusions from established or admitted facts, and possibly, in the absence of all testimony, from the physical facts, but courts cannot supply the want of facts by resort to assumptions or hypothesis. In any event, the court did not assume to decide the question by resort to judicial knowledge, and the case can have no bearing where, as in this case, a reasonable effort, or rather an effort that is not shown to be unreasonable, was made to stop the train.

[2] After finding that a train could be stopped within a distance of 650 feet, the trial judge says:

"* * * The employes of defendant company in charge of the engine evidently expected the horses would run off at the side of the track and did not exercise the proper caution and were negligent in not stopping the train within that distance."

We found nothing in the testimony, and we have read it all, to sustain the finding that the employes of appellant evidently expected the horses would run off on the side of the track. On the contrary, the engineer testifies that he endeavored to stop, and that if he had had another 100 or 150 feet to go he would not have come in contact with the animals at all, that he could think of nothing he had left undone, and that he was mindful of the danger to himself and his fireman in striking the stock.

The only thing we find in the record which could have misled the court is the following:

"Q. Isn't it a fact that, although you don't aim to hit the stock, sometimes you like to give them a chase down the track? A. Not at that speed; because we might get the benefit of the fun. Q. Have you ever been ditched that way?

A. No; but I have helped pick up fellows that was. Q. I have heard of bulls butting engines off the track. You feel quite sure that you did everything that you could do to avert that accident? A. I did."

[3] Respondent suggests in his brief that, notwithstanding the grounds upon which the case was made to rest, appellant is liable under the statute (Rem. & Bal. Code, §§ 8730, 8731), in that Balch station is not an incorporated city or town, and it was therefore the duty of the company to fence its tracks. The statute (section 8730) reads:

"Every person, company or corporation having the control or management of any railroad shall, within six months after the passage of this act, outside of any corporate city or town, and outside the limits of any sidetrack or switch, cause to be constructed and maintained in good repair on each side of said railroad, along the line of said right of way of such person, company or corporation operating the same, a substantial fence, and at every point where any roadway or other public highway shall cross said railroad, a safe and sufficient crossing must be built and maintained, and on each side of such crossing and at each end of such sidetrack or switch, outside of any incorporated city or town, a sufficient cattle-guard: Provided, that any person holding land on both sides of said right of way shall have the right to put in gates for his own use at such places as may be convenient."

We have italicized the part relied on. We confess our inability to understand the meaning of the italicized words. They cannot mean that a cattle guard is required at each end of every switch outside of an incorporated city or town, for "such" switch is the switch first mentioned in the act, and it is by express words exempted from the fence features of the law. It follows if a company is not required to fence its depot or side tracks or switch, that a cattle guard at the end of each switch would serve no purpose. Indeed we cannot imagine a condition calling for the application of the words relied on. There being no law compelling the company to fence its side tracks, the conclusion follows that the want of cattle guards was not the proximate cause of the injury.

[4] The statute is unavailing to respondent for another reason. An omission to comply with its terms does no more than to put the company under a rule of evidence; that is, to meet a prima facie case, or a presumption of negligence in the event that stock is killed at a point where the track is not fenced. Granting that respondent made out a prima facie case, we think that appellant overcame it and should prevail.

Reversed and remanded, with directions to dismiss.

MORRIS, C. J., and MOUNT, FULLERTON, and ELLIS, JJ., concur.

(89 Wash. 579)

KETLER v. MURREY et al. (No. 13069.)
(Supreme Court of Washington. Feb. 9, 1916.)INTOXICATING LIQUORS \S 327—SALE—STATUTES.

Rem. & Bal. Code, §§ 2962, 6268, declaring that any person who shall sell intoxicating liquors without a license shall be deemed guilty of a misdemeanor, and that nothing shall allow any person, firm, or corporation to sell or otherwise dispose of intoxicants without first obtaining license, does not apply to the sale of a quantity of intoxicants with a hotel, restaurant, and saloon, where the sellers were going out of business, and delivery cannot be avoided on the ground that the sellers had no license to sell intoxicants in quantity.

[For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467-472; Dec. Dig. \S 327.]

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by H. L. Ketler against M. E. Murrey and F. W. Kirsch, partners as Murrey & Kirsch. From a judgment for plaintiff, defendants appeal. Affirmed.

J. W. A. Nichols, of Tacoma, for appellants. J. W. Selden and Gordon & Easterday, all of Tacoma, for respondent.

CHADWICK, J. Respondent purchased a hotel, restaurant, and saloon from the defendants. They refused to make delivery upon the ground that the stock of goods consisted, in part, of two kegs of beer, a barrel of whisky containing some seven or eight gallons, and several bottles of liquors and wines. Appellants rely upon the statute (Rem. & Bal. Code, §§ 2962, 6268):

"Any person who shall sell or dispose of any spirituous, malt, or other intoxicating liquors without having first obtained a license from the proper authorities shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not to exceed six months, or by both fine and imprisonment, for each offense."

"Nothing in this act shall be held or construed to allow any person, firm, or corporation to barter, sell, or otherwise dispose of any spirituous, malt, fermented, or other intoxicating liquors without having first obtained a license therefor, as required by the provisions of this chapter, except as provided in section 6275, infra."

The court below held that a license to sell in quantity was not necessary where the seller was closing out his business as a dealer in intoxicating liquor. The holding was correct. Statutes such as our own are directed to the regulation of traffic in intoxicating liquor, and not to the transfer of property in it. Black on Intoxicating Liquors, p. 130.

In Wildermuth v. Cole, 77 Mich. 483, 43 N. W. 889, under a statute as broad as our own, the Supreme Court of Michigan held that a sheriff holding intoxicating liquors under a writ of attachment did not need a license to sell on execution sale; that his act did not fall within either the letter or the spirit of the statute, which was directed

only to those engaged in the business of selling intoxicating liquors. We note this case because appellants contend that all the cases cited by respondent are to be distinguished as covering sales made by public officers in the performance of their duty. If appellants' reasoning be good, it would not be possible so to distinguish the cases; for the statute uses the words "any person," and a sheriff or other officer would fall within the letter of the law. If it were admitted that the sale by a sheriff could be so distinguished, it would not follow that a sale by an assignee of a debtor or an administrator was a sale under the compulsory process of a court, and yet it is held that a sale by either of these agents does not fall within the meaning and intent of the law.

In Williams v. Troop, 17 Wis. 463, the court said:

"He [an administrator], is a person whose plain legal duty it is to sell property, collect and pay the debts, and settle up the estate committed to his charge. In performing this duty and disposing of the spirituous liquors belonging to the estate, it is no more necessary for him to obtain a license than it would be for a sheriff to obtain one before he could sell liquors taken upon an execution."

And the like rule was applied to an assignee in Gignoux v. Bilbruck, 63 N. H. 22.

In Forwood v. State, 49 Md. 531, in discussing the law of the case it is said:

If the vendor "had disposed of them [stock of liquors] at private sale by wholesale, and at one time in good faith, solely for the purpose of closing his business, and not in the continued prosecution of his business, this would not have been, in our judgment, any infraction of the license laws."

In Hagerty v. Tuxbury, 181 Mass. 126, 63 N. E. 333, the holding is epitomized in the syllabus:

"One owning an interest in a liquor saloon and its stock in trade, but having no license to sell intoxicating liquors, lawfully may sell to his partner his interest in the saloon and the intoxicating liquors it contains."

We find the judgment of the lower court well founded in reason and sustained by ample authority.

Affirmed.

MORRIS, C. J., and MOUNT, ELLIS, and FULLERTON, JJ., concur.

(89 Wash. 552)

VAN HORN v. CHAMBERS et al.
(No. 12712.)

(Supreme Court of Washington. Feb. 9, 1916.)

1. VENDOR AND PURCHASER \S 33 — FALSE REPRESENTATIONS—RELIANCE.

Relative to right to rescind for fraud, the purchaser of land several hundred miles distant in another state, known never to have seen it, and to be relying on the vendors' representations in regard to it, had a right to so rely.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. \S 33.]

2. VENDOR AND PURCHASER — 33 — FALSE REPRESENTATIONS—RELIANCE—WARNING.

Relative to right to rescind, a purchaser had no less right to rely on the vendors' representations as to the land several hundred miles distant, because warned by an attorney, with whom he consulted on a minor matter, not to make the trade without first examining the land.

[Ed. Nota.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 38, 40-43, 66; Dec. Dig. § 33.]

Department 2. Appeal from Superior Court, Walla Walla County; Edward O. Mills, Judge.

Action by Francis M. Van Horn against Clarence Chambers and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Reynolds & Bond, of Walla Walla, for appellant. Sharpstein & Sharpstein, of Walla Walla, and Merritt, Oswald & Merritt and O. C. Lantry, all of Spokane, for respondents.

FULLERTON, J. On May 8, 1913, the appellant, Van Horn, was the owner of a certain tract of land situated in Walla Walla county, in this state, containing some 200 acres. Theretofore he had contracted to sell the land to one C. D. Weaver, under some form of deferred payment plan, on which there was at the date named a balance unpaid of \$10,500. Van Horn had listed his interests in the property for sale with a real estate broker residing in Spokane. This broker introduced him to the respondent Clarence Chambers, who proposed to exchange for his interests a certain 80-acre tract of land situated near Great Falls, in the state of Montana. After some negotiations between the parties a written agreement was entered into between them by which Van Horn agreed to convey to Chambers the Walla Walla county lands and assign to him his interest in the contract, in consideration of a conveyance by Chambers of the lands in the state of Montana, the payment of \$530 in cash, and the assumption by Chambers of an obligation of \$180 due from Van Horn to one A. J. Bolter; the exchange to be consummated as soon as abstracts of title to the lands could be furnished and deeds executed. Deeds were executed and delivered on May 10, 1913, two days after the agreement was executed, but prior to the time the abstracts were furnished. The deed executed by the appellant ran to the respondent W. H. Honefenger, instead of the respondent Chambers, who furnished the consideration for the exchange. Shortly after the execution of the deeds the appellant visited the property in Montana, and, finding it, as he contended, not in accordance with the representations made by Chambers, returned and sought a voluntary rescission of the contract. This being denied him, he instituted the present action to enforce a rescission. The trial court denied him relief, and from the adverse judgment, he appeals.

On the question whether the appellant was actually defrauded the evidence leaves no room for doubt. For the very considerable values he gave in exchange he actually received only the value of the cash payment made to him by Chambers. The land in the state of Montana was first sold on execution shortly after the exchange was made, under a judgment obtained against Chambers upon an obligation he had left unpaid to a resident of that state, and subsequently upon the foreclosure of a mortgage outstanding against the property at the time of the exchange. These sales exhausted the property, leaving no surplus to the holder of the fee. Nor does the evidence leave any doubt that Chambers misrepresented the character and value of the lands. He represented them as worth \$125 per acre, and that a loan could be readily obtained upon them for \$2,500; that it was high-grade agricultural land, with a fine soil, capable of producing any kind of grain, and was particularly adapted to the growth of vegetables, the purposes for which the appellant desired it. The sequel proved that all of these representations were untrue. No witness valued the land at anywhere near the value put upon it by Chambers, and the appellant testified that the best offer for a loan upon it was \$5 per acre. It is practically undisputed that the land is worthless for growing cereals or vegetables or for any kind of agriculture, and that it had never been used for such purposes. It was shown also that Chambers misrepresented the amounts of the mortgage upon the property, and that he said nothing concerning liens or the possibilities of liens from unsecured indebtedness.

[1] The principal question is whether the appellant acted in making the exchange with that degree of prudence required of him under the circumstances. The respondent's counsel argue with much earnestness that he did not, citing and relying upon the case of Washington Central Improvement Co. v. Newlands, 11 Wash. 212, 39 Pac. 366. But that case was rested chiefly upon the ground that misrepresentations alleged to have been made related to matters easily ascertainable by the person claiming to have been deceived, that they were representations the truth or falsity of which the injured party could have ascertained by only ordinary diligence, and that his failure to exercise such diligence was negligence on his part. In the course of the opinion it was recognized that a different rule obtains where the opportunity to investigate is not at hand, such as where the property is at a distance, or where for any reason the truth or falsity of the representation is not readily ascertainable. This distinction is recognized also in our later cases, notably in Wooddy v. Benton Water Co., 54 Wash. 124, 102 Pac. 1054, 132 Am. St. Rep. 1102; Stewart v. Larkin, 74 Wash. 681, 134

Pac. 186; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65; and *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585. In each of these cases it is held that:

A "purchaser may rely upon the representations of a vendor where the property is at a distance, or where for any other reason the falsity of the representations is not readily ascertainable."

The facts of the case at bar bring it within the rule of the later cases rather than the earlier ones. The contract for the exchange of the property was made at Spokane, in this state. The land in Montana was several hundred miles distant. It was known that the appellant had never seen it, but was relying upon the statements concerning it made by Chambers. Chambers therefore spoke at his peril. He should have told the truth or remained silent.

[2] The respondents also rely much upon the fact that warning was given the appellant not to make the exchange without first examining the land he was to receive. This warning came through an attorney with whom the appellant consulted with reference to a minor matter concerning the exchange. But the fact that the appellant did not heed the warning cannot, it seems to us, aid the respondents. To us it only evidences the fact that he had been completely deceived by the respondents; he was led to believe that he was in the hands of Samaritans, whereas he had fallen among the Philistines.

The judgment is reversed, and the cause remanded, with instructions to direct a reconveyance from the respondent Honefenger to the appellant of the lands in Walla Walla county, together with a reassignment of the contract mentioned, on the appellant's paying into court for the use of the respondents the sum of \$530 and depositing therein a reconveyance to Chambers of the land in Montana. As a condition precedent to a reconveyance the appellant must also pay into court the obligation assumed by Chambers, should it be established that Chambers has complied with his agreement by paying the debt.

MORRIS, C. J., and MAIN and ELLIS, JJ., concur.

(89 Wash. 527)

IMLER et al. v. NORTHERN PAC. RY. CO.
et al. (No. 13134.)

(Supreme Court of Washington. Feb. 7, 1916.)

1. RAILROADS ⚡369—LICENSEE WALKING ON TRACK—COMPANY'S DUTY.

Where plaintiff's decedent was walking on defendant railroad's right of way where a license had been established by customary and frequent use, it was defendant's duty to keep a reasonable lookout in anticipation of the presence of such licensees on the right of way and to use reasonable care to avoid injury after discovering decedent's presence thereon.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1259-1262; Dec. Dig. ⚡369.]

2. RAILROADS ⚡358—DOUBLE TRACK—RUNNING AGAINST TRAFFIC—LICENSEES.

A railroad company owes no duty to licensees using its right of way as a pathway to run its trains traveling in one direction on one of its double tracks and trains in the opposite direction on the other track, though customarily so operated, since, under both its duty to the public and its rights as owner of the right of way, it may run its trains in any direction on either track as it may see fit.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1236, 1237; Dec. Dig. ⚡358.]

3. RAILROADS ⚡365 — RIGHT OF WAY IN CITIES—LICENSEES—DUTY.

The duty of railroads to persons crossing its right of way for a pathway in cities and towns, where the population is congested, and the public have been accustomed to use the tracks, is higher than in sparsely settled country districts.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1254-1256; Dec. Dig. ⚡365.]

4. RAILROADS ⚡358—CROSSINGS—DUTY.

The duty of a railroad to persons crossing its tracks at points established by the company or by an implied license under long user by the public is that of strict accountability, since it is necessary for men and traffic to cross railway tracks in the pursuit of their legitimate undertakings and conveniences by reason whereof a legal right to so cross arises.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1236, 1237; Dec. Dig. ⚡358.]

5. RAILROADS ⚡377 — LICENSEES WALKING ON RIGHT OF WAY—ANTICIPATING PERIL.

In an action to recover for the death of a licensee walking on a right of way of defendant railroad, where it did not appear that decedent was on the track, the fact that the engineer had an unobstructed view for more than a mile does not establish negligence in failing to discover decedent's peril, since the engineer was not bound to anticipate that a man walking along the right of way would step in front of the train.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1280; Dec. Dig. ⚡377.]

Department 1. Appeal from Superior Court, Thurston County; C. E. Claypool, Judge.

Action by Daisy D. Imler and others against the Northern Pacific Railway Company and others to recover for death by wrongful act. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hugo Metzler, of Tacoma, Ben S. Sawyer, of Seattle, and Gordon & Easterday, of Tacoma, for appellants. J. W. Quick, George T. Reid, and L. B. Da Ponte, all of Tacoma, for respondents.

CHADWICK, J. [1] Joseph Imler, while walking along the track of the defendant railway company on the evening of the 4th of November, 1912, was struck and killed by one of defendant's work trains. The place of the accident was between the stations of Centralia and Bucoda, where the company maintains a double-track railway which is fenced and guarded at all proper places with cattle guards. Imler had been at work during the day at a farm about a mile and a half south of Bucoda, where he lived. He left the place of his employment about dusk, and fol-

lowed a road or footpath to the right of way of respondent company. He entered on the right of way either through, or by climbing over, a gate which had been left for the convenience of the owner of the land; the place having been formerly maintained as a private crossing. The crossing had been abandoned about three years before when the company double-tracked its road. The gates had not been removed. Imler had apparently gone but a short distance in the direction of Bucoda when he was struck and killed.

The testimony shows, notwithstanding the fact that respondent maintained a double-track railroad, a part of its transcontinental system over which some 40 trains passed each way every day, and with the track properly guarded, that the people in the neighborhood had for a long time been accustomed to use the right of way and the tracks as a footpath in going to and from their homes situated near the tracks. At times some had ridden bicycles along and between the tracks. One witness testifies that he had ridden a motorcycle, and another that he had seen a man riding along the tracks on horseback.

It is contended by the appellants that the use of the tracks and the right of way by the public in the manner indicated had continued for so long a time that a license to use the tracks as a footpath is implied, and respondent did not use that degree of care which it owed to deceased as a licensee and is liable to answer in damages. Negligence is charged, in that respondents' train was running against traffic, that is, running north on the south-bound tracks; that the headlight was not burning or was so defective as to give no warning; that the train was running at an excessive rate of speed (the testimony does not sustain a finding that it was running more than 35 miles an hour); that at the time of the happening of the accident a north-bound passenger train equipped with a powerful electric headlight, and with cars and coaches brilliantly lighted, was going north on the north-bound track; that the lights from the passenger train sufficiently lighted the track and that portion of the right of way upon which the deceased was walking to enable the engineer and fireman to see and observe him in time to give him warning of his peril; and further that the noise and light caused by the passing of the passenger train held the attention of the deceased, and he relied upon the fact that the west track was habitually used by south-bound trains, and was induced to believe that the south-bound track was, and would be, free and clear of obstructions from behind, and the light and noise and confusion of the passenger train made it impossible for him to hear and discover the approach of the work train.

It is shown that deceased was about 45 years of age, in the possession of all of his faculties and had, at one time, been a sec-

tion hand working along the track where he was killed, and hence had knowledge of the frequent use of the tracks. As material to the history of the case, although not a fact essential to our holding, there was a public highway leading into Bucoda at about the same distance from the place where the deceased was working as was the railroad track. At the close of plaintiffs' testimony, the trial judge took the case from the jury and entered a judgment of nonsuit.

Much of the briefs are taken up with the discussion of the inquiry as to whether deceased was a trespasser or licensee. We shall not inquire whether deceased was a trespasser. We shall assume that he was a licensee, although it may well be doubted whether any person can claim a license to use a railway track, more especially the double track of a transcontinental system over which trains run with great frequency, as a footpath where, as in this case, the track is laid in the open and between stations and is fenced and guarded. Under such circumstances, it has been held that a use, however long continued, will not imply a license. *Burg v. Chicago, R. I. & P. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419; *Ward v. Southern Pac. Co.*, 25 Or. 433, 36 Pac. 163, 23 L. R. A. 715. And such would seem to be the logical result of the opinion of this court in the case of *Hamlin v. Columbia & Puget Sound R. Co.*, 37 Wash. 448, 79 Pac. 991, and *Dotta v. Northern Pac. R. Co.*, 36 Wash. 506, 79 Pac. 32. The duty of a railroad company to a licensee is defined in the case of *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526, as follows:

"In the case of the licensee, the company when moving trains is charged with the additional duty of being in a state of expectancy as to the probable presence of persons upon the track at places where travel thereon is known to be customary and frequent. The care required in the case of the licensee, therefore, calls for both reasonable lookout in advance, and a reasonable effort to avoid injury after presence is discovered."

The determinative question is, therefore, whether the engineer and fireman, or either of them, discovered the presence of the deceased and his peril in time to avoid the accident.

There is no testimony that would warrant us in holding that respondents' agents were remiss in the performance of their duty to the deceased; that is, to keep a lookout and avoid any wanton or willful injury. The engineer testifies that he was keeping a lookout, and that he did not see the deceased until just the moment he was struck. This is not disputed by the testimony of any one, nor do we find the physical or admitted facts to be contrary to his declaration.

In *Spicer v. Chesapeake & O. R. Co.*, 34 W. Va. 516, 12 S. E. 553, 11 L. R. A. 385, a recovery was denied under the following state of facts:

"He is not at a street crossing, but purely for his own convenience is walking on the track

from Sixteenth to Twentieth street; and, seeing a train moving towards him on the track on which he is walking, he steps upon the next track; and being blinded by the headlight of the engine approaching, and, his hearing dulled by it, or more likely because he did not look for a train on the track to which he stepped, he is scarcely on that track before he is struck by a train which is being backed from the depot to the shops, receiving injury, from which he dies in about an hour. No one questions that the company was simply exercising, on ground belonging to it, its lawful business, and that the deceased was not in the public highway, but using the track for his own convenience, when he could have used a walk or path but a few yards distant, outside the tracks, or an alley but a short distance further away. What duty did the company owe him, under these circumstances, except that it should not willfully or wantonly hurt him? Where could the deceased have found a more deadly, dangerous walk? And he was fully aware of this, for he was an employé of the company, was well acquainted with the yard and works of the company there, but not in service in the yard nor on duty then or there. Indeed, his daily contact and familiarity with the railroad operations lulled him into a feeling of security and negligence which cost him his life, when but 21 or 22 years of age. He was in possession of all the natural senses and faculties which tell of danger and aid us in self-preservation amid perils surrounding us."

[2] Although there is no testimony to sustain it, we think the assumption of appellants, as set forth in that part of their complaint describing the presence of the passenger train, is a fair theory of the immediate circumstances and conditions. The deceased was evidently on the west side of the west track when struck, for the bruises on his body indicate that he was struck just above the hip by the pilot beam. At the time the two trains were running nearly parallel, and the deceased must have assumed that the passenger train was the only train approaching, and, there being an utter absence of testimony that he had been walking for any distance on either track, he must have stepped upon the ties immediately in front of the work train without looking, resting upon the assumption that a train on the west track, if any, would come from the north and not from the south. It follows that the only contention that can be advanced with any show of reason is that respondent was bound to operate its trains "with traffic" in all instances, and that licensees may rest secure in the belief, and act upon it without looking, that all trains will move in the customary manner. Whatever the rights of a licensee may be, railroad tracks are laid for the convenience of those who operate them, and the public which employs them, and those who ride upon their cars. A licensee cannot, from the nature of things, having in mind the public duty of the carrier, assume that a railroad company will not, or may not, use its property as will best serve, or as may be necessary at times to serve, its primary purposes. It cannot be held guilty of negligence if, in the performance of its functions as a public carrier, it suspends its own rules for the time being for the movement of its trains,

and sends a train forward against traffic. We might as well hold that a train, running ahead of time or behind time, would have to flag its way to protect those who were accustomed to use its track as a footpath in country districts; for, if appellants' theory be good, a licensee might as well rest under the assumption that if a train did not pass the point of his use at a given time, or upon schedule time, it would have no rights which he was bound to respect or to take notice of.

In all cases then, we come to the one question whether the company kept a lookout, and whether the presence of the licensee was discovered in time to prevent the accident. As we have said, the testimony in this case not only does not sustain such a finding, but is contrary to it.

The fact is apparent and conclusive that the deceased acted upon the assumption that but one train was approaching from the south and that the west track was clear. Such assumptions find no favor in the law. A similar contention was made in *Boulder v. Louisville & N. R. Co.* (Ky.) 112 S. W. 936. The court there held that the company had a right to run its trains on either of the two tracks.

"The court properly instructed the jury that the defendant had the right to use either track, as otherwise they might have thought it negligent for the defendant to run the train in question on the east track. Persons who walk along a railroad track are under obligations to keep out of the way of trains, and they cannot complain that the train is run on one track and not on another. There was nothing in the plaintiff's conduct to apprise the operatives of the train that he was ignorant of its approach, or to impose upon them the duty of taking extra precautions for his safety, until he, without looking back to see if the train was coming, suddenly placed himself in peril when the train was right upon him."

See, also, *Morgan v. Northern Pac. R. Co.*, 196 Fed. 449, 116 C. C. A. 223.

In *Northern Pac. R. Co. v. Jones*, 144 Fed. 47, 75 C. C. A. 205, instead of running against traffic, a train was running off its schedule. The court, in holding that the company was not negligent in so operating its trains, said:

"In *Louisville & N. Ry. Co. v. McClish*, 115 Fed. 268, 53 C. C. A. 60, it was said: 'Even in the case of a licensee, there is, under such circumstances, the highest duty to exercise the utmost degree of vigilance in looking out for approaching engines or cars.' The track is the property of the railroad company, which it has the legal right to use at any and all times.' The rule is well established that it is the duty of a traveler to stop and look and listen before crossing or walking along a railroad track. He has no right to assume at any time of the day or night that trains will not be run over the track. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago & St. P. Ry. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Northern Pacific Railroad v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. Said the court in *Elliott v. Chicago, M. & St. P. Ry. Co.*, 150 U. S. 248, 14 Sup. Ct. 88, 37 L. Ed. 1068: 'The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom.'

"The defendant in error was a miner of the age of 34 years, and was in the full possession of his senses. According to his own testimony, he walked upon the railroad track a distance of more than half a mile without once looking back or stopping to listen for an approaching train. In so doing, it must be held that he was guilty of gross negligence, which, irrespective of negligence in the failure of the engineer to discover him on the track, is sufficient to bar his right of recovery. It was no excuse for his failure to take such precautions that the wind was blowing in his face, or that the noise of a waterfall may have deadened the sound of an approaching train. Those circumstances only rendered the use of his senses the more imperative. It was his duty continually to exercise vigilance."

We attach no importance to the contention that the headlight on the train was not burning, or was so dim as to afford no protection to the deceased. There is no testimony even tending to show that the lack of a headlight, or its defective character, was the proximate cause of the injury. Appellants' testimony shows that the electric headlight of the passenger train illuminated the track and the right of way. Another headlight would have added no security to the deceased.

[3] Appellants rely principally on the cases of *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855; *Northern Pac. R. Co. v. Baxter*, 187 Fed. 789, 109 C. C. A. 635; and *Great Northern R. Co. v. Thompson*, 199 Fed. 395, 118 C. C. A. 79, 47 L. R. A. (N. S.) 506. These cases, like many that might be cited, are either crossing cases, or cases from cities and towns where population is congested and the public have been accustomed to cross the tracks or to use them as a thoroughfare. Recoveries are allowed in such cases because a higher duty rests upon a railroad company under such circumstances. In moving trains over and across the streets of cities, or through depot grounds, or in switchyards, the railroad company, from the nature of things, must have its trains under control and be constantly alert to the possibility of injuring persons or property. This is a condition which is generally compelled or regulated by statute or ordinance. But we do not find it to be so held in any of the cases where, as in this case, a fenced and guarded track was used, not as a crossing, but as a footpath, in the country and between stations.

[4] The crossing cases may be further distinguished. They rest in implied license upon legal grounds, as differentiated from the acts or conduct of the parties as they may arise in a particular case. In consequence, a duty is put upon the court in all such cases to measure the relative rights as well as the relative obligations of the parties to the action. The company is held to a rule of strict accountability, because it is necessary for men and traffic to cross railway tracks in the pursuit of their legitimate undertakings and conveniences. The law charges a company with a knowledge that they will do so. Whereas one who walks along a railroad

track using it as a footpath, especially where the track is in the country and fenced, cannot claim the protection given to those who do things of necessity, for, from the very nature of things, he is using the track for his personal comfort and convenience. Men must, and therefore may, move from one side of a track to another at places established by the company, or so long used by the public as to imply a license, resting under the assumption of legal right. But the one who does not cross, but loiters, or crosses the barriers that have been erected to warn him and save him from the consequences of his folly, can claim no more than that he shall not be wantonly or willfully injured if his peril is discovered in time to prevent his injury. The cases all rest in the same sound principle which controls every exploration into the law of negligence; that is, that the degree of care in every case shall be measured, not by any abstract rule, but by reference to the facts and circumstances attending the particular case.

[5] There is no merit in the contention that the respondents' engineer had an unobstructed view of the track for more than a mile, and should have discovered the peril of the deceased. There is no evidence that deceased was on the track, and we cannot hold, as a matter of law, that the engineer was bound to anticipate that a man walking along the right of way would step in front of a railway train without exercising any care for his own safety.

Affirmed.

MORRIS, C. J., and FULLERTON, MOUNT, and ELLIS, JJ., concur.

(39 Wash. 674)

SALLY v. WHITNEY CO. (No. 13126.)
(Supreme Court of Washington. Feb. 17, 1916.)

ADJOINING LANDOWNERS ↔ 7 — BANKING
DÉBRIS AGAINST BRICK WALL — DAMAGE
FROM WATER—LIABILITY.

Defendant, in building a structure on land adjoining plaintiff's building, allowed mortar and other debris to fill up a long narrow space between the wall of the new building and plaintiff's brick wall. In the following rainy season the ordinary rainfall saturated the debris, and held it in suspension, whence it was absorbed by plaintiff's wall, so as to damage the wainscoting on the inside of plaintiff's building. Held, that defendant was liable for such damage, since, he having set in motion a chain of events which naturally resulted in such damage, his wrongful act in depositing the debris against plaintiff's wall was the proximate cause of the injury.

[Ed. Note.—For other cases, see *Adjoining Landowners*, Cent. Dig. §§ 53-59; Dec. Dig. ↔ 7.]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge. Action by Charles Sally against the Whitney Company. Judgment for defendant, and plaintiff appeals. Reversed.

Vanderveer & Cummings, of Seattle, for appellant. George R. Biddle, of Seattle, for respondent.

BAUSMAN, J. Plaintiff sues in damages the builder of a structure adjoining his own, who allowed mortar and other débris to choke a long and very narrow space lying between the two and belonging to the land on which plaintiff's building rested. In the following season the ordinary rainfall saturated this débris until the absorbed or collected water oozed through plaintiff's common brick wall, 12 inches in thickness, and injured the wainscoting inside.

Liability in tort, exceeding that of contract, cannot safely be defined. Each case must be decided upon its own facts. On the one hand, the law does not wish to punish too severely the careless man; on the other, it is he that is at fault in some degree when the damaged party may not be at fault at all. The former must not, accordingly, expect easy limitations. And the law holds him liable in two classes of consequences from his fault, one, where purely physical or natural causes set in motion go beyond what ordinarily follows, and, second, where an intervening cause appears in an unexpected meddler who makes things worse.

In *Eskildsen v. Seattle*, 29 Wash. 583, 589, 70 Pac. 64, we quoted with approval the Lord Chief Justice's statement of the law in *Byrne v. Wilson*, 15 Irish C. L. 332, that the tortfeasor's liability is "not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty." This he held applicable where a defendant stagedriver's negligence tipped the coach into a canal lock, and yet no injury would have come to plaintiff save for the blunder of a lockkeeper who turned in the water. In *Akin v. Bradley Company*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586, we applied the same doctrine with more rigor to him who left dynamite in a field where a child chanced to come upon and blast it. There we expressed the view that the child's exploding a piece of this dynamite by means of a dry battery which she obtained was not too remote a consequence to be answered for under the rule, though we then put the rule in these words:

"Where a negligent act or omission sets in operation a train of occurrences resulting naturally in the injury complained of, such negligent act or omission is deemed to have been the proximate cause, or to have contributed thereto."

In the *Eskildsen Case*, Seattle was held liable for injuries to a boy who, when his foot was caught in a defective street, was run over by a negligently operated locomotive of a railway company, and this decision was approved as upholding proximate cause in another case (*Thoresen v. St. Paul Co.*, 73 Wash. 99, 107, 131 Pac. 645, 132 Pac. 860),

where under different facts a third person's negligence contributed to the ultimate mischief.

Here the result came of a succession of physical causes naturally convening. Sooner or later this choking must have some effect on the wall; if not in one season, then in two or three or more. This is not, let it be remembered, a case of unprecedented rains; for the lower court expressly found the rainfall to have been normal. Now, the builder is presumed to have known that this débris would absorb and obstruct rain, that in this climate rain in considerable quantities must fall, and that rain stopped and collected against a wall must tend to soak into or through it. That it would probably soak through a three-inch wall the builder would have to admit, and the most he can say is that he did not believe that it would ever penetrate a twelve-inch wall. In short, defendant but debates degree. He has set in conjunction two natural forces, and merely argues that he did not think they would go so far. He must respond to the consequence. It was he who was in fault, not the plaintiff; and he must make at his own peril estimates as to the effect of natural forces set in motion. He is in a far poorer position to complain than if he were held liable for the capricious or unexpected act of a third person.

Allowing to the findings of the lower court all proper presumptions of fact, we are nevertheless of opinion that it was in error.

The judgment is reversed, with instructions to enter one in favor of plaintiff for his ascertained damages, \$1,011.85.

MORRIS, C. J., and HOLCOMB, MAIN, and PARKER, JJ., concur.

(89 Wash. 537)

O'DONNELL v. McCOOL et al. (No. 11346.)

(Supreme Court of Washington. Feb. 9, 1916.)

1. APPEAL AND ERROR \S 2—SERVICE OF ABSTRACTS—STATUTORY PROVISIONS.

The statute requiring the service of abstracts upon respondents does not apply to appeals taken and pending before it went into effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3-7, 1882, 2421; Dec. Dig. \S 2.]

2. PLEADING \S 369—REQUIRING ELECTION BETWEEN THEORIES OF COMPLAINT.

Where, in an action to quiet plaintiff's title to land and to enjoin its sale under the foreclosure of a mortgage executed by one of the defendants to the other, the complaint based plaintiff's claim of title on adverse possession and on a trust resulting from the payment of the purchase price of the land by her, a motion to require her to elect on which theory she would proceed was properly denied, as both states of facts could be true, and to prove one she was not compelled to contradict the other, and there is no inconsistency in urging different sources of title, all of which lead to ultimate title in

plaintiff and result in one and the same judgment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.]

3. ELECTION OF REMEDIES § 1—REMEDIES SUBJECT TO ELECTION.

The doctrine of election of remedies applies only to cases where plaintiff has a choice of remedies arising out of the same state of facts.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 1; Dec. Dig. § 1.]

4. ADVERSE POSSESSION § 58—NECESSITY OF HOSTILE POSSESSION.

Possession of real property to ripen into title must not only be open and notorious, but under color of title or claim of right and adverse to all other claimants.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 279-281; Dec. Dig. § 58.]

For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

5. ADVERSE POSSESSION § 60—NECESSITY OF HOSTILE POSSESSION.

In 1891, defendant purchased the possessory or squatter rights of a settler on railroad land, and in the same year plaintiff and her husband took possession under an arrangement of some kind with defendant. They made valuable improvements on the property and remained in possession until the husband's death, after which plaintiff continued in possession and was still in possession in 1911. During all of this time defendant paid the taxes and pastured cattle or horses on the land, and they were cared for by plaintiff and her husband. In 1896, defendant contracted with the railroad company for the purchase of the land, and thereafter made partial payments; the final payment not being made until 1909. In 1902, plaintiff's son wrote defendant asking his price for the land, and stating that if defendant did not want too much he would try to buy it. In 1909, plaintiff wrote defendant concerning the contemplated construction of a high school building near the premises, and asking him to give her the privilege of giving enough water from a spring on the premises for the schoolhouse, stating that, "We will never miss the water," and that, "It is money in our pockets." Plaintiff's son-in-law, at the request of the school districts interested, also wrote defendant asking for the right to pipe water from the spring. *Held*, that the facts showed that plaintiff recognized some interest in the land in defendant, and that it was not made clear to defendant that plaintiff's possession was adverse to him, and hence plaintiff did not have title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 282-312, 323, 328; Dec. Dig. § 60.]

6. TRUSTS § 63½ — "RESULTING TRUST" — HOW CREATED.

A "resulting trust" is a trust implied by law from the transactions of the parties, and never arises out of a contract or agreement that is legally enforceable, but arises by implication of law from the acts and conduct of the parties apart from any contract; the law implying a trust where the acts of the party to be charged as trustee have been such as are, in honesty and fair dealing, consistent only with a purpose to hold the property in trust, though he may never have agreed to the trust and may have really intended to resist it.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98-100; Dec. Dig. § 63½.]

For other definitions, see Words and Phrases, First and Second Series, Resulting Trust.]

7. TRUSTS § 79 — "RESULTING TRUST" — PAYMENT OF CONSIDERATION FOR LAND.

Defendant in 1891 purchased the possessory or squatter rights of a settler on railroad land for \$800, paying a part in cash and giving his note for the remainder. In the same year plaintiff and her husband, under an arrangement of some kind with defendant, took possession of the land and remained in possession for about 20 years, and placed valuable improvements on the land valued at from \$2,500 to \$3,500. The husband, who had a bank deposit, gave defendant the privilege of drawing against it to the extent of \$900, and he did draw thereon to the extent of \$680, and possibly \$200 more. In 1896, defendant contracted with the railroad company to purchase the land for \$640, which he subsequently paid in installments; the final payment not being made until 1909. *Held*, that there could be no resulting trust to the whole of the property in plaintiff's favor, as it appeared that neither she nor her husband, nor both together, paid the entire purchase price, but a trust did result in her favor for an undivided half interest, as it was not reasonable to suppose that the payments by her and her husband and the making of the improvements were with the intention that they were to be mere tenants at sufferance of defendant, and as the exact proportions of the purchase price paid by each party could not be known with absolute certainty after the lapse of years, it would not be unjust to either party to conclude that they intended to invest therein in equal moieties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 111, 112; Dec. Dig. § 79.]

8. TRUSTS § 79 — "RESULTING TRUST" — PAYMENT OF CONSIDERATION FOR LAND.

There may be a "resulting trust" in land to a part less than the whole, and when one party makes an oral contract with another that the latter shall buy a specific tract of land on their common account, furnishing him with an aliquot part of the money required for the purpose, and he purchases the property, but, in violation of the agreement, takes the title in his own name or in the name of a third person, a trust results in favor of the first person for such aliquot part.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 111, 112; Dec. Dig. § 79.]

Department 2. Appeal from Superior Court, Stevens County; E. H. Sullivan, Judge.

Action by Elizabeth O'Donnell against Hugh McCool and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with instructions.

Pedigo & Smith, of Walla Walla, for appellants. Peacock & Ludden, of Spokane, and Samuel Douglas, of Colville, for respondent.

FULLERTON, J. This is an action instituted by Elizabeth O'Donnell against Hugh McCool, Mary McCool, his wife, and the first National Bank of Walla Walla, to restrain the sale under a decree of foreclosure of certain real property situated in Stevens county, and to quiet the plaintiff's claim of title to the property. From a judgment in favor of the plaintiff, the defendants appeal to this court.

The facts, as we gather them from the record, are in substance these: The lands in question lie within the belt and form a

part of the Hen land grant made by the government of the United States to the Northern Pacific Railroad Company. In the summer of 1891 the land was occupied by one Hughes, who had made certain improvements thereon. The appellant Hugh McCool, desiring the property, purchased Hughes' improvements and his possessory or "squatter" right for the sum of \$800, paying a part of the purchase price in cash and giving his note, payable at a future date, for the remainder. In the fall of the same year, McCool met the respondent and her husband, who were then with their family camping on a small creek near the land in question. They were searching for a tract of land which they could homestead or purchase. The husband of the respondent and McCool were first cousins, and had formerly been neighbors in the county of Walla Walla. On learning their errand, McCool suggested that they move on to the land that he had recently purchased of Hughes. On the next day, McCool and O'Donnell rode over to look at the land, and shortly thereafter O'Donnell moved thereon with his family. No writing passed between the parties evidencing the conditions under which possession of the property was given O'Donnell, and the living witnesses (O'Donnell, the husband, having since died) have no very distinct recollection of the conditions. Mrs. O'Donnell testified that they purchased the property from him, while McCool testified that he merely "let them take it if they would care for any stock I had there, and keep up the ranch." It is in evidence, however, that O'Donnell had at that time a considerable sum of money on deposit with the Big Bend National Bank of Davenport, and that he gave McCool privilege to draw upon the deposit to the extent of \$900. Canceled checks in the record show that he drew upon the fund to the extent of \$680, and, while McCool testifies that this is all he received from the fund, Mrs. O'Donnell produced a check for an additional \$200, drawn by her husband payable to himself, which she says was drawn for McCool's use, and the money paid over to him. These checks were all drawn during the fall of the year 1891.

After taking possession of the land, the O'Donnells, within the next few years, placed valuable improvements on the property. They fenced the entire tract, erected a nine-room house thereon, built a substantial barn, a stock shed, and other outbuildings, planted an orchard of 50 or 60 fruit trees, and cleared, broke the sod, and placed under cultivation some 75 acres of the remaining land; improvements valued by the witnesses at from \$2,500 to \$3,500. The respondent and her husband resided upon and maintained possession upon the land until his death in 1898. Since that time the respondent has maintained such possession, actually residing upon the land for the entire period, except some 4½ years between 1902 and 1908,

when she resided upon a homestead she had entered upon government land.

On May 1, 1896, McCool entered into a contract with the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, for the purchase of the land. The consideration named in the contract was \$640 to be paid in annual partial payments extending over a period of ten years. The final payment was not made, however, until the year 1909. At that time McCool was indebted in considerable sums to the respondent the First National Bank of Walla Walla. The bank also seems to have advanced to him the money necessary to make the final payment. But, be this as it may, the deed from the railway company for the land ran directly to the bank as security, as both McCool and the bank concede, for the indebtedness at that time owing from McCool to the bank. McCool paid all of the taxes assessed against the property from the time the O'Donnells moved thereon until the year 1909. He also testified that he had repaid all of the money advanced him by O'Donnell, although his testimony in that respect is disputed by Mrs. O'Donnell. During the first years of the O'Donnell's occupancy, McCool pastured a number of cattle on the premises and the surrounding country which were fed and cared for by the O'Donnells during the winter season; and during the entire period he has pastured work horses and saddle horses thereon, which were likewise cared for by the O'Donnells, some of such horses being on the premises at the time of the trial.

In 1902, James O'Donnell, a son of the respondent, wrote McCool inquiring what he wanted for the ranch, saying, "If you don't want too much, I'm going to try to buy it." In 1909, the construction of a high school building was contemplated in the school district of which the premises formed a part, and considerable interest was manifested by the people of the district as to the place of its location. One of the sites selected as suitable was near the boundary of the premises, and one of the objections to the selection of the site seems to have been the lack of water. To overcome this difficulty, Mrs. O'Donnell proposed to allow them to pipe water from a spring arising on the premises, and to that end she wrote a letter to McCool, dated August 31st, asking him to consent to a grant of the privilege. In the letter she says:

"I am writing you in regard to our consolidated high school. I would like very much if you [could] be here on the 13 of Sept. to vote where it [is] to be located. There are two sites at Fruitland, one joins this place, * * * and the only drawback is the water. Hugh, if you can't come, if you will give me the privilege to give enough water for the schoolhouse, I think we will get the school. * * * We will never miss the water they will take for the schoolhouse, * * * they haul water all the time for to drink from here. The well water is not good, that is why they want water from the spring. I know if you were here you would

let them have it. * * * Let me know before the 13 of Sept. and try and come if you can. It is money in our pockets."

It is true Mrs. O'Donnell denies writing certain of the sentences we have quoted, but in this we are afraid she has not been entirely frank. Before her attention was called to the contents of the letter, she admitted that the signature to the letter was hers and that the letter was in her handwriting. Unfortunately, the original was lost during the course of the trial, and the letter is in the record by copy, and we have not the privilege of personally inspecting it; but neither she nor any one else pretends to say that the objectionable sentences were interlined, or that they appeared to be in a different handwriting from that of the main body of the letter which she admits having written. Without further comment, it is sufficient to say that we have no doubt of the genuineness of the letter. In the record is another letter which was written by a son-in-law of Mrs. O'Donnell concerning the same matter. In this letter, he speaks of the premises as property in which McCool has an interest; saying that he writes at the request of the directors of the different school districts interested, as they wished to know what he would ask for the right to pipe water from the spring on the premises to a contemplated school building.

On October 7, 1911, the appellant bank began an action to foreclose the lien evidenced by the deed to it from the railway company, alleging the deed to be a mortgage. To this action McCool and wife alone were made parties defendant, and, McCool and wife making default therein, a decree of foreclosure against them was entered directing a sale of the property. An order of sale was issued on the decree, when the present action was instituted for the purposes and with the result before stated.

[1] The respondent has moved to dismiss the appeal, basing her motion on the fact that no abstract of record was served on the respondent at or before the time he was required by statute to serve his opening brief. But an examination of transcript will show that the appeal to this court was taken before the statute requiring the service of abstracts went into effect. The statute did not in terms purport to apply to pending appeals, and this court construed it, when formulating rules of procedure under it, as not so applying. We are still of the opinion that the construction put upon the statute was correct. The motion therefore must be denied.

[2, 3] It is the appellants' first contention that the complaint of the respondent sets forth two inconsistent theories; the one founded on the doctrine of adverse possession, and the other on the doctrine of a trust resulting from the payment of the purchase price. At the opening of the trial, they moved the court to require the respondent to elect upon which of these theories she would

proceed. The court denied the motion, and its ruling in that behalf constitutes the first error assigned. But we think the ruling without error. Conceding that the facts set forth in the pleading justified the plaintiff's claim of title to the property in issue, first, on the ground that she had been in the open, notorious, and adverse possession of the property under a claim of right for the period of the statute of limitations, and, second, on the ground that she had paid the purchase price of the property although title was taken in the name of another, no rule of law prevents her from introducing evidence tending to show both states of facts. Both could be true, and to prove the one she was not compelled to contradict the other. The ultimate inquiry was the ownership of the property, and there is no inconsistency in urging different sources of title all of which lead to ultimate title in the plaintiff and result in one and the same judgment. It is not a case of an election of remedies. This doctrine applies only to cases where the plaintiff has a choice of remedies arising out of the same state of facts, a familiar example of which is a breach of a contract to perform some specific undertaking, where the party injured may choose between the remedy of damages and the remedy of specific performance. All of the cases agree that the two remedies cannot be pursued concurrently in the same action, or even concurrently in separate actions; but no case that has been called to our attention holds that a plaintiff may not plead and introduce proof upon different states of facts to establish the ultimate issue, although the facts may call for the application of different principles of law. Such was our holding in *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023, where it is said:

"In their complaint the plaintiffs based their right or title to the water on three grounds: (1) As riparian owners on the water course through which the water flowed; (2) as appropriators; and (3) under the contract as above set forth. The defendant moved the court to require the plaintiffs to separately state their several causes of action, and later to require the plaintiffs to elect on which of their several causes of action they intended to rely. These motions were properly denied. In actions to recover or establish rights in property, each independent source through which a plaintiff claims does not constitute a separate cause of action. The ultimate facts upon which the plaintiffs relied for a recovery in this case were their right or title to the water and the defendant's wrongful interference therewith. This cause of action was one and indivisible, regardless of the sources through which the plaintiffs might claim."

See, also, *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104.

The trial court made no findings of fact on the merits of the case, and we have been unable to gather from the record the precise ground upon which the decree was rested. Two possible grounds are suggested on which the decree may rest, that of adverse possession, and that of a resulting trust. It is on

the first of these that the respondent's counsel principally rely to sustain the decree, and this claim we shall first notice.

[4, 5] Undoubtedly, the respondent has been in possession of the premises for a sufficient length of time to cover the period of the statute of limitations, and it may be conceded that her possession has been open and notorious. But these conditions alone do not satisfy the statute. In this state, possession of real property to ripen into title must not only be open and notorious, but it must be under color of title or claim of right and adverse to all other claimants. The facts recited, we think, conclusively show that the respondent's possession of this property has not been adverse to McCool. Not only has she recognized during the entire period of her possession his right to pasture stock upon the premises, but her letter of August 31, 1909, from which we have quoted, clearly shows that she then thought that he had such an interest in the property as to prevent her from conveying full title to the water arising thereon for the use of the contemplated high school. The letter of her son written some years before this period, and the letter of her son-in-law, written during the period, bear evidence that her immediate family did not understand that she claimed to be or was the sole owner of the property. True, none of these letters recognize an absolute ownership in McCool—that of the respondent, since she speaks of the contemplated grant as being “money in our pockets,” and the water taken, as “water we will never miss,” indicates rather a joint or common interest than absolute ownership—but there is nevertheless in each of them a recognition of some interest in McCool, and any such recognition is contrary to a claim of adverse possession to the whole of the property. The fact, also, that McCool only recently paid that part of the purchase price of the land necessary to acquire title from the railway company, and paid the taxes on the whole of the property for the entire period of the respondent's possession, with respondent's acquiescence and knowledge, is also very persuasive of the conclusion that the respondent had not made it clear to McCool that her possession was adverse to his interests. Our conclusion is that the decree cannot rest on the rule of adverse possession.

[6-8] Nor do we think the decree can be rested in its entirety on the alternative ground suggested by the respondent. A “resulting trust” is a trust implied by law from the transactions of the parties. It never arises out of contract or agreement that is legally enforceable, “but arises by implication of law from their acts and conduct apart from any contract, the law implying a trust where the acts of the party to be charged as trustee have been such as are in honesty and fair dealing consistent only with a purpose to hold the property in trust, notwithstanding such party may never have agreed to the

trust and may have really intended to resist it.” 39 Cyc. 104. While such a trust may arise from other transactions, it has its most frequent application to transactions where one party pays the purchase price of property and title thereto is taken in another. In the case before us, if there is a resulting trust at all, it arises in this latter way. But in any view of the evidence it is clear that neither the respondent, nor her husband, nor both together, paid the entire purchase price of the property. There could not therefore be title in respondent, in virtue of a resulting trust, to the whole of the property.

But there may be a resulting trust in land to a part less than the whole. *Croup v. De-Moss*, 78 Wash. 128, 138 Pac. 671. When one party makes an oral contract with another that the latter shall buy a specific tract of land on their common account, furnishing him with an aliquot part of the money required for the purpose, and he purchases the property, but in violation of the agreement takes the title in his own name or in the name of a third person, a trust results in favor of the first person for such aliquot part. *Bailey v. Hemenway*, 147 Mass. 326, 17 N. E. 645. The evidence convinces us that such was the condition here. McCool had paid \$800 to procure the release of Hughes. The sum of \$640 was required to procure the interest held by the railway company. O'Donnell placed to McCool's use \$900. Of this sum McCool concededly applied to his use \$640, and there is reason to believe that he so applied \$200 more. In addition to this, O'Donnell entered into possession of the property and at once began to place thereon, and within a short time did place thereon, valuable and permanent improvements. The parties have, also, down to a very recent period of time, recognized common interests in each other in the property. It is not reasonable to suppose that all this was done with the idea that O'Donnell was to be the mere tenant at sufferance of McCool. On the contrary, the transactions carry the idea of permanent, rather than transient, interests. After this lapse of years, it cannot, of course, be known with absolute certainty the exact proportions each of the parties invested in the purchase price of the property; but looking to the indisputable evidence, not regarding too closely that depending upon the uncertain memories of the parties, the mind is led to the conclusion that the parties intended to invest therein in equal moieties. That the amounts were very nearly equal we think is proven, and that it is no injustice to either of the parties to so regard it. A trust therefore results in the respondent for an undivided half interest in the property.

The conclusion reached requires a modification of the judgment. The title to an undivided half interest only should have been quieted in the respondent, and a sale permitted as to the other undivided half.

The decree is reversed, and the cause re-

manded, with instructions to modify the decree accordingly.

MORRIS, C. J., and MAIN and ELLIS, JJ., concur.

(89 Wash. 519)

FREEBORN v. CHEWELAH COPPER KING MINING CO. (No. 12848.)

(Supreme Court of Washington. Feb. 7, 1916.)

1. APPEAL AND ERROR \S 580—RECORD—ABSTRACT.

Where the case comes up on a transcript of less than 100 pages, containing the pleadings, no abstract of the record is necessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2574; Dec. Dig. \S 580.]

2. PARTIES \S 95—MISNOMER—AMENDMENT—CORPORATE NAME.

Where it was clearly the intention of the plaintiffs to sue the "Chewelah Copper King Company," the president of which was served, the court properly authorized amendment of the complaint against the "Copper King Mining Company, a corporation."

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 160-166; Dec. Dig. \S 95.]

3. CORPORATIONS \S 508—APPEARANCE—ANSWER IN GENERAL DENIAL.

Where defendant corporation, after being served through its president and notified of the amendment of the complaint correcting a misnomer of defendant, elected to stand upon its amended answer which was a general denial, there was a sufficient appearance to give the court jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. \S 2001-2005; Dec. Dig. \S 508.]

4. JUDGMENT \S 107—JUDGMENT BY DEFAULT—PROPRIETY.

Where defendant corporation, before the default judgment against it was signed by the court, filed an amended answer, denying the allegations of the complaint, upon which it elected to stand, on plaintiff's motion for default, it was the court's duty to set the case down for trial, and a default judgment for plaintiff was improperly granted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 198-200; Dec. Dig. \S 107.]

Department 1. Appeal from Superior Court, Stevens County; W. H. Jackson, Judge.

Action by Thomas Freeborn against the Chewelah Copper King Mining Company. From a default judgment for plaintiff, defendant appeals. Reversed, and cause remanded.

S. P. Domer, of Spokane, for appellant.
R. A. Thayer, of Colville, for respondent.

MOUNT, J. [1] This is an appeal from a default judgment entered against the appellant. The respondent moves to dismiss the appeal because the appellant has not made an abstract of the record. The case comes up on a transcript containing the pleadings in the case, and does not contain 100 pages. No abstract was therefore necessary. The motion is therefore denied.

The action was begun to foreclose certain liens of laborers upon mining property alleged to be owned by the appellant. The

appellant was designated in the complaint as the Copper King Mining Company, a corporation. Service of the summons and complaint was made upon S. P. Domer, president of the Chewelah Copper King Mining Company, a corporation. After service of the complaint, Mr. Domer appeared as attorney, and filed a demurrer to the complaint, and thereafter an answer; and later an amended answer, in which it was alleged that the Copper King Mining Company had been dissolved by operation of law by its failure to pay the state license, and that prior to its dissolution it sold and disposed of all its assets. The amended answer then denied all the allegations of the complaint. Thereafter, upon showing made, the trial court permitted the complaint to be amended by inserting the word the "Chewelah" before the name "Copper King Mining Company," so that the complaint as amended was against the "Chewelah Copper King Mining Company, a corporation." Thereafter, upon motion of the plaintiff for default, the court ordered as follows:

"The Chewelah Copper King Mining Company, a corporation, is hereby ordered and directed to elect, and advise the court of its action, within five days from the date of this order, whether or not it will stand upon its original answer on file herein, or further plead in said cause; and, in the event that said defendant fails to elect within the time herein specified, then in that instance said motion for default shall be granted, without further notice."

This order was dated October 7, 1914. Thereafter on the 13th day of October, 1914, Mr. Domer appeared and filed an election to stand upon the amended answer theretofore filed in the case. Thereafter, on the next day, the trial court entered a judgment by default, from which this appeal is prosecuted.

[2, 3] It is strenuously argued by the appellant that the plaintiff has sued the wrong company; and authorities are cited that in such a case the complaint is of no effect, and the court should have dismissed the action, because it had no jurisdiction of the defendant. But in this case, while the defendant was named as the "Copper King Mining Company, a corporation," the record shows that the president of the "Chewelah Copper King Mining Company" was served; and it was clearly the intention of the parties to sue the Chewelah Copper King Mining Company. Under the showing which was made, we think the court properly authorized an amendment of the name; and that when the defendant, after being served, and notified of the amendment, elected to stand upon the amended answer which had been filed, and which was a general denial, that was a sufficient appearance.

[4] But we are satisfied the court erred in granting a default judgment. Before the default judgment was signed by the court, the appellant had on file an amended answer de-

nying the allegations of the complaint. He had elected to stand upon that answer. In short, the issues were made up; and it was the duty of the court to set the case down for trial, and not grant a judgment by default under those conditions.

The judgment is therefore reversed, and the cause remanded for trial upon the complaint and amended answer.

MORRIS, C. J., and CHADWICK, FULLERTON, and ELLIS, JJ., concur.

(39 Wash. 587)

KILLINGSWORTH v. KEEN. (No. 13247.) (Supreme Court of Washington. Feb. 15, 1916.)

1. HUSBAND AND WIFE ⇐102—TORTS—LIABILITY.

Under Rem. & Bal. Code, § 5929, providing that damages may be recovered from a married woman for all injuries committed by her, but that her husband shall not be responsible therefor, except where he would be jointly responsible if the marriage did not exist, a chauffeur, whose wife took his employer's car and damaged it, is not liable for her tortious act.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 132; Dec. Dig. ⇐102.]

2. HUSBAND AND WIFE ⇐102, 268—TORTS—LIABILITY.

Where the wife of a chauffeur took his employer's car and damaged it, the act was tortious, and the husband and the community property were not liable; nor could they be made liable by an attempted waiver of the tortious aspect by the employer and suit on the contractual aspect, unless the chauffeur consented.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 132, 562; Dec. Dig. ⇐102, 268.]

3. HUSBAND AND WIFE ⇐270—TORTS—ACTIONS—PLEADING.

Where the wife of a chauffeur took his employer's car and damaged it, and in the employer's action he pleaded that the taking was "for the benefit of the marital community," the pleading was insufficient to show liability of the husband or the community, since the wife's tort was presumptively not for the benefit of the community, and facts must be pleaded to disturb the presumption.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 564; Dec. Dig. ⇐270.]

4. PLEADING ⇐9—CONCLUSIONS OF LAW—FACTS—SUFFICIENCY.

Although conclusions of law pleaded in company with facts, though defectively set out, may be good against demurrer, they cannot be upheld when pleaded without sustaining facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. ⇐9.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by U. Killingsworth against F. W. Keen, in which defendant interposed a counterclaim. Demurrer to the counterclaim was sustained, and defendant appeals, assigning error to that order. Judgment affirmed.

Israel & Kohlhasse, of Seattle, for appellant.

BAUSMAN, J. Keen, sued by his chauffeur for wrongful discharge outside of the

state, sets up as a counterclaim that the chauffeur's wife took another automobile of Keen out of his garage, and used it "for the benefit of the marital community of the plaintiff and herself" for a period of four hours, during which time she damaged it. The counterclaim was to recover the value of its use, as well as the cost of the repair. Plaintiff demurred to this as an attempt to set off tort against contract. Error is assigned on the lower court's sustaining that demurrer.

[1] As the answer does not show, and as it is not claimed in argument, that the wife's taking of the automobile was other than tortious, the husband and the community property are protected against liability in that respect by Rem. & Bal. Code, § 5929, as follows:

"For all injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be responsible therefor, except in case where he would be jointly responsible with her if the marriage did not exist."

We have had occasion to remark in a suit upon false representations by a wife that we know of no statute making the community property liable for them. *Strom v. Toklas*, 78 Wash. 223, 230, 138 Pac. 880.

[2] Appellant argues that this is one of those torts which the injured party may waive in its tort aspect and sue upon as creating an implied promise to reimburse for value appropriated. Assuming, but not deciding, that, still it cannot be applied here. Keen might, indeed, be permitted to do this in an action between him and the wife; but here he is in litigation with a third person, protected by statute. The wife's act was a tort to begin with. It cannot be made contractual against the husband, unless he, too, waives the form of action.

[3] The bare and general allegation "for the benefit of the marital community" does not oblige us to discuss under this statute the situations in which a husband by acquiescence, authorization, acceptance of profits, or otherwise may be estopped to question the community's or his own liability. The tort was presumptively not for the benefit of the community, and facts must be pleaded to disturb that presumption.

[4] We have sustained conclusions of law against demurrer when facts, though defectively set out, accompanied that conclusion. *Harris v. Halverson*, 23 Wash. 779, 782, 63 Pac. 549. But to sustain them utterly without facts is contrary to the whole theory of Code pleading. *Freeman v. Centralia*, 67 Wash. 142, 148, 120 Pac. 886, Ann. Cas. 1913D, 786; *Longfellow v. Seattle*, 76 Wash. 509, 517, 136 Pac. 855; *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214.

Judgment affirmed.

MORRIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(89 Wash. 514)

KALEZ et ux. v. SPOKANE VALLEY LAND & WATER CO. (No. 12805.)

(Supreme Court of Washington. Feb. 7, 1916.)

NAVIGABLE WATERS ~~§~~40—APPROPRIATION—SALE OF SHORE LAND—RIGHTS OF GRANTEES AND APPROPRIATOR.

The state having authorized defendant to appropriate for purpose of irrigation the waters of a navigable lake and the shore lands thereof, plaintiffs by their subsequent purchase of such lands from the state took them subject to defendant's right to use for purpose of irrigation, so that its mere maintenance of the water to the line of ordinary high water gave them no right of action.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 245; Dec. Dig. ~~§~~40.]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by M. J. Kalez and wife against the Spokane Valley Land & Water Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Robertson & Miller and E. W. Hand, all of Spokane, for appellants. Allen, Winston & Allen, of Spokane, for respondent.

MOUNT, J. This action was brought to recover damages alleged to have occurred by reason of the overflowing of plaintiffs' lands by the defendant. The case was tried to the court and a jury. At the conclusion of all the evidence the court discharged the jury and entered a judgment of dismissal. The plaintiffs have appealed from that judgment.

The facts are substantially as follows: Liberty Lake is a navigable body of water in Spokane county. This lake has no natural outlet except at extreme high water, when it overflows at the north end through a small lake known as Loomis Lake, toward the Spokane river. Liberty Lake is fed by melting snows in the spring from the adjacent hills, and rises, at extreme high water, to a point 2,057 feet above sea level. Thereafter the water percolates, or evaporates, until late in the summer, when it reaches extreme low water at about 2,050 feet above sea level.

About the year 1900 the predecessors in interest of the respondent appropriated under the statute 50 cubic feet per second of time of the waters of Liberty Lake for the purpose of irrigating lands on the plateau between the lake and the Spokane river. The respondent company has succeeded to the rights of the original appropriator.

In the year 1903 the respondent constructed a dam across Liberty Lake at the point where Liberty Lake flows into Loomis Lake; the latter lake being nonnavigable. The purpose of this dam was to store the water in Liberty Lake in the winter and the spring seasons for use in irrigation later in the summer. The top of this dam was constructed at about the point of ordinary high water in

Liberty Lake, and some 2 feet below extreme high water. The effect of this dam was to hold the water in Liberty Lake for a longer period during the dry season than it would ordinarily maintain the higher level. The meander line of Liberty Lake was fixed by the government at about the point of extreme high water.

The rights of the Northern Pacific Railroad Company to the upland bordering on this lake attached in the year 1884. In the year 1896 the plaintiffs purchased under a contract from the Northern Pacific Railroad Company fractional section 25, township 25 N., range 45 E. W. M., bordering on Liberty Lake, and in 1900 received a deed from the railway company for the land.

In the year 1909 the commissioner of state lands in this state served a notice upon the plaintiffs that they, being the upland owners, would have 60 days' preference right to purchase shore lands on the lake. On January 8, 1913, the plaintiffs entered into a contract with the state to purchase the shore lands abutting upon the lake. These shore lands consisted of lowlands at the south end of the lake which at extreme high water are overflowed, but at low water are bare, and may be used for cultivation.

The record shows that before the dam was constructed these lowlands would become dry about the 1st of June, and thereafter crops would mature thereon. The plaintiffs have cleared the lands and have cultivated a part thereof. The effect of the construction of this dam, as stated above, was to cause the water of Liberty Lake to be held for a longer period during the summer season upon these lowlands, and the plaintiffs are thereby prevented from raising crops thereon.

The trial court, under these facts, was of the opinion that these lands were shore lands, and that, since the respondent, under the statute, had appropriated the waters of the lake for the purposes of irrigation, and that the state had prior to the sale of the shore lands to the appellants authorized the respondent to appropriate the shore lands between the limits of ordinary high water and ordinary low water for storage purposes, the use of the shore lands for that purpose was rightful, and that the plaintiffs were therefore not entitled to recover.

That Liberty Lake is a navigable lake is now beyond question. It was so held to be in *Kalez v. Spokane Valley Land & Water Company*, 42 Wash. 43, 84 Pac. 395; *Madsen v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 257; and *Spokane Valley Land & Water Co. v. Jones & Co.*, 53 Wash. 37, 101 Pac. 515. This being navigable water, it is plain that the shore lands between ordinary high water and ordinary low water were the property of the state. State Constitution, art. 17.

No claim is made that these shore lands

were patented to any person prior to the adoption of the Constitution. At any rate, there is nothing in the record in this case to show any such patent. When it was shown, therefore, that the state had authorized the appropriation for the storage of water for the purposes of irrigation prior to the time the state sold the lands to the plaintiffs, the plaintiffs, of course, took with notice of that appropriation.

In *Kalez v. Spokane Val. Land, etc., Co.*, supra, after holding that this lake was a navigable lake, this court, at page 48 of 42 Wash., at page 396 of 84 Pac., said:

"The state would have the right to make such use of the water or of the bed of said lake as to it would seem proper, and could confer upon this respondent the rights of irrigation sought to be exercised by it; due regard being had to the rights of others. Were it made to appear that the dam or gates erected, or about to be constructed, by the respondent had or would raise the water above the ordinary high-water line, and to the injury of appellants' property, the court would doubtless furnish relief. * * * But in this case the court found, and properly we think, that the respondent, in retaining the water during the winter months as aforesaid, had not caused the same to raise above the line of ordinary high-water mark, and that it had not in the summer time or at any time withdrawn a sufficient amount of water to lower the lake below the line of the ordinary low-water mark. These things being true, we think that the respondent has acted within its legal rights, and that the appellants have no legal cause of complaint."

The same is true in this case. The evidence conclusively shows that the dam in question is two feet below the line of high water, and at about the line of ordinary high water. The evidence also conclusively shows that the only effect of the dam is to maintain the water in Liberty Lake for a longer period than it would naturally remain at the higher level, and that the use being made of the lake for storage purposes was within the lines of ordinary high water and ordinary low water.

In the case of *State ex rel. Ham, Yearsley & Ryrie v. Superior Court*, 70 Wash. 442, 126 Pac. 945, in referring to the *Kalez Case*, supra, where it was stated that the government of the United States could not dispose of shore lands below the high-water mark, but that such lands would become the property of the state under section 2, art. 17, of the state Constitution, we said, in referring to those statements:

"It is suggested that these remarks were largely dictum, and not necessary in the decision of that case. There is some reason for that suggestion in view of the facts there involved. Nevertheless the view there expressed seems to be fully in accord with the views of the Supreme Court of the United States as expressed in *Shiveley v. Bowlby*, 152 U. S. 1 [14 Sup. Ct. 548, 38 L. Ed. 331]. We are of the opinion that common-law riparian rights in navigable waters, if it can be said that the common law recognized such rights, have not existed or been recognized in this state since the adoption of our Constitution; at least so far as the upland owner having any right to occupy in any way

the beds or shore lands of such waters or to take from such waters water for irrigation as against the state, its grantees, or those who have appropriated such water for purposes of irrigation in compliance with the laws of the state."

It follows that, when the state authorized the respondent or its predecessors in interest to appropriate the waters of this navigable lake and the shore lands thereof for purposes of irrigation, and when the state sold the shore lands to the plaintiffs, it sold only the interest it then had. The plaintiffs acquired no greater right. They took the lands, therefore, subject to the right of the respondent to use them for purposes of irrigation. This use, if within the limits of ordinary high and ordinary low water, is a rightful use for which damages cannot be claimed.

We are satisfied, therefore, that the trial court was right, and the judgment is therefore affirmed.

MORRIS, C. J., and ELLIS, FULLERTON, and CHADWICK, JJ., concur.

(89 Wash. 532)

NORTHWEST MOTOR CO. v. BRAUND.

(No. 13114.)

(Supreme Court of Washington. Feb. 15, 1916.)

1. CORPORATIONS \S 499—ACTIONS—RIGHT TO SUE—PAYMENT OF FEES.

Where a corporation failed to pay its annual license fee required by Rem. & Bal. Code, \S 3715, until after trial, but did pay it before the argument for new trial or entry of findings and decree, the payment was sufficient compliance with the statute to enable it to conduct the suit, especially where the defendant thereina counterclaimed and took judgment thereon.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. \S 1910, 1911, 1913-1919, 2030; Dec. Dig. \S 499.]

2. REFORMATION OF INSTRUMENTS \S 45 — FRAUD—EVIDENCE—WEIGHT.

Where a party to a contract before signing it read a portion of it and objected to the rate of interest provided, though he alleged and the other denied that he was told it was only a form, and the other party testified that the whole contract was read, he was not thereafter entitled to reformation on the ground of fraud, where fraud was not shown by clear and substantial evidence.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. \S 157-193; Dec. Dig. \S 45.]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Carl, Judge.

Action by the Northwest Motor Company against Charles Braund, in which the defendant filed a counterclaim. Judgment for defendant thereon, and plaintiff appeals. Reversed and remanded, with instructions.

Knight & Muscek and George R. Biddle, all of Tacoma, for appellant. Burkey, O'Brien & Burkey, of Tacoma, for respondent.

BAUSMAN, J. Action at law tried without a jury, plaintiff suing for the balance

upon a conditional sale contract of a second-hand automobile. Defendant, admitting that he had made the contract, answered that it contained terms expressly excluding guaranties, when in point of fact it should have contained those guaranties. Demanding reformation, he sets up violated guaranty of workmanship, materials, and condition, and counterclaims for damages. Judgment was rendered in his favor on these counterclaims.

[1] Plaintiff's annual corporation license fee, under Rem. & Bal. Code, § 3715, was unpaid until after trial. It was, however, paid before the argument for new trial and before the entry of the findings and the decree. We hold this to be a sufficient compliance with the statute to enable plaintiff to conduct this suit, for as we have previously held, the statute is but a revenue measure and we have no hesitation in extending to this situation the doctrine of *Eastman v. Watson*, 72 Wash. 532, 130 Pac. 1144. There is additional reason here because defendant has not only counterclaimed, but takes judgment under that counterclaim against this plaintiff in consequence of which plaintiff, being forced to defend, is in substantially a similar situation to that of plaintiff in *North Star Co. v. Alaska Co.*, 68 Wash. 457, 460, 123 Pac. 605.

[2] The lower court found that plaintiff signed the contract under false assurance as to its contents, and that it should have contained the guaranties. But this is another case in which we must insist that fraud be made out by the substantial weight of the testimony. To begin with, defendant not only was able to read, but admits that, before signing the contract, he looked into it and objected to the rate of interest. The others refusing to change it, he submitted to that, so if the thing does not speak defendant's mind the fault is his own.

If they are to be set aside or altered upon no stronger showing than is made here the sanctity of writings is done for. Substantially the most that can be said of defendant's testimony is that at the time of the signing he did not read the contract and was assured that it was only a form. But the plaintiff company for its part denies this, claims that the paper was actually read to the man, produces the writing itself with his signature, and asserts that they understood it to mean what it says. It is not even pretended that cunning or unusual means were employed to keep him from reading the contract. No man shall escape his bargain on testimony like this. It is to avoid just these disputes that contracts are put in writing. To overturn these there must be not merely some though roundly asserted testimony, but a preponderance of testimony, substantial and clear.

The cause is reversed, with instructions that judgment be entered in favor of plain-

tiff as requested by plaintiff in its first conclusion of law, less the sum of \$25 adjudged due defendant by the court in its sixth finding on account of tools constituting a part of the car and not delivered with it. Remanded accordingly.

MORRIS, C. J., and MAIN, HOLCOMB, and PARKER, JJ., concur.

(39 Wash. 582)

STATE v. BROWNLOW. (No. 13127.)

(Supreme Court of Washington. Feb. 9, 1916.)

1. CRIMINAL LAW — EVIDENCE — CONFESSION.

The confession of one charged with grand larceny, voluntarily made to a police officer while under arrest and in jail, though she was not reminded that she was under arrest, that she was not obliged to reply, and that her answers would be used against her, was admissible.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.]

2. WITNESSES — PRIVILEGE OF DEFENDANT — IMPEACHING QUESTION.

In a prosecution for grand larceny, the question to defendant on cross-examination whether she had ever suffered conviction before, to which she answered she had, was not an invasion of any constitutional right, since by taking the stand defendant invited the question to impeach her credibility.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1043-1046; Dec. Dig. § 301.]

3. WITNESSES — APPEAL AND ERROR — RESERVATION OF GROUNDS OF REVIEW — OBJECTION TO QUESTION.

In a prosecution for grand larceny, where defendant did not object to the question to her on cross-examination whether she had ever suffered conviction before, she acquiesced therein.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1053-1057; Dec. Dig. § 305.]

4. CRIMINAL LAW — TRIAL — INSTRUCTION.

In a prosecution for grand larceny, a charge mentioning that there was evidence introduced showing previous conviction, but that it was no proof of defendant's guilt, but only touched her credibility, was proper.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1734, 1735, 1872-1876; Dec. Dig. § 783.]

5. CRIMINAL LAW — APPEAL AND ERROR — RESERVATION OF GROUNDS OF REVIEW — INSTRUCTION.

A defendant in a criminal case, who failed to except to a charge, cannot complain thereof on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.]

Department 2. Appeal from Superior Court, King County; Kenneth MacKintosh, Judge.

Nellie Brownlow was convicted of grand larceny, and she appeals. Affirmed.

Will H. Thompson, of Seattle, for appellant. Alfred H. Lundin, John D. Carmody, and Joseph A. Barto, all of Seattle, for the State.

BAUSMAN, J. [1] Appellant, convicted of grand larceny, presents as a first grievance the lower court's admitting her confession made to a police officer during arrest and in jail. The confession was properly admitted. It was not necessary to remind her that she was under arrest, that she was not obliged to reply, and that her answers would be used against her. There was no inducement, fear, or threat. The statement was voluntary. Rem. & Bal. Code, § 2151; State v. Barker, 56 Wash. 510, 106 Pac. 133; State v. Royce, 38 Wash. 111, 80 Pac. 268, 3 Ann. Cas. 351; State v. Wilson, 68 Wash. 464, 467, 123 Pac. 795.

[2-5] Testifying for herself she was asked on cross-examination whether she had ever suffered conviction before, to which she answered that she had. No objection was made. Nevertheless, it is argued that here was an invasion of a constitutional right. The court, it is said, should have itself protected her. This we cannot sustain. Defendant, taking the stand on her own behalf, warrants her credibility as a witness and invites the impeaching question. There was no error in that question, and failure to object to it, moreover, is acquiescence. The situation is clearly not that in State v. Jackson, 83 Wash. 514, 145 Pac. 470, where it was the trial judge himself who put certain questions and where we held that exceptions against his course were not necessary for reasons peculiar to his relation to trial. Neither did the judge in the present case bring himself within the rule of that case when in charging the jury he mentioned that there was evidence introduced showing previous conviction, for he was careful to add that it was no proof of defendant's guilt in the pending trial but only touched her as a witness. Besides, to this also no exception was taken.

Judgment affirmed.

MORRIS, C. J., and MOUNT, HOLCOMB, and PARKER, JJ., concur.

(39 Wash. 609)

ANEST v. COLUMBIA & P. S. R. CO.
(No. 12874.)

(Supreme Court of Washington. Feb. 15, 1916.)

1. COMMERCE \S 27—"INTERSTATE COMMERCE"—PERSONS ENGAGED IN.

One inspecting the main track of a railroad engaged in intra and inter state commerce is engaged in "interstate commerce," and an action for his death or injury falls within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8685).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. \S 27.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. RAILROADS \S 357—INJURIES TO PERSONS ON TRACKS—DUTIES OF FIREMEN.

The degree of care to be exercised by a locomotive fireman in watching the track is the

most reasonable care under existing circumstances, taking into consideration his other duties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1235; Dec. Dig. \S 357.]

3. MASTER AND SERVANT \S 145—INJURIES TO SERVANT—DUTY OF SECTION MAN.

Railroad trains have the right of way over section men, and such men, where the rules require them to look out for trains, are bound to do so.

[Ed. Note.—For other cases, see Master and Servant, Century Dig. § 238; Decennial Dig. \S 145.]

4. MASTER AND SERVANT \S 278—INJURIES TO SERVANT.

In an action for the death of a track inspector run down while riding on a speeder by an engine which was proceeding tender first, evidence held to warrant a finding that those in charge of the engine were guilty of negligence in not keeping proper lookout.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. \S 278.]

5. NEGLIGENCE \S 101—COMPARATIVE NEGLIGENCE—INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT.

Under the Federal Employers' Liability Act, the contributory negligence of an injured or deceased servant will not bar recovery, but will only reduce recovery proportionally.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. \S 101.]

6. NEGLIGENCE \S 98—COMPARATIVE NEGLIGENCE—INJURIES TO SERVANT.

Where the rules of a railroad company required section men to keep a lookout for trains, deceased, who was inspecting the track on a speeder, is guilty of negligence in not maintaining a lookout for trains, regular or irregular, particularly where he wore a cap which covered his ears so as to affect his hearing, and his negligence is at least equal to that of the railroad company in running an engine backwards without maintaining a proper lookout.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 165; Dec. Dig. \S 98.]

7. MASTER AND SERVANT \S 226—INJURIES TO SERVANT—ASSUMPTION OF RISK.

While a section man inspecting a track used for interstate commerce who was required to keep a lookout for trains regular and irregular assumes the risk of injury from trains, he does not assume the risk of injury from trains negligently operated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. \S 226.]

8. MASTER AND SERVANT \S 180—EMPLOYERS' LIABILITY ACT—NEGLECT OF FELLOW SERVANT.

The federal Employers' Liability Act has eliminated the defense of the negligence of fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. \S 180.]

9. APPEAL AND ERROR \S 877—REVIEW—HARMLESS ERROR.

As in an action under the federal Employers' Liability Act the defendant has no concern with the apportionment of the award, it cannot complain that the award was improperly apportioned between beneficiaries entitled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. \S 877.]

10. APPEAL AND ERROR §1151—DETERMINATION—POWER OF SUPREME COURT.

In a death action under the federal Employers' Liability Act tried without a jury, the Supreme Court may, where no deduction for the deceased's contributory negligence, which was equal to that of defendant railroad company, was made, make such deduction from the award and affirm the judgment; the case being tried de novo on the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Gust Anest, administrator of the estate of Keneages Flengern, deceased, against the Columbia & Puget Sound Railroad Company. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Farrel, Kane & Stratton and Stanley J. Padden, all of Seattle, for appellant. Revelle, Revelle & Revelle, Higgins & Hughes, and James McCabe, all of Seattle, for respondent.

HOLCOMB, J. On Sunday, December 15, 1912, Keneages Flengern, while employed in inspecting appellant's railroad track by the order of his immediate superior, the section foreman, was killed. He was riding eastward from Renton upon a "speeder," or handcar, operated by himself at the time. The morning was cold and stormy, and the deceased had on, when found immediately after the accident, a Swedish cap with flaps fastened over his ears and tied under his chin. At a point about 1,000 feet east of a bridge called bridge No. 7 there is a curve to the south in the track. An engine without any car attached was backing down across the bridge, eastward and around the curve, at a speed of about 20 miles per hour. It was running from Renton to Maplewood Farm to "pick up" a car. There were on this engine the engineer, fireman, and a brakeman. The engineer was in his place on the seat box at the right side of the engine when facing toward its head or left side of it as it was going, and the fireman and brakeman sat on a seat box on the opposite side, except when the fireman was attending to his duties. There was no man stationed on the rear of the tender or tank of the engine to ascertain if the track was clear and give signals to the engineer. An engine such as that one, running as it was, can be stopped, according to the condition of the track, in from 150 to 300 feet, if properly equipped. The engineer, a witness for plaintiff, said that, when just at the end of and coming out of the curve, the fireman saw the speeder ahead on the track, and called out to the engineer to whistle. They were then about two car lengths from the speeder. He immediately applied the emergency

brakes, and brought the engine to a stop within about 300 feet. Before stopping the locked wheels slid some distance, and the rear of the engine, being the end of the tank, struck the speeder upon which deceased was riding, knocking him off, and inflicting upon him fatal injuries. The engineer could not see the speeder before the fireman called out, because he was on the left-hand side and in the bend of the curve. The fireman and brakeman for the appellant both state that they did not see the speeder until the moment the fireman called to the engineer. The deceased had his back to the engine.

The evidence is undisputed that the track upon which deceased was riding, which he was inspecting, and upon which he was killed, was appellant's main line track, and, although its railroad lies wholly within King county, state of Washington, it was then being used in transporting cars that went out of the state carrying both intrastate and interstate commerce. The deceased was 45 years of age at the time of his death, and left surviving him a widow and three minor children, all dependent upon him, but living in Greece.

The case was tried to the court without a jury, and the court, after the conclusion of the testimony, and, as he certifies, "with the consent of and accompanied by both parties hereto and their respective counsel, viewed the premises where the accident occurred, and also Columbia & Puget Sound engine No. 5, which ran down the deceased." There were findings and conclusions and judgment against appellant for damages in the sum of \$3,700, apportioning \$2,835 thereof to the widow, \$115 to a minor daughter, \$350 to one minor son, and \$400 to another minor son.

The complaint charges, in effect, that the appellant was negligent: (1) Because it failed to station a man on the rear of the engine to ascertain if the track was clear; and (2) because it failed to exercise reasonable care in the operation of its engine and tender to avoid the collision and consequent injury to the decedent after the company, its agents and officers, became aware of the presence of the decedent upon its track. The answer pleads assumption of risk and contributory negligence, and denies the allegations of negligence, relationship, and damages, and the further allegation that the things which the decedent was doing were incident and necessary to the carrying on of the business of interstate commerce by appellant, and that the decedent was employed by appellant, aiding and assisting it in carrying on its interstate commerce business.

[1] 1. It is contended by appellant that respondent failed to show a cause under the Employers' Liability Act. This contention is without merit. It was alleged in the amended complaint, and not denied in the answer, that appellant was at the time of the

injury engaged in interstate commerce. It is shown that the injury occurred on its main line railroad track, and that the decedent was engaged in inspecting the condition of this main line railway track to see that no obstructions or defects existed thereon. It is true that the true test for determining whether the employé is engaged in interstate commerce is the nature of the work being done at the time of the injury. *Illinois Cent. Ry. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. In that case the deceased was engaged at the time he was killed in switching cars that contained only intrastate freight. A few minutes before that he had been switching interstate freight. The court held that he was not within the act. Other similar cases are cited. In the present case there could be no possible separation of decedent's inspection of appellant's track for the purpose of its intrastate commerce and of its interstate commerce. The two were obviously concomitant. His inspection was for the purpose of aiding and assisting the appellant in the operation of its trains, cars, and locomotives, and the carrying on of its business both of interstate and intrastate commerce. *Pedersen v. Del., etc., R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153.

[2-4] 2. It is insisted that no negligence was proven upon which a finding of the court of negligence on the part of appellant could be based. The first part of this finding is that the company carelessly, wrongfully, and negligently, and, without having used due care to station on the rear of the tender of the engine any brakeman or other person for the purpose of ascertaining if the track was clear, backed the tender and engine over the tracks down upon the deceased. A rule of the company introduced in evidence by respondent was as follows:

"When a train is pushed by an engine, except when switching and making up trains in yards, a trainman must be stationed on the front of the leading car, with proper signals so as to perceive the first sign of danger and immediately signal the engineer."

Another rule of the company introduced in evidence is as follows:

"An engine without cars in service on the road shall be considered a train."

The engine in question was out upon the main line of the railroad, running from one station to another for the purpose of getting freight cars, and had no cars attached and being pushed ahead, except its tank or tender car, was running backwards, and was not engaged in switching or making up the trains in yards. Appellant urges that no man was therefore required to be stationed on the end of the engine tender any more than one would be required on the front of it when running forwards on the road, and it was shown without contradiction that it was not customary with this and other roads to so station a man when running alone on the

road backwards. Even if there were no such rules of the company, respondent argues that the appellant might be liable if it failed to use reasonable care in regard to having a man so stationed (citing *St. L. I. M. & S. Ry. Co. v. Jackson*, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. [N. S.] 646, 8 Ann. Cas. 328; *Lake Shore & M. S. Ry. Co. v. Murphy*, 50 Ohio St. 135, 33 N. E. 408); that it therefore was a question of fact in this case whether or not there was negligence in failing to have a man so stationed, so as to observe and perceive the first sign of any danger or obstruction upon the track. The testimony of respondent's witnesses was clear and positive that there was nothing to obstruct the view of the fireman of the engine for the 1,000 feet traversed between the end of the bridge and the point of collision. The engineer himself stated that the weather conditions were such as to permit seeing as far as half a mile. He himself could not see the speeder on which deceased was riding, for the reason that he was situated on the outside of the curve as the engine proceeded, but the fireman was sitting on the inside and would thus have a further view. The brakeman, a witness for appellant, testified that he saw the deceased ahead of him for a distance of about 300 feet, and the fireman testified that he saw him 100 or 150 feet, though neither of them disputed the engineer's testimony that neither the brakeman nor the fireman gave the engineer any warning until the engine was about two car lengths, or a little over 60 feet, away from the speeder. As it required about 150 feet according to some witnesses, and about 300 according to others, to stop such an engine when running at the rate of 20 miles per hour, it was manifestly then too late to stop in order to avoid a collision. As the evidence was conflicting upon this question, the trial court personally viewed the scene of the injury, and the inspection was had in the same engine which killed the deceased. He therefore had the opportunity of viewing the exact scene and of being able to ascertain and determine whether or not the deceased could or should have been seen a greater distance than he was before being run down.

The second ground of negligence, as found by the trial court, was that the appellant failed to exercise reasonable care in the operation of its engine and tender to avoid a collision and consequent injury to the decedent after the appellant and its officers and employes became, or should have become, aware of the presence and imminent peril of the decedent upon the tracks. Upon this question appellant insists that, while it may be the duty of a fireman to keep a lookout on the track for obstructions, still that is only one of his many duties, and there is nothing in the record to show that this duty is owed to section men. The degree of care to be exercised by him was the most reasonable care under existing conditions. It cannot be said that he was required to look out

of his window constantly; for, if he did so, he would have no time to perform his other duties, such as "coaling, oiling," etc. It is further insisted that the rules placed the burden upon trackmen to keep out of the way of trains, and that trains have a right of way over section men. With all these contentions we must agree.

There were three agents of appellant upon the engine, the engineer, fireman, and brakeman, and, while it must be assumed that the engineer could not constantly look ahead for trackmen, nor the fireman, yet the third man, the brakeman, undoubtedly could. If there was any negligence on the engine, it must be imputed to the brakeman. The brakeman was standing in the cab on the fireman's side, looking out of the window in the direction in which the engine was going. He himself states that he saw the deceased 300 feet before they struck him. If, under the circumstances, he could see the deceased 300 feet, it is difficult to understand why he did not see the deceased a greater distance, or approximately the 1,000 feet which the testimony shows could be seen ahead on the track from that side at that time. Even if it were not the duty of the engine crew to station a brakeman or some other man on the end of the tender as a forward lookout, it would seem that the brakeman could have seen the deceased sooner than he did, and that, had he done so, the accident could have been avoided; or, if the brakeman had warned the engineer immediately upon his seeing the deceased 300 feet away, the accident might have been avoided. Whether it is negligence or not for the servants of a railroad company to run an engine backwards or push cars ahead of an engine without stationing some one on the tender or foremost car to signal its approach to a person who may be on the track is a question which is controlled by the circumstances under which the engine or train is operated. Under some circumstances the act has been held to be negligence as a matter of law. Thus backing an engine around a curve at a speed prohibited by ordinance at a time when workmen may be expected to be upon the track has been held to be negligence as a matter of law. *Little Rock, etc., R. Co. v. Pankhurst*, 36 Ark. 371; *Toledo, etc., R. Co. v. O'Connor*, 77 Ill. 391. But in most cases it has been held to be a question of fact to be submitted to the jury. 23 Am. & Eng. Enc. Law (2d Ed.) 745, 746.

We therefore arrive at the conclusion as a matter of fact that there was negligence on the part of the servants of the railway company upon the engine in question in the operation of its engine to avoid a collision and consequent injury to the deceased.

[5, 6] The same finding of the court that finds negligence against appellant concludes with a finding "that deceased used reasonable care and was not himself negligent." This finding is apparently based upon the testimony of the fireman that, when he first

saw the deceased, the deceased had stopped the speeder and was in the act of getting off. From this it is argued that upon the first warning the deceased made immediate efforts to get out of the way of the engine and escape danger. On this it may also be inferred that, had he had warning a moment sooner, he could have avoided the engine. There was a rule of the company as follows:

"No notice will be given of the passage of irregular trains. Track and bridge men will govern themselves accordingly. They must use the utmost caution at all times."

The operation of railway trains necessitates that other persons employed upon the railway track look out for the safety of the trains and the lives of those on board as well as their own. Trains cannot be stopped suddenly and cannot move aside to avoid hitting a trackman on the track. Of course, those operating the trains, when they discover, or in the proper performance of their duties reasonably should discover, the presence of trackmen on the track, should not carelessly or willfully run them down, but should adopt reasonable and immediate measures according to the circumstances to avoid doing so.

It is evident here that the deceased negligently placed himself in a situation where he could not extricate himself from his peril in time to avoid the tragedy. This constitutes contributory negligence. Contributory negligence, however, is not a bar to recovery under the federal Employers' Liability Act, if the employer was in the slightest degree negligent. In *Louisville & N. R. Co. v. Wene*, 202 Fed. 887, 121 C. C. A. 245, the United States Circuit Court of Appeals held that, under the act in question, contributory negligence shall not bar recovery, but shall be considered in abatement of recovery in accordance with the degree thereof; the fact that an employe's negligence is equal to or greater than that of the railroad company will not bar a recovery of any damages. In that case the decedent, a conductor of a freight train, was himself guilty of negligence in failing to see that a switch was closed after his train in order that a following passenger train might pass. As the passenger train approached, however, the engineer, if he had looked, could have discovered that the switch was open a distance amply sufficient to enable him to stop the train, but he failed to discover the open switch until after he had run into it, and consequently collided with the freight train and caused deceased's death. It was held that the court properly charged that the decedent was guilty of contributory negligence, and that, after the jury had found the amount of damages to which the decedent's next of kin would be entitled in the absence of decedent's contributory negligence, they should abate that sum by the amount they should find represented decedent's proportionate contributory negligence. To the same effect are *Grand Trunk*

Western R. Co. v. Lindsay, 201 Fed. 836, 120 C. C. A. 166, affirmed by the Supreme Court of the United States in 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1006, Ann. Cas. 1914C, 172; *Pennsylvania Co. v. Cole*, 214 Fed. 948, 131 C. C. A. 244; *New York C. & St. L. R. Co. v. Niebel*, 214 Fed. 952, 131 C. C. A. 248; *Southern Ry. Co. v. Hill*, 139 Ga. 549, 77 S. E. 803.

In the *Lindsay* Case, *supra*, it was held that under the act it is only when plaintiff's act is the sole cause, when defendant's act is no part of the causation, that defendant is free from liability. In the *Earnest* Case, *supra*, it was held that under the present act of 1908 Congress intended a recovery in all cases of negligence on the part of defendant no matter what the degree of negligence on the part of plaintiff. In that case it was also said:

" * * * Where the causal negligence is partly attributable to him [plaintiff] and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common-law rule completely exonerating the carrier from liability in such a case and to substitute a new rule. * * * "

In *Thornton, Federal Employers' Liability, etc., Acts* (2d Ed.) 140, the author says:

"If the plaintiff's negligence was as great as that of the defendant, he recovers one-half of his damages. So he may recover if his negligence was greater than that of the defendant."

See, also, *Richey, Federal Employers' Liability Act*, 39; *Roberts, Injuries Interstate Employes*, 220.

In a recent Oregon case, *Chadwick v. O.-W. R. & N. Co.*, 74 Or. 19, 144 Pac. 1165, the court holds that it is not a question of majority of negligence, but one of proportion. Any negligence of the defendant working injury to the plaintiff would entail some damage. For illustration: If both parties were equally negligent and the damages sustained were \$2,000, the verdict should be for the plaintiff in the sum of \$1,000. The foregoing authorities and some others not here mentioned furnish a reasonable interpretation and construction of liability under the federal Employers' Liability Act. In the case at bar the deceased was not absolved from the necessity of using reasonable care proportioned to the dangers incident to his work and the place where he was working. His duty required him to give attention to his work. But the rules of the company required him to look out for regular and irregular trains and use the utmost caution. We cannot say, as a matter of law, how often he should turn from his work to look out for approaching trains. That was a matter, in view of the nature of his employment and his situation, he had to determine for himself. He, it seems to us, proceeded upon his inspection duties without taking sufficient precau-

tions under the rules of the company and according to the dictates of the duty of self-protection, by looking back as well as forward frequently so as to discover any train approaching from either direction at the earliest possible moment and avoiding any injury, if possible. His negligence existed up to the moment when he was observed, or should have been observed, by the men on the engine if ordinarily careful in the performance of their duties. By both the company rules and that natural one of self-protection his duty to look out for trains both regular and irregular was the greater. His duty to so watch out was increased when entering a sharp and somewhat obscure curve, and hence his negligence was increased. On the other hand, however, at the moment that he was discovered or that he should have been discovered, it was the duty of the trainmen to use every effort to avoid injuring him consistent with their own safety or that of others. As was said in the *Cole* Case, *supra*, by the United States Circuit Court of Appeals:

" * * * As the night was clear, and the track straight for a considerable distance, no conclusive reason is suggested for the failure to see the lights, if actually burning, in time to avoid the collision, assuming that the train was running at the limited speed stated and as required by the block signals."

In *Lynch v. Chicago & A. Ry. Co.*, 208 Mo. 1, 106 S. W. 68, there was a state of facts very similar to those in the present case. In upholding the judgment against the defendant in that case the court said:

"But it is insisted that there was absolutely no evidence that the engineer and fireman of the engine actually knew that John Lynch was upon the track ahead of their engine. It is true, as already stated, the day was clear, the track for a distance of from a half to two-thirds of a mile from the west to where the deceased was struck was straight, and the velocipede and the man thereon was an object that could not escape being seen by the engineer and fireman with their faces turned towards the east, the direction in which their engine and tender and the velocipede were traveling at the time. * * * It is also in evidence that, when this engine returned east following the deceased, it was running backward with the tender in front, and it was not only their duty under such circumstances to keep a lookout, but the evidence shows that only a very few minutes before they struck him they were actually looking ahead. From the time they turned the curve east of the coal chute until they struck him the track was straight and unobstructed and the day was clear and bright, and there was absolutely nothing to keep them from seeing an object as large as a velocipede with a man upon it. * * * 'It appearing that the deceased had a right to be where he was on the track, that his life could have been saved by the use of ordinary care by the defendant's servants operating the train, and that they failed to exercise such ordinary care, a demurrer to the evidence was rightfully overruled, although there was evidence tending to show that the deceased was guilty of negligence.'"

In *Pittsburgh, etc., R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28, a section hand was engaged in work on the track with his back to the approaching train. He did not see it, and was run over. His representative recovered on the theory that the engine crew were

negligent in the operation of the engine, as they could have seen the deceased for half a mile before hitting him. To the same effect are *Louisville & N. R. Co. v. Morris*, 170 Ala. 239, 60 South. 933; *Missouri Pacific Ry. Co. v. Bentley*, 78 Kan. 221, 93 Pac. 150; *Kelley v. Chicago, B. & Q. R. Co.*, 118 Iowa, 387, 92 N. W. 45; *Egan v. Southern Pac. Co.*, 15 Cal. App. 766, 115 Pac. 939; *St. Louis, I. M. & S. R. Co. v. Jackson*, 78 Ark. 100, 93 S. W. 746, 6 L. R. A. (N. S.) 646, 8 Ann. Cas. 328.

The rule in such cases is well stated in 2 Thompson, Negligence, § 1759:

"Such persons [track walkers, repairers, and inspectors] using the hand cars by the license of the railway company are lawfully upon the track, and, on principles already considered, the railway company owes them the duty, through the men who are driving its trains, to keep a lookout for them and to exercise reasonable care to avoid running over them."

We cannot agree with the trial court that the deceased was free from negligence, but hold that he was guilty of contributory negligence, and his contributory negligence was at least equal to, if not greater than, the negligence of the defendant's engine crew. Under all the circumstances shown in this case we will simply find that his negligence was equal to the negligence of the appellant.

[7, 8] 3. Appellant asserts that the deceased assumed the risk. This contention is based principally upon the rule of the company that section men were to have no notice of trains, regular or irregular, but must use the utmost care for their own safety. It is shown that the deceased had been working on this section for five years, and had often made a trip over this section at the same hour. Trains of both appellant company and the Milwaukee railroad were passing this point at all hours of the day and at irregular intervals. This fact was known to the deceased, and it is claimed, therefore, that the approach of a train at any minute was a thing to be expected, and was one of the perils and hazards of his occupation, and was a risk which he assumed. The case of *Cooney v. Great Northern Ry. Co.*, 9 Wash. 292, 296, 37 Pac. 438, 440, is relied upon. In that case a section man on a speeder was injured in a collision while upon the right of way. It was found that:

"The train with which he came in contact was in plain view for a distance of a mile and a half, and was seen, or could have been seen, by him, and, if he failed to discover that it had left the station, and thereby exposed himself to danger, surely the railroad company ought not to be required to respond in damages for the injuries resulting from his own misjudgment, especially in the absence of proof that the train was negligently operated."

The general rule is stated in 20 Am. & Eng. Enc. Law (2d Ed.) 112:

"A servant will be presumed to have notice of and to have assumed the risks incident to all dangers and defects which to a person of his experience and understanding are or ought to be patent and obvious."

Same, p. 123:

"Risks arising out of the negligence of the master, or of one whom the master intrusts with the superintendence of his work, are not risks ordinarily incident to the employment, and are not assumed by the employé."

Under the present federal law the negligence of a fellow servant is also eliminated as a defense to such an action.

In *Connelley v. Pennsylvania R. Co.*, 201 Fed. 54, 119 C. C. A. 392, 47 L. R. A. (N. S.) 867, the Circuit Court of Appeals, in an action for the negligent killing of a trackwalker under the Employers' Liability Act, held:

That such trackwalker "employed to walk over and watch tracks and repair small defects, while there is a constant passing of trains, assumes the risk of injury by being struck by trains properly operated, and he must adopt for his self-protection reasonable safeguards" (syllabus); that, "where a railroad operates its trains . . . in a proper and careful manner, trackwalkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self-preservation has to rest on them, for no adequate protection, other than self-protection, can be afforded them"—citing a number of cases.

In that case it was pointed out, however, that the train was as carefully and properly operated as was possible. A train was backing up in a station where there were 16 tracks, on one of which the deceased was working as a repairer. On the end of the train which struck decedent a brakeman was stationed to give warning to any one he saw by shouting or working the air whistle. It was shown that he was on watch and had control of the air brake, but, owing to the cloud of steam enveloping the decedent from nearby engines, he did not see them until the car was hitting them, when he instantly applied the air.

The deceased assumed the risk of injury from all trains properly operated, but we have seen and found in this case that the engine here in question was improperly operated. The deceased did not assume the risk of engines being run over the road reversed without any proper lookout or warning being given, to avoid running him down. We cannot agree with the contention that in such a case the doctrine of assumption of risk applies. *Pittsburgh, etc., R. Co. v. Rogers*, supra.

[9] 4. Appellant contends also that the court erred in its findings when it found that the widow and minor dependents of the deceased were entitled to certain sums in apportioning the judgment. It has been held by the United States Supreme Court in *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, that the distribution of the award is of no concern to the defendant. This being the holding of the federal courts upon a question of federal legislation, this court is, of course, bound thereby.

There are some other contentions made by appellant in which we find no merit.

[10] As the case was tried without a jury, and is to be tried by this court de novo upon the record, we will order a judgment upon the law and the facts in accordance with this opinion. The court below found the entire damages to which respondent was entitled to be \$3,700. This was in accordance with the facts supporting it, and we will not alter it. He founded this judgment, however, upon the finding that the deceased was free from negligence, and the entire negligence was that of the appellant. This was erroneous; the deceased being equally negligent with the appellant. The respondent is therefore entitled to one-half the amount of damages found, or \$1,850. The judgment is therefore modified so as to allow the respondent a judgment of \$1,850 apportioned in the same proportion substantially between the surviving widow and the dependent children of deceased as the proportions fixed by the trial court. That is a mere matter of mathematical calculation which can be made by the court below or by the clerk.

As so modified, the judgment will stand affirmed.

Appellant will have its cost of appeal

PARKER, MAIN, and FULLERTON, JJ., concur.

(89 Wash. 510)

HAMMOND v. JACKSON et al. (GREEN et al., Garnishees). (No. 12666.)

(Supreme Court of Washington. Feb. 7, 1916.)

HUSBAND AND WIFE — §82 — CONTRACTS OF WIFE — EMPLOYMENT OF ATTORNEY — STATUTES.

Under Rem. & Bal. Code, § 181, providing that when a married woman is a party to an action her husband must be joined, with certain exceptions, and section 182, providing that husband and wife may join in all causes arising from injuries to the person or character of either or both, a wife living with her husband cannot alone make a valid contract with an attorney to prosecute an action for personal injuries suffered by herself, since the husband is a necessary party to all actions arising because of personal injuries to the wife, if the parties lived together when the injury was received, and may maintain such action alone, as section 5917 vests in the husband living with his wife the management and control of community personal property, such as the claim for damages.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 322, 324; Dec. Dig. § 82.]

Department 2. Appeal from Superior Court, King County; A. W. Fraber, Judge.

Action by F. E. Hammond against William K. Jackson and others, with Frank E. Green and L. F. Chester, as garnishees. From a judgment for plaintiff, the defendants appeal. Reversed, and cause remanded, with instructions to enter judgment for defendants.

Green & Chester, of Seattle, for appellants. Tucker & Hyland, of Seattle, for respondent.

FULLERTON, J. The appellant Lulu B. Jackson, a married woman living with her husband, was injured while alighting from a

street railway car operated by the receivers of the Seattle, Renton & Southern Railway Company. She conceived that her injury was caused by the negligent operation of the car, and that she was entitled to recover in damages for such injuries. To that end she employed the respondent, Hammond, an attorney at law, to prosecute her claim therefor, promising to pay him for his services a certain percentage of the amount recovered. The contract was in writing, and was executed by the appellant as her separate contract, her husband not joining therein. The respondent immediately entered upon the performance of the contract, first petitioning the court for leave to sue the receivers, and, failing in that, sought a settlement with the receivers, and succeeded in obtaining an offer from them to pay the sum of \$600 in satisfaction of the claim.

While the foregoing negotiations were in progress, the appellant William K. Jackson, the husband of the other appellant, employed the law firm of Green & Chester to represent himself and the community of himself and wife in the prosecution of the claim against the receivers. This employment was also evidenced by a writing, which was practically in the same terms as the contract made by the wife with the respondent. After this contract was entered into, the wife notified the respondent thereof by letter, dictated by the firm of Green & Chester, in which she told him to take no further action with reference to the claim, saying further:

"As my husband was not a party to the agreement you had me sign, I do not feel bound by the agreement, and request that you return the same to me."

The firm of attorneys employed by the husband succeeded in settling the claim with the receivers for the sum of \$1,000. The respondent thereupon brought the present action against the appellants, basing his cause of action upon the contract signed by the wife. Issue was taken on the complaint, and a trial was had before the court sitting without a jury. The court found the contract valid, assessed the amount of the respondent's recovery at \$175, and entered judgment in his favor for that sum. This appeal followed.

The sole question presented is whether a married woman, living with her husband, may make a valid contract with an attorney to prosecute an action in damages against one by whose negligence she has suffered a personal injury.

The Code (Rem. & Bal. § 181) provides that when a married woman is a party, her husband must be joined with her, except (1) when the action concerns her separate property; (2) when the action is between herself and her husband; and (3) when she is living separate and apart from her husband. It further provides (Id. § 182) that husband and wife may join in all causes arising from

injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or out of any contract in favor of either or both of them. Construing these sections we have repeatedly held that the husband is a necessary party to all actions arising because of personal injuries to the wife if the parties were living together as husband and wife at the time the injury was received. *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701, and cases there collected. Indeed, our holding has been that the husband was the only necessary party to such an action. This on the principle that the claim of damages for the injury was community personal property of the spouses, and, since the statute (Rem. & Bal. Code, § 5917) vests in the husband while living with his wife the management and control of such property, he has power to deal with it as if it were his separate property, which includes the right to maintain actions concerning it; the wife being only a proper party to such actions. *Dillon v. Dillon*, 13 Wash. 594, 43 Pac. 894; *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. 592, 28 Pac. 1021, 16 L. R. A. 803, 28 Am. St. Rep. 72; *Harker v. Woolery*, 10 Wash. 484, 39 Pac. 100; *Matthews v. Spokane*, 50 Wash. 107, 96 Pac. 827; *Schneider v. Biberger*, supra.

From the foregoing it follows we think that the wife cannot make a valid contract with an attorney to prosecute an action for personal injuries, although suffered by herself. Since the husband alone can maintain such an action, it must follow that he has the right to have a voice in any contract that affects the condition upon which the action is to be maintained. To hold otherwise is to hold that the husband's management and control of the community personal property is not absolute as the statute presupposes, but is subject to such contracts as the other spouse may choose to make concerning it. This, we think, is not the meaning of the statute.

Our attention is called to a number of cases where this court has recognized contracts concerning the community property entered into by the wife as obligatory upon the community, but in each of them we think there will be found some element of ratification or acquiescence on the part of the husband which estopped him from gainsaying the contract. Such was the fact in the case of *Williams v. Beebe*, 79 Wash. 133, 139 Pac. 867, although the court rested the decision, in part at least, on the ground that the wife could enter into a valid contract with relation to the community property, citing and relying upon Rem. & Bal. Code, § 5927. But this section of the statute, as we had theretofore uniformly construed it, relates to the separate property of a married woman, giving her power to contract with reference thereto as if she were unmarried, but not power to contract with reference to com-

munity property. This power of contract had been theretofore, in the same enactment, exclusively vested in the husband. *Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732; *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125; *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594; *United States Fid. & Guar. Co. v. Lee*, 58 Wash. 16, 107 Pac. 870. Our expression in the case mentioned must be regarded as unfortunate rather than as an authoritative determination of the question involved.

The respondent further argues that the evidence in the present case shows such an acquiescence in the contract by the husband as to estop him from repudiating the contract. We have examined the record with this thought in mind and think it does not justify the conclusion. It is shown that the husband had knowledge of his wife's action at the time he entered into the contract with *Chester & Green*, but we find nothing to show that he in any manner recognized or acquiesced in the contract after it came to his knowledge.

The judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of the appellants, defendants below.

MORRIS, C. J., and ELLIS and MAIN, JJ., concur.

(89 Wash. 547)

OLSON v. SELDOVIA SALMON CO.

(No. 12216.)

(Supreme Court of Washington. Feb. 9, 1916.)

1. ABATEMENT AND REVIVAL §53—SUPERSEDEAS BONDS — LIABILITY — DEATH OF SURETY.

Where, pending entry of decree of affirmance on appeal, one surety on the supersedeas bond died, the liability of his estate continued, under Rem. & Bal. Code, §§ 193, 236, 987, providing that in certain cases, where actions could have been maintained against the party, if living, they may be prosecuted against his representatives.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 251, 252; Dec. Dig. §53.]

2. ABATEMENT AND REVIVAL §53—APPEAL—SUPERSEDEAS BOND—REVOCABILITY.

Where, pending affirmance and entry thereof on appeal, a surety on a supersedeas bond died, his liability continued, since such a bond is an irrevocable guaranty, the obligations of which continue according to its terms, without regard to the death of the guarantor.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 251, 252; Dec. Dig. §53.]

3. APPEAL AND ERROR §1240—SUPERSEDEAS BOND—REVOCABILITY.

Where, pending entry of decree of affirmance on appeal, the surety on the supersedeas bond died, the judgment creditor could proceed against his estate, since the estate was liable as a principal obligor, and as between obligors and the obligee all of the former are principal debtors, though as between themselves they enjoy the relation of principal and surety.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4787-4791; Dec. Dig. §1240.]

4. APPEAL AND ERROR ⇨1237—SUPERSEDEAS BOND—REVOCABILITY—SUMMARY JUDGMENT.

Under Rem. & Bal. Code, § 1739, providing that, on affirmance of a money judgment on appeal, judgment shall be rendered against the appellant and his sureties for the amount of the judgment appealed from, and for damages and costs on the appeal, the plaintiff, who secured a judgment for personal injuries, was entitled to a summary judgment against the estate of the deceased surety on a supersedeas bond.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4778-4784; *Dec. Dig.* ⇨1237.]

5. ELECTION OF REMEDIES ⇨7—SUPERSEDEAS BONDS—REMEDIES.

Where, pending entry of decree of affirmance, one surety on a supersedeas bond died, and the judgment creditor presented a contingent claim to the representatives of his estate, and on its rejection brought action thereon in the superior court, such action was not an election of remedy, and did not bar his right to summary judgment in the Supreme Court for the amount of the judgment below, since the court, having jurisdiction, could finally dispose of the case, although securing the summary judgment in the Supreme Court would bar the other action.

[Ed. Note.—For other cases, see *Election of Remedies*, Cent. Dig. § 12; *Dec. Dig.* ⇨7.]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Louis Olson against the Seldovia Salmon Company, a corporation. Judgment for plaintiff, and defendant appealed; giving a supersedeas bond. Pending entry of order affirming judgment, plaintiff moved for summary judgment on the bond, and the motion was resisted by Glorivina Redelsheimer and another, executrix and executor of Julius Redelsheimer, surety on the bond. Motion granted.

Vanderveer & Cummings, of Seattle, for appellant. Arctander & Jacobsen, of Seattle, for respondent.

FULLERTON, J. On January 23, 1914, Louis Olson recovered a judgment against the Seldovia Salmon Company, a corporation, for the sum of \$2,500 and costs of action, taxed at \$83.40. The corporation appealed from the judgment, giving a supersedeas bond, with one Julius Redelsheimer and one S. S. Loeb as sureties. While the cause was pending in this court, Julius Redelsheimer died, leaving a nonintervention will, in which he named his wife, Glorivina Redelsheimer, and Benjamin Moyses, respectively, as executrix and executor of his estate. On November 19, 1915, this court delivered its opinion, directing that the judgment be affirmed. 152 Pac. 1033. Thereafter, and before judgment was entered in this court on the order of affirmance, the respondent, Olson, filed his affidavit suggesting the death of Redelsheimer, and moved in this court on notice for a summary judgment on the bond against the appellant, the surety, Loeb, and Glorivina Redelsheimer and Benjamin Moyses, as executrix and executor, respectively, of the estate of Julius Redelsheimer, deceased. The motion is re-

sisted by the executrix and executor on various grounds. These we will notice in their order.

[1] If we have correctly gathered the first objection, it is that the right of action on the bond did not survive the death of Julius Redelsheimer: First, because of the joint nature of the obligation entered into; and, second, because his death was a revocation of his contract of suretyship, operative as to any obligation arising subsequent thereto, and that this obligation did so arise. It was the rule of the common law that, when a surety became jointly liable with his principal, the death of the surety ended the obligation as to both past and future defaults. This, however, was merely an application of the rule which prevailed at common law as to all joint obligations, and was abrogated by our statutes relating to the liability of joint obligors. Rem. & Bal. Code, §§ 193, 236, 967. This question was before us in *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254. Noticing the objection we said:

"It is next urged that, when the surety dies and the principal survives the surety's estate is absolutely discharged and the survivor only is liable. But this is not so under our statutes (2 Hill's Ann. Code, §§ 704, 1042), which provide that in certain cases, which would include this one, where actions could have been maintained against the party, if living, the same may be prosecuted against his representatives."

To the same effect is *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032, where the following language was used:

"This case was before this court upon a former occasion (10 Wash. 339, 39 Pac. 131), to which reference can be had for a statement of the nature of the action. Pending the former appeal, Kirkman died, and it was stipulated in this court that the executors of his will might be substituted as defendants in his stead. When the second trial was begun, the defendants moved to dismiss the action, as against Kirkman's executors, on the ground that there is no survival of liability against the representatives of a deceased joint debtor. This point has been passed upon by this court contrary to appellants' contention since his brief herein was filed. *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254."

[2] The rule invoked by the second part of the objection is limited to cases where the guarantor or surety might, if living, have revoked his liability by giving notice, of which the obligation assumed in the present instance is not such. The governing principles are clearly stated by Circuit Judge Taft in *Fewlass v. Keeshan*, 88 Fed. 573, 32 C. C. A. 8, in the following language:

"The first point made in this court by the appellants is that the cost bond does not bind the estate of the surety for any costs accruing after his death. The rule as to the obligation of a guarantor in respect to transactions occurring after his death is that the obligation is not affected by his death if the contract of guaranty was one from which he might not withdraw upon notice, but that, if he could have done so, then his death will be given the effect of a notice of withdrawal, at least from the time when the knowledge of the same has been brought home to the obligee. The former proposition is sustained

by the cases of *Lloyd v. Harper*, 16 Ch. Div. 290, *Calvert v. Gordon*, 3 Man. & R. 124, *Green v. Young*, 8 Me. [8 Greenl.] 14 [22 Am. Dec. 218], *Moore v. Wallis*, 18 Ala. 458, and *Voris v. State*, 47 Ind. 345. The alternative proposition is illustrated in the cases of *Jordan v. Dobbins*, 122 Mass. 168 [23 Am. Rep. 305], *Hyland v. Habich*, 150 Mass. 112, 22 N. E. 765 [6 L. R. A. 383, 15 Am. St. Rep. 174], *Coulthart v. Clementson*, 5 Q. B. Div. 42, and *Gay v. Ward*, 67 Conn. 147, 34 Atl. 1025 [32 L. R. A. 818]. A court cannot release a surety upon a cost bond without the consent of the party for whose benefit the security has been given. *Holder v. Jones*, 29 N. C. 191; *Standard Publishing Co. v. Bartlett*, 5 Wkly. Law Bul. 501. This feature of the obligation of a cost bond places it in the category of irrevocable guaranties, the obligations of which continue according to their terms, without regard to the death of the guarantor."

To the same effect is the case of *Estate of Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427, where it is said:

"All voluntary bonds executed for a lawful purpose, like statutory bonds, derive whatever efficacy or binding force they have from the positive law of the state, and in this respect there is no difference in the two classes of bonds. To hold that the estate of a surety on an ordinary trustee's bond is absolutely discharged from all future liability upon the death of the surety, on the ground that his death is per se an extinguishment of the bond, would certainly be a startling proposition to come from this or any other court of final resort; and yet to decide this case in conformity with appellant's theory would be, in legal effect, to assert, as we understand it, that very proposition. We unhesitatingly decline, both upon reason and authority, to give our adhesion to any such a doctrine."

[3] A further objection is that the judgment creditor must exhaust his remedies against the principal debtor and the living surety before he can proceed against the representative of the estate of the deceased surety, and that, in any event, a summary judgment cannot be entered against such representatives in this court, but they must be proceeded against by an action on the bond in a court of the first instance. But it is clear that, if the decedent's estate is liable at all upon the bond, it is liable in the first instance as a principal obligor; the rule being that as between the obligors and the obligees all of the obligors are principal debtors, though as between themselves they may have the rights and remedies resulting from the relation of principal and surety. *Babbitt v. Finn*, 101 U. S. 7, 25 L. Ed. 820. See, also, our own case of *Long Bell Lumber Co. v. Gaston*, 78 Wash. 598, 139 Pac. 641. Since, therefore, the estate of a deceased surety is liable to the obligee as a principal debtor, its representatives cannot, of course, claim as against him the remedies which might be applicable between the estate and its immediate principal.

[4] Nor do we think the objection against a summary judgment well taken. The statute (Rem. & Bal. Code, § 1739) provides that, upon the affirmance of a judgment on appeal for the payment of money, the Supreme Court shall render judgment against both the appellant and his sureties on the appeal bond

for the amount of the judgment appealed from, in case the bond is conditioned so as to support such a judgment, and for damages and costs on the appeal. The judgment below was a judgment for the payment of money. The bond was in the language of the statute relating to supersedeas bonds. It is therefore conditioned to support a judgment in this court against the sureties, and, unless the fact of the death of the surety changes the rule of the statute, there is a clear right to enter judgment on the bond against the representatives of the deceased surety. For the reason that the estate is a principal debtor we are constrained to hold that the fact does not change the rule, and that the respondent has the right to such a judgment.

[5] On the death of Redelsheimer the respondent presented to the representatives of his estate a contingent claim, based upon his liability on the supersedeas bond, and, on the claim being rejected, brought an action thereon in the superior court. It is objected that this is in the nature of an election of remedies, and bars the respondent from insisting on a judgment in this court against the representatives of the deceased surety. But we think the objection not well taken. The appeal vested this court with jurisdiction to direct the character of the judgment to be entered in the action, and the respondent has the right to pursue his action here to its final termination. Under the rule that a person may not pursue two remedies for the same wrong, it might be a defense to the action in the other court that an action for the same recovery was pending here; but the converse of the rule would not be true. Another action pending is a plea to a second action for the same cause of action, but is not a plea to the primary action. 1 C. J. 57; *Westmoreland Co. v. Howell*, 62 Wash. 146, 113 Pac. 281.

The motion of the respondent is granted.

MORRIS, C. J., and MOUNT, ELLIS, and CHADWICK, JJ., concur.

(89 Wash. 596)

KNIBB v. MORTENSEN et al. (No. 18123.)
(Supreme Court of Washington. Feb. 15, 1916.)

1. MECHANICS' LIENS — § 157—AMOUNT AND EXTENT OF LIEN—GOOD FAITH.

Where the contractor agreed to build a dwelling for \$1,004, and deposited a certified check for \$300 to secure performance, and thereafter received payments of \$818, and on disagreement received an award from an arbitration committee of \$247 more, and filed his lien for substantially twice that amount, in addition to the \$300 deposit, the whole lien was bad, because it contained an obvious and willful excess in the deposit item and in the amount in excess of that awarded on arbitration.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 268-274; Dec. Dig. § 157.]

2. JURY \S 14—SUIT IN EQUITY—ENFORCEMENT OF LIEN.

Where a mechanic's lien claimant includes excessive amounts in filing his lien, the owner has a right to trial by jury which the claimant cannot avoid by proceedings under lien.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 40-60, 66-83; Dec. Dig. \S 14.]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by John R. Knibb against August W. Mortensen and another to foreclose a mechanic's lien. Judgment for plaintiff, and defendants appeal. Reversed, with instructions.

Aust & Terhune, of Seattle, for appellants. James T. Lawler, of Seattle, for respondent.

BAUSMAN, J. Plaintiff, agreeing in writing to build the Mortensens their dwelling for \$1,064, deposited a certified check for \$300 to secure his good performance. The Mortensens paid him \$818, and admit that they owe, and they now tender, \$259, which includes a trifling extra. Knibb, claiming many more extras, invoked an arbitration clause on that feature, but received an award of only \$247.25. He then filed a mechanic's lien for substantially twice what the arbitrators allowed him and the \$300 deposit besides, or, in exact figures, \$814.95. The lower court allowed him in the present foreclosure of the lien only \$100 more than the arbitrators had allowed him.

[1] The respondent owner contends that the whole lien is bad because of its containing an obvious and willful excess. That contention we must sustain. The \$300 was clearly no ingredient under our statute, and the lower court had to throw it out, besides, other foreign items. There was no time when this plaintiff could honestly have thought himself entitled to more than half of what he claimed in his notice of lien. His claiming more was willfully unfair, for it was done after the award of the arbitrators, whose decision he does not repudiate, and yet will not adopt, and which, moreover, he uses in his complaint and in his argument here to put the other side in the position of waiver on sundry features.

In Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721, we held that willful excess would vitiate the whole lien, and in Gilbert Hunt Co. v. Parry, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B, 225, we reached the same conclusion, where the excess was very great though without evidence of bad intent. These lien laws tend to burden the sale of property. They must be claimed in good faith. The law will not, indeed, punish the lienor for trifles included, or even for large sums which are fairly debatable in law. But it will not allow an obvious misuse of the statute. This contractor has burdened a little dwelling with twice as much as he had

a right to claim by lien, and, in our opinion, he did it willfully, out of an ill humor which is exhibited in sundry features of the record.

[2] Where excessive items are claimed, the defendant owner has the right to his trial by jury, which the plaintiff here has avoided by proceedings under lien.

The cause will be reversed, with instructions that the action be dismissed without prejudice to a suit at law by the plaintiff upon the same subject-matter.

MORRIS, C. J., and MAIN, HOLCOMB, and PARKER, JJ., concur.

(39 Wash. 599)

STATE ex rel. PUBLIC SERVICE COMMISSION OF WASHINGTON v. SPOKANE & I. E. R. CO. (No. 12838.)

(Supreme Court of Washington. Feb. 15, 1916.)

1. ELECTRICITY \S 4 — ELECTRICAL POWER COMPANIES — PUBLIC SERVICE CORPORATIONS.

Companies furnishing electrical energy may or may not be public service corporations, depending on whether the sale of power is a sale to the public generally or only an incident to the business in which the company is engaged, as a sale pending the time when the company's surplus will be needed to accomplish its assumption of duty to the public.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. \S 1; Dec. Dig. \S 4.]

2. ELECTRICITY \S 4 — SALE OF SURPLUS POWER BY TRACTION COMPANY—PUBLIC USE.

The sale of electrical power for traction purposes, lighting, manufacturing, etc., is not a public use, and the sale by a public service traction company of the difference between its ordinary requirements and its peak load is only an incident to the public employment, of which the law will take no notice.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. \S 1; Dec. Dig. \S 4.]

3. ELECTRICITY \S 4 — STATUS OF TRACTION COMPANY — PUBLIC SERVICE COMMISSION LAW.

The Public Service Commission Law (Sess. Laws 1911, p. 543), declaring all companies selling electricity for light, heat, and power for hire to be public service companies, subject to regulation by the public and under the jurisdiction of the Public Service Commission, has not extended the jurisdiction of the Commission over a traction company, selling its surplus of power between ordinary requirements and peak load to various private buyers, so far as such branch of the business is concerned, since the regulation and control of business of a private nature by the state is sustained by reference to the police power, and then only when the business is in character and extent of operation such as touches the whole people and affects the general welfare, while the act does not manifest clear legislative intent to bring such business within the police power, which the courts will not do in the absence of such expressed intent.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. \S 1; Dec. Dig. \S 4.]

4. ELECTRICITY \S 4 — POWER COMPANY—REGULATION.

If the state, at any time, acting through its accredited agency, puts a burden upon a public service corporation which requires the use of its surplus power, it must devote such power to

the public use and abandon any private contracts it may hold for the sale of such surplus power.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. ¶4.]

5. ELECTRICITY ¶11—POWER COMPANY—REGULATION.

Where the state requires a public service corporation to devote its surplus power to the public use, a private contractor with the corporation, who has been buying such power, cannot compel specific performance of the contract as against the public right.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. ¶11.]

6. ELECTRICITY ¶11—TRACTION COMPANY—REGULATION OF RATES—PUBLIC SERVICE COMMISSION LAW—"RATE."

Under the Public Service Commission Law (Sess. Laws 1911, p. 543), providing that the Commission shall ascertain the probable earning capacity of each public service company under the rates now charged, the Commission cannot compel the company to disclose its private contracts for the sale of its surplus power to private enterprises, since "rate" means a charge to the public for a service open to all and upon the same terms, and not a consideration of a private contract in which the public has no interest.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. ¶11.]

For other definitions, see *Words and Phrases*, First and Second Series, *Rate*.]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Mandamus by the State on the relation of the Public Service Commission of Washington, against the Spokane & Inland Empire Railroad Company. From a judgment granting the writ, respondent appeals. Remanded, with directions to deny the writ.

Graves, Kizer & Graves, of Spokane, for appellant. W. V. Tanner, Atty. Gen., and Scott Z. Henderson, Asst. Atty. Gen., for respondent.

MOUNT, J. Respondent brings a mandamus proceeding to compel a disclosure of private contracts. The appellant is a traction company operating a street railway system in the city of Spokane, and some interurban lines running out of Spokane into the surrounding country. It maintains a power plant which generates about 12,000 horse power. Its present average need for its operations is about 9,000 horse power. Some years ago, at a time when its own power plant had not been completed, appellant entered into a contract to take each year 3,800 horse power from the Washington Water Power Company, a power company operating in the same territory. With the development of its own plant giving approximately 12,000 horse power and the contract holding it to take 3,800 horse power from the Washington Water Power Company, appellant has a yearly supply of approximately 16,000 horse power, or about 6,000 or 7,000 horse power more than its present average need, although at times it uses as much as 12,000 horse power.

This surplus it has sold under private contract to others, and it has been put to various uses, its customers being a land company, one or two farmers, who use the power for irrigation purposes, two manufacturing plants, a grain elevator, an irrigation company, and three or four individual owners of local electric light plants in towns and villages in the vicinity of Spokane. The object of this proceeding is to compel appellant to submit its private contracts to the Public Service Commission, it being the theory of the Commission that it has jurisdiction over that part of the appellant's business which heretofore has been regarded as private and in which the state had no interest; that it cannot make an adequate and intelligent survey of the rates charged by appellant in its service to the public without them; and, further, that to regulate the rates for traction purposes, it must have a disclosure of all contracts and all activities yielding a revenue to appellant, whether they be private, entered into with individuals, or affect a public service only.

[1] We understand the law in this state to be that companies furnishing electrical energy may or may not be public service corporations, depending upon the objects for which they were organized and the business in which they are engaged, the logic of the cases being that we will judicially inquire whether the sale of power is a selling to the public generally or is only an incident to the business in which the company is engaged, as, for instance, a sale pending a time when its surplus will be needed to accomplish its assumption of duty to the public, for it has been held that a public service corporation can anticipate its future needs and develop energy reasonably in excess of present requirements. The character of such companies and their relation to the public has been frequently considered by this court. We find no departure from our first holding that a sale of electrical energy or power for private enterprises is not an engaging in a public business and gives such companies no right to assert the sovereignty of the state. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964; *State ex rel. v. White R. P. Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, 4 Ann. Cas. 987; *State ex rel. v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672, 7 Ann. Cas. 748; *State ex rel. v. Olympia*, 46 Wash. 511, 90 Pac. 656; *State ex rel. v. Superior Court*, 50 Wash. 13, 96 Pac. 519; *State ex rel. v. Superior Court*, 51 Wash. 386, 99 Pac. 3; *State ex rel. v. Superior Court*, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199; *State ex rel. v. Superior Court*, 70 Wash. 486, 127 Pac. 104; *State ex rel. v. Superior Court*, 71 Wash. 84, 127 Pac. 591. In all of these cases

the company was asserting the right of eminent domain in order to avail itself of the rights and privileges granted by statute to public service corporations. In the absence of controlling legislation the court refused to extend the right. In the Nisqually Power Company Case we even held the use of the word "private" in a legislative act to have been inadvertent and therefore surplusage. The court has not inclined to the thought that corporations not directly engaged in the sale of power to the public generally should be clothed in the garb of the state, in the absence of an unquestioned intent on the part of the Legislature so to do.

The case at bar is presented from the other angle. The company is insisting that its contracts with private individuals for the sale of excess power are of no concern to the state because they pertain to private business in no way affecting the public, while the state is insisting that such contracts are essential to an intelligent exercise of its admitted function to inquire into and regulate appellant's traction rates. In other words, appellant rests upon the law as we have heretofore found it to be, and respondent insists that the court has indicated a purpose to relax the rule in the later cases (*State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444; *State ex rel. Lyle v. Superior Court*, 70 Wash. 486, 127 Pac. 104; *State ex rel. Weyerhaeuser v. Superior Ct.*, 71 Wash. 84, 127 Pac. 591; *State ex rel. Mountain Tim. Co. v. Sup'r Ct.*, 77 Wash. 585, 137 Pac. 994), or, if not, the act of 1911 (*Sess. Laws*, p. 543) is ample to sustain the right of respondent to inquire into and control that part of the business of appellant which has heretofore been considered as private and not a proper subject of state control.

[2] To review the cases in detail would serve no purpose. We have discovered in them no purpose to depart from our former holdings. There may be some expressions in cases involving collateral questions which seemingly touch the question under discussion and which may give impulse to the thought that we had it in mind to modify some of our decisions, but the fact remains that wherever the exact question has been submitted to the court, it has held to the doctrine of the earlier cases, that is, that the sale of power to be used by others for traction purposes, lighting, manufacturing, etc., is not a public use, and that the sale of surplus power, or the difference between the ordinary requirements and the peak load by a corporation which does do a public service business, when such surplus is not in use, is only an incident to the public employment of which the law will take no notice. Notwithstanding the criticisms of counsel, there is sound reason for our former holdings, to which we shall advert when discussing the next phase of the case.

[3] The final and controlling question is whether the act of 1911 has extended the jurisdiction of the Public Service Commission over power companies regardless of the character of the business in which they are engaged. Counsel for respondent says:

"We may rest our case on the proposition that, irrespective of any question of eminent domain, the contracts of appellant are 'clothed with a public interest,' and therefore subject to regulation, and that the determination of the policy of regulation is for the Legislature."

Counsel for appellant admits:

"The sole question in the case is whether the defendant's power business is a public business, in view of the uses to which the power sold by it is put, and is therefore subject to the jurisdiction of the Public Service Commission. If it is within the legislative power to make public a business conducted as defendant's power business is, undoubtedly the Legislature has done so, and the case was rightfully decided. It is an electrical company, and owns an electric plant within the definitions of the statute. *Session Laws 1911*, pp. 543, 544. The act makes no distinction between an electrical company selling its product for public purposes and one selling for private purposes. All such companies selling 'electricity for light, heat, or power for hire' are declared to be public service companies, subject to regulation by the public, and under the jurisdiction of the Public Service Commission."

This leads us to a construction of the statute. The purpose of the state in creating the Public Service Commission was to regulate "public service properties and utilities." In the *White River Power Company Case*, supra, we held the question whether the Legislature could clothe the power companies with a public character open, saying:

"We do not mean to say that the right of eminent domain can, in no case, be extended to a corporation organized for the purpose of generating and transmitting electricity for power and other purposes. But before this can be done, public necessity must require it, and the right of the public to the use and the enjoyment of the property must be regulated, guaranteed, and safeguarded by proper legislation."

It is argued that the present act (1911) furnishes ample authority for holding that public necessity, as evidenced by the legislative declaration, now requires that such companies be held subject to regulation in their private affairs, and that the right of the public to the enjoyment and use of such property is regulated, guaranteed, and safeguarded by appropriate legislation. But we think the act does not go so far. That it assumes jurisdiction over power companies and electrical companies may be conceded, but we find nothing that compels the conclusion that the Legislature intended to inquire into or regulate such companies except in so far as their business affects the right of the whole public to their products upon fair or reasonable terms. Granting for the sake of argument the right of the Legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or to others, such right should not be declared by the courts in the absence of express legislation. The regu-

lation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, and *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, rest. Until the Legislature brings a business within the police power by clear intent courts will not do so. Courts have assumed to say whether an act of the Legislature falls within the police power, but primarily the assertion of police power is for the Legislature. They are not disposed to hold that a thing should be done by an individual or by the whole public because the public welfare demands it. They have acted only after the Legislature has defined the object of the power. In other words, the courts have never said primarily that the police power should be applied in any given case. Their only inquiry has been whether a legislative act is reasonably within the legislative power and the thing sought to be done is fairly within the terms of the act. And it is well that it is so, for the legislative body can extend the domain of the police power with sufficient rapidity. There is no reason why the courts should engage in a rivalry with it.

At the time the act of 1911 was passed the law was well defined and certain in its terms. The sale of power to individuals or companies, to be in turn sold, was not a public use. The rule and the cases declaring it must have been well understood by the Legislature. Yet the act nowhere attempts to cover any use theretofore deemed to be private. Its whole context seems to compel the thought that it had in mind only such uses as the public might compel. There is nothing to indicate a legislative intent to declare that the sale of surplus or secondary power pending a future use by a company in the performance of its public functions is a thing that affects the general welfare, the health, peace, or happiness of the citizen, or that it is in any way necessary to sustain the right of the state to govern.

Neither has the business of selling surplus power been so notoriously beset by abuses that we can judicially notice it as having an outlaw character. The right to regulate under the present law must be measured by the public interest. It will hardly be contended that appellant's contracts with those to whom it sells its surplus is of any interest or concern to any one other than the immediate parties. It is not alleged that it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus. The act of sale is purely voluntary. Like the merchant it can sell at one price to

one man and at another price to another. The parties to the contracts are not complaining. If either is not content with the offering of the other, he does not have to contract. He can go his way. But it is not so with appellant when exercising its public function, that is, furnishing something—a necessity—that all are entitled to receive upon equal terms, under equal circumstances and without exclusive conditions. *Beale & Wyman, Rate Regulation*, § 1.

[4-8] The only interest the state can have in such contracts is that they may not be made and persisted in to the detriment of the public. They are made subject to the paramount undertaking of the company, and must give way to the public interest if necessity requires. If at any time the state, acting through its accredited agency, puts a burden upon a public service corporation which requires the use of its surplus energy, it must devote such energy to the public use and abandon its private contracts, for they are no longer mere incidents to the undertaking in which the public has no interest, but are an incumbrance upon a public service. A private contractor could not compel specific performance of his contract as against an intervening public right. Thus reasoning, it follows that inquiry into these collateral matters is not essential to the performance of the public functions of the respondent. The Commission insists that it cannot find a basis for rate making without knowing the private, as well as the public, affairs of the appellant. Granting that the appellant is entitled to a fair return upon its investment and the public to a fair rate of transportation, to hold that respondent could figure appellant's private contracts as a basis for rate making would, in turn, compel the holding that appellant would be entitled to take from the public enough to make good its losses in its private enterprises. The state has no interest either in appellant's gains or losses in its private enterprises. It has not yet assumed to stand as an inquisitor or conservator in private business. The act creating the Commission reflects no more than an intent to care for every right of the public in so far as they relate to the public functions of a public service corporation. It provides for equality of service, a physical valuation, "the total market value of the property of each public service company operating in this state, used for the public convenience within the state," and that the Commission shall "ascertain the probable earning capacity of each public service company under the rates now charged by such companies," that is, rates for service falling within the scope and intentment of the law; for "rates" must be held to mean a charge to the public for a service open to all and upon the same terms, and not a consideration of a private contract in which the public has no interest.

This holding makes it unnecessary for us

to inquire into the power of the Legislature to assume a control over business of a private nature, or whether such an act being passed raises a legislative or judicial question. It is enough that the Public Service Commission Law does not go to that extent in its letter, and cannot be held to have gone to that extent by construction without doing violence to the manifest purpose and spirit of the law.

Remanded, with instructions to deny the writ.

MORRIS, C. J., and CHADWICK and ELLIS, JJ., concur.

FULLERTON, J., concurs in the result.

(89 Wash. 669)

STATE v. SANFORD. (No. 13054.)

(Supreme Court of Washington. Feb. 17, 1916.)

1. PHYSICIANS AND SURGEONS \S 6—PRACTICING WITHOUT CERTIFICATE—INFORMATION.

Under Rem. & Bal. Code, \S 8386 et seq., regulating the practice of medicine, creating a board of medical examiners with authority to issue certificates authorizing the holder to practice medicine and surgery, osteopathy, or any other system of treatment, and section 8400, making it a misdemeanor for any person to practice without a license, an information charging defendant with practicing a form of treatment without having a certificate in any form authorizing him to practice, charged an offense, even though it did not state the particular form of certificate which the defendant should have had to entitle him to practice the system he actually practiced.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S\S$ 6-11; Dec. Dig. \S 6.]

2. PHYSICIANS AND SURGEONS \S 6 — PRACTICING WITHOUT CERTIFICATE—INFORMATION—RESIDENCE.

Under Rem. & Bal. Code, \S 8386 et seq., making the practice of any method of treating the sick without a certificate issued by the board of medical examiners a misdemeanor, an information alleging that defendant practiced in a county without a certificate to practice in that county was not defective, because not alleging that he was a resident of that county, as if he practiced in that county without a certificate he was guilty of an offense under the statute.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. $\S\S$ 6-11; Dec. Dig. \S 6.]

3. INDICTMENT AND INFORMATION \S 125 — "DUPLICITY" — PRACTICE OF MEDICINE WITHOUT AUTHORITY.

Under Rem. & Bal. Code, \S 8395, making it an offense for any person holding a certificate entitling him to practice medicine in any of its forms to so practice without having the certificate recorded in the county in which he practices, and that on each change of residence he must have the certificate recorded in the county to which the change is made, and section 8400, making it an offense to practice without having such a certificate, an information for practicing medicine without a certificate, but not stating sufficient facts to charge the complete offense of practicing without having the certificate recorded, and under which defendant could not have been convicted of practicing without having his certificate recorded, was not duplicitous, as, to constitute duplicity, the information must

charge two complete offenses, and if it charges one complete offense, and states facts which completely charge another offense, the latter statements do not vitiate the information, but may be rejected as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. $\S\S$ 334-400; D. Dig. \S 125.]

For other definitions, see Words and Phrases, First and Second Series, Duplicitous.]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

H. L. Sanford was convicted of practicing medicine without a license, and he appeals. Affirmed.

Willett & Oleson, of Seattle, and Morris & Hartwell, of La Crosse, Wis., for appellant. Alfred H. Lundin, Frank P. Helsell, and Joseph A. Barto, all of Seattle, for the State.

FULLERTON, J. The appellant was convicted of the offense of practicing medicine without a license. The questions suggested for reversal are all based upon the information, which omitting the caption and conclusion, reads as follows:

"I, John F. Murphy, prosecuting attorney in and for the county of King, state of Washington, come now here in the name of and by the authority of the state of Washington, and by this information do accuse H. L. Sanford of the crime of practicing medicine without a license, committed as follows, to wit: He, said H. L. Sanford, in the county of King and state of Washington, on the 17th day of November, 1914, did then and there willfully and unlawfully practice and attempt to practice and hold himself out as practicing medicine and treating the sick and afflicted by the chiropractic method, and then and there advertising that he would treat the sick and afflicted in said county and state by said method, and that then and there by said chiropractic method treating and attempting to treat one Mary B. Fox as sick and afflicted, and by diagnosing and pretending to diagnose the affliction of said Mary B. Fox, and by said chiropractic method then and there treating the said Mary B. Fox as a sick and afflicted person, for which treatment he, said H. L. Sanford, charged said Mary B. Fox the sum of two dollars (\$2) therefor, all without having at the time of so doing a valid, unrevoked certificate from the state board of medical examiners authorizing him to treat the sick and afflicted in the county of King and state of Washington, and without having any such certificate recorded in the office of the county clerk of King county, state of Washington, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The statutes of this state regulating the practice of treating the sick or afflicted creates a board of medical examiners, and gives such board authority to issue certificates to persons entitled to practice any of the lawful systems or modes of so doing. Rem. & Bal. Code, \S 8386 et seq. Three forms of certificates are provided for: First, a certificate authorizing the holder thereof to practice medicine and surgery; second, a certificate authorizing the holder thereof to practice osteopathy; and, third, "a certificate authorizing the holder thereof to practice any other system or mode of treating the sick or af-

flicted not referred to in this section." Section 8391. By section 8400 it is made a misdemeanor for any person to practice, attempt to practice, or to hold himself out as practicing, medicine and surgery, osteopathy, or any other system or mode of treating the sick or afflicted, without having at the time of so doing a valid unrevoked certificate issued to him by the board of medical examiners.

[1] It is the appellant's first contention that the information is fatally defective, "in that it does not state which one of the three certificates provided for by statute appellant should have had to enable him to do what the state undertook to charge him with having done, and also in not showing which of the three classifications provided for by the statute defendant came under." But it seems to us that an information may charge an offense under the statute without including either of these matters. The statute, while it may or may not prohibit a person holding one form of certificate from practicing a system or mode of treatment authorized by another, clearly prohibits a person holding no certificate at all from practicing, attempting to practice, or holding himself out to practice, any system or mode of treatment. An information, therefore, which charges a person with practicing a form of treatment of the sick and afflicted without having a certificate in any form authorizing him to treat the sick or afflicted, states an offense under the statute, even though it does not state the particular form of certificate he should have possessed in order to entitle him to practice the particular system or mode of treatment he actually practiced. In our opinion the information in the present case, while somewhat crude, is thus definite. In effect it charges the defendant with willfully and unlawfully practicing, attempting to practice, and holding himself out as practicing, in the county of King, state of Washington, a system and mode of treating the sick and afflicted known as the "chiropractic method," and with actually treating one Mary B. Fox as sick and afflicted by such chiropractic method, all without having at the time of so doing a valid unrevoked certificate from the state board of medical examiners authorizing him to treat the sick and afflicted in such county and state. Clearly it would not aid the understanding to include therein a statement of the character of certificate the appellant should have possessed in order to entitle him to practice the system or mode of treatment he attempted to practice, or to state under which of the three classifications provided for by statute a person would fall who practiced the system or mode of treatment employed by the defendant.

[2] Again, it is said that the information is fatally defective because it does not allege that the defendant is a resident of King county. In support of this it is argued that it is

sufficient for the holder of a certificate to record it in the county of his residence in order to entitle him to practice his profession in any county of the state, and that the information, inasmuch as it fails to allege the residence of the defendant, does not negative the idea that his practice in King county was lawful. But, as we say, the allegation is that he practiced in King county without having a certificate authorizing him to practice in that county. It may be that, in order to convict the defendant of unlawfully practicing in King county without a certificate, the state would be obligated to show that he had no certificate entitling him to practice in any county of the state; but this fact does not render the allegation insufficient. If he practiced in King county without right, he was guilty of an offense under the statute, and an information which charges him with so doing charges an offense.

[3] Section 8395 of the statute makes it an offense for any person holding a certificate entitling him to practice the medical profession in any of its forms to so practice without having the certificate recorded in the county in which he is practicing, further providing that on each change of residence he must have the certificate recorded anew in the county to which the change is made; while section 8400, as we have noted, makes it an offense to practice without having such a certificate. The appellant, construing the first of the cited sections to require a recording only in the county of the residence of the practitioner, contends that the information is duplicitous, in that it charges the offense of practicing without having his certificate recorded and also the offense of practicing without a certificate. But while the information contains language applicable to the offense of practicing without having a recorded certificate, it manifestly does not state sufficient facts to charge a complete offense in that respect. In other words, the defendant could not on this information have been legally convicted of practicing his profession without having his certificate authorizing him to so practice recorded in the county of his residence. To constitute duplicity the information must charge two complete offenses. If it charges one complete offense, and states facts which incompletely describe another offense, the latter statements do not vitiate the information, but may be rejected as surplusage. *State v. Haskell*, 76 Me. 399; *State v. Comings*, 54 Minn. 359, 56 N. W. 50; *State v. Flanders*, 118 Mo. 227, 23 S. W. 1086; *People v. Casey*, 72 N. Y. 393; *State v. Darden*, 117 N. C. 697, 23 S. E. 106.

Our conclusion is that the judgment should stand affirmed. It is so ordered.

MORRIS, C. J., and MOUNT, ELLIS, and CHADWICK, JJ., concur.

(89 Wash. 571)

DAVIES v. MARYLAND CASUALTY CO.
(No. 12920.)

(Supreme Court of Washington. Feb. 9, 1916.)

1. INSURANCE — 514 — INDEMNITY INSURANCE — PAYMENT BY ASSURED.

Where an insolvent coal company, the assured under an indemnity policy for \$5,000, executed notes for \$17,000 to the widow of its deceased employé, who had recovered judgment against it for \$15,000 for the employé's death, she expecting to return them immediately, satisfy the judgment, and receive an assignment of the indemnity policy, which was done, the transaction was a mere subterfuge, and did not constitute payment of the judgment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298; Dec. Dig. — 514.]

2. INSURANCE — 514 — EMPLOYERS' INSURANCE — "INDEMNITY INSURANCE" — "LIABILITY INSURANCE."

Employers' insurance policies are of two sorts, the "liability" contract, which obligates the insurer to pay the loss without first requiring that the assured do so, and the "indemnity" contract, which obligates the insurer to reimburse only after the employer has paid the debt to the injured employé.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298; Dec. Dig. — 514.]

3. INSURANCE — 514 — EMPLOYERS' INDEMNITY INSURANCE — ELECTION BY INSURER.

An employers' indemnity insurance company, which took over the defense of an action by the widow of the deceased employé of the assured for such employé's death, assumed the position of a liability insurer and waived the right to exact prepayment of the widow's judgment by the assured as a condition precedent to its liability on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298; Dec. Dig. — 514.]

4. CORPORATIONS — 617 — INSURANCE — 212 — CONTRACT AFTER STRIKING OF NAME FROM PUBLIC ROLLS — ASSIGNMENT — VOIDABLE CHARACTER.

An assignment of its indemnity policy by an insolvent coal company the name of which had been stricken by the secretary of state from the public rolls for failure to pay its annual licenses to the widow of a deceased employé, who had recovered judgment against the company for the death, was not void, but voidable, and could not be complained of by the insurer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2448-2456; Dec. Dig. — 617; Insurance, Cent. Dig. §§ 481, 482; Dec. Dig. — 212.]

5. APPEAL AND ERROR — 1060 — HARMLESS ERROR — MISCONDUCT OF COUNSEL.

In an action on an employers' indemnity policy assigned by the assured, where plaintiff, under the undisputed testimony, was entitled to an instructed verdict for \$5,000, the amount of the policy, for which sum the jury returned verdict, the judgment cannot be reversed for misconduct of plaintiff's counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. — 1060.]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Anna Davies against the Maryland Casualty Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Roberts and Geo. L. Spirk, both of Seattle, for appellant. Brady & Rummens, of Seattle, for respondent.

BAUSMAN, J. Plaintiff's husband was killed in a mine of the Rose-Marshall Coal Company, when that company had a policy of indemnity from the Casualty Company. After prolonged litigation, including an appeal to this court (Davies v. Rose-Marshall Coal Co., 74 Wash. 565, 134 Pac. 180), judgments for \$15,000 were obtained by the widow and her son in consolidated actions against the coal company. The present suit against the casualty company alone was brought by the widow as the coal company's assignee of the policy. Judgment being given against the casualty company for \$5,000, its full amount, the casualty company appeals.

In addition to alleged trial errors, which will be discussed later, the appellant contends: That the coal company had never paid the loss, and thus put itself in a position where, by the policy, it could ask reimbursement; second, that there was nothing assignable in this policy before that; third, that the assignment was not only without consideration but in bad faith.

The coal company was incorporated in 1910, the policy issued in September of that year, and the death of Davies occurred in December following. That the coal company is utterly insolvent is clear. The Davies judgment was first recovered in June, 1912, and, after the appeal here, was made final below in November, 1913. A receiver of the coal company appointed in March, 1914, before the present action, but after the assignment of the policy, found no assets. The only other asset of the company had between the date of the Davies judgment and the commencement of this action was a leasehold interest in coal lands, forfeited at some uncertain date after the accident. The policy we shall construe as intended to reimburse, and not to prepay, the assured. It resembles the generality of these contracts, but does lack some features that are common in them. Thus the insurer, while engaging to defend suits, did not in terms exclude the assured itself from defending. Neither did it forbid an assignment of the policy. It permitted cancellation by the insurer at any time on five days' notice with partial refund of premium. The suit of Davies against the coal company was defended from the beginning by the insurer, with whom there is no evidence that the coal company in any way interfered.

Plaintiff admits that the policy is one solely of reimbursement, and that nobody could sue the insurer until the employer had paid the judgment; but the employer, she argues, had in fact paid the judgment, after which it assigned to her the then actionable policy for a valuable consideration.

[1] The facts are that the insolvent coal company executed notes of \$17,000 to Mrs. Davies; that she on the same day gave them all back, satisfied the judgment, and took a written assignment of the policy. In our opinion, this transaction was but a subterfuge. We have, of course, held, in *Seattle & S. F. Co. v. Maryland Casualty Co.*, 50 Wash. 44, 96 Pac. 509, 18 L. R. A. (N. S.) 121, that an employer may make by notes such a payment to a creditor employé as will sustain a suit for reimbursement from one of these insurers before the notes are paid. In that case, though, the assured employer was not insolvent. When it gave notes, it gave something valuable. Here insolvency made the notes presumptively worthless. But other facts here are still stronger. The notes were hardly issued until they were handed back. Not only were they given back immediately, but they were actually issued with an ill-concealed understanding that this should be done immediately. The maker practically never took its hands off them. It never expected to pay them. The payee's own testimony leaves it clear that she expected to return them immediately, satisfy the judgment, and get the policy. Moreover, what she gave back was not \$5,000 of these notes, but all of them. She satisfied a judgment for \$17,000 in exchange for a right to sue the casualty company in not to exceed \$5,000; all this in a few hours. The transaction cannot be sustained as a payment by the coal company.

If, then, plaintiff's right to sue the casualty company were to depend on plaintiff's own theory, her case must fail. But other facts require our consideration, and we must enter on a discussion beyond, to be sure, the scope of the briefs on either side, but indispensable to justice in this case, as well as to a proper view of these contracts in the future.

[2, 3] The Davies claim against the coal company was long resisted by the casualty company. To reimburse for such a claim when established by judgment and paid was the purpose of its contract. The judgment has established that claim. Nothing remains except a form. The casualty company, in effect, says to Mrs. Davies that, if the coal company will pay her at one end of the desk, the casualty company will repay the coal company at the other end. Not one thing besides, does it argue, is wanting to its liability except this formula. On that process it insists, not because, when the coal company shall have first paid and the casualty company shall then have given reimbursement there will result to it a right, claim, or even a salvage interest against the coal company or its assets, but because it wishes the thing done in just that way. It will pay a moment after, not a moment before, the coal company pays. If the latter will but get a loan for a few moments from some one else and pay the judgment, then the

casualty company will hand it a check perhaps long previously prepared.

Such mummeries are ill favored by the law. Technicality, indeed, is not only respectable, but is to be enforced by courts when even a remote right is exposed to danger. When technicality is invoked, however, to avoid an obligation morally established the common law usually finds in its arsenal some weapon with which to confront it, and to make that a legal which is already a moral debt. The actuary of the casualty company undoubtedly reckoned on paying a loss thus earned. It must be assumed that reserves are not calculated upon an escape through the chance of the assured's insolvency after liability to the employé. It is the executive branch of the insurer that, looking to the precise words of contract, may feel itself justified in adding casual gains from situations like these, where some claims will be perfectly established, be morally complete in every respect, but where the employer, not allowed by the insurer to pledge or assign the policy one minute in advance, will be unable to get so much as a temporary loan.

Employers' policies are of two sorts. One, called a liability contract, obliges the insurer to pay the loss without first requiring the assured to do so. The other type, of which the present is one, is called an indemnity policy, and imposes only reimbursement after the employer has paid the debt. This last being found better for the insurer, the liability policy has gradually been displaced by the other.

Tracing now the growth of the indemnity policy up to its present phraseology, its basic principle was that the assured would not only first pay the loss, but that he would attend to his own defense. The indemnifier, standing aloof, would pay the final bill, providing the defense had been honestly conducted by the employer. Generally speaking, the practice as well as the contract of the indemnifier to take over the defense came later. To do that under the old liability policy was natural, but under the pure indemnity policy was not natural. The insurer desired to defend through his own agent, because he could do so more cheaply than the employer, who would charge the expenses to him, and because he could be more certain of the good faith of that defense. He accordingly wished to become a mere reimbursor in law while a defender in fact. But in taking over the defense the insurer assumes a feature of a liability contract, as distinguished from an indemnifying contract. When an accident occurs, he hurries to protect the assured and himself from liability by defeating the claimant in advance. But, when the claimant has been successful, the insurer, falling back on the other theory, argues that he is not a liability insurer, only a reimbursement insurer. This shifting subjects him to the

familiar doctrine of estoppel by election in inconsistent positions. The law does permit him to have the exemptions of a reimbursement engagement, but he cannot have the benefits of a liability engagement at the same time. If he wishes to rely upon the former, he may continue to do so under the words of his contract and leave the defense to the assured. When he takes over the defense himself, he will not be heard to say that he has not assumed the position of a liability insurer. Accordingly we hold that, by conducting the defense, the employer's insurer waived the right to exact prepayment by the assured, and that on the final judgment of Davies against the coal company "loss" matured. The policy as one of reimbursement could then be either sued on by the assured or be assigned.

Such a consequence of the insurer's acts would seem, aside from any justice to the employé, to be but fair to the employer also; for the latter, whose solvency and protection are supposed to be promoted by these policies, is, as this feature is now taken advantage of, exposed to a willingness and even a desire in the insurer to see him, not succeed, but fail. In fact, they do sometimes fail because they are left unassisted by their insurer in just such a juncture, for the employé's judgment often ruins embarrassed employers, notwithstanding they hold in their hands the very contract that was supposed to save them. They are told by the maker of that contract that he will save them when they have saved themselves. If that is to remain permissible in these insurers, it will not remain such in this state when they take over the defense and costs of a suit. Such a privilege in their contracts involves a question of public policy. It is a privilege that would be grudgingly extended, if ever extended at all, to any private individual, since it increases the temptations to prolong litigation and puts in the hands of a stranger, who may gain by harshness, a controversy that ought to be left to those whose previous relations invite reconciliation and concord.

[4] This brings us to the assignment that was made. It is clear that, before this was done, the coal company's name had been stricken by the secretary of state from the public rolls for want of paying its annual licenses during the prescribed period. In consequence of this, the assets of the corporation passed to its trustees to be disposed of, as the statute expresses it, under the order of the court in appropriate proceedings. Just what proceedings would be appropriate are not specified by the statute. The receiver appointed after the assignment of the policy acquiesced in that transaction of which he was plainly cognizant and in which he appeared to assist.

Whether the act of assigning the policy in exchange for a satisfaction of the judgment was ultra vires under our statutes, which,

though intended to be revenue measures, must necessarily be enforced with some rigor to produce the desired revenue, is a question not necessary to be determined. The assignment, we are confident, was not void, but voidable, and, if it was voidable, it was not the casualty company that could complain of it. *Voltz v. National Bank*, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155. To the latter it should be unimportant which it pays when the loss is due; and the corporate acts that are in excess of corporate power and yet unassailable by third parties are too numerous to mention. Neither creditors, if any such exist (which the record does not show), nor the receiver have sought to disturb this transaction.

[5] In view of the foregoing, the judgment of the lower court must be affirmed. Nor can we reverse it for misconduct of plaintiff's counsel either as witnesses or as advocates before the jury. The misconduct complained of is, indeed, such as the lower court should have reprehended, for defendant's counsel made to this misconduct timely and proper objection. But no case can be reversed for misconduct of counsel when it is clear that the verdict of the jury could not possibly have been affected by it. Such is the present instance. The jury had to bring in a verdict of the \$5,000 sued for or no verdict for plaintiff at all. Under the undisputed testimony in this case plaintiff was, in fact, entitled to an instructed verdict in her favor for the amount of the policy. It is in that sum that the jury, though the case was tried by both parties under a mistaken theory, have given their verdict.

Judgment affirmed.

MORRIS, C. J., and HOLCOMB, and MAIN, JJ., concur. PARKER, J., concurs in the result.

(39 Wash. 557)

HAVERLAND v. LANE et ux. (No. 12828.)

(Supreme Court of Washington. Feb. 9, 1916.)

1. FRAUD \Leftrightarrow 25—PURCHASE OF STOCK—DECEIT—PURCHASE FOR OTHER CORPORATION.

That defendant, in buying stock of plaintiffs, their shares of stock in a corporation, concealed from them that it was being bought for the interest, if not the account, of another corporation, is not actionable deceit, they having no interest in who was the purchaser, but only in getting a satisfactory price.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 24; Dec. Dig. \Leftrightarrow 25.]

2. FRAUD \Leftrightarrow 13—PURCHASE OF STOCK—DECEIT—RECEIVERSHIP.

The representation of defendant stockholder, in buying from plaintiffs their shares of stock, that the company would be put in the hands of a receiver unless they sold their stock, would not be actionable deceit, unless it involved an actual misrepresentation as to the value of the stock, or possibly a showing that the stock became more valuable because of ex-

isting facts which defendant, being an officer of the company, was bound to disclose.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. ¶13.]

3. CORPORATIONS ¶317—STOCK—PURCHASE BY OFFICER—DECEIT—DISCLOSING MARKET.

It is not actionable deceit for a stockholder in a company, though an officer thereof, in buying stock of other stockholders, as a personal venture, not to inform them that he has a contract to sell it above its actual and market value to another corporation desiring to obtain control of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401-1414; Dec. Dig. ¶317.]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by F. W. Haverland against Thaddeus S. Lane and wife. From the judgment, defendants appeal, plaintiff taking cross-appeal. Reversed and remanded, with directions to dismiss.

Danson, Williams & Danson and George D. Lantz, all of Spokane, for plaintiff. Post, Avery & Higgins, of Spokane, for defendants.

CHADWICK, J. The plaintiff and his assignors, whom we shall hereafter refer to as the plaintiffs, were stockholders in a telephone company having lines in northern Idaho and running into Spokane, Wash. We shall call it the Limited Company. The defendant T. S. Lane, whom we shall hereafter refer to as the defendant, was interested as an officer and stockholder in several independent telephone companies in the state of Montana and in the Home Telephone Company in the city of Spokane, Wash. These were known locally as the "Independents." In order to secure a line into the city of Spokane the Independents negotiated for the purchase of the Limited Company. At the time there was a certain holding company organized under the laws of the state of Montana known as the Interstate Consolidated Telephone Company. We shall call it the Consolidated Company. This company held the stock of all the independent companies. After negotiating for some time the Limited Company was sold to the Consolidated Company. In consideration of the transfer of the stock of the Limited Company the Consolidated Company issued shares in the Consolidated Company to plaintiffs at the rate of $1\frac{1}{2}$ to 1. As a matter of special inducement to those in authority plaintiff, Haverland, was given a bonus amounting to 550 shares of a par value of \$55,000. The Limited Company was transferred to the Consolidated Company in 1910.

In 1911 the independent companies were not prospering. Not more than one or two of them were paying expenses or interest upon their bonds. There were no earnings for distribution or to pay dividends on the stock. In the fall of 1911 the Consolidated Company had outstanding obligations amounting to approximately \$1,200,000. It is likely

that its assets, liberally considered, did not exceed \$400,000. However that may be there can be no doubt that in the fall of 1911 the Consolidated Company was in a state of no more than tolerant solvency. It was borrowing money to meet expenses and interest charges. Its stock had no tangible or market value. It may have had some speculative value, but there was not even a hope of a fixed fair value on the market.

At this time defendant and another by the name of MacGinniss, who was interested in the independent telephone companies in the state of Montana, went to New York and sought to finance the Consolidated Company. They secured a loan which met temporary needs, but it was apparent that the relief was at best for a short time only, and some further relief would have to be found. Returning from New York defendant and MacGinniss went to Denver, where they undertook to interest other parties. Nothing definite was decided at the time. In February, 1912, they returned to Denver and the matter was again taken up with Mr. Smith, who was general counsel for the Mountain States Telephone Company, Mr. Hamlin assistant to the president, and Mr. Field first vice president of the same company and its active manager. Credit to the Consolidated Company was refused, but it was agreed that a company to be known as the Corporation Securities & Investment Company should be created. It was organized by Mr. Smith through the instrumentality of clerks and employes in his office. We shall refer to it as the Securities Company. After some further negotiations the Securities Company made and delivered to MacGinniss a writing, wherein it agreed to take 17,555 shares, which would carry a control of the company, at \$80 per share, and it was further agreed that MacGinniss would undertake to deliver within 90 days 6,143 shares of the stock for which the Securities Company agreed to pay 70 per cent. of its par value. The 17,555 shares were delivered promptly. Some of the stock was held in the city of Spokane, the plaintiffs being residents of that city. The book value of the Consolidated stock at the time and for a long time thereafter and possibly at the present time so far as the record shows was about \$13 a share. It was occasionally sold on the market in Spokane through the brokers who were members of the Stock Exchange, an institution which has been maintained for many years, for prices ranging from \$12 to \$20.

Defendant, who was president of the Consolidated Company, caused a letter to be written to plaintiffs on the 16th day of August, 1912, demanding that they return to the Consolidated Company certain stock and preferred certificates which they had caused to be issued to themselves when in control

of the Limited Company and which seem to have been issued without any consideration moving to the company. Plaintiff and Phelps referred the matter to Mr. Williams, one of the plaintiffs' assignors who had a slight holding of stock and who had been their counsel in another matter, and it was his judgment as well as their own that defendant had caused the letter to be written in order to coerce a sale of their Consolidated stock. Defendant disclaims this motive, but, however that may be, the fact is that through the instrumentality of these letters the parties were brought in personal contact. They could not agree on the price for the stock, defendant insisting that it was worth \$20, which was the prevailing price among brokers, and plaintiffs insisting that it ought to be worth more money. It was finally agreed that defendant would pay, not for the stock, but as a bonus, enough to make a net return of \$25 per share. Mr. Williams, by demurring longer than the rest, received \$31 per share. Defendant claims to have paid this price, as he paid \$70 for certain stock held by the officers of the Fidelity National Bank, for the reason that it was his intention to make every stockholder whole; that is, to pay them all that they had put into the stock. Plaintiffs knew or had heard enough to lead them to the information that the Fidelity people had received \$70 for their stock. The stock was indorsed in blank and sent with a draft attached for the purchase price to MacGinniss at Butte, Mont., who paid the drafts and canceled the stock.

In some suit brought in 1914 by the government against the Bell Telephone Company, of which the Mountain States Company and the Securities Company were subsidiary, it was developed that the stock which defendant had purchased had been turned over to the Securities Company by MacGinniss at \$70 and \$80 a share; this being published in the newspaper report of the proceedings. Mr. Phelps and Mr. Williams assigned their right of action to Mr. Haverland, who began this suit to recover from the defendant the difference between the price paid to them and the price which the Securities Company paid to MacGinniss for the stock. They claimed: First, that although the stock had no tangible or market value above \$20 a share or no book value beyond \$12 or \$13 a share, there was a value in virtue of the contract of \$80 a share; and, second, because of defendant's relation to the Consolidated Company and to its stockholders he was under a legal duty to disclose the fact that he was selling the stock at \$80 per share to the parties in interest that they might participate in the sale to the Securities Company. They allege active fraud and deceit in that they had no present intention of selling, that they were not under the necessity of selling, and that

they would not have sold but for certain representations which were false; that is, that the Consolidated Company was in a state of insolvency, and that if the sale was not made the company would be put in the hands of a receiver, and that defendant wrongfully concealed and denied the fact that his purchase was made in the interest of the Bell Telephone system. The case was tried by the court with a jury. At the close of the plaintiff's case defendant interposed a motion for a directed verdict. The motion, being denied, was renewed when all the evidence was in, and, again being denied, was later renewed by way of a motion non obstante veredicto. The court, in passing upon the motion, held as follows:

"As I read the complaint, there are four separate allegations of fraud. The first is that with respect to the book value of the stock being \$13 a share. I think that this is immaterial, but if it is not immaterial, the plaintiffs had no right to rely upon the representations for the reason that they had an opportunity to examine the books and did examine certain of the books, and if they failed to examine those books which would show what the book value was, it is their own fault that they were misled. The second is with respect to the insolvency of the Interstate Consolidated. I think that these representations are immaterial so far as they concern those persons to whom the indebtedness was due, but I think that there is a question of fact as to whether or not the corporation was in fact insolvent on the 30th day of September, 1912, and I think it is also a question of fact, as to whether or not there was any danger of a receivership at that time, and the representations in this respect are, I think, a question for the jury. The third representation is that the Bell interests were not concerned in the deal, had no interest in buying up the stock. I think that this is a material representation and, if relied upon by the plaintiffs, the question is for the jury to say what their damage is by reason of their misrepresentation. And, fourth, the representation as to the defendant Lane not being interested in the deal. I think that this is immaterial, but as to representations 2 and 3 I think they should be submitted to the jury upon proper instructions. I will say, though, gentlemen, that with respect to the representation about the Bell interests not being interested, that it seems to me it is clear that the plaintiff Haverland did not rely upon that, and there is some doubt in my mind as to whether Phelps did or not. So far as Haverland is concerned, it seems to me that his testimony is clear that he did not rely upon it, that the matter that induced him to sell was the representation with respect to the immediate danger of a receivership."

The jury returned a verdict for a part of the amounts claimed by plaintiffs. Both sides have appealed.

After a patient examination of the record we think that the holding of the court in so far as it goes to the facts of the case is well sustained with the exception of his holding that there was a question of fact as to whether or not the company was insolvent on the 30th day of September, 1912; that being the day upon which the plaintiff sold his stock. We find no testimony that would warrant a holding that the financial situation of the Consolidated Company was any better on September 30, 1912, than it was in the pre-

ceding year, for it will be remembered that the amount paid by the Securities Company was paid to MacGinniss and did not become a part of the assets or available funds of the Consolidated Company.

Whether there was any issue to submit to the jury as to other questions discussed by the court is a matter of law rather than of fact. They depend upon the legal propositions submitted by the plaintiffs; that is, whether there was a value to the stock which plaintiff was entitled to receive and whether defendant bore a fiduciary relation to the plaintiff and was bound to disclose the fact that the Securities Company had been organized and had entered into the contract for the purpose of bringing the property into the Bell system, and further, whether, these things being true, a concealment of those facts was such a fraud as to warrant a recovery for the amount claimed.

The parties cite a number of cases. We shall refer to a few of them, but it can hardly be said that any one of them is directly in point. Cases sounding in fraud are valueless, except in so far as they hold to an established principle, for there, more frequently than in any other branch of the law, do we find the facts to vary. No two cases have the same setting.

[1] We shall spend no time in discussing the contention that the concealment of the fact that the stock was bought for the interest if not for the account of the Bell Company was a deceit warranting a recovery. One of the plaintiffs admits that it made no difference to him who the actual buyer was, and the others so testify that the only fair inference to be drawn from the testimony is that they too had no interest in the purchaser. Their only concern was to get a satisfactory price. To overturn a consummated sale because a vendor sold indirectly at his own price to one to whom he would not have sold directly would be to hang the law upon a thread so slender that it would not bear its own weight. Whether it was the duty of defendant to admit the existence and the nature of the contract with the Securities Company will be discussed later.

[2] Whether the representation that unless defendant secured the outstanding stock in the Consolidated Company it would be put in the hands of a receiver is such a deceit as the law will call a fraud and permit a recovery of damage is a more material question. Its solution depends upon an inquiry as to the relations of the parties one to the other and the financial situation of the company.

We cannot understand how a sale of stock by plaintiffs to defendant would have any bearing upon the question of a receivership. A sale of stock by one stockholder to another cannot affect the financial standing of the company in any degree. It is a transaction that was purely personal to the parties. Plaintiff had the advice of a skilled lawyer

who had a personal interest in the transaction. Undoubtedly the company was subject to a receivership, for it was in an insolvent condition. There was no deception in the representation that the company would be thrown or have to go into a receivership, unless the stock was secured by others who were financially able to lend it a new credit or to reorganize it with a new capital. A similar statement was relied on as a basis of fraud and coercion in *Steinfeld v. Nielsen*, 15 Ariz. 424, 139 Pac. 879. Of it Judge Ross said:

"* * * If there was fraud or coercion, it consisted in that one act [closing down a mine], emphasized by the statement of *Steinfeld* to *Nielsen* that, if he did not take the offer of *Steinfeld*, he would get nothing for his stock. This last statement, construed under the condition in which it was made, was not necessarily a threat, for it was a fact that the corporation was largely indebted and liable to be sued and its assets taken by creditors; and it was without means to meet the payments on its optional contract to purchase the mines, and a failure to make such payments subjected its principal asset—the mines—to be forfeited as well, also, as all previous payments."

Chief Justice Franklin, in his concurring opinion, held:

"From a fair consideration of the evidence, I am unable but to conclude that the only means whereby the stock would become of any value was by a sale of the mines of the corporation consolidated with the adjoining mines acquired by *Steinfeld* with his own funds."

In that case there had been an actual enhancement of the value of the stock. The authorities are collected in the *Steinfeld* Case; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636, being especially instructive.

Plaintiffs knew or should have known that no one would purchase unless his object was to prevent a receivership, and apparently resting under such knowledge were content to turn their backs upon the company for two years or more. They are also bound to a knowledge that the object of the sale as disclosed to them had been accomplished. Furthermore they knew or had the means of ascertaining the financial condition of the Consolidated Company. They had access to its books and actually made an examination to the extent desired without let or hindrance. They asked for nothing that they did not receive. They knew that company had not paid dividends and that there was no prospect of a dividend, and they knew if the company kept on borrowing money to meet expenses and interest it would inevitably result in a receivership. They sold, knowing that the object of the defendant was to prevent a receivership, and they cannot now complain that his statement was deceitful because there was no receivership. This is so for the very simple reason that the law charges them with a knowledge that a sale by one stockholder to another would not of itself create any new source of credit, increase the assets, or invite the intervention of a surety; and that the most probable consequence of gathering in the

stock of an insolvent corporation would be to put it in the control of those who might be willing to finance it or to reorganize it if they were in control of it.

But it is said there was no danger of a receivership. To so hold we would have to say that the effect of the MacGinniss contract was to make the company solvent. Just how it can be so held is not made clear by counsel. The parties who bought the stock paid above the market, but that was their own concern. The sale to the Securities Company did not add a dollar to the assets of the Consolidated Company.

A purchase of stock at a fancy price for the purpose of gaining control of a corporation will not fix a market price. 2 Cook, Corporations (7th Ed.) § 581.

Neither does the testimony show that such market price as the stock of the Consolidated Company had was in any way enhanced. There is nothing to show that it became suddenly more valuable. Indeed, so far as the record shows, there was nothing to excite the interest of the plaintiffs until the sale of the stock to the Securities Company was disclosed in the government suit. It would seem therefore upon principle that the representation that the company would be put into the hands of a receiver unless plaintiffs sold their stock would not be actionable, unless it involved an actual misrepresentation as to the value of the stock or possibly a showing that the stock became more valuable because of existing facts which the vendee, being an officer of the company, was bound to disclose. In any event, if plaintiffs' theory be sound, they, having knowledge that the Consolidated Company did not go into the hands of a receiver, should have been diligent in the assertion of their rights. We do not comprehend why they should sell their stock under a representation that it would prevent a receivership and afterwards insist that the representation was deceitful, relying upon the fact that the very thing that was in the minds of the parties came about.

[3] Passing these questions, it remains only to inquire: (1) Whether there was a market to which plaintiffs were entitled, and (2) if so, was it the duty of defendant to disclose it, either (a) because he was an officer of the Consolidated Company, or (b) because it was his duty to disclose the market and the terms of his contract when asked if the sale was for the benefit of the Bell Company?

These several questions may be best discussed in a general way. It must be borne in mind that the transaction was a sale of stock from one stockholder to another; the purchaser being an officer of the company. Was there a legal duty upon the defendant to disclose his market? The duty of a stockholder, he being an officer, when purchasing stock from another stockholder, has been defined by this court in *O'Neile v. Ternes*,

32 Wash. 528, 73 Pac. 692. The court adopted the text of 21 Am. & Eng. Enc. Law (2d Ed.) § 898:

"The doctrine that officers and directors are trustees of the stockholders applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with stockholders or others, though in such dealings they take advantage of knowledge gained through their official position."

This is the holding of all the courts. Cook, Corporations (7th Ed.) § 320; Beach, Corporations, §§ 246, 614.

It would seem then, if we grant that defendant was bound to disclose anything that might affect the corporation, that he was under no duty to reveal a contract and a market that was the result of a personal venture. There is nothing in the law that will prevent a stockholder, although he be an officer, from dealing in the shares of a corporation. He may find a market and buy stock to fill it. If his purchaser is willing to pay more than the stock is worth to get control of the company or for any ulterior purpose it is of no concern to the seller.

If the purchaser is under personal contract to deliver to a third party, he is not bound to disclose his market. If it is for the benefit of the corporation he is. In this distinction is to be found the dividing line between actionable and nonactionable fraud and deceit. In all of the cases relied on by counsel will be found a duty, whether it rest in agency, partnership, or joint venture. The parties were not dealing at arm's length, but the one was bound to act for the other or for all having a like interest. The only case to which we shall refer is *Strong v. Repide*, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853. It is said by counsel to be parallel in facts and conclusive of this case, but we do not so regard it.

In that case there was an inactive corporation. It was no more than a name. It owned large bodies of land. "The company had no other property of any substantial value than these lands. They were its one valuable asset." We take it from the report of the case that the lands were not kept up in any way by the owners, but were held pending a possible purchase by the United States government. There was nothing left of the corporation when the sale was concluded. The parties were to all intents and purposes partners, with interests proportionate to their holdings of stock. The principal owner because of his large controlling interest had been consulted and knew that the lands might be sold for a price to be agreed upon; that a large sum of money had already been offered by the government. He did not go to the complaining stockholder or to her agent, although he knew him. He had an office in the same building. He purchased the stock through the intervention of a relative, who in turn employed a broker to approach the agent who had the stock in his hands. Ev-

every effort was made to conceal the prospective sale of the lands, and the immediate purchaser of the stock; " * * * perfect silence was kept." Suspicion was anticipated and avoided. "The agent of the plaintiff had no knowledge or suspicion that the defendant was the one seeking to purchase the shares." The value of the stock by reason of the sale of the lands increased from \$16,000 to \$76,256 in two months and a half.

In the case at bar the sale was entirely independent of the corporation. It did not involve its tangible assets in any way or affect their value. The parties dealt face to face. Plaintiffs knew that defendant had been purchasing stock and wanted theirs. They were suspicious of him and voiced their suspicions. They had access to the books of the company. They knew that the company was subject to a receivership if it passed its interest payments. They no doubt entertained a natural belief that others were seeking the property for their own advantage and benefit. Taking their suspicions at their full worth they amounted to no more than this, they were apprehensive that the sale was for the benefit of some one with means to rejuvenate the Consolidated Company. But that was not enough to defeat a sale if they got a fair price. They accordingly capitalized their suspicions in money and took \$5 per share—in one instance \$11—above the price at which it was selling among the brokers in Spokane. Then too this case is to be distinguished from the Strong Case in that the record shows no marked increase in the market value of the stock.

In discussing the Strong Case it is not out of place to refer to one of the contentions made by plaintiffs; that is, if they had been informed of the contract with the Securities Company they might have sold to that company. We do not so read the record. It is true that Smith said they were willing to take the stock from any one who had it, but he also said that they would not have purchased it from any one, except through MacGinniss. It is evident to us that this must be true for the whole negotiations between the Securities Company and MacGinniss and the defendant were kept secret until they were disclosed in the government suit. At that time the transactions between the parties had ended. The Consolidated Company and its affairs had not attracted the attention of plaintiffs or any one until they learned through the newspapers that although they sold their stock at above its actual worth, granting that it had a market value, they had not been privileged to share in the exploitation of the Bell Company by its own agents, and officers of its subsidiary, the Mountain States Telephone Company.

In the case at bar the defendant was not an agent, but a buyer. He bought on the market at the seller's price. The parties dealt at arm's length. The law will presume that defendant bought for an advantage, and un-

der the authority of our own decision in *O'Neile v. Ternes*, supra, he was not bound to disclose his market and is consequently entitled to the advantage of his trade.

If MacGinniss had not delivered under the contract or the Bell Company had compelled a restitution from its agents, the loss would have fallen upon him and him alone. It is insisted that there is no testimony to sustain a finding that defendant profited by the deal. We think there is no direct evidence of this fact.

Plaintiffs as stockholders have lost nothing that the law will compensate in damages. They have no cause of action. The only party legally injured in so far as the record goes is the Bell Telephone company, which seems to have suffered by reason of the activities of its agents and servants in their own behalf and at its expense. It is not now complaining.

Reversed on the appeal of defendant, and remanded, with directions to dismiss.

MORRIS, C. J., and FULLERTON, ELLIS, and MOUNT, JJ., concur.

(97 Kan. 174)

PARIS v. GOLDEN et al. (No. 19583.)

(Supreme Court of Kansas. Feb. 12, 1916.)

On petition for rehearing. Rehearing denied.

For former opinion, see 153 Pac. 528.

MASON, J. A petition for a rehearing, containing a forcible presentation of the argument for the appellee, has been fully considered, but the court adheres to the view already expressed. A contention is pressed that a correct interpretation has not been placed upon the language of the petition in the action for specific performance, with regard to the kind of title the plaintiff was willing to accept. The sentence in question reads:

"The plaintiff further alleges that on the said 1st day of March, A. D. 1906, he was ready, able, and willing, and has ever since been and still is able, ready, and willing to perform all of the terms and conditions of said contract of sale upon his part and pay the full purchase price of said lands and accept a warranty deed conveying the title to the said lands and tenements of which the said defendant was seised on the 1st day of March, 1906, or such title as the defendant had in said above-described premises at the time of the commencement of this action."

The contention is made that this means that the plaintiff was willing either (1) to accept a warranty deed conveying the title the defendant had on March 1, 1906; or (2) to accept (without qualification as to the character of deed to be given) such title as the defendant had when the action was begun. Such a reading may be consistent with the rules of grammar, but we do not think the language quoted, considered as a whole, is fairly to be given that construction. To

us the obvious meaning seems to be that the plaintiff was willing to accept a warranty deed to such title as the defendant had, either on March 1, 1906, or when the action was begun. It indicated that in case the defendant should prove unable to make a perfect title the plaintiff elected to accept such as he had, notwithstanding any defects, rather than avail himself of his alternative right to treat the contract as broken, and ask damages for its breach, allowing the defendant to retain the land. It did not imply that the plaintiff voluntarily relieved the defendant from any of his legal obligations under his agreement.

Upon grounds set out in the original opinion we regard the case as not falling within the rule against splitting a cause of action, applied in *Naugle v. Naugle*, 89 Kan. 622, 132 Pac. 164. The present action is in effect upon a breach of warranty. If the defendant had paid his personal debt to Paris, or if for any reason it had not been enforced against the land, the plaintiff would have had no claim against him.

The petition for a rehearing is denied. All the Justices concurring.

(97 Kan. 371)

CITY OF OSWEGO v. DAVIS, State Auditor.
(No. 20584.)

(Supreme Court of Kansas. Feb. 23, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS—§918—BONDS—ELECTION—VALIDITY.

Under a statute authorizing the issue of bonds for the extension and improvement of a municipal water plant, which provided that the notice of the election and the election ballot shall state the amount of bonds proposed to be issued, a city ordinance calling the election, the election notice, and the election ballot stated the proposition thus:

"Shall the mayor and councilmen of the city of Oswego, Kansas, issue the bonds of said city in a sum not exceeding thirty thousand dollars, bearing 5% per annum interest, payable semi-annually, payable within twenty years from their date, in such manner as the mayor and councilmen may determine, for the purpose of improving the water supply plant and system of said city."

Held, that this slight departure from the precision of statement required by the statute touching the amount of bonds to be issued does not render the proposed issue illegal nor preclude their registration.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.]

Original petition for writ of mandamus by the City of Oswego, Kan., against W. E. Davis, as Auditor of the State of Kansas. Writ allowed.

Nelson Case, of Oswego, for plaintiff. S. M. Brewster, Atty. Gen., for defendant.

DAWSON, J. The city of Oswego invokes the original jurisdiction of this court in a petition for a writ of mandamus directing

the auditor of state to register certain bonds of that city to provide payment for the extension and improvement of its municipal water plant.

It is agreed between the parties that the only question involved relates "to the legality and sufficiency of the description of the amount of the bonds to be issued under the ordinance, election proclamation, and ballot recited in the plaintiff's petition."

The pertinent statute in part reads:

"Whenever the city council of any such city shall desire to procure authority for the issuance of bonds under the terms of this act, they shall pass an ordinance directing the calling of an election for the submission of the question to the electors thereof. Notice for such election shall state the amount of bonds proposed to be issued, the purpose of the issue, and state the polling-place or places at which the election will be held. * * * Gen. Stat. 1909, § 745.

In the ordinance adopted by the city pursuant to this statute it was provided:

"Sec. 2. That an election is hereby directed to be held at the usual place of voting in the several wards of said city, within thirty days from the taking effect of this ordinance, at which the following proposition shall be submitted to the electors of said city, to wit: 'Shall the mayor and councilmen of the city of Oswego, Kansas, issue the bonds of said city in a sum not exceeding thirty thousand dollars, bearing 5% per annum interest, payable semi-annually, payable within twenty years from their date, in such manner as the mayor and councilmen may determine, for the purpose of improving the water supply plant and system of said city.'"

The notice by the mayor and the city clerk proclaiming the election followed the language of the ordinance, and the proposition submitted at the election was approved by a lawful and sufficient majority of the voters.

It will be noted that the statute provides that the notice for the election shall state the amount of bonds proposed to be issued. The statute gives a form of ballot to be used and directs that the ballot shall conform substantially thereto. A literal compliance with this provision would require that the proposition be thus stated:

"Proposition to issue bonds of the city of Oswego to the amount of \$30,000 for the purpose," etc. Gen. Stat. 1909, § 746.

The proposition presented by the notice and on the ballots was:

"Shall the mayor and councilmen of the city of Oswego issue the bonds of said city in a sum not exceeding thirty thousand dollars," etc.

It is conceded by the litigants that no exact precedent can be found in our own decisions.

We have examined a large number of cases which have arisen in other jurisdictions, and the following support the contention of the plaintiff that the proposition was stated with sufficient accuracy: *Chicago, B. & Q. R. Co. v. Village of Wilber*, 63 Neb. 624, 88 N. W. 660; *Fishblatt v. Atlantic City*, 73 N. J. Law, 134, 73 Atl. 125; *Village of Bronx-*

ville v. Seymour, 122 App. Div. 377, 106 N. Y. Supp. 834; *Lumbertson v. Nuveen*, 144 N. C. 303, 56 S. E. 940; *Elyria Gas & Water Co. v. City of Elyria et al.*, 7 Ohio Cir. Dec. 527; *Knight et al. v. Town West Union et al.*, 45 W. Va. 194, 32 S. E. 163.

Tending to support the position taken by the auditor of state that the proposition was not stated with sufficient accuracy are the following: *Hillsborough Co. et al. v. Henderson et al.*, 45 Fla. 356, 33 South. 997; *Smith v. Dublin*, 113 Ga. 833, 39 S. E. 327; *Crooke v. Board of Commissioners of Davies County*, 36 Ind. 320; *Cincinnati, Wabash & Michigan Railroad Co. et al. v. Wills et al.*, 39 Ind. 539; *State ex rel. Lexington & St. Louis R. R. Co. v. Saline County Court*, 45 Mo. 242; *Stern v. City of Fargo et al.*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665.

In some of the cases just cited the issue arose touching the definiteness of the proposition relating to the amount of bonds proposed to be issued, and in some instances relating to the definiteness with which the rate of interest was specified. Nor can it be said that in every case the language of the various statutes under consideration was precisely like ours. But in the main the cases turn upon the liberality or the rigidity of the courts in construing the proceedings of the various municipalities under the statutes authorizing such bond issues. Some help may be drawn from an examination of our own cases.

In *Turner v. Com'rs of Woodson Co.*, 27 Kan. 314, an injunction was sought to restrain an issue of \$27,000 of the bonds of Center township, Woodson county. The maximum amount which could be lawfully issued was \$26,385.55. The amount voted by the electors was \$27,000. The court held, in effect, that all the proceedings were valid, and the bond issue was valid up to the lawful maximum, and held the issue void only as to the excess.

An analogous case to the one before us was *State v. School District*, 34 Kan. 237, 8 Pac. 208. It concerned the validity of an issue of school bonds in which the statute provided that the bonds "shall specify on their face the date, amount, for which purpose issued, to whom, the time they run, and the rate of interest." The bonds did not in terms specify for what purpose they were issued, except by a general recital that they were "issued in pursuance of an act of the Legislature of the state of Kansas entitled 'An act to enable school districts in the state of Kansas to issue bonds,' approved February 28, 1866" (Laws 1866, c. 19), and acts amendatory and supplemental thereto. The court held, in effect, that this was sufficient to show that the purpose of the issue was to provide a schoolhouse for the district either by erecting or purchasing the same.

In *School District v. Cushing*, 8 Kan. App.

728, 54 Pac. 924, an issue of bonds which was required by the statute to state on its face to whom issued was held to be sufficiently complied with by a recital that the bonds were payable "to ——— or bearer."

It is urged against the issuance of the writ that the city officials and those interested in the success of the bond election might mislead the voters as to the actual amount of bonds which the city government would issue where the sum is not positively and exactly specified in the bond proposition. But this objection is no more true as to a bond election than to any other election. In any free government the wise and the foolish, the vain and the venal, the radical and the conservative, may and do exercise the liberty of persuading their fellows to adopt their views; and all sorts of reasons, logical and illogical, serious, trivial, and absurd, are given by electioneering advocates in their endeavors to win the support of the voters. A bond election in Oswego is no more likely to be illegally affected by the misrepresentations, wheedling, or cajolery of the promoters of the bond issue than are elections elsewhere or on any other proposition submitted for the suffrage of the people. Moreover, it has never been held that, where a positive and exact amount of bonds has been authorized by the electors, the municipality must issue that exact sum. When once the issue has been authorized by the people, every prudent municipal government strives to keep the expenditures well below the maximum amount authorized by the electors; and the proposition submitted to the Oswego voters was simply a request for authority to issue \$30,000 in bonds if that amount was necessary, and the people gave their sanction to such issue, and pursuant thereto the municipality now seeks to register and issue that amount. It seems in accord with the liberal construction always given by this court in scrutinizing the official action of public officers and boards to hold that in the proceedings leading up to the issue of the bonds in question the departure from the exact directions of the statute is not so serious as to prevent their registration.

It should be added, however, that in so important a matter as the issue of municipal bonds the statutes authorizing them should be carefully studied and closely followed in all the proceedings leading up to their registration. It ought to be the pleasure and pride of municipal officers that in matters like these their work has been so thorough and precise that the registration of their municipal bonds goes through without a hitch, rather than to have them merely "scrape through" on a test case on the ground that the proceedings were not altogether so irregular as to vitiate them.

The writ is allowed.

(97 Kan. 235)

**STOCKTON ELEVATOR & SHIPPING
ASS'N v. MISSOURI PAC. RY. CO.***
(No. 19896.)

(Supreme Court of Kansas. Feb. 12, 1916.)

*(Syllabus by the Court.)***1. MOTION TO DISMISS.**

A question of practice held not necessary to be decided.

2. COMMERCE § 33—SHIPMENT OF GOODS—“INTERSTATE COMMERCE.”

A shipment of goods consigned to a point in another state constitutes “interstate commerce,” notwithstanding an actual delivery is made before a state line is crossed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 28, 81; Dec. Dig. § 33.]

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. CARRIERS § 196½—ACTION BY SHIPPER—EXPENSES—GRAIN DOORS—PROOF.

In an action against a carrier for the expense incurred by a shipper in furnishing grain doors to box cars, the plaintiff cannot prevail by showing merely the total cost of all the doors he had furnished, including an unascertained number of items for which no charge could be made because they accrued in interstate shipments, after the Interstate Commerce Commission had forbidden the reimbursement of such expenses unless provided in the tariff, and before any tariff provision had been made in that regard.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 888-890; Dec. Dig. § 196½.]

*(Additional Syllabus by Editorial Staff.)***4. APPEAL AND ERROR § 715—PRESENTATION FOR REVIEW—AFFIDAVITS.**

The fact that, prior to the judgment, plaintiff's attorney had orally stated that the right to recover more than a certain amount was waived, could not be brought upon the record by affidavits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2964, 2965, 3273; Dec. Dig. § 715.]

Appeal from District Court, Rooks County.

Action by the Stockton Elevator & Shipping Association against the Missouri Pacific Railway Company. From judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

W. P. Waggener and W. E. Brown, both of Atchison, and O. O. Osborn, of Stockton, for appellant. S. N. Hawkes, Asst. Atty. Gen., for appellee.

MASON, J. The Stockton Elevator & Shipping Association sued the Missouri Pacific Railway Company before a justice of the peace, on account of material it had furnished for the repair of cars in which it had shipped grain between August 5, 1908, and November 25, 1908. The case was taken on appeal to the district court, where a judgment for \$231.60 was rendered against the defendant, which appeals.

[1, 4] 1. The record shows that at one stage of the proceedings the plaintiff amended its bill of particulars so that a recovery was asked for more than \$300. The defendant moved to dismiss the cause because the

increase of the amount in controversy carried it beyond the jurisdiction of the court in an appeal from a justice of the peace. The motion was denied, and that ruling is complained of, on the authority of a series of cases, culminating in *Thompson v. Stone*, 63 Kan. 881, 64 Pac. 969¹. Affidavits have been presented here for the purpose of showing that prior to the judgment an oral statement was made by the plaintiff's attorney to the effect that the right to recover more than \$175 and interest was waived. The proceedings of the trial court cannot be brought upon the record in this manner. *Mason v. Harlow*, 92 Kan. 1042, 142 Pac. 243. It is at least doubtful, however, if the assignment of error referred to is available. The judgment was rendered February 17, 1914; a motion for a new trial was overruled May 5, 1914; and the appeal was taken October 27, 1914, more than six months after the judgment, although less than six months after the overruling of the motion for a new trial. The ruling on the motion to dismiss is not reviewable unless it is such a trial error as to be the basis of a motion for a new trial, and it is said not to fall in that class. 29 Cyc. 760; 4 Enc. L. & P. 333, 334; *Galey v. Mason*, 174 Ind. 158, 91 N. E. 561, Ann. Cas. 1912C, 1290. The question suggested need not be determined, by reason of the view taken of another feature of the case.

[2] 2. The plaintiff's claim was based largely upon the furnishing of lumber for grain doors. It was conceded that the material had been furnished, and that the total cost was correctly stated by the plaintiff; but it was not shown what part of the expense was incurred for shipments within the state, or in interstate commerce after November 16, 1908. This is important because by rule 78 of the Interstate Commerce Commission, made June 1, 1908, interstate carriers are forbidden to reimburse shippers for such expenses unless expressly provided in their tariffs (*Interstate Commerce Commission, Conference Rulings Bulletin No. 6, p. 21*), and it was shown that no such tariff provision had been made prior to the date named. The evidence in behalf of the plaintiff was that most of the cars for which the doors were furnished were consigned from Stockton, Kan., to Kansas City, Mo., although the majority of them were actually unloaded at Kansas City, Kan. Shipments of goods consigned to a point in another state constitute “interstate commerce,” notwithstanding an actual delivery is made before a state line is crossed. *Horse & Mule Co. v. Railway Co.*, 95 Kan. 681, 149 Pac. 436; *Enright v. Railway Co.*, 96 Kan. 546, 152 Pac. 629. In the case last cited it was contended that, because cattle shipped from a Kansas station were unloaded at the Kansas City stockyards on

¹ Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in the Kansas Reports.

this side of the state line, the transaction was intrastate, but the court said:

"A shipment of live stock from a point in this state, consigned to a commission firm in Kansas City, Mo., is interstate commerce." Syl. par. 2.

[3] 3. It was incumbent upon the plaintiff to show how much material was furnished under such circumstances as to warrant a charge against the company. It could not prevail by showing the total amount of material furnished, including an unascertained number of items for which no charge could be made.

"In an action for the recovery of money, it devolves upon the plaintiff, before he is entitled to judgment, to prove by satisfactory and competent evidence what, if any, sum is due him from the defendant." *Wolfsey v. Shuemaker*, 4 Kan. App. 38, 45 Pac. 792; *Morgan v. Valley Bank*, 4 Kan. App. 668, 46 Pac. 61.

The judgment is therefore reversed, and the cause remanded for a new trial. All the Justices concurring.

(97 Kan. 369)

CITY OF PERRY v. DAVIS, State Auditor.
(No. 20538.)

(Supreme Court of Kansas. Feb. 12, 1916.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — 918 — BOND
ELECTION—PUBLICATION NOTICE.

Under a statute requiring a notice of an election, to vote on a proposal to issue city bonds, to be signed by the mayor and city clerk, and published, the mere fact that the publication, through inadvertence, omits the signature of the mayor is not sufficient to invalidate the election or bonds issued thereunder, where an ordinance calling the election covered all the details required to be stated in the notice, and those who voted for the bonds constituted a majority of all the qualified electors of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. ¶ 918.]

Mandamus by the City of Perry against W. E. Davis, as State Auditor, etc. Writ allowed.

Hayden & Hayden, of Topeka, for plaintiff. S. M. Brewster, Atty. Gen., for defendant.

MASON, J. The city of Perry executed bonds for the enlargement of a municipal electric light plant, which it presented to the state auditor for registration. The auditor refused to register them by reason of a doubt concerning their validity. To determine the question the city brings mandamus to require their registration. The facts are agreed to, and the case turns upon the sufficiency of the published notice of the holding of the election to vote upon the question of issuing the bonds, the proceedings in all other respects being entirely regular.

The statute requires such a notice to be signed by the mayor and city clerk, and to

be published in a newspaper for three weeks. Gen. Stat. 1909, § 745. Here a notice in proper form was prepared, signed by both the officers named, and given to the printer for publication. But through inadvertence it was published with only the signature of the clerk attached, that of the mayor being omitted. In this respect only was there any failure to comply strictly with the requirements of the statute. The matter that was published gave to the electors of the city all the information concerning the election that would have been afforded if the law had been followed with literal exactness. The signature of the mayor could have added nothing to its force except by way of attesting its authenticity, and that was doubtless shown sufficiently for all practical purposes by the city clerk's signature. It is possible that some well-informed elector, who knew the law required both names to be printed, might have discredited the notice by reason of its not appearing to have been signed by the mayor. That remote possibility is offset by two considerations which were mentioned in *Chanute v. Davis*, 85 Kan. 188, 116 Pac. 367, as worthy of consideration in determining the consequences of a defective notice. Here an ordinance had been passed calling the election, and fixing the time and place of holding it, which covered the details required to be stated in the notice. As suggested in the case cited, the ordinance may perhaps be given the force of a public law, rendering applicable the rule that a failure to give the required notice does not invalidate an election if the time and manner of holding it are fixed by statute. Moreover, it is shown that those who voted for the bonds constituted not only a majority of those participating in the election, but a majority of all who were entitled to vote thereat. The notice was not the means by which the election was called—its purpose was merely to give additional publicity to what had already been determined and announced. And if all the electors who remained away from the polls had appeared and voted against the bonds, the result of the election would not have been changed. In view of all the circumstances, we think it clear that the irregularity in the form of the published notice was not so serious as to affect the validity of the bonds. This conclusion is well within the accepted rules. See 10 A. & E. Encycl. of L. 630; note, 18 Ann. Cas. 1141; 1 Dillon on Municipal Corporations (5th Ed.) § 374; *Backus v. City*, 123 Minn. 48, 142 N. W. 1042; *Briggs v. Raleigh*, 166 N. C. 149, 81 S. E. 1084; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; *Smith v. Board of County Com'rs, Skagit County (C. C.)* 45 Fed. 725.

The writ is allowed. All the Justices concurring.

(55 Okl. 444)

STRAHAN v. DE SOTO PAINT MFG. CO.
(No. 6077.)(Supreme Court of Oklahoma. Jan. 18, 1916.
Rehearing Denied Feb. 15, 1916.)*(Syllabus by the Court.)***APPEAL AND ERROR** §248 — **PRESENTATION BELOW—NECESSITY.**

Errors alleged to have occurred at the trial in the lower court, unless the same are excepted to, will not be considered on review in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435-1439, 1443, 1447-1452, 1454-1459, 1462, 1464-1468; Dec. Dig. §248.]

Commissioners' Opinion, Division No. 3. Error from Superior Court, Muskogee County; Farrar B. McCain, Judge.

Action by the De Soto Paint Manufacturing Company, a corporation, against Kent Strahan. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Halfhill, of Muskogee, for plaintiff in error. Mosler, Greenslade & Reynolds, of Muskogee, for defendant in error.

RITTENHOUSE, C. This is an action upon two promissory notes. The defendant answered, setting up: (1) A material alteration of the notes; and (2) fraudulent representations as to the quality of the paint for which the notes were given. The questions presented are founded upon the sustaining of a demurrer to the evidence in support of the second defense; but, inasmuch as no objection was made to the sustaining of such demurrer nor exception saved to such ruling, there is nothing for us to decide. It is well settled in this jurisdiction that errors occurring at the trial not excepted to will not be reviewed on appeal. Muskogee Electric Traction Co. v. Reed, 35 Okl. 334, 130 Pac. 157; Halley v. Bowman, 41 Okl. 294, 137 Pac. 722.

The judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 419)

TOWN OF HOMINY v. McFARLAND.
(No. 5548.)(Supreme Court of Oklahoma. Jan. 18, 1916.
Rehearing Denied Feb. 15, 1916.)*(Syllabus by the Court.)***MUNICIPAL CORPORATIONS** §220 — **ACTION FOR SERVICES—DIRECTION OF VERDICT—EVIDENCE.**

The court did not commit error in instructing a verdict for plaintiff, for the reason that his claim was fully established by the evidence, and there was no evidence reasonably tending to establish the counterclaim set up as a defense.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 599-608; Dec. Dig. §220.]

Commissioners' Opinion, Division No. 1. Error from District Court, Osage County; R. H. Hudson, Judge.

Action by L. Y. McFarland against the Town of Hominy. Judgment for plaintiff, and defendant brings error. Affirmed.

Grinstead & Scott, of Pawhuska, for plaintiff in error. J. T. Shipman, of Bartlesville, for defendant in error.

BREWER, C. Defendant in error, McFarland, brought this suit against the town of Hominy to recover a balance alleged to be due him on account of certain labor performed as construction or inspection engineer, in connection with the erection of a water and sewer system for the town. The defense relied upon was that of a counterclaim in a sum more than sufficient to wipe out the amount due to plaintiff. At the close of the trial the court instructed the jury to return a verdict in favor of McFarland, evidently upon the ground that there was no evidence to support the counterclaim; and this action of the court is the point urged here for a reversal of the case.

Some time in 1909 the town of Hominy made a contract with the plaintiff, by which it employed him to draw plans for a waterworks and sewerage system, and to act as consulting and supervising engineer in the construction of same, and for the inspection of the material therefor, in which contract the town agreed to pay to plaintiff \$150 for the plans, and to allow him 8 per cent. on the cost of constructing the works. Bonds were voted to provide funds for these purposes, and they were issued. During this time plaintiff prepared plans in detail for these public improvements, and they were accepted and adopted by the board of trustees of the town. Through the advice of plaintiff, the town also contracted for a large amount of the machinery and material necessary for the improvements. In the meantime bids were advertised for and a number received. About this time, however, it became apparent to the town that there was no market for the bonds, and that therefore it would be without funds to construct the improvements. After this condition was discovered a man by the name of O'Neil appeared upon the scene and entered into negotiations with the town authorities, through which it was finally agreed that he should put in a system of waterworks and sewerage for a stated sum, taking and using the materials the town had bought, and would take the bonds in payment therefor. He refused, however, to build the improvements under the plans and specifications previously adopted, and as prepared by the plaintiff. In making his contract he submitted plans and specifications of his own, which were adopted by the town authorities. When these negotiations were nearing completion a new arrangement was entered into between the town and plaintiff, through which his former contract was abrogated, and he agreed to supervise and inspect the work to

be performed by Mr. O'Neill under the new plans for a commission of 5 per cent. on the cost of the improvements. Under this arrangement the improvements were put in and paid for, and, in so far as the record shows, were in every way satisfactory. Plaintiff performed his duties under the new arrangement of supervising and inspecting the work as it progressed. Partial payment on account for his services was made from time to time, leaving the balance due him as sued for, unless the counterclaim should be allowed. This counterclaim rests upon the claim that under the original plans drawn by plaintiff, the entire town was to be covered with water and sewer pipes, but that under the plans submitted by O'Neill, and under which the improvements were put in, two tiers of blocks on the outskirts of the town were omitted; and after the original contract had been fulfilled by Mr. O'Neill this was discovered, and the extensions to these two tiers of blocks were then made by O'Neill, under a supplemental contract, and involved an additional expenditure of something over \$700. Plaintiff's liability for this amount is predicated upon the claim that he, at the time the O'Neill plans were up for consideration, was asked by, and stated to, the trustees that these plans were substantially like the ones he had drawn, differing only in unimportant details.

The court, after hearing all the evidence, must have arrived at the conclusion, and we think correctly, that there had been shown no liability upon the part of plaintiff for the amount of this extra expenditure in carrying the water and sewerage into these two tiers of blocks. There is nothing in the record, nor, for that matter, in the pleadings, that in any way tends to show that the town did not receive full value in the way of improvements for all the bonds paid O'Neill, or that, if the two extra tiers of blocks had been in the plans under which he worked, he would not have charged, and been entitled to charge, as much more for thus extending the system as it, in fact, cost the town to have it done. It will be remembered that O'Neill, for some reason, refused to take the bonds on hand and put in such a system as was called for by the plans drawn by plaintiff, but that he was willing to put in the system his own plans called for, and take therefor a certain amount of the bonds. There is nothing to indicate that, if the plaintiff or the town authorities had known, or called O'Neill's attention to the fact, that his plans did not take in as much territory as the former ones, O'Neill would have thus enlarged his plans and done the extra work for the same price. On the contrary, there are inferences that would lead to an opposite conclusion. If the town got full value—and, so far as the record shows, it did—in the system put in by O'Neill, then it is hard to see just how or why it is damaged by an enlargement of the sys-

tem, which occasioned the expenditure of the money set up here as a counterclaim. Nor is there anything to show that, if the town trustees had been aware, at the time they were negotiating with O'Neill, as they claim they were not, that these tiers of blocks had been omitted, they would not have gone on and made the contract just as they did, with them omitted, paying him the same amount of bonds they did. So, taking it from any viewpoint, we fully agree with the trial court that the counterclaim urged against plaintiff in this case has not been established as an obligation against him, and was properly disallowed.

There being no other points of importance urged, it follows that the case should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 515)

FOREST v. APPELGET et al. (No. 6691.)
(Supreme Court of Oklahoma. Jan. 18, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

JUDGMENT ~~¶~~367—PROCEEDINGS TO VACATE—UNAVOIDABLE CASUALTY — FREEDOM FROM FAULT.

In a proceeding to vacate a judgment under subdivision 7 of section 5267, Rev. Laws 1910, on the grounds of unavoidable casualty or misfortune, the facts must be such as to make it appear that the complaining party is not himself guilty of negligence in allowing such default to be taken, and that no reasonable or proper diligence or care could have prevented the trial or judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 709; Dec. Dig. ~~¶~~367.]

Commissioners' Opinion, Division No. 8. Error from County Court, Woodward County; Clyde H. Wyant, Judge.

Action by A. M. Appelget and another, partners as Appelget & Herod, against E. C. Forest. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. H. Springfield and B. F. Willett, both of Woodward, for plaintiff in error. C. W. Herod, of Woodward, for defendants in error.

RITTENHOUSE, C. This proceeding to vacate a judgment rendered by the trial court is brought under the provisions of subdivision 7 of section 5267, Rev. L. 1910, which provides that the court shall have power to vacate or modify its own judgment or orders at or after the term at which such judgment or order was made for unavoidable casualty or misfortune preventing the party from prosecuting or defending. The petition was duly verified by affidavit, setting forth the judgment, the grounds for vacating the same, and the defense to the action. There is but one question necessary for our determination, and that is whether, under the facts as contended by the defendant, diligence has been shown which would warrant the trial court

in vacating the judgment. The action in which the judgment is sought to be vacated was for the recovery of an attorney's fee. It is insisted by the defendant that on account of unavoidable casualty and misfortune he was prevented from defending the action on the following grounds, to wit: That about January 16, 1914, defendant went to Woodward to arrange for his defense and endeavored to employ B. F. Willett as counsel; that on April 1, 1914, he endeavored to employ S. B. Laune; that each of these gentlemen refused the employment; that subsequently he endeavored to employ W. H. Springfield, and was informed that a judgment had been rendered against him on January 23, 1914.

When unavoidable casualty or misfortune is alleged, the facts must be so stated as to make it appear that the complaining party is not himself guilty of negligence, and that no reasonable or proper diligence or care could have prevented the trial or judgment. *Hill v. Williams*, 6 Kan. 17. Applying this rule to the proceedings before us, we find that no complaint was made as to the service; that defendant had until January 20, 1914, in which to answer; that on January 16, 1914, he consulted B. F. Willett, an attorney of Woodward, Okl., who refused to take his case; that no further effort was made to procure other counsel or to defend said action until April 1, 1914, which would be 70 days after he was in default for an answer, and 67 days after judgment had been rendered against him, at which time he consulted S. B. Laune, another attorney of Woodward, Okl., who refused to make a defense for him; and that some time after this defendant was informed by W. H. Springfield that judgment had been rendered against him on January 23, 1914. This is the only contention that the defendant makes relative to the unavoidable casualty or misfortune which prohibited him from defending.

It is undoubtedly true that, had the defendant exercised reasonable or proper diligence in his efforts to employ an attorney, he could have procured one. The only attorney whom he had consulted before he was in default for an answer was Willett. From that time until April 1st, he was himself inexcusably negligent in his failure to make an effort to procure other counsel. Defendant should have exercised reasonable diligence in trying to procure counsel and prepare his case, or to have otherwise looked after his own interest by asking for additional time in which to have filed an answer or in which to have employed counsel; but instead of making an effort to protect his own interest, after his first consultation with an attorney, he waited until April 1st before making further preparation. This conduct is inexcusable. Defendant should personally have attended to his case or been represented by an attorney in fact. *Freeman on Judgments* (4th Ed.) vol. 1, § 15. Had an attorney accepted the em-

ployment and failed to have filed an answer, this would not have been sufficient to justify the vacating of the judgment on the ground of unavoidable casualty or misfortune. *Hill v. Williams*, supra; *Welch et al. v. Challen*, 31 Kan. 696, 3 Pac. 314; *Wynn v. Frost*, 6 Okl. 89, 50 Pac. 184; *Marshall v. Marshall*, 7 Okl. 240, 54 Pac. 461.

The judgment of the trial court should therefore be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 511)

CATHER et al. v. SPENCER et al. (No. 6388.)
(Supreme Court of Oklahoma. Jan. 18, 1916.
On Rehearing, Feb. 15, 1916.)

(Syllabus by the Court.)

CHATTEL MORTGAGES \Leftrightarrow 141—AGISTER'S LIEN
—PRIORITY—CONSENT OF MORTGAGEE.

A lien for feed and pasturage for cattle will take precedence over a prior recorded chattel mortgage, where the same was furnished with the consent of the mortgagee, and consent may be implied from the facts and circumstances surrounding the transaction.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 239, 244; Dec. Dig. \Leftrightarrow 141.]

Commissioners' Opinion, Division No. 2.
Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by J. S. Cather and others against W. S. Spencer and others. Judgment for defendants, and plaintiffs bring error. Affirmed, and rehearing denied.

H. P. McGuire and John E. Williams, both of Frederick, for plaintiffs in error. Stevens & Myers, of Lawton, for defendants in error.

HOOKER, C. On the 15th day of March, 1913, the plaintiffs in error J. S. Cather and V. W. Britton sold to one W. S. Collins 440 head of cattle, and to secure the payment of a part of the purchase money accepted a chattel mortgage upon said cattle, which was executed on that day, and on the 21st of March thereafter duly filed in the office of the register of deeds of Comanche county. Collins acquired possession of the cattle at that time, and drove them to the ranch of the defendant in error for pasturage, where most of them remained until the institution of this suit, with the knowledge of the mortgagees. The debt of the plaintiff in error secured by said mortgage matured October 1, 1913, and under the terms of the mortgage the plaintiffs in error had the right at any time to take possession of the property when they felt themselves insecure, and the evidence discloses that on or about September 1st, prior to the maturity of the debt, they, feeling themselves insecure on account of the condition of the cattle, attempted to take possession of the property, which was agreed to by Collins, but that the de-

defendants in error refused to permit them to acquire possession until the claim for pasturage was settled. The parties waived a jury in the lower court, and after the introduction of evidence a judgment was rendered for the defendants in error, giving to them a first lien upon the property for the amount of the pasturage due upon the cattle.

The question of law involved in this case is the priority of the liens in question, it being admitted that the mortgage of the plaintiff in error was duly filed, which gave to the defendants in error constructive notice of the lien, and it likewise being shown that the plaintiffs in error knew of the pasturage of the cattle by the defendants in error.

There is quite a conflict in the authorities of the various states upon the question, but the law in this state is no longer open to doubt, for the Supreme Court in the case of *Bank v. Jones*, reported in 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 310, 11 Ann. Cas. 1041, lays down the rule as follows:

"The lien of a valid recorded chattel mortgage will take the precedence over the subsequently acquired lien of a livery stable keeper or agister upon animals placed in his charge, unless such animals were delivered to such lienholder to be kept and cared for * * * with the consent of the mortgagee."

And this court in *First National Bank v. Wilson*, reported in 153 Pac. 172 (not yet officially reported), reaffirms the doctrine announced in the *Jones Case*.

The question to be considered in the instant case is whether or not the evidence justifies the finding of the lower court to the effect that the mortgagees consented for the defendants in error to furnish the pasture for the cattle upon which they had a mortgage. It must be borne in mind that the general finding of the court for the defendants in error is sufficient to include a special finding to the effect that plaintiff in error had consented to the same. In the case of *Wright et al. v. Sherman et al.*, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792, the Supreme Court of South Dakota lays down the rule similar to the rule of Oklahoma, and says:

"The lien of a chattel mortgage properly filed is paramount to that of an agister for subsequently pasturing the mortgaged stock, unless it is shown that the mortgagee consented, either expressly or impliedly, that such stock might be so pastured and subjected to such lien," and that "such consent may be shown by circumstances."

Also the Supreme Judicial Court of Massachusetts, in the case of *Lynde v. Parker*, 155 Mass. 481, 30 N. E. 74, and in the case of *Howes v. Newcomb*, 146 Mass. 76, 15 N. E. 123, say:

"Undoubtedly an implied consent will answer the requirements of the law, and that 'in every case of this kind the inquiry is whether such * * * consent is proved,' and that this 'depends, where animals are left with a mortgagor by a mortgagee, not only upon the terms of the

express contract in relation to them, but also upon all the circumstances surrounding the transaction, indicating the expectation of the mortgagee as to the management of them by the mortgagor.'" In other words, "the mortgagee may be presumed to have understood that the mortgagor would take them to a stable keeper to be boarded, and no objection was made, such consent should be implied, otherwise it should not."

Likewise our own court in the case of *Wilson v. Bank*, supra, supports the theory that consent may be established by circumstances.

Mr. Black, in his *Law Dictionary*, says:

"Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raises a presumption that the consent has been given."

The evidence in this case, in our judgment, was amply sufficient to justify the lower court in his finding that the mortgagee had consented for the defendant in error to pasture these cattle, and amply sustains the finding that the defendants in error were entitled to the possession of the cattle until their claim or lien for pasturage was paid. There is not only evidence to support the judgment of the court, but the preponderance of the evidence is in accord with his finding.

We recommend that the judgment appealed from be affirmed.

On Rehearing.

Section 145 of Snyder's Compiled Laws of 1909 is omitted from the Revised Laws of 1910, and the cause of action herein was attempted to be enforced in October, 1913, which was several months after the Revised Laws of 1910 went into effect, and inasmuch as 25 per cent. of the conceded value of the property in controversy here is many times greater than the amount of the lien, we adhere to the former opinion given in this case, and the petition for rehearing is denied.

PER CURIAM. Adopted in whole.

(55 Okl. 477)

VAN ARSDALE-OSBOURNE BROKERAGE
CO. v. PATTERSON. (No. 6329.)

(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

INSURANCE — 187 — PREMIUM NOTE — CONSIDERATION.

Where the defendant gave his note for the premium on a policy of hail insurance covering his wheat, and after the application for such policy had been made, but before the policy was issued, the wheat was destroyed, held, that there was nothing at the time the policy was issued to insure. And, since the defendant could derive no benefit from the policy, and the insurance company could incur no liability by reason of having issued it, the note was wholly without consideration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 399-401; Dec. Dig. — 187.]

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by the Van Arsdale-Osbourne Brokerage Company against T. N. Patterson. Judgment for defendant, and plaintiff brings error. Affirmed.

E. L. Foulke, C. A. Matson, and J. D. Wall, all of Wichita, Kan., and L. M. Gensman, of Lawton, for plaintiff in error. W. C. Stevens, of Lawton, for defendant in error.

BRETT, C. The material facts in this case are that the plaintiff in error, which will be designated as plaintiff, sued the defendant in error, who will be designated as defendant, on a note given for the premium on a hail insurance policy. The date of the application for this policy was April 26, 1906. On the night of April 26, 1906, a hailstorm destroyed the wheat covered by this application; and the defendant immediately notified the plaintiff of this fact. But, regardless of this notice, the policy was issued on this application May 1, 1906. The defendant, under a mistaken idea that the liability of the company began on the date of the application, demanded that the company settle for the damage. The company declined to do this, but offered to return defendant's note if he would return the policy at once. He refused to return the policy, and in a lengthy correspondence covering several weeks insisted on the company settling the damage, which, in response to each of his demands, the company refused to do. When the note fell due defendant refused to pay it, and this suit was brought to collect the amount due under the terms of the note. The defendant for answer plead a failure of consideration. A trial was had to the court and a jury, which resulted in a verdict and judgment for the defendant, and from this judgment, the plaintiff appeals to this court.

As we view the case, it narrows itself down to the sole question as to whether or not there was any consideration for the note. At the time the policy was issued the plaintiff had notice that there was nothing to insure, and should not have issued the policy. On the other hand, the defendant should have returned the policy under the offer of the company that, if he would do so, it would return his note. But the real test of the rights of the parties under these conditions is: Was the company injured, or did it incur any liability by the defendant's refusal to return the policy? We think not; for under the conditions, the defendant could not derive any benefit from the policy. And under the conditions the company could not incur any liability by reason of his failure to return the policy, for the reason that the subject-matter of the policy had been destroyed before the policy was issued. And the fact that the defendant had a mistaken idea

of his rights, and thought he could hold the company liable for all damage from the date of his application, and therefore held the policy, and insisted on settlement on that theory, would not in reality change the relations or rights of the parties. It is in evidence that an agent of the company was sent to examine the defendant's wheat shortly after the issuance of this policy and during the correspondence he had with the company, and remarked to the defendant: "Young man, I find you haven't got any wheat." That statement seems to be true. And under these circumstances it can also be truthfully said that he got no insurance. And there was therefore no consideration for the note. Ostrander on Insurance, p. 39.

There are a number of errors assigned, which we have examined, and which we find are not well taken, and which are unnecessary to be discussed in arriving at a correct and just determination of this case.

The note being wholly without consideration, we think the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 232.)

RETAILERS' FIRE INS. CO. v. EACOCK.
(No. 6773.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

INSURANCE — §84—COMPENSATION OF AGENT—SHARE OF PROFITS—SUFFICIENCY OF EVIDENCE.

The record in this case carefully examined, and the evidence found to reasonably support the verdict.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 111-114; Dec. Dig. §84.]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by R. M. Eacock against Retailers' Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ledbetter, Stuart & Bell, of Oklahoma City, for plaintiff in error. Geo. J. Eacock and W. J. Davidson, both of Oklahoma City, for defendant in error.

COLLIER, C. This is an action brought by defendant in error against plaintiff in error to recover salary at the rate of \$150 per month from the 15th day of July, 1913, until September 1st thereafter, and, in addition thereto, 10 per cent. of the net profits of the insurance business for the period of defendant in error's employment, from September 1, 1911, to September 1, 1913. It is averred in the petition that the profits of said business during said period of time amounted to \$10,000, and that defendant in error's commission of 10 per cent. was \$1,000.

Plaintiff in error answered by general denial and cross-petition. The case was tried to a jury, and a verdict rendered in favor of defendant in error in the sum of \$450. Motion for new trial was filed, overruled, and duly excepted to. Judgment was entered on said verdict. To reverse said judgment, this appeal is prosecuted.

The evidence discloses that the contract upon which said claim of salary and profits is based was entered into by and between the parties, and by section 3 thereof it is provided:

"At a salary of \$125.00 per month and 10 per cent. of the net profits at the end of each year (by net profit is meant gross premium income, less losses, expense of adjustment, and usual home office expenses) for the first year, and \$150.00 per month and 10 per cent. as above for the second year."

It is conceded by plaintiff in error that the judgment should stand so far as the sum of \$225, awarded for salary. It is admitted in brief of plaintiff in error that this appeal is based upon only one error, which is as follows:

"The jury allowed plaintiff at least \$225 for 10 per cent. of the profits alleged to have been made by defendant. The evidence did not justify the recovery of said \$225, or any part thereof, and the verdict of the jury as to said commission on profits was against the evidence, unsupported by the evidence, and was the result of passion or prejudice on the part of the jury against said defendant."

It follows that the only question with which we have to deal is as to whether or not there was sufficient evidence upon which to predicate that part of the verdict of the jury, which awarded \$225, evidently on account of profits earned by the company during the term of said contract of employment.

We have very carefully examined the voluminous record in this case, and are unable to agree with the contention of plaintiff in error that the finding of the jury, so far as to the amount awarded as profits made during the period of the employment is concerned, is not supported by sufficient evidence. While it is true that the reports to which our attention is called show loss, yet this is due to the peculiar manner of keeping books of insurance companies, as in said reports reinsurance is charged as loss, when, in fact, it was not a loss; and this, we think, is clearly explained by the testimony of defendant in error. We think the evidence in chief of defendant in error that there was a profit, and the amount thereof, was sufficient to support the verdict rendered, taking into consideration the reports upon which he was cross-examined, which show a loss. It is a well-settled rule in this jurisdiction that, where there is any evidence reasonably tending to support the verdict, this court will not interfere with it. *Smith v. Bell*, 144 Pac. 1058; *Johnson v. Johnson*, 43 Okl. 582, 143 Pac. 670.

Finding no error in the record requiring a reversal of the cause, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 219)

KAPP et al. v. CROAN. (No. 6493.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 773—FAILURE TO FILE BRIEF—DISMISSAL.

Same as *Cobe v. Bank*, 44 Okl. 677, 146 Pac. 19.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. \Leftrightarrow 773.]

Commissioners' Opinion, Division No. 2. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action between H. Kapp and others and R. B. Croan. From the judgment, the parties first mentioned bring error. Dismissed.

Bond & Melton, of Chickasha, for plaintiffs in error. R. E. Bolling, of Chickasha, and C. L. McArthur, of Lindsay, for defendant in error.

HOOKER, C. The petition in error and case-made attached was filed in this court on June 6, 1914. No briefs have been filed by the plaintiff in error. Therefore, under the established rule of this court, the appeal will be dismissed for failure on the part of the plaintiff in error to file brief.

PER CURIAM. Adopted in whole.

(55 Okl. 84)

MIDLAND SAVINGS & LOAN CO. v. SUTTON et al. (No. 6157.)

(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

1. JUDGMENT \Leftrightarrow 739—RES JUDICATA—NEW MATTER.

New matter that arises after the trial of an action is not barred by the judgment rendered in such action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1105, 1267; Dec. Dig. \Leftrightarrow 739.]

2. MONEY RECEIVED \Leftrightarrow 6—SUBROGATION \Leftrightarrow 25—REINSTATEMENT OF MORTGAGE.

S. borrowed \$800 from M. to improve certain lots and gave a note to M. to secure the same. S. afterwards borrowed \$1,200 from A. for the purpose of paying off M.'s mortgage and intending to use the balance in the completion of the improvements on said lots, and gave a mortgage thereon to A. to secure said loan. One Swan was the agent of both M. and A., and the money in each instance was sent to him to pay over to S. as the work progressed. When A. sent the \$1,200 to Swan, S. instructed him to pay off the mortgage of M. Swan failed to pay M. but it was finally adjudicated in another action that Swan being the agent of M., payment to Swan was payment to M. Swan did not in fact pay out any of the \$1,200 sent him by A. for S. He afterwards repaid the \$1,200 to A., and A. released the mortgage S. had giv-

en A. to secure the \$1,200. Held, A., having full knowledge of all the facts, was bound to pay over to M., out of the money paid it by Swan, the amount due M., and, when it gave S. credit for that amount instead of turning it over to M., the rightful owner, A. became liable to M. for that amount, and M. had a right to have the mortgage of S. to A. reinstated and to be subrogated to the rights of A. for the amount due M.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 15, 21-27; Dec. Dig. 6; Subrogation, Cent. Dig. § 50; Dec. Dig. 25.]

Commissioners' Opinion, Division No. 4. Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by the Midland Savings & Loan Company, a corporation, against Ellie Sutton and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

See, also, 30 Okl. 448, 120 Pac. 1007.

Robert M. McMillen, of McAlester, A. J. Bryant, of Denver, Colo., and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. A. C. Markley, of McAlester, Ferry, Doran & Dean, of Topeka, Kan., and Fuller & Porter, of McAlester, for defendants in error.

MATHEWS, C. For convenience the plaintiff in error will be referred to as the "Midland Company," and the defendant in error the Aetna Building & Loan Association as the "Aetna Company," and Ellie Sutton and her husband as the "Suttons." The facts in this case are quite complicated, but briefly stated, as far as is necessary for a decision, are as follows: In June, 1908, the Suttons, having in contemplation the improvement of two lots in McAlester owned by them, borrowed \$800 from the Midland Company, giving a mortgage on the lots to secure the same. Having decided that the sum thus borrowed would not be sufficient to complete the intended improvements, they borrowed \$1,200 in August, 1908, from the Aetna Company, and gave it a mortgage on the same lots to secure the loan. One H. E. Swan was the local agent for both loan companies, and in each instance the money was sent direct to him by draft made payable to the order of him and the Suttons jointly; the arrangement being that each should indorse the draft and then Swan was to retain the money and pay the same out as the work progressed. Upon the reception of the \$1,200 from the Aetna Company by Swan, he was instructed by the Suttons to pay to the Midland Company \$800 thereof in full payment of their mortgage. It seems that Swan was rather tenacious of money coming into his hands and, instead of paying off the \$800 mortgage, to put it mildly, retained the money in his own hands. The Suttons, being unable to get what was due them on the loans, on the 13th day of August, 1909, instituted suit against the Midland Company, to which the Aetna Company was made a party,

to have the Midland Company mortgage canceled upon the grounds that they had instructed Swan, who they alleged was the Midland Company's agent, to apply enough of the funds acquired from the Aetna Company to the payment in full of the Midland Company's mortgage. A trial was had upon this issue in the superior court of McAlester and judgment rendered in favor of the Suttons. The Midland Company took an appeal to the Supreme Court, and there on December 12, 1911, the judgment was affirmed in favor of the Suttons; the reported case being found in 30 Okl. 448, 120 Pac. 1007. That case turned entirely upon the question whether Swan was the agent of the Suttons or the Midland Company, the court deciding that Swan acted as the agent of the Midland Company. In September, 1912, the Aetna Company, through an arrangement with Swan, purchased a \$3,000 real estate mortgage, paying the excess over their \$1,200 mortgage in cash, and in January, 1912, filed a release of the said mortgage given them by the Suttons. At the same time the Suttons filed their action for cancellation against the Midland Company, they also filed the same kind of action against the Aetna Company. This case did not go to trial, and on October 10, 1912, was dismissed with prejudice.

It is the contention of plaintiff, the Midland Company, that there having been rendered a final judgment in the aforesaid action holding that Swan was the agent of plaintiff and had received from the Suttons as such agent the sum of \$800 obtained by them from the Aetna Company which canceled the mortgage held by plaintiffs against the Suttons to secure the payment of its mortgage, that Swan, being due it the said \$800, instead of paying that sum over to them, in fact, paid the money over to the Aetna Company, who then proceeded to credit the Suttons with the same and released the mortgage held by the Aetna Company against the Suttons; that the Aetna Company had full knowledge of all the facts in the case and were in duty bound to have turned over to it the \$800 due them, instead of giving the Suttons credit for it, and for that reason plaintiff claims the right to be subrogated to the rights of the Aetna Company in the mortgage of the Suttons to the Aetna Company and asks that the said mortgage be reinstated, the release held ineffective, and that it have judgment against all of said parties for the amount found due it and a decree of foreclosure of said mortgage.

The Aetna Company contends that there was no privity of contract between it and plaintiff, and that it was under no obligation to plaintiff to assist it in the collection of its debt, but that its duty was to make itself whole; that its agent, Swan, had failed to pay over the money sent him to be delivered to the Suttons, and that the Suttons had instituted suit for the cancellation

of its mortgage on that ground; that plaintiffs had purchased a mechanic's lien on the lots in controversy which was a prior lien to its mortgage; that, in order to secure a refund of the money it had turned over to Swan, it was compelled to purchase from the said Swan a real estate mortgage in the sum of \$3,000 and had paid the difference between the same and the \$1,200 in cash.

The Suttons and the Aetna Company both contend that the matter in issue here became *res judicata* as a result of the judgment rendered in the said action instituted by the Suttons against plaintiff and affirmed by the Supreme Court as reported in 30 Okl. 448, 120 Pac. 1007.

The Suttons further contend that, when the \$1,200 was received by Swan from the Aetna Company, they directed him to pay out of this money the amount in full due the Midland Company, and that in this manner the Midland Company was paid, and that they are no longer indebted to it.

At the close of plaintiff's testimony which disclosed practically the fact as above set out, the court sustained a demurrer to plaintiff's evidence. Plaintiff's motion for a new trial having been overruled, it prosecutes this appeal.

[1] The defendants base their claim of *res judicata* upon the decision of this court as laid down in the case of *Prince v. Gosnell*, 149 Pac. 1162, wherein it is stated that, when a cause of action goes to final judgment, not only every matter litigated in the case, but every matter which might or could have been litigated therein, whether pleaded or not, becomes *res judicata*. This rule applies to matters then in existence at the time of the trial. But in the case at bar the entire matter which plaintiff complains of arose after a final adjudication of the former action, which was tried in November, 1909. It was there decided that Swan, as the agent of the Midland Company, had received from the Suttons, for the use and benefit of the Midland Company, an amount of money out of the Aetna Company loan to fully pay off the indebtedness of the Suttons to the Midland Company. The status of the parties at the conclusion of this trial was, Swan was indebted to the Midland Company for the amount due on the Sutton mortgage. The Aetna Company did not receive this sum from Swan until September, 1910, which it then gave the Suttons credit for, instead of paying it over to the Midland Company; and these are the acts which the Midland Company complain of in the action at bar, and we hold that the plea of *res judicata* is not well taken.

[2] It is argued that there was no privity of contract between the Aetna Company and the Midland Company. In a strict legal sense, this contention might be conceded, yet the Aetna Company is in the attitude of taking funds coming into its hands and, with full knowledge of all the facts, turning the same

over to the Suttons, when reason and equity say that it belonged to the Midland Company and should have been paid over to it.

As a result of the former trial, it was judicially determined that Swan had received \$800 from the Aetna Company for the use of the Suttons, and that under the instructions from the Suttons this \$800 went to the Midland Company for the purpose of paying off its mortgage executed by the Suttons. After this status was fixed by the court, there was nothing that Swan could legally do except pay the money over to the Midland Company, the rightful owners; the court having decided that he held that sum for it as agent. But instead of paying the Midland Company, we find him turning the same over to the Aetna Company, who in turn deliver it to the Suttons, or rather give them credit for it. This money legally belonged to the Midland Company, and no matter in whose hands it came, if they were cognizant of that fact, they could make no other legal disposition of the same except to deliver it to the rightful owner. *Coulter v. Minion*, 139 Mich. 200, 102 N. W. 660; *Markillie v. Allen*, 120 Mich. 360, 79 N. W. 568; *Webber v. Hausler*, 77 Minn. 48, 79 N. W. 580; *Young v. Pecos County*, 46 Tex. Civ. App. 319, 101 S. W. 1055; *Matthews v. Fidelity Title Co.* (C. C.) 52 Fed. 687; *Byrom v. Gunn*, 102 Ga. 565, 31 S. E. 560; *Zinkelson v. Lewis*, 63 Kan. 590, 65 Pac. 644; *Newell v. Hadley*, 206 Mass. 335, 92 N. E. 507, 29 L. R. A. (N. S.) 908; *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346; *Independent District v. King*, 80 Iowa, 497, 45 N. W. 908; *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, 20 Am. St. Rep. 442; *Myers v. Board of Education*, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; 33 *Pomeroy's Equity Jurisprudence*, 1047-1051; *Peters v. Bain*, 133 U. S. 693, 10 Sup. Ct. 354, 33 L. Ed. 696; *Montagu v. Pac. Bank* (C. C.) 81 Fed. 602; *Farmers' & Traders' Bank v. Kimball M. Co.*, 1 S. D. 388, 47 N. W. 402, 36 Am. St. Rep. 739; *Tierman v. Security B. & L. A.*, 152 Mo. 135, 53 S. W. 1072; *Amer. S. F. Co. v. Futrall*, 73 Ark. 464, 84 S. W. 505, 108 Am. St. Rep. 64; *Sheldon on Subrogation*, § 14; 27 Am. & Eng. Enc. 213; *Gooch v. Allen*, 70 W. Va. 38, 73 S. E. 56, 37 L. R. A. (N. S.) 932; *Cumberland B. & L. A. v. Sparks*, 111 Fed. 647, 49 C. C. A. 510; *Dorrah v. Hill*, 73 Miss. 787, 19 South. 961, 32 L. R. A. 631.

The Aetna Company stood in relation to the Midland Company in a kind of quasi contractual relation at least. It had been a party to the former suit and was as fully informed as to every fact in the case as was the Midland Company itself.

As the case stands, the Suttons are in the attitude of having received some money upon a loan which they have not repaid in any way, but have had the note and mortgage given to secure the same canceled and have been entirely relieved of the obligation with-

out paying any consideration for such relief. For them to retain the money received by them in this transaction without being liable to any one for its repayment is absolutely fallacious and violates all rules of equity and right. But it is further claimed that the Suttons have suffered damages at the hands of the Midland Company in several ways, which it is not necessary to here set out, and that these damages offset the sum of money due the Midland Company. This contention may be supported by facts which warrant this relief, but the plaintiff is entitled to have the question of damages claimed by the Suttons tried out and judicially determined, which has not been done, as this case went off upon demurrer to plaintiff's evidence.

The Aetna Company urges that Swan was instructed not to turn the \$1,200, or any part thereof, over to the Suttons, or to pay any of it out for them unless the \$1,200 was sufficient to liquidate the entire claims against the lots in controversy, and they claim that the facts show that it was not sufficient to do this. Their plea of *res judicata* reacts on them here, for it was decided in the former case that Swan had used \$800 of this money to pay off the Midland mortgage. It is conceded that Swan was its agent, and, while he may have violated its instructions, yet it remains, constructively speaking, that he has appropriated \$800 of its money for that purpose, and so determined by the court.

It is also contended that the Suttons were entitled to have the mortgage released, as was done, because they did not get any of the Aetna money; but it appears quite to the contrary, that they did get the benefit of enough of it to obtain the release of the \$800 mortgage held against them by the Midland Company.

The fact that the Aetna Company obtained securities instead of the actual money from Swan in their effort to have him repay it the \$1,200 sent him for the Suttons might be a complication which may have to be met on the retrial of this case, because, if the securities received by it were not worth the sum invested in the same, it seems equitable that it should respond only for the securities' actual value.

To state it concisely, we hold that, at the conclusion of the trial in the former case, Swan stood indebted to the Midland Company for the amount that the Suttons owed it on the note and mortgage executed by the Suttons to the Midland Company, which the Suttons admit was \$615, but the Midland Company claims was \$800 and interest, a matter not necessary to determine here. When Swan repaid the \$1,200 sent him by the Aetna Company for the use of the Suttons, then the Aetna Company became liable to the Midland Company to pay it the sum due it by Swan, and therefore the Midland Company have a right to be subrogated in

the mortgage given by the Suttons to the Aetna Company in the amount due them and to have the mortgage restored for that amount and for a personal judgment against the Aetna Company for the sum due. While Swan was made a party to the suit and filed an answer, he seems to have then passed out of the case, as no further action was taken as to him, as far as the record shows.

If it be found upon retrial that the Suttons are entitled to damages against the Midland Company, as claimed in their cross-petition, of course, this could be offset against their indebtedness to the Midland Company.

We recommend that the judgment be reversed and remanded, with instructions to the trial court to proceed in accordance with this opinion.

PER CURIAM. Adopted in whole.

(57 Okl. 42)

JONES v. JONES. (No. 5605.)

(Supreme Court of Oklahoma. Oct. 12, 1915.
Rehearing Denied Feb. 29, 1916.)

(Syllabus by the Court.)

1. PROCESS \S 141—SERVICE OF SUMMONS—RETURN—EFFECT AS EVIDENCE.

A sheriff's return on a summons showing personal service is not conclusive, but *prima facie* evidence of its truthfulness, and it requires clear and convincing proof to overcome it.

[Ed. Note.—For other cases, see Process, Cent. Dig. \S 189-192; Dec. Dig. \S 141.]

2. APPEAL AND ERROR \S 1010—FINDING OF FACT—SERVICE OF SUMMONS—RETURN.

Upon a motion to vacate a judgment, regular upon its face, based upon an officer's return showing personal service, the finding of the trial court that the return was true will not be disturbed on appeal, where the evidence reasonably supports the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3979-3982, 4024; Dec. Dig. \S 1010.]

Commissioners' Opinion, Division No. 3. Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by Gracie Jones against Lewis Jones. Judgment for plaintiff, and defendant brings error. Affirmed.

Jess W. Watts, Alvin F. Molony, and Edward M. Gallaher, all of Wagoner, for plaintiff in error. Chas. F. Runyan, of Muskogee, for defendant in error.

DUDLEY, C. This is an appeal from the district court of Wagoner county. On May 10, 1912, the defendant in error, plaintiff below, commenced an action in the district court of said county against her father, plaintiff in error, defendant below, to recover possession of certain real estate situated in said county constituting her allotment, and to quiet title thereto, and to recover the rental value of said premises for the years of 1910 and 1911. Summons was issued on the day the suit was filed, and on May 21st was re-

turned by the sheriff, showing that the defendant could not be found in said county. On June 7th an alias summons was issued, and on June 16th was returned by the sheriff showing personal service upon the defendant in said county on June 8, 1912. On August 12, 1912, a default judgment was rendered in favor of the plaintiff against her father, the defendant, for the possession of said real estate, canceling a deed made by her to him, and quieting her title to said premises. After the rendition of said judgment, the plaintiff sold said real estate to J. W. Myers, who in turn sold the same to one W. A. Lamson, who later sold the same to Thomas C. Harrell. On January 31, 1913, a writ of possession was issued by the clerk of said court in favor of the plaintiff and her assigns, directing the sheriff of said county to dispossess the defendant of said premises. On February 12, 1913, the defendant filed a verified motion in said court in said cause to set aside and vacate the said default judgment, on the sole ground that he was not served with summons in said cause, and that he had no notice of the institution of said cause and the rendition of said judgment, pleading a valid defense to said cause of action. The plaintiff filed a response to this motion, and on March 25, 1913, the court, on consideration of the evidence of both parties, overruled said motion, holding that the sheriff's return showing personal service upon the defendant was correct, and from this judgment defendant has appealed.

[1] The sole question presented is whether the sheriff's return showing personal service on the defendant on June 8, 1912, is true or false. The summons and the return thereon are regular. The judgment is regular upon its face. The common-law rule as to the conclusiveness of an officer's return is not in force in this state, but a more liberal rule, to the effect that, while not conclusive, yet it is prima facie evidence of its truthfulness, and it requires strong and convincing proof to overcome it. *Ray v. Harrison*, 32 Okl. 17, 121 Pac. 633, Ann. Cas. 1914A, 413. This is a just and wholesome rule, for under it an officer by his return cannot make that which is false true. Where a judgment, regular upon its face, based upon an officer's return showing personal service, is sought to be vacated and set aside, public policy demands that it should not be overcome, except upon clear and convincing proof that the return is false. Especially is this true where, as in the instant case, the rights of presumably innocent third parties are involved. *Kavanagh et al. v. Hamilton*, 53 Colo. 157, 125 Pac. 512, Ann. Cas. 1914B, 76; *Manson v. Duncanson*, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105; *Ferguson v. Crawford*, 86 N. Y. 609; *Owens v. Ranstead*, 22 Ill. 161; *Davis v. Dresback*, 81 Ill. 395; *Connell v. Galligher*, 36 Neb. 749, 55 N. W. 229; *Wilson v. Shipman*, 34 Neb. 573, 52 N. W. 576, 83 Am. St. Rep. 660; *Mur-*

rer v. Security Co., 131 Ind. 35, 30 N. E. 879.

[2] The trial court, on a consideration of all the evidence for and against the motion, after seeing the witnesses and observing their demeanor, reached the conclusion that the sheriff's return was correct. We are urged to disturb this finding on the theory that it is not reasonably supported by the evidence. The sheriff's return, showing service, is prima facie evidence of its truthfulness. The deputy sheriff, who served the summons according to the return, testified positively that he served the summons personally on the defendant, as stated in the return. The defendant testified that he was not served. The evidence discloses other circumstances, which, to some extent, support the defendant's statement; but, taking the testimony as a whole, we are satisfied that the evidence reasonably supports the finding of the trial court. This being true, it should not be disturbed, on appeal. *Conrath v. Johnston et al.*, 36 Okl. 425, 128 Pac. 1088; *Semple v. Baken*, 39 Okl. 563, 135 Pac. 1141; *Mullin v. Brown*, 40 Okl. 137, 137 Pac. 107; *Board of Com'rs Woodward County v. Thyfault*, 43 Okl. 82, 141 Pac. 409. The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 480)

MURRAY CO. v. PALMER. (No. 6344.)
(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. SALES \S 428—ACTION ON PURCHASE-MONEY NOTE—DEFENSE—BREACH OF WARRANTY.

In an action on a promissory note given as part payment for machinery purchased, the maker of the note may defend on the ground of breach of warranty as to fitness of the machinery to do the work for which it was intended and recover on a cross-petition the amount of damages sustained by reason of such breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1214-1223; Dec. Dig. \S 428.]

2. SALES \S 442 — BREACH OF WARRANTY — MEASURE OF DAMAGES.

The measure of damages for breach of warranty as to fitness of machinery to do certain work is the difference in the value of such machinery as warranted to be and its actual value.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1284-1301; Dec. Dig. \S 442.]

3. APPEAL AND ERROR \S 263—PRESENTATION —INSTRUCTIONS.

Instruction given to the jury by the trial court, although copied in full in the case-made, are not brought to the Supreme Court for review unless excepted to as provided by section 5003, Rev. L. 1910.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1516-1523, 1525-1532; Dec. Dig. \S 263.]

Commissioners' Opinion, Division No. 2. Error from County Court, Love County; J. H. Hays, Judge.

Action by the Murray Company against J. C. Palmer. Judgment for defendant, and plaintiff brings error. Affirmed.

A. Eddleman and J. C. Graham, both of Marietta, for plaintiff in error. Cruce & Potter, of Ardmore, and R. A. Keller, of Marietta, for defendant in error.

GALBRAITH, C. This was an action on a promissory note for \$512.85, and to foreclose a chattel mortgage given to secure the same. The defendant filed an answer and cross-petition, in which the execution of the note and mortgage were admitted, but prayed that the same be canceled on account of a breach of warranty given on the property for which the note and mortgage were executed, and judgment over against the plaintiff for damages resulting therefrom. There was a trial to the court and a jury, and a verdict returned for the defendant, canceling the note and mortgage and fixing the defendant's damages in the sum of \$500. On this verdict, judgment was rendered, and from that judgment this appeal was prosecuted.

There was a demurrer to the answer as follows:

"Plaintiff demurs to the second paragraph or cause of action set up in defendant's answer in which the defendant alleges a promise or understanding from the plaintiff that plaintiff would make said machinery work, etc., and state that the same states no cause of action against the plaintiff, in that no consideration for such alleged promise is shown, and of this plaintiff prays judgment of the court."

This demurrer was overruled, and exception saved, and this ruling is assigned as error.

[1] It appears from the record that the defendant below purchased from the plaintiff a gin outfit for the agreed price of \$2,551.40; that under the contract of sale \$500 of the purchase price was paid upon the delivery of the machinery, and the balance was evidenced by four promissory notes for \$512.85; that three of these notes had been paid, as well as the \$500 cash payment; and that the note in suit was the last of the notes given for the purchase price of said gin machinery.

The contract of sale contained the following warranty:

"Said machinery is warranted to be good material, to perform well, if properly operated by competent persons. Upon starting, if the purchasers, at any time within ten days, are unable to make same operate well, telegraph or written notice, stating wherein it fails to conform to the warranty, is at once to be given by the purchasers to the Murray Company, Dallas, Tex. (and not verbally to some of its traveling men), and reasonable time shall be given to the Murray Company to send a competent person to remedy the difficulty, the purchaser rendering all necessary and friendly assistance to the Murray Company, which reserves the right to replace any defective part or parts, but such defective part or parts shall not condemn the machine to which it belongs; and if such machine cannot be made to fulfill the warranty, and the fault is in the machine, it is to be returned to place where received, and then another, as soon as practicable, substituted therefor, which shall fulfill the warranty, or the amount of the purchase price credited on notes pro rata,

or money paid thereon refunded pro rata, neither party in such case to have or make any claim against the other; and such failure shall in no way affect this contract, or the notes and trust deed in accordance therewith, for any of the articles named therein. Failure to make such trial or give such notice, or use after ten days without such notice, shall be conclusive evidence of the fulfillment of the warranty. If the Murray Company shall, at the request of the purchasers, render assistance of any kind in operating said machinery, or any part thereof, or in remedying any defects either before or after said ten days, said assistance shall in no case be deemed a waiver of, or excuse for, any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers, a man is sent to operate the machinery, which is found to have been carelessly or improperly handled, the Murray Company putting the machinery in working order again, the expense incurred by the Murray Company shall be paid by said purchasers, if demanded."

It was the breach of this warranty on the part of the plaintiff that gives rise to the defendant's claim for damages set out in his cross-petition.

The second paragraph of the answer and cross-petition, to which the demurrer was directed, reads as follows:

"Second. He says that, at the time said machinery was delivered to this defendant, he paid to the plaintiff the sum of \$500, and executed four notes of the same size of the one sued upon herein, to wit, \$512.85 each. That when the first, second, and third of said notes fell due, he paid same with the distinct understanding and promise from the plaintiff that he would make said machinery work as they had agreed it would work, and perform the functions that the contract guaranteed it should perform, and perform the work for which it was purchased. He said that relying upon these promises, and in good faith, believing that the plaintiff would make said machinery good, he paid said notes when they fell due. He says that he now sees that the plaintiff does not intend to try to make said machinery work or to replace it with machinery that will work. He says that, by reason of these promises made by the plaintiff, he was induced to and did pay the plaintiff by reason of said false representations at least \$1,000 more than said machinery was worth and that by reason thereof he is entitled to and should recover of the plaintiff the said \$1,000 that he has paid thereon more than said machinery was worth."

It is evident from a reading of the allegations of this part of the cross-petition that it alleges the essential elements constituting a claim for damages for breach of warranty, and therefore the demurrer to the same was properly overruled by the trial court.

Again, error is assigned to the ruling of the trial court denying the motion presented at the close of the evidence to exclude and withdraw from the consideration of the jury all the testimony introduced in the case relative to a subsequent promise or promises made by the plaintiff to remedy or repair the machinery. The uncontradicted testimony in the record is to the effect that, immediately after the machinery was installed, it did not work to the satisfaction of the defendant, and that he notified the plaintiff of that fact and made complaint to it, and it sent a man to the village of Orr, where the gin was located, to remedy the defects; that later on fur-

ther complaint was made, and another representative of the plaintiff was sent to repair the gin, and still later another man was sent there; that the second year after the purchase the defendant went to Dallas, the headquarters of plaintiff, and took up the matter of the defects of the machinery with the plaintiff there, and the defendant was then assured that the defects in the machinery would be perfected and the gin would be made to operate as good or better than any other gin the defendant had ever controlled; that there was continuous complaint of the working of the gin by the defendant from the time of its purchase until the trial of this action; and that the gin turned out an inferior sample, that it was "nappy," and had an excess of dirt mixed with the cotton, and cotton from this gin sold for 1 and 1½ cents less per pound than cotton from the other gin at Orr. It clearly appears from the record that the defendant made frequent complaint of the defects in the gin and its defective work. One of the defendant's witnesses, an expert gin constructor, said that these complaints made by the defendant would fill "a volume." This testimony was competent and relevant to show a breach of the warranty, and also the amount of injury sustained by the defendant on account thereof, and the ruling of the trial court in denying said motion was correct.

Again, it is complained that the court erred in refusing to direct the jury to return a verdict for the plaintiff. This was not error, inasmuch as the answer and cross-petition stated a cause of action for breach of warranty and damages, and the evidence offered in support thereof tends to support this pleading.

[2] Again, it is complained that the court refused the plaintiff's second requested instruction. This instruction was in words and figures as follows:

"That under the contract in evidence in this cause the measure of the defendant's damages against the plaintiff, if any, is the price of any defective article of said machinery, and, if you find that any particular article of said machinery was defective, it would not void the contract nor entitle the defendant to plead a failure of consideration; but you will find the value of such defective article or said part or parts, and the defendant would be allowed the price thereof as a credit on his indebtedness to plaintiff."

It was not error to refuse this instruction, inasmuch as it was not applicable to the issues raised by the pleadings, in this, that the cross-petition was not based upon a failure of consideration, but upon a breach of warranty and damages resulting therefrom, and this instruction did not correctly state the measure of damages in an action for breach of warranty of contract of sale. The measure of damages in an action for breach of warranty "in quality" is set out in section 2865, Rev. L. 1910, and where damages are claimed for breach of warranty "in fitness"

of the article sold, as in the case at bar, the rule for measuring the damage is set out in section 2866. The application of these statutory rules for the measure of damages is illustrated in many decisions of this court. *Osborne & Co. v. Walther*, 12 Okl. 20, 69 Pac. 953; *Continental Gin Co. v. Sullivan*, 150 Pac. 209; *Kansas City Hay Press Co. v. Williams et al.*, 151 Pac. 570, and *Parsons v. Smith et al.*, 151 Pac. 862; *Rogers Lbr. Co. v. Judd Lbr. Co.*, 153 Pac. 150. It therefore appears that the refusal of this instruction was not error.

[3] Again, it is assigned as error, and urged in the brief, that the court erred in the instructions given to the jury. A casual reading convinces us that instructions Nos. 6 and 7 of the court's instructions to the jury are inconsistent and are not applicable to the issues in the case, and neither of them states the correct measure of damages prescribed in this character of action. However, it appears from the record that these instructions were not excepted to by the defendant, and therefore they are not brought up for review in this cause. Section 5003, Rev. L. 1910.

The other assignments made do not seem to require specific mention. Upon consideration of the whole record, it seems that substantial justice was done by the verdict returned in this cause, and, inasmuch as none of the exceptions urged are well taken, we recommend that the judgment appealed from be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 24)

JONES v. THOMPSON et al. (No. 4905.)

(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ~~§~~966—CONTINUANCE ~~§~~20—DISCRETIONARY RULING.

The granting or refusing of a continuance on account of the absence of counsel is a matter of discretion with the trial court, and, unless it appears that such discretion was abused to the prejudice of the substantial rights of a litigant, the action of such court will not be disturbed upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3837; Dec. Dig. ~~§~~966; Continuance, Cent. Dig. §§ 51, 53-57; Dec. Dig. ~~§~~20.]

2. APPEAL AND ERROR ~~§~~1009, 1175—REVIEW—WEIGHT OF EVIDENCE—FRAUD—EQUITY.

While the rule prevails in this jurisdiction that in cases of purely equitable cognizance it is within the power of this court to consider the entire record, weigh the evidence, and, where the judgment of the trial court is clearly against the weight of the evidence, to render or cause to be rendered such judgment as should have been awarded by the trial court; yet the doctrine is equally well established that where fraud is relied upon as a basis for equitable relief, and the trial court, after hearing the evidence, finds that fraud has not been established, this court

will not disturb such findings, unless it is clearly against the weight of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978, 4573-4587; Dec. Dig. § 1009, 1175.]

Commissioners' Opinion, Division No. 8. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by Julia A. Jones against E. M. Thompson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Harris & Nowlin and Burford, Robertson & Hoffman, all of Oklahoma City, for plaintiff in error. William Blake, of Tulsa, and Burwell, Crockett & Johnson, of Oklahoma City, for defendants in error.

BLEAKMORE, C. This action was commenced in the district court of Pawnee county by the plaintiff in error against the defendants in error, seeking the cancellation of certain written instruments on the ground that at the time of the execution thereof plaintiff had been stupified by some drug surreptitiously administered by one of the defendants, which rendered her mentally incapacitated to understand and appreciate the nature of the transaction, and, while her faculties were thus impaired, she was fraudulently induced to execute such instrument.

The plaintiff, a woman 65 years of age, was the owner of 155 acres of land in what is known as the Cleveland oil field in Pawnee county, which she had theretofore leased to the Minnetonka Oil Company for a royalty of one-eighth of the oil; such royalty, from three wells, having for some 5 years afforded her an average monthly income of about \$50, and for the month of March, 1912, \$114. The land was practically valueless for agricultural purposes. An oil well then being drilled to a deeper sand on an adjoining tract was producing a large amount of gas and spraying some oil. On March 19, 1912, while plaintiff was visiting her daughter, who resided on the land involved, the defendant E. M. Thompson, a physician, called upon her there and offered \$500 for an option to purchase a one-half interest in said land and royalty; such option to be exercised within 9 months by the payment of an additional sum of \$3,500. Plaintiff declined to enter into any contract at the time, stating that she desired to consult her children in regard to the matter. She and defendant Thompson had some conversation over the phone that night or the following morning relative to such proposition; she still refusing to make any agreement for the sale of the property. On the next day defendant Thompson again called upon her at the same place, stating that he was on his way to see an oil well upon the adjoining tract, and asked her to be ready upon his return to accompany him to the town of Cleveland, where they both resided. He came back from the well, and the plaintiff went with him to said town. Defendant took her

to his home, where she ate dinner and thereafter executed to the defendant Emma M. Thompson, the wife of the doctor, in consideration of \$500 cash, a contract for the conveyance of an undivided one-half interest in said land and the royalties therefrom, to be executed and delivered at any time within 9 months upon the payment to her of an additional sum of \$3,500; and also a deed to such one-half interest in said land and royalties which it was agreed should be placed in escrow to be delivered upon the payment to the plaintiff of said additional sum within a period prescribed. The instruments were prepared by one Stanley Edmister, a lawyer and notary public, who resided at Cleveland. At the Thompson home at the time of the execution of said instruments were the plaintiff, the defendants Dr. Thompson and his wife, a Mrs. Moore, who, on account of the illness of Mrs. Thompson, had been called in to prepare the meals and perform the general household duties, her daughter, a child of about 11 years, and Stanley Edmister, who arrived at about the time the others had concluded the noon meal and who brought with him the contract and conveyance, which he had previously prepared. Shortly after eating dinner plaintiff signed such instruments and received a check for \$500 from Mrs. Thompson, and also copies of such instruments. Edmister then retired, taking with him the original instruments to be deposited in escrow, and the doctor also left, ostensibly to see a patient. Thereafter, about 3 o'clock, he returned and took the plaintiff in his buggy to the bank, upon which the check was drawn, where she alighted from the buggy, entered the bank, indorsed and deposited the check, and received a passbook, upon which she was given credit therefor, and was driven by the doctor to her home in the town of Cleveland. The contract and deed were placed in escrow in the bank by Edmister.

On March 27th, seven days thereafter, plaintiff went to the office of the defendant Dr. Thompson and informed him that she had previously executed deeds to the land in question conveying 80 acres thereof to her daughter, Mrs. Kinney, and 80 acres thereof to another daughter, Mrs. Neuman, who at the time had reconveyed the same to her, and that their conveyances were in the possession of a Mr. Gilbert for her whenever she desired them. Whereupon the following instrument was prepared, which plaintiff dictated and acknowledged and signed:

"Statement of Julia A. Jones Concerning Homestead.

"Section twenty, Township twenty-one (21), Range eight (8) East I. M., in Pawnee county, Oklahoma, containing 155 acres. The west half (W. ½) of the said land was deeded to Grace L. Kinney and the east half (E. ½) to Virgie A. Newman. The object, an assignment for protection. It was for a protection of an enormous attorney fee. They gave me a deed which is in escrow with Mr. Gilbert. This was to prevent

the collection of what I considered an unjust claim for attorney fee. I did not make this as a transfer of my interest, only for that reason. It was understood by the girls that I held the ownership of the land, while they held the naked legal title, and for my protection the girls made deeds back to me, which are with Mr. Gilbert and which I was to have the privilege of securing for the purpose of placing on record at any time. Mr. Gilbert understanding this and I trusting him fully in the matter.

"Julia A. Jones."

"Witnesses:

"Berta Arnett.

"S. C. Edmister.

"State of Oklahoma, County of Pawnee, ss.

"Before me, Berta Arnett, a notary public, in and for said county and state on this 27th day of March, 1912, personally appeared Julia A. Jones, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

"Witness my hand and notarial seal the day and year last above written.

"[Seal] Berta Arnett, Notary Public.

"My commission expires March 21, 1915."

Immediately thereafter plaintiff accompanied the defendant Dr. Thompson to the office of Mr. Gilbert and procured said deeds and delivered them to him. Later defendant deposited to the credit of the plaintiff in the Cleveland National Bank \$3,500, and the deed involved was delivered. Emma M. Thompson thereupon conveyed to the defendant Mullendore a one-fourth interest in said property, he having been previously informed of the transaction with plaintiff and agreeing to purchase the same for \$2,000. Wells upon the adjoining property were drilled into deeper sands, as were the wells upon the property in controversy, which greatly increased the value thereof, at the time of the trial in October, 1912; various opinions as to such value being offered, ranging from \$20,000 to \$80,000.

Plaintiff insisted that she had been drugged by some substance administered to her by Dr. Thompson or at his instance, in the food or drink of which she had partaken at his home shortly before making the said contract and deed, the effect of which rendered her dizzy, partially blind, sleepy, and dull, and affected her mentally to such an extent that, as expressed by her, she did not have mind enough to know what she wanted to do, and after she reached her home she lost consciousness entirely; that in the execution of the contract and during the entire transaction she was not acting of her own volition, but was dominated entirely by the defendant Dr. Thompson.

Some days after the transactions involved plaintiff stated to E. G. Todd, mayor of the town of Cleveland, who desired to purchase an interest in the royalty derived from the land in question, that she had sold a portion thereof to defendants and did not care to sell any more. She also stated to one Shepherd, an acquaintance residing in Cleveland, that she had made the sale to defend-

ants, and although she had been told that she sold too cheap, yet she was satisfied.

All the persons present at the Thompson home when the instruments in question were executed, as well as a Mrs. Long, who called there a short time thereafter and saw and talked with the plaintiff, and S. A. Bryant, vice president of the Cleveland National Bank, who received the deposit of the \$500 check and conversed with the plaintiff at the time, testified that there was nothing unusual in her appearance or demeanor.

The court made elaborate findings of fact, among which are:

XXI. "That at the time of the execution of this option contract, there were three producing wells on the plaintiff's land, and one gas well, and said gas well probably produced a little oil; that these wells had been drilled some five or six years prior to said date to what is known as the Cleveland sand; that her royalties from production of said wells was an average of \$50 per month. That the total value of said land based upon settled production and independent of speculative values, taking into consideration the fact that it was covered by the Minnetonka Oil Company's lease, and that only one-eighth of the production would go to the purchaser of the land, could not exceed \$3,000; that said land had little value for agriculture, there being only a few acres of tillable land on the premises."

XXII. "That the plaintiff at the time of the execution of the option contract had knowledge of the fact that one of these old wells that had been drilled five or six years prior to said date was being drilled to deep sand, and she had knowledge of the fact that the Miller well had been drilled into the deep sand and was producing gas and spraying oil, and with knowledge of this condition and without misrepresentation upon the part of the defendant, she voluntarily executed this option."

XXIII. "That she was not drugged, nor was she deceived, nor was there any undue influence exerted over her so far as the evidence in this case discloses."

The cause had been regularly set for trial on October 8, 1912. On that and the day before the plaintiff, by her attorneys, Harris & Nowlin, applied to the court for a postponement until some day after October 15th, because of the alleged unavoidable absence of her counsel, Hon. S. H. Harris, whose duties as general counsel for the Pioneer Telephone & Telegraph Company required his attendance before the Corporation Commission of the state of Oklahoma in another proceeding. Such application was supported by the affidavit of the plaintiff, in which it is set forth that while she had nominally employed the law firm of Harris & Nowlin to represent her, that in fact she had employed only Mr. Harris, on account of his reputation and because of her personal preference; that she had consulted alone with him and he was her only counsel familiar with the facts and circumstances of the case and prepared to take charge and conduct the trial thereof, etc. Accompanying the application was also the affidavit of Mr. Nowlin, of the firm of Harris & Nowlin, to the effect that he had never consulted with the plaintiff with reference to the matters

in controversy; that Mr. Harris alone was prepared to try the case, and the cause of his absence. The motion for continuance was overruled. There are many assignments of error; those particularly urged in the brief being (1) error in overruling the motion for a postponement of the trial, and (2) failing to render judgment for plaintiff and giving judgment for defendants.

Upon the trial plaintiff was represented by Mr. Nowlin and the law firm of Biddison & Merritt.

From an examination of the voluminous record consisting of more than 700 pages, we are persuaded that the plaintiff's cause was fully and ably presented and her interests protected by the attorney who participated in the trial, and that her substantial rights were not prejudiced by the absence of her other distinguished counsel.

[1] As a general rule the granting or refusing of a continuance is a matter of discretion with the trial court, and, unless it appears that such discretion was abused to the prejudice of the substantial rights of a litigant, the action of such court will not be disturbed upon appeal. In *Pierce v. Engelkemeler*, 10 Okl. 308, 61 Pac. 1047, sustaining the action of the trial court in refusing a continuance on account of the absence of counsel by illness, it was said:

"The sickness of an attorney is not one of the statutory grounds entitling a party to a continuance, and it has been repeatedly and often held that an application for continuance, under circumstances like the present, is discretionary with the court."

"The courtesy existing between members of the bar, and recognized by trial courts, will usually in such cases enable counsel to postpone the cause for a few days in one of the courts so as to enable him to be present at both trials. But this is purely a matter of grace and not of law. The rights of litigants in one court are not to be determined by the condition of the docket in another, nor because an opposing counsel has assumed duties in different courts, which may conflict." 9 Cyc. 102; *Vance v. Territory*, 3 Okl. Cr. 208, 105 Pac. 307; 6 R. C. L. 549; *Roper v. U. S.*, 7 Ind. T. 185, 104 S. W. 584; *Sharman v. Morton*, 31 Ga. 34.

[2] The prevailing rule in this jurisdiction is that in all cases, such as this, which were formerly cognizable in a court of chancery, this court has the power upon appeal to consider the entire record, to weigh the evidence, and, when the judgment of the trial court is clearly against the weight of the evidence, render or cause to be rendered, such judgment as that court should have rendered. *Schock v. Fish* (not yet officially reported), 144 Pac. 584; *Tucker v. Thraves*, 151 Pac. 598; *Wimberly v. Winstock*, 149 Pac. 238. Yet the doctrine is equally well established that:

"Where fraud is relied upon as the basis for equitable relief and the trial court, after hearing the evidence, finds that fraud has not been established, the appellate court will not disturb such finding, unless it is clearly against the weight of evidence." *Overstreet v. Citizens' Bank*, 12 Okl. 383, 72 Pac. 379.

Upon consideration of the entire record herein, we cannot say that the findings and judgment of the trial court are clearly against the weight of the evidence; but, on the contrary, we are of opinion that the court below correctly found therefrom that plaintiff was not drugged, as she claimed, but voluntarily executed the instruments which she seeks to cancel, relying upon her knowledge of existing conditions relative to the sinking of the wells on her own and adjoining land, and exercising her independent belief as to the probable outcome of such development, uninfluenced by concealment, deception, misrepresentation, or other inequitable artifice or conduct on the part of defendants. It is apparent that plaintiff at the time was in a situation to form an independent judgment concerning the entire transaction, and, having done so, and acted thereon knowingly and intentionally, the fact that those wells, of the drilling of which she was fully aware, shortly thereafter reached a new and rich sand, greatly enhancing in value the property involved, affords no ground for the interposition of a court of equity and the cancellation of her conveyance thereof.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 67)

CLARK v. CLARK. (No. 6070.)

(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

1. DIVORCE §27 — GROUNDS — "EXTREME CRUELTY."

Where one spouse frequently cursed and abused the other, such conduct constituted "extreme cruelty" and warranted the granting of a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-83; Dec. Dig. §27.]

For other definitions, see Words and Phrases, First and Second Series, Extreme Cruelty.]

2. DIVORCE §27 — GROUNDS — "EXTREME CRUELTY."

Whipping one's wife constitutes one of the highest degrees of "extreme cruelty."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-83; Dec. Dig. §27.]

Commissioners' Opinion, Division No. 4. Error from Superior Court, Custer County; J. W. Lawter, Judge.

Action by Fern A. Clark against Monroe F. Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

G. W. Cornell, of Weatherford, for plaintiff in error. Darnell & Darnell, of Arapaho, for defendant in error.

MATHEWS, C. The parties will be designated as in the trial court. This was an action for divorce upon the alleged grounds of extreme cruelty and gross neglect of duty. The trial court found for the plaintiff, grant-

ing a decree of divorce as prayed for, and defendant prosecutes this appeal, assigning as the only error the insufficiency of the evidence to support the verdict.

[1, 2] It could serve no useful purpose to review the evidence here, but we believe the same fully sustains the finding of the trial court. Plaintiff testified that defendant frequently cursed her, and struck her upon three different occasions, and that he neglected her while she was sick. While it is no uncommon occurrence to find women who do endure such outrageous treatment rather than desert their husbands, yet we will not judicially say that it is their duty to do so. If cursing and whipping one's wife do not constitute "extreme cruelty," it is difficult to imagine a condition that would comply with the term.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(56 Okl. 218)

NAVARRE et al. v. FINERTY. (No. 6264.)
(Supreme Court of Oklahoma. Dec. 14, 1915.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 564—CASE-MADE —
TIME FOR FILING.

A purported case-made which is not served within the statutory time after the judgment appealed from is entered, or with an extension of time duly allowed, is a nullity, and cannot be considered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2501-2506, 2555-2559; Dec. Dig. \S 564.]

Commissioners' Opinion, Division No. 3. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by F. C. Finerty against Louis Navarre and others. Judgment for plaintiff, and defendants Navarre bring error. Dismissed.

H. R. Winn, of Oklahoma City, for plaintiffs in error. Harry White, of Oklahoma City, for defendant in error.

DUDLEY, C. On December 28, 1912, F. C. Finerty, plaintiff below, commenced this action in the superior court of Oklahoma county against the plaintiffs in error and others, defendants below, to foreclose a real estate mortgage. There was judgment for the plaintiff, from which the defendants Louis Navarre and Julia Navarre, his wife, have attempted to appeal. Since the petition in error was filed in this court the plaintiff, F. C. Finerty, died, and the cause has been revived in the name of May C. Finerty, administratrix of his estate.

The defendant in error has filed a motion to dismiss the pretended appeal, for the reason that the purported case-made was not served within the time allowed by the trial court. The motion for new trial was over-

ruled on October 18, 1913, and the defendants were given 60 days from that date within which to prepare and serve case-made. On November 17, 1913, an order was made extending the time to serve case-made. That portion of the order applicable is as follows:

"Orders that the defendants be, and they are hereby allowed an extension of time for the period of 60 days within which to prepare and serve case-made on appeal to the Supreme Court. * * *

The case-made was not served within 60 days from the date of this order. On February 16, 1914, another order was made extending the time to serve case-made until April 1, 1914. The purported case-made was served on March 26, 1914. The order of November 17, 1913, does not grant 60 days' additional time from the expiration of the time theretofore given, but in plain words grants 60 days from that date. The order of February 16, 1914, granting additional time to serve the case-made, is a nullity, because the time in which to prepare and serve the same had expired.

The motion to dismiss should be sustained. Soliss v. Davis, County Judge, 28 Okl. 496, 114 Pac. 609; City of Wagoner et al. v. Gibson et al., 32 Okl. 14, 121 Pac. 625; Woods v. Coleman et al., 32 Okl. 244, 122 Pac. 234; Korimer v. Collins, 31 Okl. 457, 122 Pac. 159; Lawson et al. v. Zeigler, 33 Okl. 368, 125 Pac. 724.

(55 Okl. 203)

LEACH et al. v. SARGENT et al.
(No. 6416.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE \S 161—APPEAL—
WAIVER OF ERRORS.

The same as the first paragraph of the syllabus in Cohn v. Clark, 150 Pac. 467.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 592-599, 601, 602, 604; Dec. Dig. \S 161.]

2. ABATEMENT AND REVIVAL \S 47—SUBSTITUTION OF PARTY—LANDLORD AND TENANT—ACTION FOR POSSESSION.

Where a lessee, after commencing an action for possession of the leased premises, surrenders his lease to his lessor, it is proper under section 4695, Rev. L. 1910, for the court upon motion to substitute the lessor as plaintiff in the action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. \S 239-244; Dec. Dig. \S 47.]

3. ABATEMENT AND REVIVAL \S 41—TRANSFER OF INTEREST—GRANTEE OF PLAINTIFF—CONTINUANCE OF ACTION.

A cause of action for unlawful and forcible detainer by one entitled to the possession, in case of a transfer of the interest of the plaintiff, continues in his grantee.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. \S 212-220; Dec. Dig. \S 41.]

Commissioners' Opinion, Division No. 2. Error from County Court, Tulsa County; Conn Linn, Judge.

Action by J. M. L. Sargent and another against J. W. Leach and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

John Lydecker and Chas. A. Steele, both of Tulsa, for plaintiffs in error. Robinson & Mieher, of Tulsa, for defendants in error.

GALBRAITH, C. J. M. L. Sargent commenced this action in forcible entry and detainer against plaintiffs in error before a justice of the peace. The trial resulted in a judgment for the plaintiff, the defendants appealed to the county court, where a trial de novo resulted in a like judgment, from which an appeal has been prosecuted to this court.

It appears from the record that the defendant in error J. S. Shaver was the owner of the fee in the land involved herein, and that J. M. L. Sargent was the lessee thereof; that Sargent, after making demand for the premises and serving notice to quit on the plaintiffs in error, commenced the action, and on the day set for trial surrendered his lease to Shaver and filed a motion in the case to dismiss without prejudice. On the same day, Shaver made application to be substituted as plaintiff in the cause. This application was granted over the objection of the defendants, and a trial resulted in a judgment against the defendants, who prosecuted an appeal therefrom to the county court. A further statement is taken from the brief of plaintiff in error, as follows:

"On the 19th day of December, 1913, the cause came regularly for trial de novo in the county court. There the defendants, J. W. Leach and A. L. Leach, presented the dismissal of the plaintiff, J. M. L. Sargent, filed before the justice of the peace and moved the court to dismiss the action on the motion of plaintiff. This motion was overruled, and defendants excepted. The defendants then objected to the hearing of the case because the issues had not been joined pending wherein J. S. Shaver asked to be substituted as plaintiff. The court overruled this objection and substituted J. S. Shaver as plaintiff instead of J. M. L. Sargent, to all of which defendants excepted. * * * The case then went to trial without any further pleadings, and the jury, after hearing the evidence and the instructions of the court, brought in a verdict of guilty."

The errors assigned are presented under four heads as follows:

"First. J. S. Shaver was erroneously allowed to prosecute the suit below as plaintiff.

"Second. No notice to terminate the tenancy of defendants was served by any one, and no notice to quit before suit was served by J. S. Shaver.

"Third. The court erroneously permitted certain evidence to be introduced on behalf of J. S. Shaver.

"Fourth. The court erroneously instructed the jury and erroneously refused instructions demanded by J. W. Leach and A. L. Leach."

[1] Although it may be true, as contended by plaintiffs in error, that Sargent's motion to dismiss the cause was presented in the justice court before the application of Shaver to be substituted as plaintiff therein, the de-

fendants by prosecuting an appeal to the county court, where a trial de novo was had, waived such error, if any, on the part of the justice of the peace. By perfecting the appeal the defendants (the plaintiffs in error here) invoked the jurisdiction of the county court and voluntarily appeared therein, and thereby waived any and all errors that may have been committed by the justice of the peace. It was said by this court in *Cohn v. Clark*, 150 Pac. 467:

"It is true in the foregoing case the service of process was termed by the court as defective, yet the same principle is involved should there be no service at all, as in the instant case; for the filing of an appeal bond, duly approved, constitutes an appearance, the prior service thereby becoming immaterial, because a party to a suit can appear voluntarily. *Fowler v. Fowler*, 15 Okl. 529, 82 Pac. 923; *McCord-Collins Merc. Co. v. Dodson*, 32 Okl. 561, 121 Pac. 1085; *Deming Inv. Co. v. Love*, 31 Okl. 146, 120 Pac. 635; *Doggett v. A. T. & S. F. Ry. Co.*, 31 Okl. 177, 120 Pac. 654; *Gulf Pipe Line Co. v. Vanderberg*, 28 Okl. 637, 115 Pac. 782, 32 L. R. A. (N. S.) [661] Ann. Cas. 1912D, 407."

[2, 3] 2. The substitution of Shaver for Sargent as plaintiff in the action by the county court was authorized by section 4695, Rev. L. 1910, although the courts seem to have permitted the action to be prosecuted in the joint names of Sargent and Shaver. The Supreme Court of Oklahoma territory, in construing this section of the statute, passed upon the identical question in *Anderson v. Ferguson & Zaring*, 12 Okl. 307, 71 Pac. 225, and said:

"A cause of action for unlawful detainer by one entitled to the possession would undoubtedly continue in his vendee, therefore comes clearly within the provisions of the statute just quoted. The action might have been continued in the name of Ferguson, or Zaring could have been substituted as successor in interest.

"The conveyance by Ferguson, while the action was pending, would not defeat his right to recover, if he was entitled to the possession in the commencement of the action. *Enc. Plead. & Prac.* vol. 9, p. 52. While in all probability the court should have either permitted Zaring to have been substituted as plaintiff or the action to have proceeded in the name of Ferguson, that the action was allowed to continue in the name of both could in no way be prejudicial to the rights of the plaintiff in error."

It is only necessary to say that the record clearly shows that the notice to quit as prescribed by section 5507, Rev. L. 1910, was served upon the defendants by Sargent prior to commencing the action, and that the action was properly commenced by him. Section 4695, Rev. L. 1910, authorizing the substitution of parties, justified the county court in substituting Shaver as plaintiff.

It follows that the rights accruing to Sargent by reason of serving notice were available to Shaver when substituted as plaintiff.

3. It is not made to appear that the testimony, which it is claimed was admitted over the objection of the plaintiff in error, was erroneously admitted, inasmuch as this testimony related to the title of Shaver to the property involved, and was therefore relevant

as tending to support his claim to the immediate possession thereto.

4. The errors assigned to the instructions given by the court to the jury, and the refusal to give requested instructions on behalf of the plaintiff in error, are not well taken, inasmuch as the instructions given by the court embraced a fair and full statement of the law arising upon the single issue made by the pleadings, and the evidence, namely, Who was entitled to the possession of the premises in dispute? The requested instructions, in so far as they were not covered by those given by the court, were not a full and fair statement of the law arising upon this issue.

The cause seems to have been fairly submitted to the jury, and the verdict is abundantly supported by the evidence.

We therefore recommend that the judgment appealed from be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 32)

RINGER et al. v. WILSON. (No. 6104.)
(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

BILLS AND NOTES \S 496—BONA FIDE HOLDER—PRESUMPTION.

Where a party is in the possession of a note payable to his order, there is a strong presumption that he is the owner and holder of the same for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1665½, 1669-1674; Dec. Dig. \S 496.]

Commissioners' Opinion, Division No. 4. Error from County Court, Oklahoma County; John W. Hayson, Judge.

Action by G. F. Wilson against James Ringer and another. Judgment for plaintiff, and defendants bring error. Affirmed.

H. A. Wilkinson and C. M. Thorp, both of Oklahoma City, for plaintiffs in error. D. K. Pope and Walter, Hilpirt & Callihan, all of Oklahoma City, for defendant in error.

MATHEWS, C. The parties will be designated as in the trial court. On the 1st day of July, 1911, the defendants executed their note in the sum of \$125, payable to the order of plaintiff. Having failed to pay the same, this action was instituted. The defendant answered, admitting the execution of the note, but as a defense pleaded that between themselves and two third parties there existed mutual accounts, and that said note was executed in settlement of said mutual accounts due said third parties, but that they were never indebted to this plaintiff at any time.

Defendants further alleged that on the day of August, 1911, plaintiff, as agent for aforesaid third parties, entered into an agreement with defendants employing them to procure a purchaser for a certain tract of land owned by said third persons at a net

price of \$1,000, their compensation for their services to be all sums paid in excess of \$1,000 for said land, that in pursuance of said agreement defendants procured a purchaser for said land who was ready, willing, and able to buy the same at the price of \$1,100, but that the said owners refused to carry out said transaction, and by reason thereof defendants were damaged in the sum of \$100, for which amount they prayed an offset against the note sued on.

Upon motion of plaintiff, the trial court gave plaintiff judgment upon the pleadings, and from this action of the court, the defendants prosecute this appeal.

Upon the part of appellants it is admitted that the party holding the legal title to a note may sue on it, but they urge that the defendants have the right to interpose any legal defense which they may have against the real party in interest, and, if the case at bar presented that state of facts, we are inclined to agree with them, but there is no allegation in their answer that the plaintiff is not a bona fide holder of the note for value. We note that defendants have alleged that the said note was intended to be and is a note of the partnership, but this may be true, and yet the plaintiff still be a bona fide holder of the same for value. Where a party is in the possession of a note made payable to his order, there is always a strong presumption that he is the owner and holder of the same for value. Defendants failed to negative this presumption in their answer; hence the action of the court in entering judgment upon the pleadings in plaintiff's favor was correct.

We recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 41)

HENDERSON v. PENDLETON. (No. 5528.)
(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

MANDAMUS \S 57—APPEAL BOND — TIME OF FILING.

Mandamus will not lie to compel the filing and approval by a justice of the peace of an appeal bond tendered to the justice of the peace more than 10 days after the rendition of judgment by such justice of the peace.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 68, 114-120; Dec. Dig. \S 57.]

Commissioners' Opinion, Division No. 1. Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Mandamus by Emily Henderson against J. F. Pendleton. Judgment for defendant, and plaintiff brings error. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error. Chas. El. Davis, of Ryan, for defendant in error.

RUMMONS, C. This is an action by the plaintiff in error against the defendant in error.

ror, a justice of the peace of Jefferson county, praying that a writ of mandamus issue commanding the defendant in error to file and approve an appeal bond. An alternative writ issued, to which the defendant in error answered. Upon the trial the court denied a peremptory writ, and rendered judgment for the defendant in error. In due time a motion for new trial was filed, which being overruled, plaintiff in error excepted and brings error to reverse the judgment of the trial court.

It appears that in an action pending in a justice of the peace court, before the defendant in error, a justice of the peace, in which one C. E. Davis was the plaintiff and the plaintiff in error was defendant, judgment was rendered against plaintiff in error on October 22, 1912, and that on October 31, 1912, the defendant in error received an appeal bond through the mails, which, on the same day, he returned to the attorneys for plaintiff in error without filing or approving the same. His objections to the bond were that the provision that the plaintiff in error would prosecute her appeal without unnecessary delay was omitted from the conditions of the bond, and that he did not think the surety who had signed the bond was sufficient. The attorneys for plaintiff in error received the bond, inserted the provision omitted in the conditions thereof, procured the signature of another surety thereon on November 2, 1912, and mailed the bond to the defendant in error on that day. It seems that the defendant in error received this bond on Sunday, November 3, 1912, and that he thereafter refused to file and approve the same.

We think the judgment of the trial court was right. The authorities cited in the brief of counsel for plaintiff in error only go to the right of an appellant, when a bond has been filed and approved by the justice of the peace which is defective in form or upon which the sureties are insufficient, to amend the same either in form or by adding additional sureties, or to substitute a new bond in the appellate court. It is unnecessary to determine whether, if the plaintiff in error had stood upon the bond tendered to the defendant in error on October 31st, and had her evidence shown that the sureties signing said bond were responsible for the amount thereof, she might have been entitled to the relief sought without regard to the defect in the form of the bond; but in this case she attempted to file a bond after the 10-day limit fixed by the statute had expired, since it appears that the bond finally tendered to the plaintiff in error, and the filing and approving of which is sought to be enforced, was not finally signed until November 2d, one day after the time for giving the bond had expired. Nor is there anything in the evidence to show responsibility of the sureties tendered upon the bond. A party seeking to ap-

peal from a judgment of a justice of the peace cannot compel by mandamus the filing and approving of a bond tendered to the justice of the peace after the statutory time for taking an appeal has expired. *Vowell v. Taylor*, 8 Okl. 625-629, 58 Pac. 944; *Bubb v. Cain*, 37 Kan. 692, 16 Pac. 89.

The judgment of the court below should be affirmed.

PER CURIAM. Adopted in whole.

THOMPSON et al. v. THOMPSON.
(No. 6506.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773—FAILURE TO FILE BRIEF—AFFIRMANCE.

Where plaintiff in error fails to file brief, and the record itself shows no error, the cause may be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3104, 3108-3110; Dec. Dig. \S 773.]

Commissioners' Opinion, Division No. 2. Error from District Court, Tillman County: Frank Matthews, Judge.

Action by Atha Thompson against C. E. Thompson and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. E. Red, of Frederick, for plaintiffs in error. J. E. Williams, of Frederick, for defendant in error.

HOOKER, C. Suit upon a redelivery bond. A demurrer was sustained by the lower court to the answer of defendants, and they declined to plead further and stood on the pleading, and judgment was rendered against them in the lower court, and to reverse the same an appeal was had to this court.

Petition in error with case-made attached was filed in this court on June 6, 1914, and plaintiffs in error have filed no brief to point out the errors, if any, of the trial court, and from an examination of the record we are unable to find any.

We recommend that the judgment of the lower court be affirmed.

PER CURIAM. Adopted in whole.

CHISUM v. HUGGINS et al. (No. 6067.)
(Supreme Court of Oklahoma. Jan. 11, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. CONTRACTS \S 94 — RIGHT TO ENFORCE — FRAUDULENT REPRESENTATIONS — NEGLIGENCE OF VICTIM.

A contract obtained by the fraudulent representations or conduct of one of the parties thereto should not be enforced, if it satisfactorily appears from the evidence that the party seeking a rescission has been misled in regard to a material matter by such misrepresentations or

conduct to his injury; and it matters not that the party so misled may have been in some degree negligent, for it is not just, nor equitable, for a person who has deceived another to challenge his credulity, or shield himself from the consequences of his own misconduct behind the faith and confidence reposed in him by his victim.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. § 94.]

2. VENDOR AND PURCHASER § 37—VALIDITY OF CONTRACT—FALSE REPRESENTATIONS.

The rule of caveat emptor is no longer a shield and protection to the deliberate frauds and cheats of the "blue sky sharper," and where a party positively makes false representations, as an inducement for another to contract with him, and such person, relying wholly upon such false representations, enters into a contract, such contract is voidable for fraud, even though the false representations were innocently made.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 54-60; Dec. Dig. § 37.]

3. FRAUD § 27—FALSE REPRESENTATIONS—ACTION FOR DECEIT.

Statements by a vendor, that he has been offered a certain sum for the property on sale, or that a third party has been offered a certain sum for the same kind of property in the same location, is a statement of a material fact affecting the value, and, if false, may form the basis of an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. § 8; Dec. Dig. § 27.]

Commissioners' Opinion, Division No. 4. Error from District Court, Pottawatomie County; Charles B. Wilson, Jr., Judge.

Action by W. C. Chisum against Ellen Huggins and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Paul F. Cooper, of Shawnee, for plaintiff in error. B. B. Blakeney and J. H. Maxey, Jr., both of Muskogee, for defendants in error.

ROBERTS, C. This action was commenced in the district court of Pottawatomie county on the 10th day of July, 1911, by W. C. Chisum against Ellen Huggins and T. W. Smith, to recover judgment upon a promissory note signed by said parties, and for foreclosure of mortgage on certain real estate in the city of Shawnee, executed by the defendant Huggins. The defendant Smith was surety on the note. The petition is the usual pleading for such proceeding. The parties herein will be designated "plaintiff" and "defendants," the same as below.

The defendants answered by general denial of all allegations of the petition not specifically admitted in their answer or cross-petition. They admit the execution and delivery of the note and mortgage sued on, but allege that defendant Huggins was principal, and defendant Smith was surety on said note, which fact was at all times known to plaintiff. They also allege that said note was given in part payment for the purchase of the real estate included in the mortgage, and

that the plaintiff in person, and by his agents, Fay Chew and U. S. Hart, sold said real estate to the defendant Huggins for the consideration of \$550, on which the defendant at the time paid plaintiff the sum of \$250 in cash, and gave the note and mortgage involved for the sum of \$300; and defendants allege that they received no consideration for said note and mortgage, and that they are not indebted to plaintiff on account thereof, nor for any amount whatever, and that said contract for the sale and purchase of said property has been rescinded on the ground of fraud, misrepresentation, undue influence, and abuse of confidence on behalf of plaintiff and his agents above mentioned, in the following particulars: That at the time of the execution of the said note and mortgage, and at the time of the sale and transfer of said property, the plaintiff, in person, and through his agents, Fay Chew and U. S. Hart, stated to the defendant Huggins that immediately north, and within one mile, of this property, there was located at that time, and would within six months be built and maintained, a large packing plant; and that adjoining said packing plant lots had been laid out, and would be sold to and occupied by persons who would be employed in the building and operation of said plant; and that in connection with said packing plant there had been located, and would be maintained, stockyards, which would accommodate a large number of cattle, and other stock, and the building and operation of said plant and cattle yards would greatly enhance the value of the property in that portion of the city. Defendant further alleges that she had had no experience in dealing in real property, which fact she told plaintiff and his agents, and knew nothing about the probability of the increase in value of the property, and that she was unable from her own inexperience to ascertain the value thereof, and told the plaintiff and his agents that she desired them to state to her the true conditions in regard thereto; that she would rely upon their judgment in the matter, and asked them to tell her the truth, and the value of the property; and that plaintiff and his agents told the defendant Huggins that they knew she did not know the value of the property, and that they would tell her the true conditions in connection therewith, and that she could rely upon their statements in that behalf. And defendant states that reposing special trust and confidence in the integrity and ability of the plaintiff and his agents, and knowing nothing of the value of the property, she relied upon their representations and believed the same to be true, and that, relying upon their representations, she made a contract to purchase said property, and that she would not have made the contract under any other circumstances. Defendant further says that \$550 was more

than five times the actual value of the property, unless the packing plant and stockyards were built, and said contract was made upon the express understanding that said improvements would be made.

The plaintiff stated to defendant that he was the owner of other property adjoining this property, of the same size and location, and that he had been offered \$1,200 for the same, and had refused to sell it; that the property he intended to sell to the defendant was the only property he had left in that section of the city, and he would sell it to her only for the reason that she was a special friend, and wanted to give her a bargain; that the Development Company had, the day before, paid \$40,000 cash for the Chas. Kirst place, and had refused \$35,000 for 20 lots in the neighborhood of the property involved; that a wire and steel plant had been located in the immediate vicinity of this property, and an interurban railway had been located between Oklahoma City and Shawnee and would, within six months, be built and operated by said property; that, immediately across the street, H. T. Douglas had purchased property, and had agreed to build a handsome residence thereon within six months from that date; and defendant says that she believed such representations and relied thereon. Defendant further alleges that plaintiff, at the time of the purchase of said property, stated to her, as an inducement to purchase the same, that he could, and would, dispose of said property within 30 days for the sum of \$1,200; that defendant believed the plaintiff would comply with his promise, and relied thereon; that said representations were false and fraudulent, and made by plaintiff without the intention of performing the same, but for the purpose of cheating and defrauding the defendant, and with no intention to carry the same out. And defendant alleges, in substance, that each and all of said representations of plaintiff as to said property, and the value thereof, and all other facts, conditions, and circumstances of and concerning said property and its surroundings, were false, and known by plaintiff and his agents to be false, and were made to defendant for the express purpose of inducing her to purchase said property at a price greatly in excess of its actual value, and to thereby cheat and defraud her. Defendant further says that upon ascertaining that the said representations were false, and the true facts in relation thereto, she immediately offered to and did rescind the said contract, and offered to reconvey the property conveyed by the said plaintiff to her, and demanded that her note and mortgage be canceled; but plaintiff refused to accept the same, and defendant now offers to rescind the said contract, and tenders into court a deed conveying the said property to the plaintiff and the amount of money necessary for the recording of such conveyance,

and other expenses incident to the proper clearing of the title of said property, and asks that the said note and mortgage be canceled and ordered returned to her. Defendant alleges that, by reason of the said premises, the consideration for said note and mortgage has failed; that the said contract has been rescinded; and that she is entitled to have the same rescinded. Defendant prays that the plaintiff recover nothing, that the note and mortgage be canceled; the contract of sale rescinded, and defendant have judgment for costs.

For her cross-petition, defendant Huggins alleges: That relying upon the said representations aforesaid, and believing them to be true, and relying upon the said promises to resell the said property within 30 days from the date of sale for the sum of \$1,200, and believing that said promises were made in good faith, and intended to be performed, this defendant paid to the plaintiff the sum of \$250 on the 8th day of March, 1910. That said promises and representations were false, and made with the intention to defraud, cheat, and swindle this plaintiff, and known by the plaintiff to be false at the time; and that, immediately upon learning that the same were false, this defendant offered the plaintiff a deed to said property, and offered to reconvey the same to him, and demanded that said note and mortgage be canceled and a repayment to this defendant of the sum of \$250; and that the said defendant stated to the said plaintiff herein that she did thereby elect to rescind the said contract, and declare the same rescinded, and now tenders into court a deed reconveying said property and all expenses necessary to record the same and incident to the proper clearing of the title thereof. Defendant further alleges that by reason of the said promises she is entitled to a return of the sum of \$250 and interest thereon at the rate of 6 per cent. per annum from the 8th day of March, 1910. And defendant prays judgment against plaintiff for the sum of \$250, with interest, and for costs in this behalf expended.

A demurrer to defendant's answer and cross-petition was overruled, and plaintiff excepted.

Plaintiff replied as follows: (1) A general denial. (2) Denied the allegations of fraud or false representations, or that plaintiff had any knowledge of such statements. (3) Denied a rescission. (4) Alleging that defendant examined the property; that no fiduciary relation existed between the parties; that the projected improvements were as open to defendants' investigation as to plaintiff.

The case was tried to a jury, and verdict returned for defendant for \$250, upon which judgment was rendered, with a decree canceling the mortgage. Plaintiff brings error.

Two questions are here presented for consideration: (a) Are the facts alleged in the answer and cross-petition sufficient to entitle the defendant to the relief prayed for there-

in? (b) Does the evidence establish such a state of facts as entitle the defendant to the relief sought?

We confess that our first impression was that neither the allegations, nor the proof, were sufficient to sustain the judgment, and, if we were to rely upon the earlier authorities, we would still be forced to that conclusion; but it seems that the later decisions are not as liberal or lenient as they formerly were with the trader, in his "dealer's talk," "offhand matters of opinion," "representations as to values," and false statements as to "prices which have been offered or paid" for the property on sale or trade, and the rule of caveat emptor is no longer a cloak beneath which the intentional falsifier may retire to protect himself from the effects of his false and fraudulent transactions. This is probably due to the great increase in the number of cheats and frauds of the "blue sky" operators of these days.

For the purpose of considering the point now in hand, we have heretofore given the substance of the answer and cross-petition, and, in line with that, we quote a part of the testimony in support of these allegations:

Mrs. Huggins, speaking of the lots, testified as follows:

"A. Well, I told him as we came back, I said, 'Mr. Chew, if you don't know for certain that packing plant is to be built,' I says, 'I haven't got the money to pay just to hold them.' I told him, 'I haven't got the money to make the second payment.' He said, 'You needn't worry about that, I guarantee I will sell them inside of 30 days for \$1,200.' Q. What did he say, if anything? A. He said the packing plant would be built, he knew it would be. Q. Now, Mrs. Huggins, state to the jury whether or not Mr. Chew pointed out to you where the packing plant was to be built? A. Yes, sir; he pointed out it would be three-quarters of a mile, or probably further, and we asked him where it was to be, and he said, 'Over on the hill there, about a mile and half or two miles from town,' and he said it was to be built over there on the hill."

* * * A. Well, I asked him if he knew for certain the plant, the packing plant, was to be built, and he said he did, and I said if he didn't know for certain I didn't want to buy, I didn't have the money to make any second payment, and he said he certainly knew what he was talking about, it would be built. I relied on him and supposed he represented an honest firm. Q. Mrs. Huggins, what did you tell him, if anything, in regard to your relying upon his representations and taking his statement as true? A. I told him I would depend on what he said to be true. I wouldn't buy on that consideration unless I understood he knew what he was talking about, and that was the only reason I was buying, it was on the strength of his saying the plant would be built. Q. Now, did you repose confidence in these statements that he made to you? A. Yes, sir. Q. Would you have bought this property if he hadn't made these statements to you? A. No, sir. Q. After he made these statements, did you make any further inquiry? A. No, sir; I did not. Q. Why didn't you? A. I thought he had told me the truth, and I didn't think it necessary. I said I took what he said to be true, and if I took the lots it would be on the strength of what he told me—the plant would be built. Q. You say after he told you that you didn't make any further inquiries? A. No, I didn't make any further inquiries. Q. Why didn't you make any further inquiries?

A. I thought he knew. Q. Well, did you rely upon him? A. Yes, sir. * * * Q. And believed them to be true? A. Yes, sir. Q. And would you have made the deal or contract if he hadn't have made these representations he made to you? A. I would not. Q. Did you repose special confidence and trust in his statements? A. Yes, sir. Q. I believe you stated at the time you had no knowledge of the value of the property. A. No, sir. Q. Had you ever bought property of that nature before? A. No, sir. Q. And had no experience in dealing with real estate at all? A. No, sir."

She also testified that the plaintiff's agent represented to her that a wire and steel mill would be located in that neighborhood, and that Mr. Kirst had been paid \$40,000 for his property, and also as to other improvements which is alleged in the petition. It appears that she did not want to take the property, and called up Mr. Chew and told him so, but that he told her she had already taken it, and that she could not back out. She testified as to this as follows:

"A. I told him I would 'phone to him the next day whether I would take them or not. I said, while he told me the plant was to be built, I didn't know whether I would have money to make the first payment, I would 'phone to him and let him know the next day whether I would take them or not, and the next morning about 10 o'clock I told him I wouldn't take the lots, and he said, 'It is too late, Mrs. Huggins, the papers are made out,' and I said, 'I don't want to take them at all,' and he said, 'It is too late, I have already made the papers out,' and a little later they came up, and I said, 'Why did you come, I told you I wouldn't take them?' Q. What did they have, if anything? A. They had the papers with them, the contract, deed, and notes to be signed. Q. Did they have that note that is offered in evidence here? A. Yes, sir. Q. And did they have this mortgage that is offered in evidence? A. Yes, sir. Q. I will ask you to state to the court and jury whether or not the note and mortgage was made out? A. It was. * * * Q. Did you know the firm of Lambard & Hart? A. Yes, sir. Q. How long had you known them? A. Really, I don't know how long I had known them, about a year. I had known of them ever since they had been there, but I don't know how long. Q. How long had you known of them? A. Probably a year. I heard of them ever since they had been in town. Their reputations were good, so far as I knew of. I supposed they were honest men and would tell what was true."

Miss Huggins, a witness on the part of defendant, testified:

"A. He told her the packing plant, a very large packing plant, would be built in that neighborhood. Q. Did he point out where the packing plant would be built? A. Yes, sir. Q. What did Mr. Chew say to your mother in your presence about the packing plant? A. She told him—she asked him if he knew positively that the packing plant would be built. She knew in his business he would know the truth about it, and she wanted to know the truth about it. Q. What did he say? A. He told her it would positively be built; he knew and understood all the things and knew it would be built. Q. What was said, if anything, in regard to the arrangements, or what he knew of the arrangements, that had been made with the Development Company? A. He said he knew all the papers had been signed up and everything would be carried out, and it would be built within six months. Q. Now, do you remember any further discussion about the packing plant there than you have detailed? A. She told him that—well,

she wanted to know the truth about it, that she placed all of her confidence in him for the truth of the matter. Q. Well, give the language in regard to the packing plant as near as you remember it. A. She asked him—I can't give the language. He told her it would be built within six months; he knew it to be a positive fact; all the papers had been signed up with the Development Company and it would be built. She told him all her confidence was placed in him. * * * He told her a steel and wire factory would be built in that neighborhood. Q. Did he say whereabouts? A. He didn't tell the exact location, but from his conversation we supposed it would be built out there. Q. In the neighborhood of the lots? A. In the neighborhood of the lots and packing plant. Q. Was there any other statements made about improvements or purchases that had been made, if you remember? A. He told of several lots that had been bought and residences to be built, one of H. T. Douglas' residence to be in the neighborhood. Q. Where was H. T. Douglas' residence? A. Just across the street. Q. In the immediate neighborhood of the property? A. Yes, sir; just across the street. Q. Did he say anything about any sales having been made? A. He said the Kirst place had been sold, the Development Company had bought that for \$45,000, and lots were being sold all around. Q. Where was the Kirst place? A. It was to the east, nearer town. Q. Now, Miss Huggins, you remember anything about any statements made there about the Development Company having bought property in that neighborhood? A. Yes, sir; the Development Company bought the Kirst place. Q. Any other property? A. They bought up several lots and paid \$35,000. Q. You say they paid \$35,000. You know where those lots were? A. It was about a block west and several blocks down south. Q. From where your mother was about to buy? A. From where we bought. Q. Now, what did your mother say after Mr. Chew made those statements to her about what she wanted to do about the property? A. Well, it was getting late, and we asked to be taken home, and on the road home she told him she would let him know in the morning; she didn't know at the time whether they would take them or not, and would let him know in the morning whether she would take them or not. Q. You know what experience your mother had had in buying or selling real estate? A. She had none whatever. Q. You lived at home with your mother up to that time, had you? A. Yes, sir. Q. All of your life? A. Yes, sir. Q. How old were you, Miss Huggins, at that time? A. About 19. I was 19. Q. You was about 19 years old? A. Yes, sir. Q. And you say your mother at that time had not had any experience in dealing in real estate? A. No, sir. Q. Now, you know whether she so stated to Mr. Chew? A. She told him she had had no business affairs at all and she depended on him altogether. Q. At that time did you know what business Mr. Chew was engaged in, or what he had been engaged in? A. Yes, sir; I knew he was with Lambard & Hart in the real estate business."

Charles Kirst also testified that the Development Company had not paid him \$40,000 for his property; that they offered to buy his place for \$36,000 on long-time payments, and he would not accept it, and no bona fide sale had ever been made. He also testified that none of these improvements had been made. A wire and steel plant had been built in the other side of the city, about a mile and a half from this property, and on the other side of the business district of the city; but none of the improvements talked of had been made.

W. F. Huggins testified that he had given

to Mr. Chisum, plaintiff in the case, an offer to rescind his contract, and that Chisum refused, and that he did not tender him formally a deed for the reason that he thought it would be useless, inasmuch as Mr. Chisum had told him that he would not accept it.

"Q. At that time you told him you would deed it back to him? A. Yes, sir. Q. And he told you he didn't—wouldn't accept it? A. Yes, sir. Q. And after he told you he wouldn't accept it, you didn't think it was necessary to make out a formal deed? A. No, sir."

J. H. Maxey testified that the lots were, at the time, of the reasonable value of \$2 a foot, or the entire tract purchased would be of the value of \$100.

W. C. Chisum, the plaintiff, testified that he sold this property to Mrs. Huggins for \$11 a foot.

"Q. Now, how much per foot did you get for the property you sold to Mrs. Huggins? A. Eleven dollars."

Mr. Chew, the agent of defendant, testified:

"Q. What representation did she make to you with reference to her reposing special confidence in you, with reference to your advice to her as to purchasing this property? A. Mrs. Huggins, to the best of my recollection, made some remark to Mr. Lambard and myself as to the confidence she had in us as real estate men generally, and said she was depending upon us to sell the property for a profit; that she was not buying it to hold, but to sell. * * * In my opinion, the packing house and other developments were discussed, and I am of the opinion that Mrs. Huggins was told that the property was worth the money whether the packing plant was built or not. Q. Who told her so? A. I probably stated it myself. Q. You told her this while you were acting as agent for Lambard & Hart and while you were trying to make a sale of this property? A. Yes, sir. Q. Your main object was to sell real estate to whomever you could and get your pay for it for whatever price you could get? A. That was my business at the time."

The plaintiff, Chisum, testified that he listed his property with Lambard & Hart for sale, and that they represented him in making the sale; that he personally took no part in the matter and knew nothing about it, but that he accepted the proceeds of the sale.

At the close of the defendant's testimony, she tendered to the plaintiff a deed reconveying the property to him, and also return of the abstract delivered by the plaintiff to the defendant, and offered to pay all expenses of recording said papers and bringing such abstract down to date, and to pay all other expenses that the court might find it necessary to put the parties in status quo, and deposited said deed and abstract with the court to carry out the tender made in the defendant's answer and cross-petition.

The plaintiff testified, in substance, that the agents making the sale represented him, but he personally took no part in the transaction, except to make the conveyance and accept the proceeds of the sale. At the close of the testimony, the defendants tendered to plaintiff a deed to the lots, and also a return of the abstract, with charges for recording the deed and completing abstract to date,

which deed and abstract were deposited with the clerk of the court; and tendered all other things necessary to do complete equity between the parties.

The question of the truth or falsity of the statements and representations of the agent in making the sale was passed upon by the jury by their verdict against the plaintiff. The verdict was approved and adopted by the trial court, and, upon a careful consideration of the entire record, we fully approve the findings of facts in that particular.

The more serious question is: Are these facts sufficient in law to sustain the judgment? Plaintiff in error relies upon the oft-quoted and many-times perverted proposition that "trade talk," "false statements as to value," "prices offered and rejected," "general glowing and roseate environments," prospects of improvements, increase in values, and all such matters so common with, and useful to the "blue sky shark," to be fraudulent in law, must relate to a present or past state of facts, and that relief cannot be obtained by the victim for a failure of such false representations and promises to materialize, and especially for failure of third parties to make improvements which the vendor, as an inducement to the sale, said would be made; and also that, in matters of opinion, if the vendor makes representations as of his personal knowledge, if he in fact believes them to be true, and they are not made with the intention to deceive, it does not amount to a fraud, although the statements in fact were false. The trouble with plaintiff's contention in this behalf is that his premises stated do not quite come up to the facts relied on herein by the defendants. In this cause the plaintiff testified, speaking of the lots, that the agent said: "You needn't worry about it. I guarantee I will sell them inside of 30 days for \$1,200," and "He said the packing plant will be built; I know it will be." She also testified:

"Well, I asked him if he knew for certain the plant, the packing plant, was to be built, and he said he did, and I said if he didn't know for certain I didn't want to buy, I didn't have the money to make any second payment, and he said he certainly knew what he was talking about, it would be built. I relied on him and supposed he represented an honest firm. * * * I told him I would depend on what he said to be true. I wouldn't buy on that consideration unless I understood he knew what he was talking about. That was the only reason I was buying. It was on the strength of his saying the plant would be built. * * * I said I took what he said to be true, and if I took the lots it would be on the strength of what he told me—the plant would be built."

Miss Huggins testified, speaking of the same matters:

"Q. What did Mr. Chew say to your mother in your presence about the packing plant? A. She told him—she asked him if he knew positively that the packing plant would be built. She knew in his business he would know the truth about it, and she wanted to know the truth about it. He said he knew all the papers had been signed up and everything would be carried out, and it would be built within six months. She told him that—well, she wanted to know the

truth about it, that she placed all of her confidence in him for the truth of the matter."

The testimony shows that the same positive statements of fact, and assurance of personal knowledge, were made by the agent in reference to the value, and sale and purchase, of other property in the neighborhood of these lots, at exorbitant prices; all of which were false, and either known by the agent to be false, or else made with absolute indifference as to whether they were false or not. Nor were they statements of a future speculative nature. They were positive statements of material existent facts.

[1-3] In the case of Prescott et al. v. Brown, 30 Okl. 428-432, 120 Pac. 991, 992, the same questions were involved, and a long line of authorities collated by Judge Robertson, and in which he rendered a well-considered and able opinion, which, to our mind, fully sustains the contentions of defendant herein, as follows:

"As will be seen, the objections challenge the sufficiency of defendant's amended answer, all raising the same question, and we will consider them together. The part of the amended answer which plaintiffs in error contend does not state any defense is found in the third paragraph of second defense, and relates to representations, statements, and matters of opinion of Thorpe and White, and, as arranged by counsel for plaintiffs in error, may be stated as follows: First, 'matter of opinion'; second, 'dealer's talk'; third, 'representation as to value'; fourth, 'statements of price which he has given or been offered for it.'

"Counsel for plaintiffs in error contend, and want this court to uphold them in this contention, that the allegations of the defendant's amended answer, all of which for the purpose of the demurrer and other motions are taken as true, are simply expressions of opinion, dealers' talk, representations as to value, etc., which, even though they be false and were known to be false by Thorpe and White when made, and were made for the sole and express purpose of selling the patent right, and made to deceive, and did deceive, the defendant, yet should be assumed by the court to be made always by persons holding property for sale, and that any purchaser who confides in such statements should be considered by the court too careless of his own interests to be entitled to any relief, and that therefore said amended answer is insufficient in law, and that the court below erred in refusing plaintiffs in error the relief sought by the demurrer, etc. Such doctrine may be the law in some states, and possibly obtains to some degree in this state; but the trend of modern decisions is that where a contract is induced by false representations as to material existent facts, which are made with the intent to deceive, and upon which plaintiff relied, and was thereby deceived, it is no defense to an action for rescission, or for damages arising out of deceit, or to avoid a contract, that the party to whom the representations were made might with diligence have discovered their falsity, and that he made no searching inquiry into facts.

"In 20 Cyc. 53, it is said: 'General assertions or expressions of a vendor in commendation of his land or wares—commonly called "dealer's talk"—are generally held to fall within the rule under discussion, and thus to constitute no grounds for an action of deceit. Statements merely descriptive of the operation and utility of an invention or patented article are generally regarded as mere expressions of opinion, or "dealer's talk," upon which a purchaser cannot safely rely; and even a misrepresentation that experiments have been made with the in-

vention and have proved successful has been held to be merely an expression of opinion and so not actionable, although put in the form of a statement of a past fact.' But, as is suggested by counsel for the defendant, the balance of that text reads as follows: 'But the decisions in cases of this character are not wholly consistent, and representations very similar to those just indicated have been held to be sufficient to ground an action for deceit as false statements of fact.' * * *

"In *Pierce v. Wilson*, 34 Ala. 596, it is said: 'But a gross misrepresentation of the capacity of a machine and the success in selling and operating it, of which the purchaser was ignorant, has been held sufficient to warrant the rescission of the contract induced thereby.'

"On page 32 of 20 Cyc., we find the following: 'It is difficult to draw a line beyond which human credulity cannot go, especially in speculations in mining stocks. If the representations were so extravagant that sensible, cautious people would not have believed them, that is a proper consideration for the jury in determining whether the plaintiff believed and relied upon them; but it does not preclude a finding that the plaintiff did so, or relieve the defendant from liability for his fraud, if he committed fraud. It is as much an actionable fraud willfully to deceive a credulous person with an improbable falsehood as it is to deceive a cautious and sagacious person with a plausible one. The law draws no line between the two falsehoods. It only asks, in either case, was the lie spoken with intent to deceive and defraud, and was the false statement believed, and money paid on the faith that it was true? These questions are for the jury.'

"The statement as made by Thorpe and White that Ferguson, a man well known to the defendant and in whose business ability she had great confidence, was in Kansas City at that time organizing a corporation for the purchase of all the territory in the United States for \$35,000 or \$40,000, was certainly a statement of a material existent fact, and not an expression of an opinion or representation as to value. 'Statements by a vendor that a third person has offered him a certain sum for the property is a statement of a material fact affecting the value and may form the basis for an action of deceit.' 20 Cyc. 59. 'In cases where positive fraudulent misrepresentations have been made by the vendor, the modern cases show a strong tendency either to relax the doctrine of caveat emptor, or to refuse to extend it further than it has been carried by previous decisions, even with respect to "dealer's talk"; the courts taking the view that a vendor, guilty of a falsehood made with intent to deceive, should not be heard to say that the purchaser ought not to have believed him.' 20 Cyc. 62, and the long line of authorities there cited. 'A contract obtained by the fraudulent representations or conduct of one of the parties thereto cannot be enforced if it satisfactorily appears that the party seeking a rescission has been misled in regard to a material matter by such representation or conduct to his injury.' *Coolidge v. Goddard*, 77 Me. 578, 1 Atl. 831; *Schneider v. Foote* (C. C.) 27 Fed. 581; *Sealey v. Reed* (C. C.) 25 Fed. 361; *Mills v. Collins*, 67 Iowa, 164, 25 N. W. 109. 'Where a person positively makes false representations as an inducement for another to contract with him, and such person, relying wholly upon such false representations, enters into a written contract, the contract is voidable for fraud, although the false representations were innocently made.' 28 Kan. 517, *Wickham v. Grant*. * * *

"In *Bigelow on Frauds*, p. 524, is found the following: 'If the representations were of a character to induce action, and did induce it, that is enough. It matters not, it has well been declared, that a person misled may be said, in some loose sense, to have been negligent (in reality, negligence is beside the case where the

misrepresentation was calculated to mislead, and did mislead); for it is not just that a man who has deceived another should be permitted to say to him, "You ought not to have believed or trusted me," or, "You were yourself guilty of negligence." This indeed appears to be true even of cases in which the injured party had in fact made a partial examination.' And in *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 441, it is said: 'The rule of caveat emptor is not founded on a high standard of morals, but it is no longer a shield and protection to the deliberate frauds and cheats of sharpers.'

"These authorities amply sustain the rule contended for by defendant in error that where a party was induced to make and enter into a contract by the false and fraudulent representations of material existent facts, which were made for the purpose of deceiving the party, the contract may be avoided, and this doctrine has also been enunciated by decisions of our own Supreme Court, especially in the case of *Gilpin v. Netograph Machine Co.* et al., 25 Okl. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477. * * *

"*Bigelow on Frauds*, vol. 1, page 523, lays down the rule as follows: 'Recent authority has, however, gone far towards settling the matter right in principle. The proposition has now become widely accepted, at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge was specially open to him, although he had legal notice of the real state of things. It may be improbable that a man with the truth in reach should accept a representation made in regard to it, but the improbability can be no more than a matter of fact.'

"In *Fargo Gas & Coke Co. v. Fargo Gas & Elect. Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593, a well-considered case involving a discussion of this identical question, the court in closing said: 'The unmistakable drift is toward the just doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim. The general rule is, and upon principle must be, that the question is one of reliance by the buyer upon the false statement of the seller. Whether it was wise for him to rely upon it, whether he was prudent in so doing, whether he is not chargeable with negligence in a certain sense in not investigating these inquiries, are in general immaterial, provided the purchaser has in fact been deceived. The circumstances under which fraud is accomplished are so varied, the nature of the property and the character of the misrepresentations so widely different, in different cases, that it is unwise to attempt to enunciate with precision a general rule by which all cases shall be governed.'

These authorities, supra, seem peculiarly applicable to the facts disclosed here, and as settled by the verdict of the jury, the effect of which is that the representations of the agents of plaintiff, as to the future prospects, present conditions, actual value, and general environments of the lots, were false, and known by them, at the time, to be false, and made for the express purpose of inducing the defendant to purchase the property at a price far in excess of its actual value, and with the intention to cheat and defraud her.

Several other questions are presented and argued in the briefs of counsel; but, as we view the case, a discussion of other matters is unnecessary. We will say, however, that we have considered the entire record, and are of opinion that no error, prejudicial to the rights of the plaintiff, was committed by

the trial court. The evidence reasonably tends to support the verdict of the jury, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 118)

METROPOLITAN LIFE INS. CO. v. DUNN.
(No. 6555.)

(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773—FAILURE TO FILE BRIEF—REVERSAL.

Where defendant in error has not filed a brief, or offered an excuse for such failure, and the brief of plaintiff in error appears to reasonably sustain the assignments of error, this court will not search the record for grounds upon which to sustain the judgment rendered, but will reverse the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3104, 3108-3110; Dec. Dig. \S 773.]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Junius A. Dunn against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

William J. Tully, of New York City, and B. B. Blakeney and J. H. Maxey, Jr., both of Muskogee, for plaintiff in error.

COLLIER, C. This action was brought by defendant in error against plaintiff in error on a policy of life insurance upon the life of the wife of defendant in error, in which said policy defendant in error was named as the beneficiary. Hereinafter the parties will be referred to as they were in the trial court. The execution of said policy, payment of premium thereon, the death, and proper proof of death of insured, were admitted. Defendant filed an answer, predicated its defense upon an alleged breach of warranties contained in the application made by insured for, and also embraced in, said policy, and offered evidence tending to support its contention. By agreement, the case was tried to the court, and resulted in a judgment in favor of plaintiff in the sum of \$87.50, to which defendant duly excepted. Defendant, within the statutory time, filed a motion for new trial, which was overruled and exceptions saved. To reverse said judgment this appeal is prosecuted.

Defendant has completed its record and filed same in this court, and has filed and served a brief in compliance with the rules of this court. Plaintiff has neither filed his brief, nor offered any excuse for such failure.

We have examined the brief of defendant, and find that it appears to reasonably sustain some of the errors assigned. Under such a condition, we are not called upon to search the record to find some theory up-

on which the judgment rendered may be sustained, and we decline to do so. Taylor v. J. H. Wade & Co., 144 Pac. 559; Bryan v. State, 146 Pac. 32; Durant Nat. Bank v. Cummins, 148 Pac. 1022; Midland Val. Ry. Co. v. Horton, 149 Pac. 131; Lytle v. Roberts, 151 Pac. 191; Butler v. McSpadden, 25 Okl. 465, 107 Pac. 170; M., K. & T. Ry. Co. v. Long, 27 Okl. 456, 112 Pac. 991.

This cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

(55 Okl. 468)

PARKER GORDON CIGAR CO. v. FIRST NAT. BANK OF CLAREMORE.

(No. 6209.)

(Supreme Court of Oklahoma. Jan. 18, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. CONTRACTS \S 129 — VALIDITY — PUBLIC POLICY—ASSIGNMENT FOR BENEFIT OF CREDITORS.

A contract entered into between a national bank and an insolvent merchant, who has made a general assignment for the benefit of all of his creditors—the bank being the largest creditor—that the bank would take over the stock of merchandise and pay all creditors' claims on condition that the merchant would induce the district court to accept the resignation of the assignee, who had qualified, and appoint a person to be named by the bank, is not void as against public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 616-632; Dec. Dig. \S 129.]

2. BANKS AND BANKING \S 280—CONTRACT—LIABILITY OF BANK.

A petition by a creditor alleging the making of such contract, and that the resignation of the one assignee had been accepted, and the other had been appointed, and that the bank had taken the stock of merchandise, and upon demand had refused to pay the claim of the plaintiff, setting out the amount due and owing, states a good cause of action against the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 1072-1074; Dec. Dig. \S 280.]

Commissioners' Opinion, Division No. 2. Error from District Court, Rogers County; T. L. Brown, Judge.

Action by the Parker Gordon Cigar Company against the First National Bank of Claremore. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

W. H. Bassmann, of Claremore, for plaintiff in error. J. I. Howard, of Oklahoma City, and C. B. Holtzendorff, of Claremore, for defendant in error.

GALBRAITH, C. Action was commenced in the trial court for balance due upon an account for goods, wares, and merchandise, sold and delivered. There was a demurrer to the petition which was sustained by the court, and, the defendant electing to stand upon its petition, judgment was rendered against the plaintiff for costs. From that

judgment an appeal has been prosecuted to this court.

[1, 2] There is only one assignment of error, namely, that the court erred in sustaining the demurrer to the plaintiff's petition. The petition, in substance, alleged that the plaintiff sold certain goods to the Davis Drug Company, at Claremore, and that there was a balance due upon this account of \$57.50, and that the same was reduced to judgment on January 14, 1913; that that judgment, together with costs in the sum of \$3, is still due and unpaid; that on the 16th day of January, 1913, the defendant in error, the First National Bank of Claremore, entered into a contract with the Davis Drug Company, whereby, for a good and sufficient consideration therein set out, it undertook and agreed to pay and discharge all of the obligations of said Davis Drug Company; that demand had been made upon the bank and payment had been refused. The contract under which the liability of the defendant in error is alleged reads as follows:

"Exhibit B.

"This contract and agreement made and entered into this 16th day of January, 1913, by and between the first National Bank of Claremore, party of the first part, and Guy M. Davis, party of the second part, both of Claremore, Rogers county, Oklahoma, witnesseth: That whereas the said party of the second part, Guy M. Davis, has heretofore been engaged in conducting a retail drug business in the city of Claremore, Rogers county, state of Oklahoma, the same being known as the Davis Drug Company; and whereas the said Guy M. Davis doing business as the said Davis Drug Company, as aforesaid, has made a voluntary assignment for the benefit of his creditors, naming one Ray Haynes assignee; and whereas the said party of the first part, the First National Bank of Claremore, is the largest creditor of the aforesaid Davis Drug Company; and whereas the said party of the first part is desirous of securing all the right, title and interest of the said Davis Drug Company: It is therefore agreed and understood by and between the parties hereto, in consideration of the sum of one dollar and other valuable considerations, as follows:

"First. That the party of the second part will procure the resignation of the above-named Ray Haynes, as assignee of the said Davis Drug Company, and procure the appointment of one R. A. Patton, as assignee of the said Davis Drug Company.

"Second. And that after having complied with the above and foregoing covenants, said party of the second part will relinquish any and all claim, right and interest in and to all the goods, wares and merchandise and accounts belonging to the said Davis Drug Company, except such interest as the said Guy M. Davis now has in certain slot machines located in certain parts of said county of Rogers, state of Oklahoma. And for the full and complete performance of the above and foregoing covenants, and in consideration thereof, the party of the first part agrees and binds itself to perform the following covenants:

"First. That the said party of the first part will satisfy all of the indebtedness now existing against the aforesaid Davis Drug Company and will secure and turn over to the party of the second part releases in full from all the creditors of the said Davis Drug Company, including the party of the first part.

"Second. That said party of the first part further contracts and agrees to protect and se-

cure the said party of the second part against any and all claims of the creditors of the said Davis Drug Company against the interest of the said Guy M. Davis in certain slot machines located in certain portions of Rogers county, state of Oklahoma, and guarantees that said property or interest will not be taken to satisfy any of the creditors of the said Davis Drug Company, but shall be preserved to the said Guy M. Davis as his individual property.

"Third. And the said party of the first part agrees to pay all of the expenses heretofore had in the matter of the assignment of the said Guy M. Davis, doing business as the Davis Drug Company, as aforesaid, including an attorney's fee of one hundred and fifty dollars due Kight & Wills for making said assignment, said one hundred and fifty dollars to be paid to the said Kight & Wills immediately upon the execution of this contract.

"Said party guarantees that the attached list is a full and complete list of all creditors having claims against the Davis Drug Company.

"Witness our hands this 16th day of January, 1913.

"The First National Bank, by C. F. Godbey,
Cashier,

"Party of the first part.

"Guy M. Davis,

"Party of the second part."

The demurrer to the petition sets out a number of grounds, but it was sustained by the trial court on the fourth ground, which reads as follows:

"That the defendant admitting the execution of said contract with the Davis Drug Company, then the defendant says that said contract with the Davis Drug Company was void as being against the policy of the law, and was not enforceable by the said Davis Drug Company or by Guy M. Davis doing business as the Davis Drug Company, and is therefore void and not enforceable against the defendant herein; the plaintiff not being a party to said contract."

The journal entry of the judgment reads, in part, as follows:

"The court being advised in the premises finds that said demurrer should be sustained, and finds that the contract attached to the plaintiff's bill of particulars as 'Exhibit B' is void as contrary to law and public policy, and cannot be enforced between said parties thereto; and the court further finds that said contract being void as contrary to public policy and cannot be enforced between said parties thereto; and that the court further finds that said contract being void as against public policy confers no rights on the plaintiff herein, and the court finds that said demurrer should be sustained, and it is so ordered."

It appears from the record that the Davis Drug Company was engaged in the retail business at the city of Claremore, and that it had made a general assignment for the benefit of all of its creditors early in January, 1913, and that R. Haynes had qualified as assignee, and that the First National Bank of Claremore was its largest creditor, and that the bank had entered into an agreement in writing with the Davis Drug Company to take over its stock and pay all of its debts, provided the bank could name the assignee. This condition, of course, necessitated the securing of the resignation of Mr. Haynes and the consent of the district court to the appointment of the person selected by the bank. After the execution of this written agreement, Mr. Haynes resigned as assignee, and a Mr. Patton, the person named by the

bank, was appointed and qualified, and the bank obtained the stock of goods of the Davis Drug Company. It appears, however, that when the plaintiff in error, a creditor of the Davis Drug Company, asked the bank to pay its claim, the bank refused, and denied liability, and when sued interposed the objection that its contract with the Davis Drug Company was against public policy and void, and that it therefore was not enforceable by the drug company or any of its creditors. This was the view taken by the trial court in sustaining the demurrer to the petition.

It is urged on behalf of the plaintiff in error that this was an erroneous view of the law; that there is nothing in the contract between the bank and the drug company that involved moral turpitude, or that provided for doing anything immoral or illegal, or in any way contravened public policy; that the subject of the contract was a proper and legitimate subject of contract, and that the bank had voluntarily entered into the contract and had taken its benefits and should not be relieved from its burdens; that the bank had agreed for a valuable consideration to pay the claim of the plaintiff in error, and it should not be relieved from this obligation.

On the other hand, it is argued by the defendant in error that under the statute the control of the assignee was placed entirely with the district court; that the assignee was appointed by the court and could not be removed without the consent of the court; and that the agreement set out bound the drug company to secure the resignation of the assignee and to induce the district judge to appoint another assignee; and that this carried with it an obligation to unduly influence the court in its official acts, and the contract or agreement was for that reason contrary to public policy and void.

It does not seem that the contract called for the exercise of any improper influence on the court in securing the resignation of one assignee and the appointment of another. There was no moral turpitude involved in the fact that the bank made its proposal conditional upon the appointment of an assignee to be named by it, although this condition contemplated a request to the judge of the district court to accept the resignation of the assignee who had qualified, and the appointment of a person to be nominated as his successor. The reasons why the bank made this condition do not appear. It may have been made for the reason that an officer of the bank, if appointed assignee, would administer the trust gratuitously and thus save to the estate the statutory fees allowed to assignees. Whatever the reason for the condition may have been, it appears that the judge recognized the propriety of the suggestion and acceded to the same and accepted the resignation of Mr. Haynes and appointed the person named by the bank as assignee. This action on the part of the court and the parties in interest was entirely consistent

with good faith and honesty and integrity of purpose of all parties concerned.

The line of authorities cited by the defendant in error to the effect that contracts made with a view of securing the appointment of some one to an office, or to exercise influence in securing legislation, or to influence judicial decisions, are void, have no application to the case at bar. All of that class of cases involve agreements in which moral turpitude appears, and in which improper influence is expected to be used. The case at bar is not that character of case.

A case very much in point, and applying the controlling rule, is that of *Baumhoff v. Oklahoma City Electric, Gas & Power Co.*, 14 Okl. 127, 77 Pac. 40. In that case Baumhoff entered into a contract with the Oklahoma City Electric, Gas & Power Company for the purchase of its property and franchise, provided that certain amendments to the franchise of the company, to be agreed upon, should be passed by the city council of Oklahoma City. The changes agreed upon were voted by the city council, but when the contract was sought to be enforced the same objection was made to that contract that is urged to the one in the case at bar, and the court answered the argument as follows:

"Can it be rightfully said that, because the validity of this contract depended upon legislative action, there was in it therefore an inducement to corrupt the city council by improper means, and it is therefore void? We think not. If such a rule could be applied in this instance, then improper motives could be charged to every application for a franchise right. The plaintiff has not here imposed upon the defendant a requirement to do anything of the kind. He has simply said, 'I will take your property at a given price if your franchises are amended in a manner to be agreed upon.' Such a contract of purchase and sale does not contain the elements which the courts have held to be illegitimate, because subversive of sound morals. To be so subversive requires something more than such an agreement."

And again the court said:

"This proposition of the defendants to sell their plant with franchises amended so as to satisfy the plaintiff as a purchaser, the amendments being a condition precedent to the plaintiff's liability in accepting the defendant's proposition, was a legitimate subject of contract and agreement, and does not, on the face of it, import corrupt or illegal action by either party."

So in the case at bar the agreement between the drug company and the bank that the bank would take over the stock of the drug company and pay all of its debts, provided the court would agree to accept the resignation of the assignee that had been named by it and appoint the assignee suggested by the bank, did not imply that anybody would attempt to corrupt the court in order to get its consent to the agreement, or that any improper influence would be necessary to be brought to bear upon the court to bring about the result the parties had agreed upon. The subject-matter of the contract was therefore legitimate, and the contract itself seems to have been entirely proper, and en-

tered into in good faith. The bank, having received the benefits of the contract, has shown no good reason why it should be relieved from its burdens. It agreed to pay the plaintiff in error's claim, and should do so. It was error for the trial court to sustain the demurrer. *Crowder State Bank v. Aetna Powder Co. et al.*, 41 Okl. 394, 138 Pac. 392.

We therefore recommend that the judgment appealed from be reversed, and the cause remanded, with directions to the trial court to overrule the demurrer, and for such further proceedings in said cause as the law may direct.

PER CURIAM. Adopted in whole.

(55 Okl. 109)

ENGLISH et al. v. LEVY. (No. 6456.)
(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐773—FAILURE TO FILE BRIEFS—DISMISSAL.

Dismissed under rule 7 (137 Pac. ix) for failure to prosecute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. ⇐773.]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Harry Levy against Paul A. English and another. Judgment for plaintiff, and defendants bring error. Dismissed.

PER CURIAM. Inasmuch as no briefs have been filed by the plaintiff in error, we recommend that the appeal be dismissed, under rule 7, for failure to prosecute.

PER CURIAM. Adopted in whole.

(55 Okl. 197)

BENNETT et al. v. ABBOTT. (No. 6142.)
(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐334—DEATH OF PARTY—DISMISSAL.

One of the plaintiffs in error died pending proceedings in error and before submission in this court. Nothing was done to revive the action, and the year (section 5294, Rev. Laws 1910) expired. The defendant in error, without consenting to a revivor, moved to dismiss. Held, that the action is barred by the statute, and the appeal is ordered dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1848, 1851-1863; Dec. Dig. ⇐334.]

Commissioners' Opinion, Division No. 4. Error from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by Charles P. Abbott against Florence Bennett and another. Judgment for plaintiff, and defendants bring error. Dismissed.

Porter Newman, of Durant, for plaintiffs in error. McPherren & Cochran, of Durant, for defendant in error.

MATHEWS, C. On January 5, 1916, the defendant in error filed a motion to dismiss this appeal, alleging therein that W. D. Coleman, one of the plaintiffs in error, died on December 14, 1914, that a joint judgment was rendered in the trial court against both of the plaintiffs in error, and that this action has not been revived in the name of the administrator of the estate of the said W. D. Coleman.

This appeal was perfected on March 12, 1914, and submitted December 13, 1915. There has been no effort made to revive the same. Following the rule laid down in *McKay v. Watson et al.*, 40 Okl. 353, 137 Pac. 1177, we recommend that the appeal be dismissed.

PER CURIAM. Adopted in whole.

(55 Okl. 34)

BARBER et al. v. BROWN et al. (No. 5492.)
(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

1. WILLS ⇐437—CONSTRUCTION—WHAT LAW GOVERNS.

A will must be construed by the laws as they exist at the time of the death of the testator, and not by the laws in force at the time of the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 951; Dec. Dig. ⇐437.]

2. WILLS ⇐25—INDIANS—ALLOTMENTS—VALIDITY OF DEVISE—OPERATION OF STATUTE.

An enrolled Chickasaw freedman executed a will on the 4th day of August, 1904, at which time she was without legal authority to convey her allotment by will, and she departed this life on the — day of September, 1906, at which time she had authority, under Act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876), to convey her allotment by will. After the death of such testatrix, said will was admitted to probate. Held, that such will was governed by the laws as they existed at the time of the death of said testatrix, and legally devised her property, including her allotment.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 53; Dec. Dig. ⇐25.]

3. WILLS ⇐23—CONSTRUCTION—WHAT LAW GOVERNS.

A statute, passed after the making of a will, but before the death of the testatrix, by which the law in force when the will was made is changed, will operate on the will; and to give such interpretation to the statute does not make it retrospective, since it affects no vested rights.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 51; Dec. Dig. ⇐23.]

Commissioners' Opinion, Division No. 1. Error from District Court, Garvin County.

Ejectment by Ben Brown and others against Joseph C. Barber and others. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

Blanton & Andrews, of Pauls Valley, for plaintiffs in error.

COLLIER, C. This is an action in ejectment, brought by the heirs at law of Minerva Stevenson, against plaintiffs in error, to recover certain lands described in the petition in said cause, which said lands were the allotment of Minerva Stevenson, a Chickasaw freedman. It is averred in the petition that plaintiffs in error claim title to said lands through a mesne conveyance from Henry Taylor, the devisee in a will executed by said Minerva Stevenson on the 4th day of August, 1904, who departed this life on the — day of September, 1906; which said will was, on the — day of July, 1907, duly probated. Plaintiffs in error demurred to the petition, and, by agreement of the parties, "all questions which might arise under the pleadings and the demurrer thereto, save the one question of whether said will was valid and sufficient to pass title to the allotment of deceased, are waived." The court held that said will was invalid and not sufficient to pass title to said land, and overruled said demurrer. From said holding of the court, this appeal is prosecuted upon a transcript.

[1-3] The only question in this case is whether or not said will vested in Henry Taylor, the devisee under the will, title to the land in controversy. At the time of the execution of the will, testatrix was without power to convey her allotment by will; but at the time of her death, under section 23 of an act of Congress approved April 26, 1906 (34 Stat. 137), she had authority to bequeath all her real estate and personal property, and interests therein. The will took effect at the death of the testatrix, and is governed by the law existing at the time of her death, and not by the law in force at the time of the execution of the will. Hence said will legally conveyed said land to the said Henry Taylor.

In the well-considered case of *Wilson v. Greer*, 151 Pac. 629, Commissioner Devereux held:

"A will is ambulatory during the life of its maker. It is, in effect, reiterated as his testament at each moment of his life after its execution, including the last moment, and is governed by the law existing at the time it takes effect, which is at the time of the testator's death."

It is further held in said case that:

"A statute passed after the making of a will, but before the death of the testator, by which the law in force when the will was made is changed, will operate on the will, and to give such interpretation to the statute does not make it retrospective, since it affects no vested rights."

In *Loveren v. Kamprey*, 22 N. H. 434, it was held that a new law, changing the operation of a will, is not retroactive, where the testator makes his will prior to the passage of the act, but dies thereafter. In that case, it is also said:

"A will does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction is to depend upon

the law as it then stands. A statute passed after the making of a will, but before the death of the testator, by which the common law is changed, will operate upon the will. To give the statute such an effect is not to make it retrospective in its operation, since it affects no rights vested before its passage."

We are therefore of the opinion that the court committed reversible error in holding that said will was invalid and overruling the demurrer interposed to the petition.

This case should be reversed and remanded, with instructions to sustain the demurrer.

PER CURIAM. Adopted in whole.

(55 Okl. 214)

HOLLISTER v. NATIONAL CASH REGISTER CO. (No. 6486.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1, 2. CORPORATIONS ~~§~~642 — COMMERCE — INTERSTATE COMMERCE — POWER TO REGULATE — FOREIGN CORPORATIONS — DUTIES.

1 and 2 the same as 1 and 2 in Fruit Dis. Co. v. Wood, 42 Okl. 79, 140 Pac. 1138.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. ~~§~~642.]

3. EVIDENCE ~~§~~441 — PAROL — WRITTEN CONTRACT — SALES.

A contract in writing supersedes all oral negotiations or stipulations prior thereto, and, if at the time of the sale a written order is given by the purchaser, duly signed by him, and later upon delivery of the article bought a note is given for the purchase price, oral testimony is incompetent to vary, change, or contradict the written order.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. ~~§~~441.]

Commissioners' Opinion, Division No. 2. Error from District Court, Jefferson County; Frank M. Bailey, Judge.

Action by the National Cash Register Company, a corporation, against S. L. Hollister. Judgment for plaintiff, and defendant brings error. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error. N. C. Peters, of Waurika, for defendant in error.

HOOKE, C. The plaintiff in error purchased from the defendant in error two cash registers for the agreed price of \$760, as evidenced by a written contract executed on the 19th day of September, 1912, which, among other things, provided that the consideration therefor was to be \$760, \$30 of which was paid in cash, and \$30 upon the arrival of the machines, which was subsequently paid, and \$700 in monthly installments, and that the registers were to be delivered f. o. b. at Dayton, Ohio. And the contract contains a further provision:

"It is expressly agreed that this order shall not be countermanded, that it covers all agreements between the parties hereto relative to this transaction, and that you shall not be bound by any representations or promises made by any

agent relative to this transaction which is not embodied herein."

This contract was sent to the defendant in error at its place of business in Dayton, Ohio, and accepted by them, and the registers shipped to the plaintiff in error to her place of business in Oklahoma. The order therefor was given to its travelling salesman who made the territory in which the city where the plaintiff in error resided was located. Upon the delivery of the machine, to wit, October 9, 1912, the plaintiff in error executed a promissory note whereby she obligated herself to pay to the company \$700 in monthly installments of \$30, as set forth in the note. She made default in the payment of the monthly installments, and the company declared the whole debt due as provided in the note executed by her. Suit was filed upon the note by the company, and the defense interposed was: (1) That the company was not entitled to maintain the suit for the reason that it was a foreign corporation, and was not authorized to transact business in the state of Oklahoma, and that it had not up to the time of the institution and trial of the suit filed in the office of the secretary of state a certified copy of its charter or articles of incorporation, and had failed and refused to appoint a citizen and resident of the state capital as its agent upon whom service of process might be made; (2) that the agent of the company made certain representations which were untrue and false as to the efficiency of the registers sold to do the work which the plaintiff in error desired them to do, and which the company represented that said registers would do. Upon the trial of the cause the plaintiff in error attempted to introduce certain evidence to which an objection was sustained by the court, the purport of which evidence was that the agent of the company taking the order for the machines had with him a sample machine and attempted to demonstrate to the defendant in error that said registers would be a complete check upon the various clerks, and would show the articles that they sold and the amount of the sales, and would show any shortage that might occur, and when the machines arrived the defendant gave them a fair trial, and they failed to do the work for which they were purchased, and for which the agent of the company knew at the time they were purchased, and thereupon she tendered back the machines to the company, and the company refused to accept them. The court sustained objections to this evidence for the reason that the written contract between the parties expressly provided that all the stipulations and agreements and representations made with reference to the registers in question were embraced in it, and that no agent of the company had authority to make any other representations or promises, other than those embodied in the contract, and for the additional reason

that the evidence disclosed that the plaintiff in error had received from the company two identical machines which she had bought. The case then rested, and the court instructed the jury to return a verdict in favor of the company and against the plaintiff in error for the amount due upon her note, to reverse which judgment this appeal is had to this court.

There are two questions presented: First. Under the law of this state, was the transaction on the part of the company such as would require it to comply with the Oklahoma statute requiring foreign corporations transacting business in this state to file with the secretary of state a certified copy of its articles of incorporation, and to designate an agent upon whom process might be served? Second. Did the court commit error when it directed a verdict for the company as stated above? We will now discuss the questions in the above order.

[1, 2] 1. Under the authority of this court in the case of *Dr. Koch Vegetable Tea Co. v. Shumann*, 42 Okl. 60, 139 Pac. 1133, and also of *Fruit Dis. Co. v. Wood*, 42 Okl. 79, 140 Pac. 1138, the acts of the company in the instant case did not constitute transaction of business in this state, and the judgment of the trial court must be held upon that proposition to be correct.

[3] 2. The evidence thus sought to be introduced by the plaintiff in error does not establish fraud or any fact or circumstance from which the jury would be authorized to find fraud. The agent of the company had a sample of the register with him, and demonstrated the same to plaintiff in error, and the order for the two machines was given by her, and she knew at the time she gave the order just what she was buying, and the company delivered to her the machines she bought. The contract which the plaintiff in error signed excluded the introduction of evidence as to any representations made by the agent of the company which were not embraced in the contract, and under the provisions of our statute (section 942, Rev. Laws 1910) the execution of a contract in writing supersedes all the original negotiations or stipulations concerning its matter which precedes or accompanies the execution of the instrument.

This court in a multitude of cases has uniformly held that in this character of cases parol evidence is incompetent to vary or alter the terms of a written contract, and more especially is this true when the contract itself contains stipulations as in the case at bar. The plaintiff in error would be denied recovery for implied warranty under the authority of *Stanford et al. v. National Drill & Mfg. Co.*, 28 Okl. 441, 114 Pac. 734, wherein this court, quoting from the case of *Davis Drill Co. v. Mallory*, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973, say:

"But no implied warranty that a machine, tool, or article is suitable to accomplish a par-

titular purpose or to do a specific work arises where the vendor orders of the manufacturer, or purchases of the dealer, a specific described or definite machine, tool, or article, although the vendor knows the purpose or work which the purchaser intends to accomplish with it, and assures him that it will effect it. Such an assurance is but the expression of an opinion, when it is followed by a written contract, complete in itself, which is silent upon the subject. The extent of the implied warranty in such case is that the machine, tool, or article shall correspond with the description or exemplar, and that it shall be suitable to perform the ordinary work which the described machine is made to do."

See authorities cited in the Stanford Case above.

We recommend that the judgment of the trial court be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 96)

SUMMERS et al. v. GATES. (No. 6352.)
(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE \S 161—JURISDICTION OF COUNTY COURT—APPEAL FROM JUSTICE COURT—WAIVER OF OBJECTIONS.

Where a judgment is rendered in the justice court, without jurisdiction of the person of the defendant, and the defendant appeals to the county court, where the cause is to be tried anew upon its merits, by this act he invokes the jurisdiction of the county court, and therefore cannot be heard to say that the county court has no jurisdiction over his person.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 592-599, 601, 602, 604; Dec. Dig. \S 161.]

2. ACTION \S 48—JOINDER—TORT—CONTRACT.

Causes of action in tort may be joined in separate counts in the same petition with causes of action in contract, when they all arise out of the same transaction or transactions, connected with the same subject of action, and affect all the parties to the action.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 450, 471, 490-510; Dec. Dig. \S 48.]

3. APPEAL AND ERROR \S 882—INVITED ERROR—RIGHT TO COMPLAIN—SUBMISSION OF ISSUES.

Where there are several causes of action pleaded, and there is no evidence to sustain one of them, but the defendant requests the court to submit this particular phase of the case to the jury, and the court does so, the defendant will not thereafter be heard to complain of this action of the court, for one cannot invite error and then complain of it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3591-3610; Dec. Dig. \S 882.]

4. APPEAL AND ERROR \S 1064 — HARMLESS ERROR—INSTRUCTIONS.

Where the petition pleads a tort, and the court instructs the jury that they must find that the act complained of was knowingly done before the plaintiff can recover, but calls this instruction one upon "implied warranty," held, that inasmuch as the instruction speaks for itself, and sounds purely in tort, the misnaming of it by the court is not such prejudicial error as will reverse the case, especially since it is not at all probable that the jury were misled by this fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219, 4221-4224; Dec. Dig. \S 1064.]

Commissioners' Opinion, Division No. 2. Error from County Court, Bryan County; J. L. Rappolee, Judge.

Action by W. W. Gates against Dave Summers and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Hatchett & Ferguson, of Durant, for plaintiffs in error. Hayes & McIntosh, of Durant, for defendant in error.

BRETT, C. This action was commenced in a justice court of Bryan county by W. W. Gates, the defendant in error, as plaintiff, against Dave Summers and J. A. Alderson, as defendants, to recover damages alleged to have been sustained by the plaintiff, by reason of the defendants having sold to plaintiff a certain hog, alleged to have been infected with cholera at the time of the sale. It is also alleged that this hog communicated the disease to two hogs the plaintiff owned at the time he purchased the hog from defendants, and that they, as well as the hog purchased, died from this disease. The plaintiff relies in his petition upon two separate causes of action, pleaded in separate counts. In the first count he pleads an express warranty, alleging that the defendants expressly warranted the hog purchased to be free from cholera. In the second count he pleads a tort, alleging that the hog was infected with cholera at the time he purchased it, and that the defendants knew this fact, and claims as damages the price paid for the hog purchased of the defendants, and the value of the two hogs he owned at the time of the purchase, and for the value of time and money expended in doctoring these hogs. Summons was issued out of the justice court, and served on defendant Summers in Bryan county, and on defendant Alderson in Grant county, the county of his residence. The service of Alderson was defective, in that he was not allowed the statutory time in which to answer. Neither of the defendants appeared in the justice court, and judgment was taken against them by default. Within the statutory time, the defendants perfected their appeal to the county court of Bryan county, by filing an appeal bond, which was approved by the justice of the peace, and the cause was duly certified to the county court. In that court the defendant Alderson made a special appearance, and objected to further proceedings against him on the ground that he was a resident of Grant county, and that his codefendant, Summers, in the sale of the hog only acted as his agent, and was in no way liable to the plaintiff by reason of the transaction; that the fact of his agency was known to the plaintiff; and that Summers was only made a party defendant in said action to give colorable jurisdiction to the court of the defendant Alderson. Upon motion of plaintiff, this special plea was stricken, to which the defendant Alder-

son excepted. The defendants moved the court to require the plaintiff to elect upon which cause of action he would rely, which was overruled, and exceptions saved. The cause then proceeded to trial to the court and a jury, which resulted in a joint judgment against the defendants in the sum of \$55, from which the defendants appeal to this court.

[1] 1. We will notice the assignment of error first which challenges the jurisdiction of the court. It is insisted that the joinder of the defendant Dave Summers in the action was a subterfuge, since he only acted as agent for Alderson in the sale of the hog; and that he was joined in the action solely for the purpose of placing venue of the action in Bryan county; and that therefore the court should have sustained Alderson's plea to the jurisdiction of the county court.

Under the record in this case, it is unnecessary for us to pass upon the motive, in the first instance, for joining these parties as parties defendant. It is evident, from the return of the summons in the justice court, that the justice had no jurisdiction of the person of Alderson; but it seems equally as well settled by this court that, when he perfected his appeal to the county court, that court, by his own act, obtained jurisdiction of his person. An appeal to the county court under our statute cannot be taken for the purpose of reviewing errors, but only for the purpose of trying the case anew upon its merits. And it seems to be the established policy of the law that where the object of an appeal is to try the cause anew, in the appellate court, upon its merits, and not to review errors, the taking of the appeal is equivalent to an appearance, and gives the appellate court jurisdiction over the person of the party appealing. In *Gulf Pipe Line Co. v. Vanderberg*, 28 Okl. 637, 115 Pac. 782, 34 L. R. A. (N. S.) 661, Ann. Cas. 1912D, 407, Justice Hayes, in a well-considered opinion, says:

"* * * Where on appeal a trial de novo is had, the rule supported by almost all the decided cases is stated in 2 Ency. of Plead. & Prac. p. 614, as follows: 'And where the object of an appeal is to try the case anew in the appellate court on its merits, and not to review errors, the taking of an appeal is equivalent to an appearance, and gives the appellate court jurisdiction over the person, whether the service of the process before the inferior court was sufficient for that purpose or not.'"

"*Deering & Co. v. Venna*, 7 N. D. 576, 75 N. W. 926, is in point. Until shortly prior to the appeal from the justice court in that case, there had existed in that state a statute authorizing two methods of appeal from judgments of justices of the peace courts, by one of which errors of law alone could be reviewed and by the other a trial de novo had. This statute, however, had been amended before the institution of the appeal in that action so as to provide that in all such appeals the cause should be tried anew in the district court in the same manner as actions commenced therein. In that case it was held that the defendant by the appeal invoked a trial anew upon the merits of the case, and by doing so necessarily submitted to the jurisdiction of

the appellate court over his person, and could not be heard to deny such jurisdiction on appeal. Referring to the criticism that this rule in effect denies the right of appeal to a defendant upon whom an invalid service has been made, the court said: 'The right of appeal is a statutory right, and, being such, it is competent for the Legislature, not only to regulate the manner of appeals, but, to deny the right for some purposes, and confer it for others. With the expediency of any such legislation the courts have nothing to do. A party is not, however, remediless in a case where no appeal is allowed. A judgment entered without jurisdiction may be attacked in various ways. The most usual mode is to resort to the writ of certiorari. This writ will be available in a case where no appeal is allowed, and where the law affords no other plain, speedy, and adequate remedy.'"

In the case at bar, the judgment in the justice court against Alderson was rendered without jurisdiction, and might have been set aside in an action for that purpose; but, when he appealed to the county court, he invoked the powers of that court to hear and try this cause anew, on its merits, and could not thereafter object to the jurisdiction of that court over his person. *Turk v. Mayberry*, 32 Okl. 66, 121 Pac. 665; *Farmers' National Bank of Vinita v. First National Bank of Pryor Creek*, 24 Okl. 140, 103 Pac. 685.

[2] 2. It is again insisted that the two causes of action were improperly joined.

While it is admitted that the rule laid down in *Aylesbury Mercantile Co. v. Fitch*, 22 Okl. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573, controls, which is that:

"Causes of action in tort may be joined in separate counts in the same petition with causes of action in contract, when they all arise out of the same transaction or transactions connected with the same subject of action, and affect all the parties to the action."

Yet it is insisted that:

"There are exceptions to this rule, and one is that the causes of action must affect alike the defendants to the action."

But this is the rule above announced by this court, and not an exception; and we fail to see why the case at bar does not come within the rule. The petition ascribes all the wrongs complained of alike to both of the defendants. They were charged as joint tort-feasors, and as being jointly liable for the breach of warranty; and the jury returned a general verdict against them jointly. And under this state of facts, we are unable to see why the case at bar does not come within the rule above announced by this court. *Melton v. Fulton*, 22 Okl. 636, 98 Pac. 911, 19 L. R. A. (N. S.) 960.

[3] 3. The defendants (plaintiffs in error) also complain because the court charged the jury that the plaintiff should recover, even in the absence of an express warranty, if the jury "found that the defendants sold the plaintiff a hog that was infected with cholera of which they had notice." This was error, they say, because there was no evidence that the defendants had notice of the fact that this hog was infected with cholera, and that issue therefore should not have been submit-

ted to the jury. We have examined the record, and have been unable to find any evidence that could justly impute notice of the condition of this hog to the defendants; but the defendants, by a requested instruction, asked the court to submit this specific phase of the case to the jury. While the court did not give the instruction offered, yet the one offered requested that this particular phase of the case be submitted to the jury. And inasmuch as the defendant invited the court's attention to this phase of the case, and requested an instruction upon it, we think they are not in a position to be heard to complain upon this ground. For one certainly cannot invite error, and then complain of it. *Carter v. State*, 6 Okl. Cr. 232, 118 Pac. 264; *Pressley v. Town of Sallisaw*, 154 Pac. 660, decided January 18, 1916, not yet officially reported.

[4] 4. The defendants further complain of this particular instruction, because the court by way of introduction told the jury that it was an instruction "on implied warranty." It is true the court misnamed it. But the instruction speaks for itself, and, instead of being an instruction on implied warranty, it sounds clearly in tort, and tells the jury, if the defendants sold the plaintiff a hog infected with cholera, and the "defendants knew at the time of selling and delivering" the hog to the plaintiff that it was infected with cholera, then they would be liable. And while it is true the court erroneously called this an instruction on "implied warranty," yet the instruction itself sounded purely in tort, and was in line with the one requested by the defendants. We cannot, therefore, say the defendants were so prejudiced by this misnomer as to entitle them to a reversal on that ground, especially since it is not at all probable that the jury were misled by the fact that the court gave it the wrong name.

Finding no prejudicial error, we recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 178)

CHICAGO, R. I. & P. RY. CO. v. BROWN.
(No. 5864.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1. TRIAL §143—ISSUES FOR JURY — CONFLICTING EVIDENCE.

Where there is evidence reasonably tending to sustain an issue on the part of plaintiff, and the evidence of defendant conflicts therewith, a determination thereof is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. §143.]

2. APPEAL AND ERROR §1002 — VERDICT — CONFLICTING EVIDENCE.

A verdict found upon evidence reasonably tending to support it, though in direct conflict

with all the other evidence in the case, will not be disturbed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3985-3987; Dec. Dig. §1002.]

3. NEW TRIAL §143—IMPEACHMENT OF VERDICT—TESTIMONY OF JUROR.

Upon grounds of public policy, jurors will not be heard by deposition, affidavit, or other sworn statement, to impeach their verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. §143.]

4. NEW TRIAL §145 — INCOMPETENCY OF JUROR—STATEMENTS BY JUROR—HEARSAY.

Statements made by a juror after the trial of a case to or in the presence of defendant's attorney, tending to show that such juror was an incompetent juror, cannot be shown by the testimony of such attorney.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 300, 301; Dec. Dig. §145.]

Commissioners' Opinion, Division No. 1. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by Minnie Brown against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. O. Blake, R. J. Roberts, and W. H. Moore, all of El Reno, J. G. Gamble, of Des Moines, Iowa, and George C. Crump, of Holdenville, for plaintiff in error. T. G. Cutlip, of Tecumseh, and W. N. Mabon, of Shawnee, for defendant in error.

COLLIER, C. This suit was begun by Minnie Brown, defendant in error, hereinafter called plaintiff, against the Chicago, Rock Island & Pacific Railway Company, plaintiff in error, hereinafter called defendant, in the district court of Seminole county, to recover the sum of \$15,000 damages alleged to have been sustained by her through the negligence of defendant while she was a passenger on one of its trains en route from Stewart, Okl., to Asher, Okl., on the 1st day of April, 1912.

On the trial of the case plaintiff testified substantially as follows: That she lived at Asher, Okl.; that she was married; that her husband was living; that she had two children; that she made a trip to visit her brother in March, 1912; that she stayed between two and three weeks; that she was pregnant at the time; that her general health was good; that the night before she started home she stayed with her brother, Walter Bryson; that they started from her brother's house about half past 3 o'clock in the morning; that her brother, W. B. Bryson, accompanied her; that she had no injury or accident on the road; that they reached Stewart about half an hour before the train left; that, when they reached Stewart, she went to the depot, and, when the train came, she got on the train; that her brother assisted her with the children and luggage; that she sat four or five feet, as nearly as she could remember, from the end of the

coach; that there were two seats turned, facing each other; that she was sitting on one of the seats, and her children in front on the other; that she was facing the direction the engine was going; that the train jerked, and there was a sudden jar that threw her out of the seat; that she hit something on the left side; that she did not know whether it was a pipe or not; that she tried to get back on the seat, but never did get back; that she had a miscarriage on the train a few minutes after she was hurt; that she did not get any medical attention until the train reached Shawnee, and that they forced her to a hospital, against her will; that she suffered terribly—almost death; that it lasted a long time, and she had not gotten over it yet; that her health is ruined now and forever; that after she left the hospital she took the train to Asher; that Dr. Reeder treated her at Asher; that she is under his treatment at this time; that she had no notice of the fact that the cars were going to be suddenly jerked; that she had never had a miscarriage previous to this one in her life; and that she was 25 years of age when this occurred.

Upon conclusion of the evidence of plaintiff defendant demurred thereto, which was overruled by the court and excepted to. Thereupon defendant introduced evidence of members of its train crew and several passengers which was in direct conflict with the evidence of plaintiff as to the sudden jerk or jar of the train, or that plaintiff had been thrown from her seat.

The case was tried to a jury, and resulted in a verdict for plaintiff for \$2,000, to which the defendant duly excepted. A timely motion was filed by defendant for a new trial, which was overruled and excepted to. In said motion, defendant, as ground for a new trial, alleged misconduct on the part of one of the jurors in the jury room; and, against the objection and exception of the plaintiff, the court admitted the testimony of two of the jurors in this case showing that one of the jurors who signed the verdict rendered had stated in the jury room, in the presence of the jury, that he would not believe any employé of the railroad in the case, and, as a basis for such statement, related his experience with the testimony of railroad employés in a case arising out of the death of his brother, in which said witnesses admitted to him (juror) that they had falsely sworn in order to hold their jobs.

Defendant on a hearing of said motion also introduced evidence tending to show that the said juror who made said statements in the jury room was examined on his voir dire before being accepted as a juror, and stated that he had no prejudice against the defendant; that he had had a brother killed by a railroad, but the matter had been settled. Against the objection and exception of plaintiff, evidence of one of the attorneys of defendant that said juror, after trial, stated to

him the substance of what the said two jurors testified had been said in the jury room by said juror, was admitted on a hearing of said motion for new trial.

The court overruled the motion for new trial, and judgment was entered upon the verdict, to which the defendant duly excepted. To reverse said judgment, this appeal is prosecuted.

[1, 2] There are but two errors assigned, which are as follows:

"(1) The court abused its discretion in refusing to grant a new trial on the ground that the verdict was against the weight of the evidence and was not supported by sufficient evidence; (2) the court erred in refusing a new trial on account of the misconduct of W. D. Berry, one of the members of the jury, by reason of which misconduct the defendant was prevented from having a fair trial."

On page 57 of defendant's brief it is said:

"The appeal in this case does not seek primarily to impeach the verdict, but raises the question whether the defendant, without fault on its part, was deprived of a trial before an impartial jury."

Consequently the second assignment of error is the only one insisted upon. If, however, we are mistaken as to the said first error assigned being waived, the same is nevertheless not well taken. While the evidence is in direct conflict, yet there is evidence upon which to predicate the verdict. In the case of Chicago, R. I. & Pac. Ry. Co. v. Cridder, 153 Pac. 63, decided November 16, 1915, but not yet officially reported, it is held:

"(1) Where in an action at law there is conflict in the evidence, and the verdict in favor of the plaintiff is approved by the trial court, this court cannot weigh the evidence and reverse the judgment because the evidence on which the verdict was founded was contradicted by other evidence at the trial.

"(2) This court has jurisdiction to review a judgment where the verdict on which it is founded is not reasonably supported by the evidence, but by this it is meant that, assuming the evidence to be true, it does not reasonably prove the fact, and not that, where the evidence is conflicting this court can weigh it, in an action at law."

[3, 4] We are of the opinion that the sole contention in this case is based upon the second assignment of error, based on the misconduct of W. D. Berry, who was a member of the jury.

In *St. Louis & S. F. R. Co. v. Brown*, 144 Pac. 1075, it is said:

"This court has held several times, without any apparent qualification, that affidavits or testimony of jurors will not be received for the purpose of impeaching their verdict. *Colcord v. Conger*, 10 Okl. 453, 62 Pac. 276; *Barnes v. Territory*, 19 Okl. 373, 91 Pac. 843; *Pitchlynn v. Cherry*, 32 Okl. 77, 121 Pac. 196; *Tulsa St. Ry. Co. v. Jacobson*, 40 Okl. 113, 136 Pac. 410; *Glockner v. Jacobs*, 40 Okl. 641, 140 Pac. 142."

In the case of *Spencer v. State*, 5 Okl. Cr. 7, 113 Pac. 224, it is said:

"Jurors cannot be heard to impeach their verdict unless expressly authorized to do so by statute, and then only in the manner provided by statute. When jurors are impaneled, they are sworn to decide the case submitted to them according to the law and the evidence. For a juror to make an affidavit that he has violated his oath and rendered a verdict upon any other

ground than the sworn evidence in a case places him in contempt of court."

In *Tulsa St. Ry. Co. v. Jacobson*, supra, Chief Justice Hayes quotes with approval from *Colcord v. Conger*, supra, the rule governing this question, as follows:

"Upon grounds of public policy jurors will not be heard by affidavit, deposition, or other sworn statement to impeach or explain their verdict, or show on what ground it was rendered, or that they made a mistake, or misunderstood the law or the result of their finding, or to show what items entered into the verdict or how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when same is attempted to be impeached." This doctrine is supported by the decided weight of authority (2 Thompson, Trials, 2618), and no good reason has been suggested to us why it should be overturned."

In the case of *Keith v. State*, 7 Okl. Cr. 156, 123 Pac. 172, *Furman, P. J.*, quotes with approval from *Spencer v. State*, supra, the following:

"If, after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, judgments based upon verdicts of juries would rest upon a very uncertain foundation. Litigants against whom verdicts have been rendered would be continually importuning jurors, and attempting to obtain from them affidavits upon which such verdicts could be assailed. This would result in perjury and bribery. There would be no end of litigation in cases tried before juries. Therefore, for the security of litigants, and to prevent fraud and perjury, as well as for the protection of the jurors themselves, courts will not allow jurors to impeach their own verdict, unless they are permitted to do so by the express provisions of the statute. We have no statute permitting this to be done."

In *Barker v. Livingston Co. Nat. Bank*, 30 Ill. App. 591, it is said:

"It is further objected that the court erred in not granting a new trial on the ground of the prejudice of the juror Bennett. This claim is based on a declaration alleged to have been made by Bennett after the verdict that he did not believe what Kent swore to on the trial, because he knew him too well. Conceding that the juror made this declaration (but which he denies), still it cannot be received to impeach his verdict. It is well settled that a juror cannot impeach his own verdict by declarations made after the trial which would show his disqualification as a juror, or to show misconduct on the trial. *Allison v. People*, 45 Ill. 37; *Nicolls v. Foster*, 89 Ill. 386. The affidavit was properly rejected by the court."

In *Allison v. People*, 45 Ill. 37, it is said:

"It is, however, urged that in this case there are affidavits of persons not jurymen in the case, and that they of themselves were sufficient to require the granting of a new trial. When examined, it seems that the facts sworn to in those affidavits were derived from the jurymen. We therefore perceive no difference in the effect whether the facts are sworn to by the jurymen or by persons learning them from the jurymen. To receive and act upon these affidavits would be to do indirectly what the law does not permit to be done directly. Such a course cannot be adopted. Whilst it may be true that the jury may have been guilty of misconduct, still it is not established by evidence upon which the court was authorized to act. This is the uniform current of authority, so far as we have been able to find, and no reason is perceived for holding differently."

In *Thompson and Merriam on Juries*, § 445, it is stated:

"If the courts refuse, on grounds of public policy, to listen to primary evidence of a fact, they will, of course, for stronger reasons, refuse to listen to secondary evidence of it. What the law will not allow to be proved by the oath of the person having the knowledge it obviously will not allow to be proved by the oath of another person deriving his information from the unsworn statements of the former person. It follows that the affidavits of counsel, or other persons, of the misconduct of the jury, upon information derived from particular jurors, will not be heard to impeach the verdict. If the same grounds of public policy did not intervene as in the case where the fact is sought to be proved by the oath of the juror himself, a consideration of the infirmity which attaches to hearsay testimony would operate to exclude it."

It is our opinion that the court erred in admitting the evidence of the two jurors who did not sign the verdict to impeach the verdict rendered, and that the court also erred in admitting evidence of the statements made by the juror Berry after the trial, in the presence of one of defendant's attorneys, by reason of the infirmity which attaches to hearsay testimony. But, as the court overruled the motion for new trial, such errors were harmless.

We are of the opinion that the court did not err in overruling the motion for a new trial.

Finding no prejudicial error in the record, this case should be affirmed.

(55 Okl. 227)

CHICAGO, R. I. & P. RY. CO. v. PALMER.
(No. 6709.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

NEGLIGENCE §1—DEFINITION.

"Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 1; Dec. Dig. § 1.

For other definitions, see *Words and Phrases*, First and Second Series, *Negligence*.]

Commissioners' Opinion, Division No. 3. Error from District Court, Carter County; A. Eddleman, Judge.

Action by A. L. Palmer against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. O. Blake, of El Reno, J. G. Gamble, of Des Moines, Iowa, K. W. Shartel, of Oklahoma City, and R. J. Roberts and W. H. Moore, both of El Reno, for plaintiff in error. Brown, Brown & Brown, of Ardmore, for defendant in error.

RITTENHOUSE, C. The principal question in this case is whether there is any evidence reasonably tending to show that the defendant was guilty of negligence towards the plaintiff. If there was a failure of proof as to primary negligence, then there was no

question to submit to the jury. *Midland Valley R. Co. v. Bailey*, 34 Okl. 193, 124 Pac. 987; *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191; *Solta v. Southwestern Cotton Oil Co.*, 28 Okl. 706, 115 Pac. 776; *Chicago, R. I. & P. Ry. Co. v. Baron*, 32 Okl. 540, 122 Pac. 926. The defense of assumption of risk does not arise unless the defendant has been guilty of negligence. *St. Louis & S. F. R. Co. v. Long*, 41 Okl. 177, 137 Pac. 1156, Ann. Cas. 1915C, 432. It is therefore necessary for the plaintiff to establish primary negligence before there is anything against which to defend; merely showing an injury does not in the case of an employé establish negligence. So it becomes necessary for us to ascertain from the evidence whether primary negligence has been shown in the instant case. The evidence establishes the fact that the plaintiff was 28 years of age, weighing about 140 pounds, was in the employ of the defendant as warehouse foreman at Ardmore, which position he had held for 9 months. Prior to his promotion to warehouse foreman he had for 15 months been a trucker in the warehouse. Nine months before the accident, on the recommendation of a former station agent of defendant, plaintiff had employed Linn Eggleston to work for him in the warehouse. Eggleston weighed about 125 pounds, and, according to the plaintiff's testimony, was incapable of doing the work. Eggleston, as plaintiff's witness, contradicted this. The station agent and his chief clerk both directed plaintiff in his work. Some time before the accident plaintiff's other assistant, Cagle, had quit, and the new station agent had employed a boy 17 or 18 years old to assist plaintiff and Eggleston. The plaintiff's duties consisted of loading, unloading, and trucking freight. On Sunday, October, 5, 1913, he was directed by the station agent to get his men and unload seven cars of merchandise at the warehouse. Plaintiff and Eggleston unloaded the cars; the boy, Dent, not showing up for work until after the cars were unloaded. While these two were unloading a folding bed weighing about 500 pounds from the first car, the plaintiff, in lifting the bed onto the truck, and just as the top of the bed struck the ceiling of the car, felt a catch in his back. After plaintiff and Eggleston finished unloading the other five cars, plaintiff's back was hurting him so badly that he went home and went to bed, where he remained for 1½ months. Plaintiff was, and has been, suffering from tuberculosis of the lungs, and had been discharged from the navy in 1910 for that reason, at which time he weighed 125 pounds, or about the same he weighed at the time of the trial. The condition of the plaintiff at the time of the trial prevented him from performing manual labor. A week or 10 days before the injury, plaintiff had requested the station agent of defendant to allow him more help to take care of the ad-

ditional work caused by the fact that defendant's freight business was growing. The plaintiff at no time complained of the inability of Eggleston and Dent to do the work, nor had he attempted to discharge them. We therefore gather from the argument that it is the contention of the plaintiff that the railway company owed the plaintiff the duty to furnish him sufficient and competent help to do the work, and in order to strengthen this contention the plaintiff testified that a week or 10 days before the accident he had applied to the company for additional help, which was refused. It will be observed in connection with this demand that his reason in asking for additional help was not because the individual items of freight handled were too heavy, but on account of the fact that the volume of business of the company had been growing and expanding to such an extent that the number of employes necessary to handle the business was insufficient.

Is it possible that under such evidence the company can be held to have been negligent? We think not. Negligence is a failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such a person would not have done. *Chicago, R. I. & P. Ry. Co. v. Watson*, 36 Okl. 1, 127 Pac. 693. It is admitted by the plaintiff that the company had furnished two helpers to assist in the unloading of freight and over whom he had control as foreman of the warehouse; that on the day of the injury the plaintiff had orders as foreman to get his helpers and unload the freight in question. These helpers were employed by the company to assist in the very work which plaintiff was engaged in at the time of the injury, but the third man was not present. No showing was made that his absence was due to any negligence on the part of the company, or that his presence would have prevented the injury. The fact that the plaintiff engaged in the work of unloading the heavy bed without waiting for the assistance of the absent employé, whom he was instructed to call to his assistance, does not tend to establish the negligence complained of, that is, the failure of the company to furnish sufficient and competent help, and does not show primary negligence on the part of the company. What more precaution could the company have taken than to furnish two helpers; and if the plaintiff, as such foreman, preferred to lift the heavy articles without waiting for the assistance of the absent helper, the company could not be charged with negligence in failing to furnish sufficient and competent help. This is a clear case of an accident occurring without any showing of negligence on the part of the company, and no recovery can be had. The case of *Sulzberger & Sons v. Hoover*, 149 Pac. 887, is relied upon by defendant in error as decisive of the case at bar. In that case the court said:

"It is true, as has been repeatedly held by this court, that the mere fact of an injury does not prove the fact of negligence; but in the case at bar the negligence is admitted."

The facts in that case justified an admission of negligence. The main question argued was whether there was a casual connection between the admitted negligence and the injury; while, under the facts in the instant case, negligence is not shown, nor is it admitted.

The judgment should therefore be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(55 Okl. 163)

CASE et al. v. POSEY et al. (No. 5709.)
(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1. TRIAL \S 139—DIRECTION OF VERDICT—EVIDENCE.

The question presented to the trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence that has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn therefrom, there is enough competent evidence to reasonably sustain the verdict, should the jury find in accordance therewith.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341, 365; Dec. Dig. \S 139.]

2. PRINCIPAL AND AGENT \S 24—AGENCY—QUESTION FOR JURY—CONFLICTING EVIDENCE.

Where the guardian of the person and estate of a minor is expressly authorized by the county court to sell, for cash, a certain note payable to himself as guardian of such minor, for the purpose of paying certain existing debts against said minor's estate, and in pursuance of said order said guardian indorses said note in blank, and delivers the same to a trusted third person, for the purpose of procuring a buyer therefor, and such third person sells and delivers said note, for cash, to certain purchasers, and receives the proceeds thereof, but fails to turn the same over to said guardian, and where such guardian subsequently institutes a suit upon said note, and such purchasers intervene, claiming to be the owners thereof, and there is a controversy as to whose agent such third person was, *held*, that the question of agency was one of fact for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 722, 723; Dec. Dig. \S 24.]

Commissioners' Opinion, Division No. 3. Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by James S. Posey, guardian of Kinnie W. Posey, a minor, and others, against Carl Stein and others, in which F. W. Case and another intervened. Judgment for plaintiffs, and interveners bring error. Reversed and remanded.

Wm. T. Hutchings and James L. Allen, both of Muskogee, for plaintiffs in error. Jess W. Watts, Alvin F. Molony, and Edward M. Gallaher, all of Wagoner, for defendant in error James S. Posey.

DUDLEY, C. This is an appeal from the district court of Wagoner county. On December 26, 1912, the defendant in error James S. Posey, as the guardian of the person and estate of his daughter, Kinnie W. Posey, a minor, commenced this action in said court against the defendants in error Carl Stein and the Citizens' State Bank, to recover the amount claimed to be due upon a promissory note of \$693.33, dated February 24, 1912, signed by said Stein, due and payable to the order of said guardian 10 months thereafter, bearing interest at 8 per cent. from date. The bank had said note in its possession for collection and was made a party to said action, on account thereof. On January 10, 1913, the plaintiffs in error, by leave of court, intervened in said action, claiming ownership of said note, by purchase from said guardian, through his agent, the defendant in error Carl Deichman, and seeking to recover the amount due thereon from said guardian and Stein, the maker thereof. Later Deichman and the defendant in error the Wagoner Investment Company were made parties defendant. At the conclusion of the taking of the testimony, the trial court, upon request of the guardian, directed the jury to return a verdict in his favor for the amount due upon said note. This was done, and judgment rendered in his favor accordingly, from which the interveners have appealed.

[1] The only question presented is whether or not the trial court committed error in directing a verdict for the guardian. The question presented to a trial court, on a motion to direct a verdict, is whether, admitting the truth of all the evidence that has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn therefrom, there is enough competent evidence to reasonably sustain the verdict, should the jury find in accordance therewith. *Moore v. First Nat. Bank of Iowa City*, 30 Okl. 623, 121 Pac. 627; *Jones v. First Nat. Bank of Bristow*, 39 Okl. 784, 136 Pac. 737; *Abbott et al. v. Diggins*, 145 Pac. 365.

[2] Measured by this rule, should the verdict have been directed in favor of the guardian? A determination of this question requires an examination of the record. James W. Posey is the father and legally appointed guardian of the person and estate of his daughter, Kinnie W. Posey, a minor. He was appointed prior to February 24, 1912. On said last-named date, he sold and conveyed certain real estate belonging to said minor, pursuant to an order of the county court of Creek county, to Stein, for a stipulated sum, payable one-third cash and the balance in two equal payments, evidenced by promissory notes, one of which is the note sued on herein. In both the deed and the notes the guardian retained a vendor's lien on said

real estate for the deferred payments. On March 16, 1912, said guardian obtained an order of the county court of said county authorizing him to sell and dispose of the note sued on for cash, and use the proceeds thereof for the payment of certain existing indebtedness against his ward's estate. Immediately following this, he indorsed said note in the following words:

"For value received and by special order of the county judge of Creek county, Oklahoma, I hereby assign and transfer the within note, together with all interest in and all rights under the vendor's lien securing the same to ———. [Signed] J. S. Posey, Guardian of Kinnie W. Posey."

—and delivered said note, bearing such indorsement, to Deichman, for the purpose of procuring a buyer for the same. In May following, Deichman sold and delivered said note to the interveners, who resided in New York state, for the sum of \$850, \$600 of which was paid to him at that time. He furnished them an abstract of title to said real estate, together with a certified copy of the order authorizing the guardian to sell said note. The abstract disclosed some unpaid taxes upon said real estate, and on account thereof the purchasers retained \$50 to protect them against said taxes. The interveners made investigation of the financial responsibility of Stein before they purchased said note. Considerable correspondence passed between them and Deichman before the sale was consummated, from which it reasonably appears that Deichman was representing the guardian in the sale of said note.

The guardian admitted that he indorsed and delivered said note to Deichman, for the purpose of procuring a buyer for the same, but claims that he was not to deliver the note, nor receive the money for the same, except in his presence. The guardian claims that Deichman was the agent of the purchasers. They deny this, and claim that he was the guardian's agent in selling the note, and that they bought it in good faith through him. Deichman did not turn over the \$600 he received upon said note to the guardian. He claims, however, that the guardian owed him this amount, or more, and that the estate of said ward owed the guardian over \$700, and that the guardian authorized him to retain this money in payment of his debt.

The main controversy is as to the ownership of the note. The important factor in determining this question is whether Deichman was the agent of the guardian or of the purchasers. This was a question of fact to be determined by the jury. The evidence upon this question was sharply conflicting, and the trial court was not justified in directing a verdict for the guardian. *Wrought Iron Range Co. v. Leach*, 32 Okl. 706, 123 Pac. 419; *Yukon Mills & Grain Co. v. Imperial Roller Mills Co.*, 34 Okl. 817, 127 Pac. 422; *Gast et al. v. Barnes*, 143 Pac. 856. The guardian

was specifically authorized by the county court to sell this particular note. The purchasers certainly had a right to buy it; but if Deichman was, as a matter of fact, their agent, and he failed to account to the guardian for the purchase price, then under certain circumstances they would be liable. *First National Bank of Keota v. Bridges*, 39 Okl. 355, 135 Pac. 378. If, however, Deichman was the trusted agent of the guardian, and the guardian saw fit to indorse and deliver this note to him, with authority to procure a buyer therefor, and the purchasers bought in good faith, then they would be entitled to recover upon the note, notwithstanding the fact that the guardian's agent may have dissipated the funds.

The record discloses other questions of fact which should have gone to the jury. The judgment of the trial court should be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(55 Okl. 224)

SQUIRES et al. v. POOLEY (POOLEY, Intervener). (No. 6621.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1. GARNISHMENT ⇐225—INTERVENTION—EXPENSES OF INTERVENER—RIGHT TO REIMBURSEMENT.

Where an intervener, in a matter of garnishment, successfully maintains his claim of ownership to the property in the hands of the garnishee, such intervener cannot, in such intervention, recover against the plaintiff, in the suit in which the summons in garnishment issued, damages for attorney's fees, hotel and traveling expenses, incurred by him in intervening in said cause.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 420; Dec. Dig. ⇐225.]

2. GARNISHMENT ⇐219 — RIGHTS OF INTERVENER—TRIAL.

A trial of the rights of the ownership of an intervener of property garnished may be had prior to the trial of the cause in which the garnishment issued.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 414; Dec. Dig. ⇐219.]

Commissioners' Opinion, Division No. 1. Error from County Court, Jefferson County; J. M. Adams, Judge.

Action by L. H. Squires and another against T. E. L. Pooley, wherein S. F. Pooley intervened. Judgment for defendant, and plaintiffs bring error. Modified and affirmed.

Bridges & Vertrees, of Waurika, for plaintiffs in error. Guy Green and Joseph T. Dillard, both of Waurika, for intervener.

COLLIER, C. An action was brought by plaintiffs in error, plaintiffs below, against defendant in error, defendant below, to recover upon a promissory note. On the same day, summons in garnishment was issued and served upon H. Winningham, who answered that he held \$190 belonging to defendant.

Thereafter, S. F. Pooley obtained leave of court to intervene in said cause, and filed his plea of intervention, claiming that he was owner of the property garnished in the hands of Winningham, and averred that the order of garnishment was wrongfully and illegally issued, and that he had been put to much trouble and expense by reason of said garnishment, in railroad fare, hotel bills, and other expenses, and that he had been required to lose many days in attending to the same; that he had been damaged \$75, together with interest from the time said money was withheld from him, and was compelled to employ an attorney to protect his rights; and prayed that the garnishment proceedings be held for naught, and that he recover from said Winningham \$190 and interest thereon, and from these plaintiffs, damages, costs, and a reasonable attorney's fee, alleged to be \$100. Testimony was offered, tending to prove his (intervener's) ownership of said fund in the hands of the garnishee. On a trial of the case, against the objection and exception of plaintiff, the court admitted evidence as to what was a reasonable attorney's fee to be allowed intervener, and the expenses incurred by intervener in the way of railroad fare and hotel bills in attending to and in said trial. The case was tried to a jury, and resulted in a verdict in favor of plaintiff and against defendant, T. E. L. Pooley, in the sum of \$223.75, and also a verdict in favor of intervener in the sum of \$190, against said Winningham, with interest at the rate of 6 per cent. from date of garnishment, and against the plaintiff for \$35 attorney's fees, and \$50 for expenses incurred by reason of the wrongful issuance of said garnishment, \$10 of which was remitted by intervener. Upon said verdict, the court entered judgment in favor of intervener and against H. Winningham for \$190, and against the plaintiffs in the sum of \$78.02. Motion for new trial was filed by plaintiffs, which was overruled and duly excepted to. To reverse said judgment this appeal is prosecuted.

[1, 2] The only errors argued in the brief of plaintiffs are: (1) That the court erred in trying the garnishment action until after judgment had been had in the principal action; (2) the court erred in admitting evidence, showing the amount of a reasonable attorney's fee incurred by intervener; (3) the court erred in the admission of evidence as to the expenses incurred by intervener for hotel bills and railroad fare.

The only authority cited by plaintiffs is part of chapter 121, Sess. Laws 1913, p. 232, which reads:

"The proceedings against a garnishee shall be deemed an action by the plaintiff against garnishee and defendant, as parties defendant, and all the provisions for enforcing judgment shall be applicable thereto; but when the garnishment is not in aid of execution, no trial shall be had of the garnishee action until the plaintiff

shall have judgment in the principal action, and if the defendant have judgment, the garnishee action shall be dismissed with costs, unless the plaintiff shall give immediately, in open court, notice, to be stated in the journal entry, that he appeals from such action. * * *

This law evidently has reference to proceedings between the plaintiff and defendant, and does not refer to an intervener. We deem it unnecessary to cite authorities in support of the proposition that one whose property has been wrongfully attached by the process of garnishment may proceed to have the question disposed of, regardless of whether or not the suit upon the original case in which the garnishment issued has been disposed of or not. The right to intervene and the recovery to be had are provided for by sections 4701 and 4702, Rev. Laws 1910, and such recovery cannot include an attorney's fee, hotel bills, and traveling expenses, incurred by the intervener. Therefore the court committed error in permitting evidence to be introduced as to the value of such attorney's fee and expenses, which, ordinarily, would work a reversal of the case; but inasmuch as neither the garnishee, Winningham, nor the plaintiffs, complain of the judgment rendered in favor of the garnishee, except by the plaintiffs as to the rendition of judgment for \$78.02 attorney's fee and expenses, this judgment should be modified by setting aside that part of the judgment rendered against said plaintiffs for said expenses in said sum of \$78.02, as not being a proper element of damages in this case; and said judgment, being so modified, should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 109)

BRYAN et al. v. SULLIVAN. (No. 6550.)
(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

ACTION \S 50—JOINDER OF CAUSES.

While, under section 4738, Rev. Laws 1910, several causes of action may be joined in one suit, they cannot be so joined, except in actions to enforce mortgages or other liens, unless each cause of action stated affects each of the parties to the suit.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 511-547; Dec. Dig. \S 50; Pleading, Cent. Dig. \S 137.]

. Commissioners' Opinion, Division No. 1. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by D. F. Sullivan against John Bryan and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. C. Stevens, of Lawton, for plaintiffs in error. H. N. Whalin, of Lawton, for defendant in error.

COLLIER, C. January 5, 1912, defendant in error instituted an action against plain-

tiffs in error, stating what purports to be three causes of action; and the petition, omitting caption, filing marks, and formal parts, and omitting the justification exhibits and affidavits to the exhibits thereto, was as follows:

"Comes now the plaintiff, D. F. Sullivan, and makes the following general allegations, which are intended to be applicable to and form a part of the several causes of action hereinafter set out: * * * That on or about the 1st day of February, 1910, in an action pending in the district court in and for the county of Comanche, state of Oklahoma, wherein John Bryan, one of the defendants herein, was plaintiff, and D. F. Sullivan, this plaintiff, was defendant, the said John Bryan obtained an order of injunction, enjoining this plaintiff, D. F. Sullivan, from in any way or manner interfering with or molesting the said defendant, John Bryan, his agent or tenant, in the possession, enjoyment, and use of the premises described in said petition, to wit: The S. E. $\frac{1}{4}$ of section 12, township 2 N., R. 13 W., I. M., Comanche county, state of Oklahoma, until the further order of this court. And to obtain said injunction, the said John Bryan as principal, and F. B. Rivers as surety, executed and filed with the clerk of said court in said action a written undertaking, approved by said clerk, in the amount of \$500, binding themselves to pay to this plaintiff, D. F. Sullivan, the damages he might sustain if it should be finally decided that said injunction ought not to have been granted. A copy of said bond is hereto attached, marked 'Exhibit A,' and made a part hereof.

"Plaintiff further alleges: That on or about the 7th day of February, 1911, the said cause came regularly on for hearing by the court at chambers, upon the motion of plaintiff herein to dissolve the injunction, and that upon consideration of the evidence adduced and the argument of counsel on behalf of the plaintiff and defendant, and being fully advised in the premises, the court rendered judgment in favor of this plaintiff and against defendant, John Bryan, and an order was entered dissolving said injunction. A copy of the judgment and order dissolving said injunction is herewith filed as a part hereof, marked 'Exhibit B.' That from said judgment dissolving said injunction aforesaid, defendant, John Bryan, secured an appeal to the Supreme Court of the state of Oklahoma, a supersedeas in said judgment, and a stay of execution. And to obtain said supersedeas and stay of execution aforesaid, the defendant, John Bryan, as principal, and F. B. Rivers and M. A. Nelson as sureties, executed and filed with the clerk of said court in said action a written undertaking approved by said clerk in the sum of \$1,500, binding themselves to pay to this plaintiff, D. F. Sullivan, the damages he might sustain, including a reasonable attorney fee and all costs, if it should be finally decided that said injunction ought not to have been granted. A copy of said bond is hereto attached, marked 'Exhibit C,' and made a part hereof. That the Supreme Court of the state of Oklahoma did, at the November, 1911, term on the 14th day of November, 1911, render an opinion in said cause on appeal to said Supreme Court from the district court of Comanche county, as aforesaid, dismissing said appeal, and issuing its mandate to said district court for proceeding according to the judgment in said court. A copy of said order and mandate from the Supreme Court is hereto attached, marked 'Exhibit D,' and made a part hereof.

"Plaintiff further alleges that on the trial of said action on the 21st day of December, 1910, and the consideration of the case by the court and jury on the merits of the action, judgment was rendered in favor of this plaintiff and against said defendant, John Bryan, and an order was entered restoring said D. F. Sullivan

to the possession of said premises from which he had been enjoined by issuing of said injunction. A copy of said judgment and order is hereto attached as part hereof, marked 'Exhibit E.' From the verdict of the jury and order of the court finding in favor of this plaintiff as aforesaid, the defendant prayed an appeal to the Supreme Court, and to obtain said appeal a stay of execution and supersedeas of said judgment, the said defendant, John Bryan, as principal, and Ed B. Rivers as surety, executed and filed with the clerk of said court in said action a written undertaking, approved by said clerk in the amount of \$1,000, binding themselves to pay to this plaintiff, D. F. Sullivan, the damages he might sustain from any waste committed on said premises, and to pay to plaintiff the value of the use and occupancy of said premises from the date of said undertaking until the delivery of said premises pursuant to said judgment, and to pay all costs, if it should be finally decided that said judgment should be sustained. A copy of said appeal bond is hereto attached as part hereof, and marked 'Exhibit F.' That said defendant, John Bryan, secured extensions of time from time within which to make and serve case-made for the Supreme Court, and continued to hold possession of said premises, whereby the several causes of action have accrued on the said bonds hereinafter set out.

"*First Cause of Action.* The said plaintiff hereby refers to the general allegations preceding this cause of action, and, further to inform the court, states: That by reason of the procurement of the said injunction and the appeal from said order dissolving the same to the Supreme Court of the state of Oklahoma, he was damaged as follows, to wit: (Here follows a detailed statement of the damages averred to have been sustained, aggregating the sum of \$2,686.20.) That by reason of the premises and the issuance of the injunction as aforesaid, this plaintiff has been damaged in the aggregate sum of \$2,686.20, and asks judgment against the defendants, John Bryan and F. B. Rivers, and each of them, in the full sum thereof on their bonds as aforesaid and against the defendant M. A. Nelson in the sum of \$1,500 as surety on said bond aforesaid.

"*Second Cause of Action.* That the said plaintiff hereby refers to the general allegations preceding the first cause of action herein, and makes the same a part thereof, and further alleges and says that by reason of the appealing by said defendant John Bryan, from the order and judgment of the court and the verdict of the jury in behalf of the plaintiff rendered on December 21, 1910, and the supersedeas bond by the defendants John Bryan and Ed B. Rivers, thus preventing this plaintiff from having the use, occupancy, and benefit of said premises for the year 1911, this plaintiff has been damaged in the sum of \$300, as is set out and described in plaintiff's first cause of action, and for which damage the said defendant Ed B. Rivers is liable on his bond, together with the said defendant John Bryan, for the said damage aforesaid.

"Wherefore, plaintiff prays judgment against the defendants John Bryan, Ed B. Rivers, and each of them, in the sum of \$2,686.20, as set out in the first cause of action, and against defendant John Bryan and Ed B. Rivers, and each of them, in the sum of \$300, as set out in the said second cause of action, and for his costs herein and all proper relief."

On February 2, 1912, plaintiffs in error each filed a separate demurrer to said petition, the grounds therefor being as follows:

"(1) That there is a defect of parties defendant. (2) That several causes of action are improperly joined, in that there are two causes of action in the first count of plaintiff's petition, founded on two separate alleged bonds, the

one signed by John Bryan as principal, and F. B. Rivers as surety, and the other purporting to be signed by John Bryan as principal, and F. B. Rivers and M. A. Nelson as surety, so that all the parties defendant are not and could not be affected by both of said bonds, and the second alleged cause of action purports to be upon still another alleged bond, purporting to be signed by John Bryan as principal, and Ed B. Rivers as surety, and neither this defendant nor defendant F. B. Rivers is or could be affected thereby. (3) That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant."

August 31, 1912, these demurrers came on for hearing, and each of the same was, by the court, overruled, and exceptions duly saved by each of the defendants separately.

The case was tried to a jury, and the following verdict was rendered:

"We, the jury, impaneled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find in favor of plaintiff, D. F. Sullivan, and against group No. 1 of defendants, John Bryan and F. B. Rivers, and assess plaintiff's damage in the sum of \$135; and we further find in favor of the plaintiff, D. F. Sullivan, and against group No. 2 of defendants, John Bryan, M. A. Nelson, and F. B. Rivers, and assess plaintiff's damage in the sum of \$900; and we further find in favor of plaintiff, D. F. Sullivan, and against group No. 3 of the defendants, John Bryan and Ed B. Rivers, and assess plaintiff's damages in the sum of \$200."

Within the statutory time defendants filed a motion for new trial, which was overruled and duly excepted to, and judgment entered in accordance with said verdict. To reverse said judgment this appeal is prosecuted.

Section 4738, Rev. Laws 1910, in part, provides:

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of any one of the following classes: First. The same transaction, or transactions, connected with the same subject of action. * * * But the cause of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens."

In this case, each of the causes of action, counted upon in the petition, does not affect each of the party defendants, for the reason that some of defendants were in no wise liable upon some of the bonds sued upon. We are of the opinion that it is prerequisite, to the correct joining of causes of action, that all the causes shall affect each one of defendants to the action. That such prerequisite is the plain letter of said section 4738, supra, cannot be questioned, in view of the provision in said section that:

"But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, except in actions to enforce mortgages or other liens."

"Actions against separate sureties upon bonds given to secure different duties cannot be joined." 23 Cyc. 432; Street v. Tuck, 34 N. C. 605.

"The test is whether or not the parties joined in the suit have one connected interest centering in the point in issue in the cause, or one common point of litigation." * * * In other words, all of the plaintiffs and all of the defendants must have a common interest or con-

nection centering in the point in issue." Section 192, Sutherland, Code Plead. & Pr. & Forms.

"It will not do to unite, in one pleading, a cause of action by or against two or more with a cause of action by or against a part only of the plaintiffs or defendants. The Codes are express that 'the causes of action so united * * * must affect all the parties to the action.' * * * Bliss on Code Plead. § 132."

In Atchison, T. & S. F. Ry. Co. v. Bd. Com'rs of Sumner Co., 51 Kan. 617, 33 Pac. 312, it is held:

"A cause of action in favor of the plaintiff, and against one defendant, cannot be united with another cause of action in favor of the same plaintiff against another defendant, where neither defendant is interested in the cause of action alleged against the other."

In Harrod v. Farrar et al., 68 Kan. 153, 74 Pac. 624, it is held:

"Except in actions to foreclose mortgages or other liens, several causes of action cannot be united in one petition unless they all arise out of the same transaction or transactions, and are all connected with the same subject of action, and each cause of action affects all the parties."

"Except in cases to enforce mortgage and other liens, it is a prerequisite to the joinder of causes of action in a pleading that all the causes of action should affect all the parties to the action." Benson, Receiver, v. Battey et al., 70 Kan. 288, 78 Pac. 844, 8 Ann. Cas. 283, and authorities cited in note.

In Aylesbury Mer. Co. v. Fitch, 22 Okl. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573, Judge Dunn cites with approval Hoyer et al. v. Raymond, 25 Kan. 665, which holds that, though causes of action may be joined, they cannot be united, unless all affect all the parties to the suit.

In Brown v. Williams, 24 Okl. 308, 103 Pac. 588, Justice Turner quotes with approval from Doan et al. v. Holly et al., 25 Mo. 357, as follows:

"Here are two causes of action united in the same petition. One of these causes of action is against one party, and the other is against the same party and a third person. * * * Notwithstanding the great liberality of the present practice act in relation to the joinder of actions, it is conceived that there is nothing contained in it which gives the slightest sanction to the joining of actions in which the defendants are not the same, not in part, but in the whole. * * *"

And also quotes with approval from the case of Miller v. Northern Bank of Mississippi, 34 Miss. 412, as follows:

"A man cannot in the same action sue two or more persons upon a joint contract, and one of them upon a separate and distinct liability. In other words, it would be illegal to embrace in the same complaint a charge or count against A., B., and C., founded upon their joint note, and a charge against them based upon the individual note of C. * * *"

And cites the following cases in support of said rule:

"United States v. McCoy et al. (D. C.) 54 Fed. 107; Sleeper Co. v. World's Fair Bankquet-Hall Co. et al., 166 Ill. 57, 46 N. E. 782; Owen v. Bankhead, 52 Ala. 399, 3 South. 97; Citizens' Bank v. Frazee, 8 Kan. App. 638, 56 Pac. 506; Malsby v. Lanark Co., 55 W. Va. 484, 47 S. E. 358; Jamison, Adm'r, v. Culligan et al., 151 Mo. 410, 52 S. W. 225; McDaniel

v. Chinski, 23 Tex. Civ. App. 504, 57 S. W. 922; Spencer v. Candelaria Waterworks, etc. (O. C.) 118 Fed. 921."

We are of the opinion that the following decisions of this court, cited in brief of, and relied upon by, plaintiff, viz., *Stone v. Oase*, 34 Okl. 5, 124 Pac. 960, 43 L. R. A. (N. S.) 1168, *Maloy v. Johnson*, 32 Okl. 92, 121 Pac. 257, and *Tootle et al. v. Kent et al.*, 12 Okl. 674, 73 Pac. 310, are not in conflict with the conclusions reached in this case.

The views herein expressed render it unnecessary to consider the many other errors assigned.

It follows that the several causes of action, alleged in the petition in this cause, were improperly joined, and that the court committed reversible error in overruling the demurrers thereto.

This cause should be reversed and remanded.

PER CURIAM. Adopted in whole.

(55 Okl. 152)

MUSKOGEE INDUSTRIAL DEVELOPMENT CO. v. AYRES. (No. 5275.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW — 24—ABROGATION OF STATUTE BY CONSTITUTION.

Article 6, c. 20, Comp. Laws 1909 (Snyder), was abrogated by section 39, art. 9, of the Constitution, and after the adoption of the Constitution the provisions of the aforesaid statutes were not in force in this state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 21-29; Dec. Dig. 24.]

2. CORPORATIONS — 90—SUBSCRIPTION CONTRACT — RIGHT OF ACTION — CUMULATIVE REMEDIES.

The provisions of the statutes named with reference to forfeiture and sale of stock to pay the subscriptions, even if in force, are cumulative.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. 90.]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; N. B. Maxey, Judge.

Action by the Muskogee Industrial Development Company, a corporation, against C. C. Ayres. Judgment for defendant, and plaintiff brings error. Reversed.

John H. Mosler, Ezra Brainerd, and Wm. H. Davis, all of Muskogee, for plaintiff in error. W. C. Franklin and P. J. Carey, both of Muskogee, for defendant in error.

HOOKEE, C. This suit was instituted by the plaintiff in error against the defendant in error to recover a judgment upon a subscription contract made on the 20th day of September, 1910, whereby the defendant in error subscribed for three shares of the capital stock of the Muskogee Industrial Development Company, and agreed to pay therefor the sum of \$300. The subscription under

the terms of the contract was binding when \$300,000 had been subscribed to the capital stock, and the same was payable in such manner and on such terms as the board of directors directed, and subject to the limitation that no more than 10 per cent. of the subscription should be demanded in any thirty days. The defendant relied upon the failure of the company to comply with article 6 of chapter 20 of the Compiled Laws of Oklahoma 1909 in bar of any recovery herein, and contended that by reason of the failure of the company to levy assessments in the manner and form as stated in the 1909 law no recovery could be had in this action. At the conclusion of the evidence in this case the court rendered a judgment for the defendant in error, and to reverse which an appeal is had to this court.

[1] It is contended by the defendant in error that article 6, c. 20, of the Compiled Laws of Oklahoma 1909, is the sole and exclusive manner by which corporations may collect subscriptions due it, and that, if it fails to comply with the provisions of the statute, it is not entitled to institute a suit upon its subscription contract in order to enforce the payment thereof. By an examination of said statute it appears that the various sections of said article were brought from the statutes of 1893, and that section 1312 authorizes a corporation, after one-fourth of its capital stock has been subscribed for the purpose of paying expenses, etc., to levy and collect assessments upon the subscribed capital stock in the manner and form, and to the extent provided in this chapter. Section 1313 limits the assessments to 10 per cent., except in certain cases therein provided: (1) Where the capital stock has not been paid, and the corporation is unable to meet its liabilities or to pay its creditors, the assessment may be made for the full amount unpaid upon the capital stock, or, if a less amount is sufficient, it may be for such percentage as will raise that amount. (The other two excepted cases have no application to the case at bar, and are not copied.) Section 1314 provides that no assessment must be levied while any portion of a previous one remains unpaid, unless: (1) The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment; (2) or the collection of the previous assessment has been enjoined; or (3) the assessment falls within the provisions of either the first, second, or third subdivision of section 1313. And section 1315 provides the order for the levying of assessments must be certified, the amount thereof, when, to whom, and where payable, fixes a day subsequent to the full term of publication of the assessment notice on which the unpaid assessment shall be delinquent, nor less than 30 days nor more than 60 days

from the time of making the order levying the assessment, and the time for the sale of the delinquent stock not less than 15 days nor more than 60 days from the day the stock is declared delinquent. Section 1316 prescribes the form of notice. Section 1317 designates the manner of service of the notice. Section 1318 directs that, if any portion of the assessment mentioned in the notice remains unpaid on the day specified therefor for declaring the stock delinquent, the secretary shall publish a notice, designating the form. Section 1319 provides the contents of the notice. Section 1320 directs the publication of the notice. Section 1321 defines the effect of the publication. Section 1322 provides for the manner of sale. Section 1323 defines the meaning of the word "bidder," etc. That this statute was in force in this state when the Constitution was adopted must be admitted, and the question for us to determine is whether section 39 of article 9 of the Constitution of Oklahoma, which provides as follows:

"No corporation shall issue stock except for money and labor done, or property actually received, and the amount of the par value thereof. All fictitious increase of stock or indebtedness, shall be void, and the Legislature shall prescribe the necessary requirements and provisions of issuing fictitious stock or indebtedness"

—supersedes the provisions of article 6 of chapter 20 of Compiled Laws of Oklahoma aforesaid. It must be admitted that the intention of this constitutional provision was to restrict the issuing of stock by the corporation unless its equivalent in money, labor, or property was received by it, as was expressed by this court in the case of Webster v. Webster Ref. Co., 36 Okl. 168, 128 Pac. 261, 47 L. R. A. (N. S.) 697.

By an examination of article 6, c. 20, quoted above, it is apparent that there was no such limitation upon corporations, and that this statute had in view and in contemplation the authority of corporations to issue stock under conditions which are prohibited by the section of the Constitution above quoted. When we consider this article of the statute, together with certain provisions of article 2 of the same statute, it is clear to our mind that the statute law of the territory above quoted gave to corporations certain rights with reference to the issuing of stock which is denied to it by the provisions of the Constitution above quoted, and, inasmuch as the Constitution is the controlling law upon this question and supersedes all laws of the territory of Oklahoma in conflict therewith, we must hold that the provisions of chapter 6, art. 20, were abrogated by the Constitution, and at its adoption the statute ceased to be the law in the state of Oklahoma, and it necessarily follows that, if the statutes are in conflict with the Constitution, and have been superseded by it, the provisions thereof cannot be relied upon by the defendant in error in bar of the contract sued upon in this case.

[2] It is also urged by the defendant in error that, where the statutes of the state afford a remedy to the corporations for enforcing their subscriptions to capital stock, and provide for a forfeiture and sale of said stock to pay the same, the statutory remedy is exclusive, and that the corporation cannot resort to an action at law to collect its subscription. This theory of the defendant in error cannot be sustained by the authorities; for practically all of the courts hold that, even where the contract for subscription does not contain an express promise to pay, an implied promise is inferred, and that an action can be maintained thereon, and that the statutory remedy thereof for the forfeiture and sale of the stock is merely cumulative. Those courts holding to the contrary have established what is known as the New England doctrine; yet a majority of the states refused to follow the same, and all of the states, including those where the New England doctrine prevails, hold that, where the contract contains an express promise to pay, as in the instant case, an action can be maintained thereon, although the statute may confer upon the corporation a right to a forfeiture and sale of its stock, in the event the same is not paid by the subscriber. See 10 Cyc. 503, and the authorities there cited; also Century Dig. vol. 12, pars. 390, 391.

Having reached the conclusions stated above, we are of the opinion that the statutes in question are not in force in the state of Oklahoma, and that the Constitution is the supreme law dealing with that subject-matter (in this connection it may not be amiss to say that the compilers of the 1910 Revised Laws omitted chapter 6 of article 20 of the Laws of 1909, with the statement that the same was in conflict with the Constitution), and that the plaintiff in error is entitled to maintain its suit to collect its subscription independent of the statutory provisions of forfeiture and sale.

We recommend that the judgment of the lower court be reversed, and a new trial granted.

PER CURIAM. Adopted in whole.

(56 Okl. 83)
MIDLAND CASUALTY CO. v. MASON.
(No. 6326.)

(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

INSURANCE — 454 — ACCIDENT AND HEALTH POLICY—CONSTRUCTION—"BOIL."

A special accident and health insurance policy, providing for the payment of indemnity in the event the insured under certain conditions suffered from boils, is clear and explicit, and does not cover disability occasioned by a disease designated as "ischio-rectal abscess"; and the courts have not the right to enlarge upon the plain provisions of such policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1177, 1178; Dec. Dig. 454.]

Commissioners' Opinion, Division No. 3. Error from County Court, Carter County; W. F. Freeman, Judge.

Action by Isaac R. Mason against the Midland Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. A. Walker, of Oklahoma City, and McKenzie Cleland, of Chicago, Ill., for plaintiff in error. I. R. Mason, of Ardmore, for defendant in error.

RITTENHOUSE, C. This action was instituted upon a special income accumulative limited accident and health insurance policy issued by the Midland Casualty Company to Isaac R. Mason, wherein the company agreed to pay the sum of \$15 per week indemnity for the space of five consecutive weeks, provided the insured was confined in the house continuously for said period of time, was called upon regularly by a licensed physician, and was wholly disabled and prevented from performing each and every duty pertaining to any and every kind of business, labor, or occupation, solely by, among other diseases, boils. The petition alleges that the plaintiff was confined to the house under the care of a physician for six weeks, and during said time was not able to attend to his usual duties by reason of "deep-seated boils." There was evidence offered by the plaintiff that he was suffering with a disease designated as "ischio-rectal abscess," and that this expression was synonymous with "boils." The evidence offered by the defendant was that ischio-rectal abscess is a concrete, specific pathological entity, distinctly descriptive of itself, and not descriptive of a boil. The court found that there was a distinction between a boil and an abscess; that the term, "ischio-rectal," merely determined the locality of the abscess; that an abscess is a condition wherein the internal portions of the anatomy are affected, as an abscess of the liver or of the brain, but that a boil is external involving only the skin; that by a preponderance of the testimony it is shown there is good reason why insurance companies should include boils and exclude abscesses in a health indemnity policy, the reason being that boils rarely prostrate or disable the patient, while abscesses usually do; that the one is included and the other excluded as a matter of economy. After making these special findings of fact, the trial court proceeded to render judgment in favor of the plaintiff upon the ground that an insurance policy should be construed liberally in favor of the insured, and, inasmuch as plaintiff paid the premium in good faith and thought he was protected by said policy, he should not be bound by technicalities, and judgment was rendered in his favor. Is the question presented a technical one? We think not. The language of the policy is clear and explicit.

It insures against boils, not against abscesses. The court found that abscesses were internal, while boils were external, afflictions, involving only the skin. If this finding is correct, and we are bound by it, the policy conveys a clear and explicit meaning, which involves no ambiguity or absurdity. It insures against boils, and the courts have not the right to enlarge upon the plain provisions of the policy and insure against abscesses. It was held in *Lake County v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060, and approved in *Kingcade v. Continental Casualty Co.*, 35 Okl. 99, 128 Pac. 683:

"To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it."

We therefore conclude that the language of the policy is clear and explicit, insuring against boils, but not abscesses.

The judgment of the court should therefore be reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(55 Okl. 506)

FIRST NAT. BANK OF COWETA v. BRUMBAUGH. (No. 6378.)

(Supreme Court of Oklahoma. Jan. 11, 1916. Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. TRIAL ¶252 — **ACTION BY BROKER FOR COMMISSION—INSTRUCTIONS—EVIDENCE.**

Where a real estate broker is suing for a commission for the sale of real estate, which the uncontroverted evidence shows was actually made, and upon the terms the land was listed with him, it is not prejudicial error for the court to refuse to instruct the jury that before he can recover he must have produced a purchaser ready, able, and willing to buy it, and upon the terms agreed upon. For while correctly stating a general principle of law, such requested instruction has no specific application to the facts in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ¶252.]

2. TRIAL ¶252 — **ACTION BY BROKER FOR COMMISSION—INSTRUCTIONS.**

Where a sale of real estate has been completed, and the agent is suing for his commission, it is not error for the court to refuse to instruct the jury that before the broker can recover his commission for the sale he must have procured a written, enforceable contract from the purchaser, binding him to take the land upon the terms agreed upon. This rule is only applicable when the agent is suing for a commission where the sale was never consummated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ¶252.]

Commissioners' Opinion, Division No. 2. Error from County Court, Wagoner County; W. T. Hunt, Judge.

Action by W. T. Brumbaugh against the First National Bank of Coweta, Okl. Judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Pinson, of Coweta, and Watts & Molony, and Edward M. Gallaher, all of Waggoner, for plaintiff in error. Z. I. J. Holt and Frank L. Haymes, both of Broken Arrow, for defendant in error.

BRETT, C. The defendant in error was a real estate broker at Broken Arrow, and sued the plaintiff in error, the First National Bank of Coweta, in the lower court to recover \$122.06, alleged to be due him as a commission earned in the sale of a piece of real estate owned by the plaintiff in error. The parties will be referred to as they appeared in the lower court; that is, defendant in error will be referred to as plaintiff, and plaintiff in error as defendant.

The evidence on behalf of the plaintiff in this case is to the effect that defendant listed this property with him at \$30 per acre, and agreed to give the plaintiff a commission of \$1 per acre for his services in procuring a purchaser; that he telephoned the defendant that he had a buyer, and the defendant, by its president, came to Broken Arrow, met the proposed purchaser, who agreed to pay \$30 per acre for the farm. But it developed that there was some defect or irregularity in the title, which the defendant thought could be remedied, and the deal was suspended until the title could be cleared. It took longer to do this than was anticipated, and before this had been done the bank changed presidents. But when the proposed purchaser learned that the title was clear, he went to the office of plaintiff and found he was not there, and then proceeded to Coweta, and closed the deal with the new president of the bank on the terms agreed to between him and the former president of the defendant bank; the only change being that under the first agreement he was to get one-third of the growing crop, and under the terms upon which he actually purchased, as the crop had been gathered and disposed of, he got a reduction in the price he was to pay of about \$100 as compensation for the portion of the crop he was to get under the first agreement. The purchaser testified that he was ready, willing, and able to buy the farm at \$30 per acre at all times, and would have closed the deal at the first meeting but for the defect in the title; that the deal was not called off, but only suspended until the title could be perfected; and that as soon as this was done he did buy the land upon the terms agreed upon at the first meeting, except that he was allowed something less than \$100 in lieu of the one-third of the crop, which had been disposed of.

The only material conflict in the evidence is that the former president of the bank testified that when the purchaser was unwill-

ing to accept the title, the deal was dropped. The jury returned a verdict for the plaintiff, which became a judgment, and the defendant appeals from this judgment.

The defendant in its argument, in its brief, bases its claim for a reversal upon the refusal of the court to give three requested instructions.

The first request was for a peremptory instruction to find for the defendant. But the defendant does not seriously insist upon this, and we will only say it was not error to refuse this request.

[1] The second requested instruction is to the effect that before a real estate agent is entitled to recover a commission for the sale of real estate, he must procure a purchaser who is ready, able, and willing to buy upon the terms and conditions agreed upon; and if he fails to find such a purchaser, he cannot recover. That request as a general statement is correct, but we fail to see where it has any application to the facts in this case. The evidence of all the witnesses is, that the plaintiff in the first instance procured the purchaser, and that he was ready, able, and willing, at all times, to buy, and did buy, as soon as the cloud was removed from the title at \$30 per acre, the price placed on the land by the defendant; the only conflict in the evidence being the testimony of the president of the bank, with whom the purchaser first negotiated, to the effect that when the purchaser objected to the title, it was agreed that the deal should be dropped. But on this point the court instructed the jury if they found "that the negotiations for the sale of said land was dropped, and the commission contract between the plaintiff and the bank was mutually abandoned, then it will be your duty to find for the defendant." This was really the only controverted fact in the case, and the jury under this instruction found in favor of the plaintiff; and there is an abundance of evidence to sustain this finding. Under the facts in this case, and in view of the instructions given by the court, which were very favorable to the defendant, we do not think the defendant was prejudiced by the court refusing to give this requested instruction.

[2] 2. The third requested instruction is: "You are further instructed that to entitle the plaintiff, a real estate agent, to recover a commission for the sale of real estate, he must procure and present to the seller, from a purchaser, who is ready, willing, and able to buy, an enforceable contract in writing, binding him to take the land according to the terms and conditions agreed upon, and in this connection you are instructed that if the plaintiff fails to procure such a contract between the purchaser and the seller, you should find for the defendant."

This instruction is correct when an agent is suing for a commission, where the sale was never consummated, but has no application to the facts in the case at bar, and it would have been error for the court to have given it. And in the cases cited by defendant as supporting this rule, we note that without

exception those were cases where the agent was claiming a commission where the sale was never consummated, and claiming his commission on the ground that he had performed his duty by procuring a purchaser able, ready, and willing to buy upon the terms agreed upon, and that the sale was not consummated by reason of the fault of the owner. And this court held in *Gilliland v. Jaynes*, 36 Okl. 563, 129 Pac. 8, 46 L. R. A. (N. S.) 129:

" * * * That it is necessary for the broker either to effectuate a sale, or where the seller declines to proceed, to present him with a written agreement, signed by the purchasers, which would become enforceable when signed by the seller and take the negotiations for sale out of the statute of frauds."

And it is true that in cases where the sale was never consummated, an enforceable contract is the best evidence that the agent had procured a purchaser ready, able, and willing to buy on the terms agreed upon. But in the case at bar the sale was actually effectuated, and the fact that there was a lapse of time between the beginning of the negotiations, and a final consummation of the deal, is immaterial, since the evidence showed the deal was never dropped, but was only suspended until the title was perfected, and that the purchaser stood ready, able, and willing to close the deal at all times, on the terms fixed by the defendant, and did close it on those terms as soon as the title was clear. The instruction requested, therefore, had no application to the facts in this case. *Schlegel v. Fuller*, 149 Pac. 1118 (not yet officially reported); *Doub & Co. v. Taylor*, 150 Pac. 687 (not yet officially reported); *Gillett v. Corum*, 7 Kan. 156; *Ratts v. Shepherd*, 37 Kan. 20, 14 Pac. 496; *Long and Place v. Thompson*, 73 Kan. 76, 84 Pac. 552.

Finding no prejudicial error in the record, we think the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 37)

McCRACKEN v. CLINE. (No. 5524.)

(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

1. FRAUD — 41—ACTION FOR DECEIT—PETITION—SUFFICIENCY.

A petition, which alleges that defendant made false representations to plaintiff but fails to allege that plaintiff believed such representations and relied and acted thereon to his damage, does not state a cause of action for deceit.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 36, 37; Dec. Dig. —41.]

2. TROVER AND CONVERSION — 32—PETITION—REQUISITES—POSSESSION OF PROPERTY.

To state a cause of action for the conversion of personal property the petition must show that the plaintiff has been deprived of the possession of such personal property.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 191-202; Dec. Dig. —32.]

Commissioners' Opinion, Division No. 1. Error from County Court, Grant County; J. W. Bird, Judge.

Action by D. L. Cline against D. B. McCracken. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

J. B. Drennan, of Medford, for plaintiff in error. Sam P. Ridings, of Medford, for defendant in error.

RUMMONS, C. This action was commenced by the defendant in error, hereinafter styled the plaintiff, against the plaintiff in error, hereinafter styled the defendant, in the county court of Grant county to recover the sum of \$500 for the conversion of a building situated in the city of Medford. In disposing of this case we need only consider the demurrer of the defendant to the petition, which was overruled and exceptions saved. The petition in substance alleges that about two years prior to the filing thereof the defendant sold to one Geo. McCarroll certain buildings described in the petition; and shortly after said purchase the said McCarroll sold, by and with the consent of the defendant, the said buildings to the plaintiff; that the defendant at the time of the sale to McCarroll, and of the sale by McCarroll to plaintiff, was the owner of the real estate upon which the buildings were located; and that at the time of said sales one Lizzie Schwartz held a mortgage on said real estate for the sum of \$3,500; that it was represented by the defendant to the said McCarroll and to the plaintiff that it was satisfactory and agreeable to the said Lizzie Schwartz that said buildings be removed from the said real estate, and that Lizzie Schwartz assented to such removal; that said buildings have remained on said premises at all times since the purchase by plaintiff, by and with the consent and agreement of the defendant, and that the defendant has leased the real estate and the plaintiff the building to the same party, each agreeing with the other, and each collecting his respective rents therefor; and that no part of said buildings have been removed, except a small room which was and is of small value; that plaintiff at the time of the purchase of the buildings and up to a short time previous to the filing of the petition supposed that it was agreeable to said Lizzie Schwartz that he should buy and remove said buildings from the said premises; that the defendant has made default in the payment of the mortgage to the said Lizzie Schwartz, and the same has been foreclosed, and the said real estate has been ordered sold, including the said buildings; that it has been adjudged and decreed by the court that the said buildings purchased by the plaintiff be sold to satisfy the mortgage given by the defendant to the said Lizzie Schwartz; that in truth and in fact said Lizzie Schwartz had not given permission to the said defendant to have said build-

ings removed from the said premises, and the said Lizzie Schwartz has prohibited plaintiff from removing same; that said building has been appropriated to the use and benefit of the defendant for the purpose of satisfying said mortgage, that plaintiff has been deprived thereof; that said building remains on said premises, and is of the reasonable value of \$500.

[1] We think the trial court erred in overruling the demurrer of the defendant to this petition. The petition seems to have been drawn upon the theory that the defendant was liable for a conversion of the buildings because he consented to the sale thereof by McCarroll to the plaintiff, and because he represented that the mortgagee had consented to the removal thereof from the real estate upon which they were situated, and that in suffering a decree of foreclosure to be entered ordering the sale of the real estate, including the buildings, he had converted the same to his own use. We think that the facts set out in the petition do not constitute a conversion by the defendant of the property bought by the plaintiff. It will be noted that the petition attempted to set out a cause of action for deceit and alleged that it was represented by the defendant both to McCarroll and to plaintiff that it was satisfactory and agreeable to the mortgagee that the buildings be removed from the premises, and that the mortgagee assented to such removal, and that in truth and in fact the mortgagee had never assented to a sale of the buildings or to a removal thereof from the premises. But it is nowhere stated that such representation was made to plaintiff before the purchase by him of said buildings; neither is it alleged that plaintiff believed such representation and relied thereon in such belief, nor that he acted upon such representation to his damage. These allegations are necessary in order for the plaintiff to maintain an action against the plaintiff for deceit. *Cooper v. Ft. Smith & W. Ry. Co.*, 23 Okl. 139-151, 99 Pac. 785.

[2] It will be further noted that while the petition alleges that the defendant has suffered the mortgage upon the premises upon which the buildings are situated to be foreclosed, and that said premises, including the buildings, had been ordered sold, it does not allege that said buildings have been sold under such decree of foreclosure. The petition also fails to allege facts showing that plaintiff has been deprived of the possession of said building; the allegation that plaintiff has been deprived thereof being merely a conclusion. In fact it seems from the allegations of the petition that the plaintiff, at the time of the bringing of this action, was in possession of said building by a tenant. The petition in an action for the conversion of personal property must allege facts showing: First, that the plaintiff has a general or special property in the chattels alleged to have

been converted; second, the right of possession thereof at the time of the conversion; and, third, that the defendant has converted the same to his own use.

"Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Aylesbury Mercantile Co. v. Fitch*, 22 Okl. 475, 488, 99 Pac. 1089, 23 L. R. A. (N. S.) 573; *Bilby v. Jones*, 39 Okl. 613, 618, 136 Pac. 414; *Dodd-Lear, etc., Co. v. Gyr*, 146 Pac. 16.

The petition wholly fails to state a cause of action either for deceit by the defendant, which has resulted in damage to the plaintiff, or for conversion of the property of plaintiff by the defendant.

The demurrer to the petition should have been sustained. This cause should be reversed and remanded, with directions to the trial court to sustain the demurrer of the defendant.

PER CURIAM. Adopted in whole.

(55 Okl. 379)

SWIFT v. McALESTER TRUST CO. et al.
(No. 4327.)

(Supreme Court of Oklahoma. June 29, 1915.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

CORPORATIONS — 116, 118 — SALE OF CORPORATE STOCK — CONSTRUCTION OF CONTRACT — CONDITION PRECEDENT — ESCROW AGREEMENT.

S. and C., stockholders and officers in the Alderson Coal Co., entered into an escrow contract in writing that S. would sell and C. would purchase and pay \$3,000 for all of S.'s stock in said company when and upon condition that the Indian Coal & Mining Co., as original lessee, should give consent to C.'s prior assignment to the Alderson Coal Co. of a 10-year leasehold estate in certain segregated coal lands of the Choctaw and Chickasaw Indians in Oklahoma; and a letter from S., addressed to N., a major stockholder in said Indian Coal & Mining Co., which was attached to and made a part of said escrow contract, recited that it was understood that "the Alderson Coal Co. will execute a good and sufficient bond to pay all royalties and carry out the general terms of the lease," which the latter wholly failed to execute. *Held*, said contract must be construed as contemplating, as a condition precedent to C.'s absolute obligation to purchase and pay, that the Alderson Coal Co. should give such bond. *Held*, further, that the contingency upon which C.'s obligation to purchase said stock depended having never happened, S. was not entitled to demand and recover said \$3,000, nor to an injunction restraining the return of same to C. by the escrow holder.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 493, 494, 496-498; Dec. Dig. §§ 116, 118.]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Pittsburg County; W. C. Liedtke, Judge.

Action by George M. Swift against the McAlester Trust Company and others. Judgment for certain defendants, and plaintiff brings error. Affirmed.

Clayton & Clayton, of McAlester, for plaintiff in error. Robt. N. McMillen and Gordon & McInnis, all of McAlester, for defendants in error.

THACKER, C. The plaintiff in error, George M. Swift, and one of the defendants in error, J. E. Cavanagh, on April 11, 1911, addressing as their escrow holder the McAlester Trust Company, another one of the defendants in error, agreed in writing then delivered to the latter that the latter, as such holder, should deliver to Cavanagh, as purchaser, 143 shares of stock in the Alderson Coal Company, then put in escrow by Swift, as owner and seller, together with the latter's resignation as secretary of the latter company, reciting that he had sold all his stock therein, and that said escrow holder should deliver to Swift, as such seller, the purchase price of said 143 shares of stock in the form of a certified check for \$3,000, also then put in escrow, when and upon condition that the Indian Coal & Mining Company, as original lessee, should give its consent, subject to its right to demand bond therefor of the Alderson Coal Company as a condition precedent to Cavanagh's prior assignment, as sublessee, to the said Alderson Coal Company, in which he was president and owned a controlling amount of the stock, of his interest in a 10-year lease on certain segregated coal lands in Oklahoma belonging to the Choctaw and Chickasaw Indians, and when such consent to such assignment should be given, Swift and Cavanagh, or their respective attorneys, should notify the McAlester Trust Company to make such deliveries. This escrow agreement in writing included as a part thereof a letter attached thereto, addressed by Swift to his father-in-law, one J. A. Nichols, secretary, treasurer, member of the board of directors, and controlling stockholder of the Indian Coal & Mining Company, at Asheville, N. C., informing this addressee of said sale of stock in the Alderson Coal Company, including the condition of consent upon which it depended, and urging him to use his influence to cause the Indian Coal & Mining Company to give consent to Cavanagh's said assignment of said lease to the Alderson Coal Company, and informing said addressee that it was understood that:

"The Alderson Coal Company will execute a good and sufficient bond to pay all royalties and carry out the general terms of the lease."

The foregoing is, we believe, the full substance of all the terms of the written memorandum of the contract between Swift and Cavanagh addressed and delivered as aforesaid, with the said 143 shares of stock and the said certified check, to the said escrow holder, on April 11, 1911. On September 3, 1910, Cavanagh had executed an assignment of his lease to the Alderson Coal Company; but on April 11, 1911, it was not effective for

want of the consent of the Indian Coal & Mining Company. On November 24, 1910, the Indian Coal & Mining Company, by resolution on its minutes, had given, but before execution withdrew, authority to its president to give the required consent in terms substantially identical with those in which it was given as hereafter shown on April 14, 1911, except that the italicized part did not occur in the resolution of November 24th; and the contract of April 11, 1911, was made in the light of that past experience and of the continued desire of Cavanagh to effect such assignment, and, as aid to that end, to have Swift write said letter to Nichols.

Immediately upon so placing said shares of stock and said certified check in escrow, an attorney and agent of Cavanagh departed for Asheville, N. C., taking said letter from Swift with him, to there procure the requisite consent of the Indian Coal & Mining Company to Cavanagh's assignment of said lease to the Alderson Coal Company; and on April 14, 1911, he procured such assignment, indorsed on the original lease contract—

"conditioned that the Alderson Coal Company execute and maintain in favor of the Indian Coal & Mining Company a \$10,000 surety company bond, conditioned for the faithful performance of the terms of said lease by the Alderson Coal Company, and upon failure to give and maintain such bond the consent hereby given to said transfer and assignment may be withdrawn, and the said J. E. Cavanagh shall be held bound according to the original lease."

It may be here incidentally observed that, on April 14, 1911, the day said consent was procured Cavanagh, who had commenced negotiations to sell on the day the said contract was executed, sold a major amount of his stock in the Alderson Coal Company to Jonas Johanneson; but, of course, a major stockholder cannot control the volition of a corporation, as such control is in its board of directors.

It does not appear that the aforesaid form of consent was unsatisfactory to Cavanagh for a month or more, during which time he vainly endeavored to procure a surety company to give the required bond for the Alderson Coal Company; but, after he and certain other stockholders of the Alderson Coal Company, including Johanneson, had signed an indemnity bond required by a surety company willing only upon receiving indemnity to become surety for the Alderson Coal Company to the Indian Coal & Mining Company, and, some time between May 15, 1911, and the commencement of this suit on May 20, 1911, while he was endeavoring to induce a stockholder named J. R. Richardson to join them in the execution of such indemnity bond, upon the suggestion of Mr. Richardson, Cavanagh entered into what is called a "working contract" with the Alderson Coal Company, by the terms of which it undertook to work the leased land for him (Cavanagh), who continued to hold his estate therein and to sustain his contractual liability

ity therefor to the Indian Coal & Mining Company, and the original purpose of Cavanagh to assign, and of the Alderson Coal Company to acquire, the said lease was abandoned.

Plaintiff sues to enjoin the return of said certified check to defendant and to require the McAlester Trust Company to deliver the same to himself, and said shares of stock and resignation of office to Cavanagh. The defendant Cavanagh answers by a qualified general denial, and, which alone is important here, by a denial that the Alderson Coal Company was to give bond and a denial that the Indian Coal & Mining Company consented to the assignment. J. B. Dowell and M. J. Smith were made parties only because they had garnisheed said \$3,000, as belonging to Swift.

The rights of the parties in this case depend upon their intent, as expressed in said escrow contract, with respect to whether C.'s obligation to purchase was dependent in part upon the contingency of the Alderson Coal Company's execution of said bond, and thus, in effect, upon the absolute or effective consent of the Indian Coal & Mining Company to said assignment of said lease. If so, the judgment of the trial court should be affirmed; but if said contract should be construed as only requiring, as a condition precedent to said sale by Swift and purchase by Cavanagh, a consent so qualified as to be ineffective to assign said lease until the Alderson Coal Company should execute such bond, thus placing upon Cavanagh the risk of both the volition and the ability of said company to give such bond, the judgment should be reversed.

The provision in the consent given that the Indian Coal & Mining Company might withdraw the same and that Cavanagh should be held bound according to the original lease seems to have been an undue burden upon him; but it appears that he probably waived this point as a ground of objection, and, in view of our conclusion on another point, we pass this without decision.

In view of the fact that both Swift and Cavanagh were officers and stockholders in the Alderson Coal Company, and presumably equally well informed as to whether it could give bond and of the fact that S., in said letter part of the contract, informs Mr. Nichols, of the Indian Coal & Mining Company, that the Alderson Coal Company will execute such bond, which might either have been done in advance of the giving of absolute consent or after the giving of consent qualified by requiring such bond as a condition precedent to its effect, we are of the opinion that a correct construction of said contract requires us to hold that Cavanagh's obligation to purchase Swift's stock was contingent upon an event, the execution of said bond, that never happened.

It is neither alleged nor proven that Cav-

anagh is blamable for the inability or unwillingness of the Alderson Coal Company to give the required bond, and it must be presumed that its board of directors controlled its volition. Cavanagh, as he was not bound to refrain from doing, sold his controlling interest in the stock of this company immediately after entering into said escrow contract; but it does not appear that the failure of the Alderson Coal Company to give the bond was due to this or to any act or omission on his part, or, for that matter, upon the part of Swift.

Numerous propositions and counter propositions are urged in the briefs of the parties to this case, and each and all have deserved and had our serious consideration; but we deem it unnecessary to enter into a discussion of each in detail, the foregoing views being our answer to them all.

For the reasons stated, the judgment of the trial court should be affirmed.

BREWER, C., being disqualified, did not participate in this decision, and RITTENHOUSE, C., served in his stead.

PER CURIAM. Adopted in whole.

(55 Okl. 398)

SACKETT et al. v. ROSE. (No. 4770.)

(Supreme Court of Oklahoma. Jan. 4, 1916.

Rehearing Denied. Feb. 15, 1916.)

(Syllabus by the Court.)

1. ABSTRACTS OF TITLE — LIABILITY OF ABTRACTOR—PARTIES.

Under section 1, Wilson's Rev. Statutes 1903, an abstractor of title is liable on his bond to pay all damages that may accrue to any person by reason of any incompleteness, imperfection, or error in any abstract furnished by him and relied on by such person to his injury, and such liability is not confined to the person for whom he makes or furnishes an abstract.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. §§ 2-8; Dec. Dig. —3.]

2. STATUTES — 207 — CONSTRUCTION — CONFLICTS.

In the construction of statutes, harmony, not confusion, is to be sought. Conflicts between different provisions of the statute are not to be held to exist, if harmony, by any reasonable construction of them, can be discovered. The true rule has often been said to be that where two acts or parts of acts are reasonably susceptible of a construction that will give effect to both and to the words of each, without violence to either, it should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict. There is no conflict between different provisions of a statute if there is a reasonable meaning of the words used, considering the manner of their use, which will bring them into harmony.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 284; Dec. Dig. —207.]

3. EVIDENCE — 429 — PAROL — ALTERATION OF RECORD.

The alteration of a record may be shown by parol evidence; such evidence not being within the rule excluding evidence to vary the record but for the purpose of showing that the

record in question is not the true record which was actually made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1969-1971, 1973, 1974; Dec. Dig. ¶429.]

4. DAMAGES ¶95—SCOPE OF REMEDY.

When a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury, and the latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be in the situation which he would have occupied had not the wrong been committed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-229; Dec. Dig. ¶95.]

5. ABSTRACTS OF TITLE ¶3—DEFECTS—DAMAGES RECOVERABLE.

A party injured on account of the incompleteness or error in an abstract is entitled to all the damages proximately resulting from such injury.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. §§ 2-6; Dec. Dig. ¶3.]

6. DAMAGES ¶62—MITIGATION—DUTY OF INJURED PERSON.

Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. It is only incumbent on him, however, to use reasonable exertion and incur reasonable expense, and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. ¶62.]

7. DAMAGES ¶163—MITIGATION—BURDEN OF PROOF.

The burden of proving mitigation of damages is upon the party guilty of the tortious act or breach of contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. ¶163.]

8. JURY ¶110—DISQUALIFICATION OF JUROR—WAIVER OF OBJECTION.

A known ground of disqualification of a juror, before or during the progress of the trial, is waived by withholding it or failure to raise the objection until after the verdict.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 502-513, 515-523; Dec. Dig. ¶110.]

Commissioners' Opinion, Division No. 6. Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action by Martha Rose against James G. Sackett and others. Judgment for plaintiff, and defendants bring error. Remanded, with directions.

Geo. J. Eacock and Jennings & Levy, all of Oklahoma City, for plaintiffs in error. James S. Twyford, of Oklahoma City, for defendant in error.

BOWLES, O. The defendant in error (plaintiff below) instituted this action in the superior court of Oklahoma county, against James G. Sackett, an abstractor of title, and Robert I. Sackett, Lizzie Jennings, and A.C. Farmer, bondsmen for said James G. Sackett, plaintiffs in error (defendants below), hereinafter referred to respectively as "plaintiff" and "defendants," for damages resulting from an incorrect abstract on certain property in Oklahoma City on which the plaintiff loaned \$1,750 and subsequently thereto purchased

what she thought was a fee title to said property. The defendant James G. Sackett, in making the abstract, prior to the loan above referred to, omitted in his certificate to disclose the existence of a judgment which was then a lien on said property, which said judgment was against one Dewalde, a former owner of the property, in favor of J. W. Morrison. After the plaintiff had purchased the property, said property was sold under said judgment and entirely lost to plaintiff. Plaintiff recovered judgment in the court below for the value of said property so lost to her; hence this appeal.

[1] At the outset, we are called upon to construe section 1, Wilson's Revised & Annotated Statutes of 1903; plaintiff in error claiming that an abstractor is only liable for damages for any incompleteness, imperfections, or errors in any abstract furnished by him to the person or persons for whom he may compile, make, or furnish an abstract of title. The court below held that a party furnishing an abstract was liable in damages to any person relying upon said abstract to his detriment. We believe this construction of the statute clearly right. Section 1 reads as follows:

"That it shall be unlawful for any person, firm or corporation to hold themselves out as abstractors and to engage in the business of abstracting title to real estate in any of the counties of the territory of Oklahoma, without first having executed and filed with the county clerk of the county in which said person, firm or corporation intends to engage in the business of abstracting, a bond, to be approved by the board of county commissioners of said county, with three or more good and sufficient sureties residing in the county, and worth not less than double the amount of the bond over and above all debts, liabilities and exemptions, in the sum of five thousand dollars, conditioned that he will properly demean himself in the business of abstracting, and will pay all damages that may accrue to any person by reason of any incompleteness, imperfections or error in any abstract furnished by him, and will in no way mutilate, deface or destroy any of the records of the several offices to which he may have access, and that he will not in any way interfere with, hinder or delay the several county officers in the discharge of their duties, while using said records, in the prosecution of said business of abstracting: Provided, however, that the records shall in no case be taken from the county office to which they belong. The person, firm or corporation who shall execute and file said bond of five thousand dollars for said purpose, shall, together with the sureties thereon, be liable on said bond to the territory of Oklahoma in the penalty of one hundred dollars (\$100); and to any county or person who shall be in any way damaged by any mutilation, injury or destruction of any record or records of the several county offices to which he or they may have access, to the amount of damage actually done said county or person; and to any person or persons for whom he or they may compile, make or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection or error made by said person, firm or corporation, in compiling said abstract."

This statute seemingly has two inconsistent provisions. The first part of the section

provides that the abstractor shall give bond, etc., said bond conditioned that he will properly demean himself in the business of abstracting and pay all damages that may accrue to any person by reason of any incompleteness, imperfection, or error in any abstract furnished by him. The latter part of the same section provides that the abstractor and his bond shall be liable to the state or territory in the penal sum of \$100 and to any county for mutilating the records, etc., and to any persons for whom he or they may compile, make, or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection, or error made by such person, firm, or corporation in compiling said abstract.

It is clear that the former part of the section makes the abstractor liable to any person by reason of any error in any abstract furnished by him. The latter part of the section provides that the abstractor is liable to any one to whom he furnishes an abstract. It seems to us that these two expressions can be construed together without doing violence to either. The latter part of the section in no wise repeals, modifies, or curtails the clear import and purpose of the Legislature to make an abstractor liable to any person injured by relying upon his abstract as provided in the first part of the section. The liability in the first portion of the section is general. The latter part of the section provides that he is liable to the party to whom he furnishes the abstract and does not undertake to confine or curtail his liability to any other person relying upon the correctness thereof to his injury. The section might well read:

"The abstractor will pay all damages that may accrue to any person by reason of any incompleteness, imperfections or error in any abstract furnished by him and to any person or persons for whom he or they may compile, make or furnish an abstract."

Would it be contended that the provisions, read together as above, indicated anything else than that the abstractor's liability extends to any person relying upon the abstract, whether it was furnished to him in the first instance or furnished to some other person?

[2] This construction of the statute makes it a harmonious whole and gives full effect to all of its provisions and does violence to none. Harmony, not confusion, is to be sought for by statutory construction. Conflicts between different provisions of a statute are not to be held to exist, if harmony, by any reasonable construction of them, can be discovered. The true rule has often been said to be that where two acts or parts of acts would be reasonably susceptible of a construction that will give effect to both and to the words of each, without violence to either, it should be adopted, in preference to one which, though reasonable, leads to the conclusion that there is a conflict. There is no conflict between different parts of a statute if there is a reasonable meaning of the words used, con-

sidering the manner of their use, which will bring them into harmony. See *Atty. Gen. v. Brown*, 1 Wis. 513; *Atty. Gen. v. Railway Co.*, 35 Wis. 425; *Mason v. City of Ashland*, 98 Wis. 540, 74 N. W. 357.

Before we would be justified in applying the doctrine contended for by plaintiff in error, that, where two sections of the same statute or particularly two parts of the same section of a statute are flatly contradictory of each other, that which has the latterly position will be deemed to govern and control, we must first conclude that there is an irreconcilable conflict, which we cannot say of this statute. Having come to this conclusion, it is plain that the law as to agency and privity of contract has no application, and is therefore not considered.

[3] It is next contended by plaintiff in error that the court below erred in permitting evidence to go to the jury for the purpose of contradicting the record as to when the judgment complained of in this case was rendered against Dewaide, the original owner of the property. The judgment docket showed on its face that this judgment was recorded on the 23d day of July, 1909; the abstractor made his abstract, or the extension thereof, March 18, 1909; the judgment was rendered February 17, 1909. The claim of plaintiff below was that the record had been changed; in other words, the judgment had been recorded on the 23d day of February and afterwards changed to read July 23d.

The evidence complained of was admitted, not for the purpose of impeaching the record, but for the purpose of showing that the record had been tampered with, and the judgment was actually recorded February 23d. The authorities cited by plaintiff in error, that the record of a court cannot be impeached in a collateral proceeding, are the law; but was this evidence admitted for that purpose? We think not. The evidence was introduced and admitted for the purpose of showing what the record actually was and for the purpose of ascertaining the truth. The alteration of a record may be shown by parol evidence, such evidence not being within the rule excluding evidence to vary the record, but for the purpose of showing that the record in question is not the true record which was actually made. See *Louisville & N. Ry. Co. v. Malone*, 116 Ala. 600, 22 South. 897; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *Wilkinson v. Carter*, 22 Neb. 186, 34 N. W. 351; *Town of Woodville v. Harrison*, 73 Wis. 360, 41 N. W. 529; *Lowry v. McMillan*, 8 Pac. 157, 49 Am. Dec. 501.

In *Lowry v. McMillan*, *supra*, the court uses this language:

"The record is entitled to great sanctity, in the law. But then it must be an honest record. It is in vain to talk of the danger of altering or explaining a record by parol; everything imbued with fraud must give way before credible sworn testimony."

[8] Plaintiff in error again contends that the jury to which the case was tried was not

impaneled and drawn according to law; in other words, that talesmen were ordered at a time when there were ample jurors on the regular panel present and qualified to try the case, and not otherwise engaged. This fact was known to counsel for plaintiff in error, if such was the fact, at or before the trial, according to their own affidavit. The record shows no objection made or exception saved to the impaneling of the jury at the time. This being true, such disqualification was waived. *Horton v. State*, 10 Okl. Cr. 294, 136 Pac. 177; *Fooshee v. State*, 3 Okl. Cr. 666, 108 Pac. 554.

[4-7] Defendant again assigns error in the refusal of the trial judge to give instruction No. A, as requested, which reads as follows:

"You are further instructed that, if you find for the plaintiff in this case, you will find for her in a sum not to exceed \$1,047.90."

This instruction was requested upon the theory that the "Morrison judgment" against Dewalde, the judgment upon which the property was finally sold and the judgment which the defendant Sackett omitted from the abstract, was the extent of defendants' liability, upon the theory that it was the duty of the plaintiff, when she found that a wrong had been perpetrated upon her, to use all reasonable means to arrest the loss, and that she could not stand idly by and permit the loss to increase, and then to hold the wrongdoer liable for loss which she might have prevented; the evidence failing to show that the plaintiff did anything to lessen the damages.

It will be noted that no amount of diligence on her part could have averted the loss of the amount of the Morrison judgment. Satisfaction of the judgment was her only remedy; consequently, she was entitled to a judgment for that amount, but so far as a further judgment, for additional damages, was concerned, the duty to exercise ordinary care and reasonable diligence to mitigate the same rested upon her. It was only incumbent upon her, however, in this regard, to use reasonable diligence to mitigate the damages and to lessen the injury. The question in such cases is always whether the necessary acts to mitigate the damages were reasonable, having regard to all the circumstances of the particular case.

In *Uhlrig v. Barnum*, 43 Neb. 584, 61 N. W. 749, the syllabus reads as follows:

"Where two parties have made a contract, which one of them has broken, the other must make reasonable exertions to render his injury as light as possible; and he cannot recover, from the party breaking the contract, damages which would have been avoided, had he performed such duty."

In *Washington County Abstract Co. v. F. S. Harris*, 149 Pac. 1075 (No. 4080), opinion by Judge Robberts, not yet officially reported, Ira S. Hopkins, on July 16, 1909, deeded to the plaintiff, F. E. Harris, certain lands in Washington county, and which deed was recorded on July 20, 1909. On July 19, 1909,

Ira S. Hopkins deeded the same land to Delilah B. Hopkins. This deed was recorded on July 19, 1909. On or about the 21st of July, 1909, the plaintiff, Harris, through his agents, employed the Washington County Abstract Company to furnish an abstract of title to the land, and on July 21, 1909, the abstract company did furnish said abstract to Harris, but failed to show the deed from Ira S. Hopkins to Delilah B. Hopkins, which was recorded two days before the abstract was furnished to Harris. Harris, after receiving the abstract and relying on the same, paid \$500 for the land. Delilah B. Hopkins then sued Harris to quiet her title, and Harris gave notice to the abstract company and its sureties of that suit, and they refused to defend it. Harris defended the suit alone, was defeated, and afterward sued the abstract company. One item of damages recovered was the expense of the suit, including attorney fees. This case was appealed to this court, and one of the questions passed upon was whether or not the attorney fee and costs were proper items of damages. Judge Robberts in the opinion says:

"Under such circumstances, evidently it was the duty of the defendant in that case (defendant in error herein) to use reasonable means, including necessary and reasonable expenses, to defeat, if possible, that cause of action, not only that he might reduce his own loss, but it was a duty he owed to the defendant (plaintiff in error herein) to reduce any damage he might sustain by reason of the erroneous abstract."

This case is squarely in point in our judgment, and decisive of the proposition at bar, and therefore binding upon us, as to the duty involving upon the plaintiff to exercise reasonable diligence to reduce any damages she sustained by reason of the erroneous abstract, after she had notice.

Roberts v. Leon Loan & Abstract Co., 13 N. W. 702, 63 Iowa, 76, is a case in point. The syllabus reads as follows:

"The defendant furnished plaintiff with an abstract of title, in which the period allowed for redeeming the land appeared by mistake to be 10 days longer than it actually was. Plaintiff discovered the error a day before the expiration of the time allowed for redemption, but failed to obtain the money in time to redeem, and neglected to apprise defendant of the mistake. Held, that defendant was entitled to be informed of his mistake in time to enable him to avert the consequences, and that plaintiff could not recover damages without showing that such timely information was given, and that reasonable effort had been made to secure the money."

This case goes a step further than we concede to be the law, that a failure to notify the abstractor precludes a party from recovery. A failure to notify the defendant in time to enable him to protect himself is a fact to go to the jury to aid them in determining whether plaintiff was negligent and failed to exercise ordinary care to reduce or lessen the damages.

The *American and English Encyclopedia*, vol. 8, p. 605, states the general rule to be:

"As it is the duty of a party injured by a breach of contract or tort to make reasonable effort to avoid damages therefrom, such damages as might by reasonable diligence on his part have been avoided are not to be regarded as the natural and probable result of the defendant's acts. There can be no recovery therefore for damages which might have been prevented by reasonable effort on the part of the person injured."

We believe these decisions and the text declare a doctrine consonant with honesty and fair dealing. To hold otherwise would be an absolute perversion of justice and would many times work injuries destructive and ruinous in their consequences. However, reasonable diligence and ordinary care is all that is necessary or can, in justice, be required. Time, knowledge, opportunity, and expense are all to be taken into consideration in determining whether or not the party injured exercised ordinary care to lessen the loss and mitigate the damages. The want of ordinary care is a question of fact to be submitted to the jury and to be determined by them.

The instant case was tried upon the theory, on the part of the plaintiff, that she was entitled to recover all the damages proximately resulting to her on account of the mistake in the abstract, and that no duty devolved upon her to make any effort to lessen or mitigate the damages. The defendant seemed to be of the opinion that, if liable at all, the maximum of recovery was the amount of the Morrison judgment. The plaintiff's theory was correct, with this modification: She was entitled to all of the damages proximately resulting to her on account of the failure of defendant to note the existence of the Morrison judgment in the abstract, except damages as might, by reasonable diligence on her part, have been avoided. Such damages are not to be regarded as the natural and probable result of defendant's acts.

Under the admitted facts in this case, the plaintiff, after discovering the property was advertised for sale and about to be sold under the Morrison judgment, made no effort either to satisfy the judgment or notify the defendant. It is true, she was in Arlington, Ohio, but she had two days, or possibly three, in which to satisfy the judgment or notify the defendant, or have made some effort with this end in view, or given some reasonable explanation for her neglect. This property, according to plaintiff's evidence, was worth \$5,000. It was within the range of possibilities for her to have borrowed sufficient money upon this property to have satisfied the judgment.

We believe plaintiff's right to recover in-

cluded all the damages suffered by her proximately resulting from the failure of the defendant to include the Morrison judgment in the abstract; in other words, the general rule is that, when a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury; the latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be in the situation which he would have occupied had the wrong not been committed. With this modification, that where a party is entitled to the benefit of a contract and can save himself from a loss arising from the breach of it at a trifling expense, or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable diligence and expense he could not prevent. The burden of proving circumstances in mitigation of damages is upon the party guilty of the tortious act or breach of contract.

The evidence was before the jury as to what the plaintiff did to lessen the damages, and it was the duty of the court to instruct the jury as to her duty to exercise ordinary care and reasonable diligence to avert the loss, if the same could be done at trifling expense and reasonable exertion on her part. This evidence showing lack of diligence on the part of the plaintiff was admissible under the general issue, and it was the duty of the court to instruct the jury that, if they believed that the Morrison judgment was of record at the time this abstract was made and delivered, the plaintiff, in any event, would be entitled to the value of that judgment as heretofore suggested, and such other damages as proximately resulted to her by reason of the erroneous omission in the abstract, and which she could not have prevented by the exercise of reasonable diligence and care on her part. We therefore believe that instruction No. 10 should have been given, as plaintiff's right to recover the amount of the Morrison judgment was unquestioned, if the judgment was of record at the time the abstract in question was extended; but her further recovery should have been limited by the instructions of the court, as heretofore suggested.

We therefore recommend that the judgment be remanded, with instructions that if the plaintiff remit all that part of the judgment over and above the amount of the Morrison judgment, with interest, the case be affirmed, and, should the plaintiff fail to agree to said remittitur, a new trial be granted.

PER CURIAM. Adopted in whole.

(55 Okl. 518)

LAUSTEN v. LAUSTEN. (No. 7274.)
(Supreme Court of Oklahoma. Jan. 18, 1916.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 22 — SPECIAL APPEARANCE — ASSIGNMENT OF NONJURISDICTIONAL ERRORS.

Where a defendant files a special appearance objecting to the jurisdiction of the court over his person, in which special appearance only jurisdictional matters are set up, and, after such special appearance is overruled and exceptions saved, appeals to this court, the assigning in his petition in error, filed in this court, of nonjurisdictional errors of the trial court does not constitute a waiver of the want of jurisdiction in the trial court over his person. *Rogers v. McCord-Collins Mercantile Co.*, 19 Okl. 115, 91 Pac. 864, not followed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 98; Dec. Dig. —22.]

2. PLEADING — 238, 252 — AMENDED PETITION — NOTICE — NECESSITY.

The filing by a plaintiff, after service or attempted service of summons and before answer, of an amended petition, which is complete in itself and does not refer to or adopt the original as a part of it, operates as an abandonment of the original petition; and, where such amended petition sets out a new cause of action and seeks for relief not prayed for in the original petition, notice of the filing thereof to the defendant or his attorney is essential to give the court jurisdiction to render judgment thereon, and a judgment rendered on such amended petition without such notice is void for want of jurisdiction of the person of the defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 602, 620-625, 736-743; Dec. Dig. —238, 252.]

(Additional Syllabus by Editorial Staff.)

3. COURTS — 92 — OPINIONS — "OBITER DICTUM."

Where a judge who writes the opinion of the court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point or principle is "obiter dictum"—citing Words and Phrases, Dictum.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. —92.]

Commissioners' Opinion, Division No. 1. Error from District Court, Washington County; R. H. Hudson, Judge.

Action by Mary K. Lausten against Mads C. Lausten. Judgment for plaintiff, and defendant brings error. Reversed, with directions.

Norman Barker, of Bartlesville, and Hainer, Burns & Toney, of Oklahoma City, for plaintiff in error. Everest & Campbell, of Oklahoma City, for defendant in error.

RUMMONS, C. On December 18, 1914, this action was commenced by the defendant in error, hereinafter called the plaintiff, in the district court of Washington county against the plaintiff in error, hereinafter called the defendant, for separate maintenance and alimony, and for the custody of the minor children of plaintiff and the defendant. On said day summons was issued in the said cause, returnable on December 28, 1914, requiring the defendant to answer the petition on or

before the 18th day of January, 1915. This summons was served by delivering a copy to the defendant, in which copy the defendant was required to answer the petition on or before January 18, 1914. On December 21, 1914, after the issuing and service of the said summons, the defendant filed an amended petition in said action. On January 11, 1915, the defendant entered a special appearance in the cause, objecting to the service of summons upon him, which, being overruled, he excepted, and made no further appearance. On January 28, 1915, judgment by default was rendered by the court in favor of the plaintiff against the defendant for the sum of \$30,000 alimony, and restraining and enjoining defendant from transferring or disposing of any of his property, real or personal, until such time as such judgment was fully satisfied. On January 28, 1915, the defendant again appeared specially, questioning the jurisdiction of the court to render the judgment, and moved the court to vacate and hold for naught the said judgment for want of jurisdiction of the person of the defendant. This motion was by the court overruled, to which ruling the defendant excepted, and brings error to this court.

The defendant assigns as error the overruling of his special appearance to quash the service of the summons, and the overruling of his motion to vacate and hold for naught the judgment for want of jurisdiction of the person of the defendant. He also assigns as error the permitting of the plaintiff to amend her petition, stating a new and enlarged cause of action against the defendant, without any service of process or notice to the defendant, and making a new and enlarged demand against the defendant, without notice or additional service of process on the defendant. He further assigns as error that the trial court erred in hearing any testimony under the pleadings in said cause. He further assigns error in rendering judgment on the pleadings and the testimony because the court was without jurisdiction over defendant, and had no jurisdiction to render said judgment, which was not supported by the evidence, and neither the original petition or amended petition of the plaintiff justified or supported the findings of the trial court in rendering such judgment.

[1] It is contended by the plaintiff that the last three assignments of error, briefly set out above, constitute a general appearance by the defendant, and that he thereby waived the want of jurisdiction over his person in the trial court, and that this court is thereby precluded from inquiring into any want of jurisdiction of the trial court over the person of the defendant. This question meets us at the threshold in the determination of this case, and we must consider whether or not a party, appealing to this court from a judgment claimed to be void for want of jurisdiction in the trial court over his person, by

filing a petition in error in which he assigns errors committed by the trial court which are not jurisdictional, enters a general appearance in the case and validates and makes binding and effective a judgment which was up to that time void for want of jurisdiction. Counsel for plaintiff rely upon the case of *Rogers v. McCord-Collins Mercantile Co.*, decided by the territorial Supreme Court, and reported in 19 Okl. 115, 91 Pac. 864. The court there says:

"In the brief of the plaintiff in error in this case, they argue two propositions, which can in no wise be taken advantage of by special appearance, and an appearance in any case which is designated as a special appearance, and in which special appearance propositions are contended for which cannot be taken advantage of by a special appearance, but can only be heard upon a general appearance, the parties will be taken and held to have made a general appearance. Counsel argue, upon pages 10 and 11 of their brief, that the judgment was rendered without testimony; also that the petition was not subscribed by the plaintiff in error, and for this reason the court erred in rendering judgment; also the service was made on Thanksgiving Day. The first two of these propositions are not matters that can be considered under the head of a special appearance. They are matters that do not pertain to the jurisdiction of the person, and the defendant, having presented these two matters to the court, will be deemed to have entered a general appearance in the action, and, having entered a general appearance, all matters affecting the service are waived, and the court will be held to have jurisdiction of the person of the defendant."

This case is the only Oklahoma case we have been able to find touching upon the question of general appearance in the Supreme Court as a waiver of jurisdiction. While it has been cited repeatedly by this court on the proposition that a motion designated as a special appearance in which nonjurisdictional questions are raised is in fact a general appearance, we are convinced the language we have quoted above is a dictum not necessary for the decision of the case in which the opinion was rendered. The question of jurisdiction in that case was a question of fact; the sheriff's return showing service upon the defendant at his usual place of residence, and the defendant contending that at the time of the service he was a non-resident of the county and territory. The court, in determining the case before considering the question of the matters argued in the briefs, says:

"It is insisted by the plaintiff in error that both of these motions ought to have been sustained. There was, however, evidence offered and considered, and we think that the return of the sheriff was sufficient as against the evidence offered by the defendant. The affidavits offered by the defendant are very unsatisfactory. The affidavit of the wife of the defendant was incompetent and could not have been considered by the court. The other affidavits contain conclusion and evidently appeared to the court as evasive and unsatisfactory."

The court further says:

"This same question, having been presented to the court upon the motion to quash service, became *res adjudicata*, and the court would have been justified in overruling the motion upon that ground, if none other."

[3] So it will be seen that the territorial Supreme Court, before arriving at a consideration of the effect of the arguing of nonjurisdictional questions in the brief, had concluded that the judgment of the trial court was right upon the facts, and was correct for the reason that the question determining it had become *res adjudicata*. In the case of *Huston v. Scott*, 20 Okl. 156, 94 Pac. 517, 35 L. R. A. (N. S.) 721, the court says:

"The declaration of law made in the quotation was clearly obiter dictum: 'Where a judge who writes the opinion of the court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point or principle is obiter dictum.' *Hart v. Stribling*, 25 Fla. 433, 435, 6 South. 455; *L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co.*, 109 Fed. 393, 400, 48 C. C. A. 436; 3 Words and Phrases, p. 2051.

"So, when the learned jurist, Justice McAtee, speaking for the court, made the finding of fact 'or that Martin had any knowledge of the pendency of any suit in any court touching the property, nor is there any proof in the case that the lands in question were the subject of any suit,' there was created a condition under which he was not required to decide the legal question involved, and the holding is obiter dictum, and not binding on this court."

We therefore conclude that the holding which we have quoted in the case of *Rogers v. McCord-Collins Mercantile Co.*, *supra*, is obiter dictum and not authoritative.

It seems clear that the assignments of error, "that the trial court erred in hearing any testimony under the pleadings in said cause on the 28th day of January, 1915," and "that the trial court erred in rendering judgment for the defendant in error against plaintiff in error on the pleadings and the testimony, which was not supported by the evidence, and that neither the original petition or amended petition of the plaintiff below, this defendant in error, justified or supported the findings of the trial court," challenge this court to the review of the judgment of the trial court upon grounds that are nonjurisdictional; but does the fact that the defendant complains of errors which are not jurisdictional waive the jurisdictional errors of which he also complains? It is not contended that the special appearance to quash the summons or the motion to vacate the judgment are based upon any nonjurisdictional grounds. So the repeated holdings of this court, that a motion to vacate a judgment for want of jurisdiction of the person of the movant and also for nonjurisdictional grounds constitute a waiver of the want of jurisdiction, and submits the person of the movant to the jurisdiction of the court, and that thereby a judgment void for want of jurisdiction of the person is validated, do not directly aid us in the determination of this question. It seems to us that this court has gone as far in the matter of waiver of jurisdiction after judgment as the law requires. The authorities upon the question of waiver of jurisdiction of the person upon appeal to the Supreme Court are not in harmony. They seem to be divided into three groups: The first holding

that an appeal to the Supreme Court from a judgment rendered without jurisdiction of the person waives the want of jurisdiction and submits the person of the appellant to the jurisdiction of the court, and binds him by the judgment already entered, and the appellate court is precluded from considering the want of jurisdiction. The next group holds that while an appeal from a judgment void for want of jurisdiction of the person submits the appellant to the jurisdiction of the court, yet the appellate court will consider the question of jurisdiction; and if it finds want of jurisdiction, will reverse and remand the cause with leave for the appellant to plead therein. The third group holds that a general appeal from a judgment void for want of jurisdiction of the person of the appellant is not a waiver of the question of jurisdiction, and does not validate the judgment if it be void.

An almost unbroken line of decisions by this court holds that a defendant making a special appearance, objecting to the jurisdiction of the court over his person, may, when such special appearance is overruled, save his exception and thereafter demur and answer, and proceed to the trial of the cause upon its merits without waiving his special appearance; and that he may appeal to this court from an adverse judgment, and bring to the attention of this court not only the error of the trial court in overruling his special appearance, but all other errors committed by the trial court in the proceedings below, after such special appearance has been overruled, without being held to have waived his special appearance. This court will upon such an appeal consider the question of the jurisdiction of the person of the defendant, and, if it finds that the court below was without jurisdiction, will reverse and dismiss the case. *Chicago Building & Manufacturing Co. v. Pewthers*, 10 Okl. 724, 63 Pac. 964; *Chicago Building & Manufacturing Co. v. Kirby*, 10 Okl. 730, 63 Pac. 966; *Austin Manufacturing Co. v. Hunter*, 16 Okl. 86, 86 Pac. 293; *St. L. & S. F. Ry. Co. v. Clark*, 17 Okl. 562, 87 Pac. 430; *Oklahoma Fire Insurance Co. v. Barber Asphalt Paving Co.*, 34 Okl. 149, 125 Pac. 734; *Spaulding v. Polley*, 28 Okl. 764, 115 Pac. 864; *Wm. Cameron & Co. v. Consolidated School District No. 1*, 44 Okl. 67, 143 Pac. 182; *Commonwealth Cotton Oil Co. v. Hudson* (No. 5483) 155 Pac. 577, not yet officially reported.

This being the state of the law upon the consideration of the question of the jurisdiction of the person upon appeal in cases where the defendants have proceeded to try the cases upon their merits and have speculated upon the chances of obtaining favorable verdicts or judgments in the trial court, can it be said that a stricter and harsher rule will be applied to him who rests his case in the court below upon the question of jurisdiction and takes no chances of obtaining a favorable judgment in the trial court? We can see

no reason for any such distinction, and we feel convinced there is none. In fact it seems to us that the defendant who stands alone upon the question of jurisdiction is entitled to the more favorable consideration. This court, in the case of *Griffin v. Jones*, 147 Pac. 1024 (not yet officially reported), says:

"The rule established by this court, following the decisions of the Supreme Court of Kansas in holding that a general appearance, after rendition of judgment, has the effect to validate a void judgment, often results in hardships, and, in effect, a denial of justice, and should not be extended beyond the reason of such rule. It has been said that a judgment which is void for want of service is no judgment at all; and to hold that after a judgment in form only has been entered against a party, which in fact and in law is no judgment, by his appearance in an effort to relieve himself from such judgment which is apparently valid, but which in fact is void, is carrying the rule of estoppel and waiver to the extreme."

As we have said above, we think this court has gone to the extreme limit in validating judgments void for want of jurisdiction of the person, by holding that a general appearance after judgment in the court rendering judgment makes such judgment valid and waives the question of jurisdiction. We do not think that either reason or authority requires an extension of that rule to a proceeding in error in this court to reverse the judgment of the trial court for errors in ruling upon purely jurisdictional questions.

We therefore conclude that the defendant did not, by assigning nonjurisdictional errors in his petition in error, waive the questions of jurisdiction which he had properly preserved below. *Bastian v. Adams*, 5 Neb. (Unof.) 32, 97 N. W. 231; *Zimmerman v. Gerdas*, 106 Wis. 608, 82 N. W. 532; *Electric Appliance Co. v. Warren*, 115 Wis. 477, 91 N. W. 970.

[2] It remains to be considered whether or not the court below had jurisdiction of the person of the defendant, so that it could enter a valid judgment against him. Upon this question we need only consider whether or not the trial court had jurisdiction to enter judgment against the defendant upon the amended petition. The plaintiff by filing her amended petition, in which no reference whatever is made to her original petition, upon which she had caused, or attempted to cause, a summons to be served upon the defendant, abandoned her original petition, and the same ceased to be a part of the record of the case; and her case against the defendant rested solely upon the amended petition. It is contended by counsel for plaintiff that because no notice was given defendant of the amended petition it became a nullity, and that the case was tried and judgment rendered upon the original petition. We think the converse of this is true; and that when the plaintiff filed an amended petition before answer she elected to abandon her original petition, and the same became, and was, a nullity. *Berry v. Berry*, 12 Okl. 221, 226, 71 Pac. 1074, 66 L. R. A. 513; *Lane v. C., O. & G. Ry. Co.*, 19 Okl.

324, 91 Pac. 833; Territory v. Woolsey, 35 Okl. 545, 553, 554, 130 Pac. 934; Gaar-Scott & Co. v. Rogers (not yet officially reported), 148 Pac. 161, at page 164.

It is apparent from an examination of both the original and amended petitions that the plaintiff sets up a new cause of action in the amended petition. That is, in the amended petition she sets up facts stating a cause of action against the defendant for an injunction restraining him from disposing of his property, pending the determination of the suit. She also seeks, in the amended petition, for the sum of \$250 attorneys' fees; while in the original petition no attorneys' fees are prayed for specifically. It is apparent, from a perusal of the judgment of the court below, that in rendering judgment against the defendant it was based upon the amended petition, for the court grants the injunction prayed for and allows the attorneys' fees in the sum prayed for.

Section 4787, Revised Laws 1910, provides:

"The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceedings; but notice of such amendment shall be served upon the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as to the original petition."

It is not contended that any notice whatever of this amended petition was given either to the defendant or his attorneys, so that the defendant at the time judgment was entered was not in default, nor was he in court upon the amended petition. The giving of notice of the filing of an amended petition before answer is jurisdictional; and any judgment rendered, without such notice having been given, is without jurisdiction and of no effect. Haight v. Schuck, 6 Kan. 192; R. R. Co. v. Van Riper, 19 Kan. 317; Beecher v. Ireland, 46 Kan. 97, 99, 26 Pac. 448; Perry-Rice Grocery Co. v. Craddock Grocery Co., 34 Tex. Civ. App. 442, 78 S. W. 906; Three Forks City Co. v. Commonwealth, 20 Ky. Law Rep. 149, 45 S. W. 353; Sanford v. Edwards, 19 Mont. 56, 47 Pac. 212, 61 Am. St. Rep. 482, note page 493.

This being true, the trial court was without jurisdiction to render the judgment complained of; and, taking this view of the case, we do not deem it necessary to consider the other errors assigned.

The judgment should be reversed and remanded with directions to the trial court to vacate such judgment.

PER CURIAM. Adopted in whole.

(55 Okl. 120)

SHIPMAN v. PORTER. (No. 6649.)

(Supreme Court of Oklahoma. Jan. 25, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 773—FAILURE TO FILE BRIEF—AFFIRMANCE.

Where plaintiff in error fails to file brief under rule 7 (137 Pac. ix) of this court, and

an examination of the record discloses that the appeal is without merit and was prosecuted for delay, the judgment appealed from may be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 8104, 3108-3110; Dec. Dig. \S 773.]

Commissioners' Opinion, Division No. 4. Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by Vera Porter against P. E. Coyne and R. K. Shipman. Judgment for plaintiff, and defendant Shipman brings error. Affirmed.

Biddison & Campbell, of Tulsa, for plaintiff in error. Geo. T. Brown, of Tulsa, for defendant in error.

MATHEWS, C. No brief having been filed herein by the plaintiff in error, and the defendant in error having filed a motion to dismiss for that reason on November 15, 1915, and having since filed an additional motion to affirm for failure to file brief, and neither of these motions having received any response from the plaintiff in error, the court is of the opinion that the appeal was for delay only, and, under rule No. 7 of this court (137 Pac. ix), we recommend that the judgment be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 1)

ROGERS et al. v. HERNDON, County Treasurer. (No. 4827.)

(Supreme Court of Oklahoma. Jan. 24, 1916.)

(Syllabus by the Court.)

1. TAXATION \S 210 — EXEMPTION — USE OF PROPERTY.

Where exemption from taxation is based upon the use to which the lands are put, when the use ceases the exemption also ceases.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 334-337; Dec. Dig. \S 210.]

2. TAXATION \S 181—PROPERTY SUBJECT—INDIAN ALLOTMENT—TRANSFER TO THIRD PERSONS.

After land which has been allotted to a freedman citizen of the Seminole Tribe of Indians and designated as a homestead under the Seminole Agreement bearing date of December 16, 1897 (Act July 1, 1898, c. 542, 30 Stat. L. 567), has been conveyed by the allottee to third parties, it becomes subject to taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 45; Dec. Dig. \S 181; Indians, Cent. Dig. \S 54.]

Commissioners' Opinion, Division No. 6. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action by H. H. Rogers and V. V. Harris against Mace Herndon, Treasurer of Seminole County, to enjoin collection of taxes. Judgment for defendant, and plaintiffs bring error. Affirmed.

Mann, Rogers & Harris, of Holdenville, for plaintiffs in error. C. L. Hill, Co. Atty., of Wewoka, for defendant in error.

BROWN, C. This action was originally commenced in the district court of Seminole county by H. H. Rogers and V. V. Harris, the plaintiffs in error, who will be hereinafter designated plaintiffs, against Mace Herndon, treasurer of Seminole county, defendant in error, who will be hereinafter designated defendant, to restrain the collection of taxes levied against the northwest quarter of the southeast quarter of section 16, township 9 north, range 7 east, in Seminole county, for the years 1909, 1910, 1911, and 1912.

The trial court sustained a demurrer to plaintiffs' petition, and the plaintiffs elected to stand upon the same. The court rendered judgment against the plaintiffs, and they bring error to this court.

The land upon which the tax is sought to be collected was allotted to one Ned Island, a freedman citizen of the Seminole Tribe of Indians, as a part of his portion of the lands of said tribe of Indians, under the laws of Congress and the Seminole Agreement dated December 16, 1897 (30 Stat. L. 567, c. 542), and the said tract of land was designated as a homestead, as provided in said treaty.

[1, 2] On July 30, 1908, the said Ned Island conveyed the land above described to the plaintiffs, and they are now, and have been ever since, the owners of the same in fee. The sole question for determination in this case is whether or not the Seminole freedman homestead is subject to taxation after the same has been conveyed by the allottee, and the answer to this question depends upon the construction to be placed upon that part of said agreement which applies to the question of taxation; said section being as follows:

"When the tribal government shall cease to exist, the principal chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as a relinquishment of the right, title, and interest of the United States in and to the lands embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of 40 acres, which shall by the terms of the deed be made inalienable and nontaxable as a homestead in perpetuity."

It is conceded that the tax exemption provided for in the treaty is a property right that cannot be abrogated by either Congress or the state of Oklahoma. *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303; *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; *English v. Richardson*, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949; *Lieber v. Rogers, Co. Treas.*, 37 Okl. 614, 133 Pac. 30; *Whitmire v. Trapp*, 33 Okl. 429, 126 Pac. 578. But the controversy arises as to the period of time such land is to be exempt from taxation.

The provision, "Each allottee shall designate one tract of 40 acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity," is the specific provision of the treaty relied upon by the plaintiffs.

In arriving at the meaning of this provision of the treaty we should take into consideration the whole treaty, and its object and purposes (*United States v. Boisdoré*, 8 How. 122, 12 L. Ed. 1009; *Kansas City Bridge Co. v. Lindsay Bridge Co.*, 32 Okl. 81, 121 Pac. 639; *Jack Rider et al. v. Lee Helms et al.* [Okl.] 150 Pac. 154, recently decided, but not yet officially reported), and should bear in mind that a treaty with the Indians must be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians (*Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49).

The legal title to the land in the Seminole Nation was in the tribe, for the common use of its members, and the principal object of the treaty was to extinguish the title of the tribe and to divide the land in severalty among its members, thereby creating a system of private property and laying a foundation for the creation of a state which Congress desired to organize for the government and development of the Indian Territory.

It was also the object and purpose of the parties to the treaty to place certain safeguards and restrictions around the individual members of the tribe to protect them in the use and enjoyment of the said property that was to be allotted to them as their share of the tribal property, and one of the things specially provided for was that each member should have a home consisting of a tract of 40 acres, and, in order to hedge the same around with safeguards and restrictions so as to preserve it to the allottee, it was provided in that part of the treaty under consideration that it should be "inalienable and nontaxable as a homestead in perpetuity."

It was doubtless not the purpose of the parties to the agreement to enhance the market value of the said 40-acre tract, for the same provision that made it nontaxable also made it inalienable for the same period of time, thus clearly disclosing that it was the sole purpose in making the land nontaxable to preserve it to the allottee as a home, and to protect him in the use and occupancy thereof. And this is further evidenced by the fact that the said treaty makes no special provision for the exemption of the other lands of the allottees from taxation.

There is nothing in this provision of the agreement or in any act of Congress applicable to the Seminole Tribe of Indians that evidences a purpose or intention to exempt the property from taxation in the hands of third persons after they have purchased it from the allottee. On the contrary, the act of Congress of April 28, 1906 (34 Stat. L. 137, c. 1876), expressly provided that the homestead

shall be nontaxable so long as the title remains in the allottee, which is equivalent to saying that the same shall be taxable after it passes into the hands of third parties. Thus showing a construction of the treaty by one of the contracting parties, to wit, Congress, to the effect that there was no exemption of the land from taxation in the hands of third parties, and this is a significant fact in ascertaining the real intention of the parties. *Searight v. Stokes*, 3 How. 151, 11 L. Ed. 548; *Cope v. Cope*, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832; *Marchie Tiger v. Western Inv. Co. et al.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Jack Rider et al. v. Lee Helms et al.*, supra.

But we are not forced to rely upon mere circumstances in reaching a conclusion in this case. The language of the provision is not susceptible to any other reasonable construction than that the land should be nontaxable only so long as it remained the property of the allottee, and we believe that this was what the parties undertook to express thereby; the phrase used being "nontaxable as a homestead in perpetuity." To our mind this was a short way of saying that the land must be forever nontaxable so long as it was the homestead of the allottee. It will be observed that it was to be nontaxable "as a homestead." If the parties to the agreement had intended otherwise they certainly would have used more appropriate language; they would not have placed the limiting clause "as a homestead" immediately following the word "nontaxable." Therefore, when the land was sold and it ceased to be the property of the allottee, the purpose for which the exemption was given, to wit, to preserve the land to the allottee and protect him in the use and occupancy thereof, had been fully accomplished. In the case of *Commissioners of Miami County v. Brackenridge*, 12 Kan. 114, Judge Brewer, in delivering the opinion of the court, laid down the rule:

"Where exemption from taxation is based upon the use to which the lands are put, when the use ceases the exemption also ceases."

Consequently, when the land ceased to be the allottee's homestead by being transferred to a third party, it ceased to be nontaxable. See, also, *Bledsoe Indian Laws* (2d Ed.) § 294; *Schock v. Sweet* (Okla.) 145 Pac. 388.

The plaintiffs insist that the case of *New Jersey v. Wilson*, supra, is decisive of this question, but we are unable to agree with them in this view. We do, however, fully recognize the soundness of the rule laid down in that case, that a contract to exempt lands from taxation is binding, and cannot be broken, and we have fully adhered to that rule in the foregoing discussion. But in the *Wilson* Case the contract provided:

"That the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof in any wise notwithstanding."

Thus clearly providing that the land should never thereafter be taxable, but in the instant case, the land was to be nontaxable as a homestead of the allottee, or in other words, in the *Wilson* Case there was no limit to the time the land should be nontaxable, while in the instant case the land was nontaxable only for a limited period.

Finding no error in the record, we recommend that the judgment of the trial court be affirmed. It is so ordered.

PER CURIAM, Adopted in whole.

(55 Okl. 168)

HART et al. v. WILLIAMS.

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

ESTOPPEL — § 83 — STATEMENTS — INTENT TO ABANDON LEASE — DEFENSE OF SUBSEQUENT LESSEE.

In an action for the recovery of real estate, by one claiming under a prior lease against a subsequent lessee in possession, statements by the prior lessee that he did not intend to do anything under his lease, that as he had not got possession he did not want to do anything further under the lease, and that he was going to throw up the lease, made to the subsequent lessee, there being no evidence that the person making the statements was aware at the time that the subsequent lessee intended to procure a lease on said land, or that the statements were made for the purpose of leading the subsequent lessee to rely and act thereon, do not constitute a defense to the action.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 218, 227-229; Dec. Dig. § 83.]

Commissioners' Opinion, Division No. 1. Error from District Court, Okfuskee County; John Carruthers, Judge.

Action by R. W. Williams against Tom Hart and another. Judgment for plaintiff, and defendants bring error. Affirmed.

W. A. Huser, of Okemah, and C. B. Conner, of Wenatchee, Wash., for plaintiffs in error.

RUMMONS, C. This action was commenced in the district court of Okfuskee county by R. W. Williams against Tom Hart and Archie Hart to recover possession of a tract of land to which defendant in error claimed to be entitled by virtue of a lease executed by the guardian of an Indian minor. At the close of the evidence the trial court directed a verdict for the defendant in error for the possession of the land sought to be recovered. Plaintiffs in error complain of this action of the trial court, and bring this proceeding in error to reverse the same.

We have not been favored with a brief on behalf of the defendant in error; but we have examined the brief of plaintiffs in error, and have reached the conclusion that the assignment of error argued therein is not well taken. The plaintiffs in error relied, as a defense to the action of defendant in error, upon certain statements made by him to

the effect that he intended to throw up his lease—intended to have nothing more to do with it. It appears from the brief of plaintiffs in error that the lease to defendant in error was executed about one year prior to the lease to plaintiffs in error, and that both leases were duly executed with the approval of the county court of McIntosh county. Plaintiffs in error set out in their brief excerpts from the testimony upon which they relied to establish their defense to the action of defendant in error. We do not think the testimony set out warrants the conclusion that plaintiffs in error seek to reach. They contend that the statements made by defendant in error to them constitute an abandonment of his rights under the prior lease, and estop him from thereafter asserting any rights over their lease. The statements contained in the brief claimed to have been made by defendant in error only go to a declaration of his intention not to have anything more to do with the land in controversy, and an intention not to do anything more under his lease, and that because he had been unable to secure possession of the land he would do nothing more about it. It does not appear in the brief that at the time he made these statements he knew that the plaintiffs in error were about to lease this land, or that they had made any inquiry of him as to his intentions with regard to the lease, for the purpose of being guided by his statements in taking the lease, which they subsequently secured. Mere declaration of a person in ordinary conversation as to his intentions as to his property, made under circumstances which do not indicate to him that the persons to whom the statements are made intend to rely upon the same, and not made for the purpose of influencing their conduct, do not rise to the dignity of an estoppel.

The brief of plaintiffs in error disclosing no error committed by the court below, the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 170)

PAULS VALLEY NAT. BANK v. MITCHELL. (No. 5819.)

(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

BANKS AND BANKING §270 — NATIONAL BANKS — USURY — RECOVERY OF PENALTY — DEMAND.

An action to recover double the amount of usurious interest paid, against a national bank is governed by section 5198, Revised Statutes United States (U. S. Comp. St. 1913, § 9759), and not by section 1005, Revised Laws 1910, and it is not necessary in such an action to allege and prove a demand for the return of the usury claimed.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1023-1053; Dec. Dig. §270.]

Commissioners' Opinion, Division No. 1. Error from County Court, Garvin County; W. R. Wallace, Judge.

Action by J. F. Mitchell against the Pauls Valley National Bank, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Thompson & Patterson, of Pauls Valley, for plaintiff in error.

RUMMONS, C. This action was commenced in the county court of Garvin county to recover from the plaintiff in error the penalty for usury prescribed in section 5198, Revised Statutes United States. The cause was tried to a jury, and resulted in a verdict and judgment for defendant in error, to reverse which plaintiff in error brings this proceeding.

The first proposition urged by plaintiff in error is that the court erred in overruling its demurrer to the petition, its objection to the introduction of evidence, its demurrer to the evidence, and its motion to instruct the jury to return a verdict in its favor. All these rested upon the proposition that it was necessary for the defendant in error to allege and prove a demand for the return of the alleged usurious interest before he could recover. We do not think this assignment of error is well taken. This suit, being against a national bank, is governed by the provisions of the act of Congress relating to national banks. Congress has exclusive right to legislate as to national banks, and, having legislated upon the subject of the recovery of usury from national banks, such legislation is exclusive. *Farmers' & Mechanics' Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 198, 199. It is, however, argued by plaintiff in error that, while defendant in error can only recover the penalty prescribed by the Revised Laws of the United States, yet, having brought his action in the state court, he is bound by the procedure governing actions for the recovery of the penalty provided by Revised Laws 1910, § 1005, for the taking of usurious interest. The fallacy of the argument of plaintiff in error lies in the fact that the action of defendant in error is not brought to recover the penalty prescribed in section 1005, Revised Laws, 1910, but to recover the penalty prescribed by the Revised Laws of the United States, and, no demand being prescribed by such statute, it was not necessary for defendant in error to make demand in order to entitle him to a recovery. The Revised Laws of the United States provide that the penalty may be recovered in an action in the nature of an action of debt, and, as no demand was ever necessary to maintain the action of debt the trial court committed no error in overruling plaintiff in error's objections.

Plaintiff in error next complains of the instructions given by the court. While the

form of the instruction complained of set out in the brief of plaintiff in error is open to criticism, yet, taken together with all the instructions given by the court, we cannot say that the jury was misled thereby as to the burden of proof, and the giving of the same did not, therefore, constitute reversible error.

Plaintiff in error further complains of the refusal of an instruction requested by it. We do not think the instruction requested correctly stated the law applicable to the case, and therefore the court committed no error in refusing the same.

Complaint is further made of the rulings of the court upon the admission of testimony; but we do not think the rulings complained of constitute prejudicial error.

We have not been favored by a brief for the defendant in error, but a careful examination of the brief of plaintiff in error does not disclose the commission of any reversible error by the trial court, and its judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 221)

WALKER v. WEST PUB. CO. (No. 6591.)
(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 926—PLEADING \Leftrightarrow 304—HEARSAY—SWORN STATEMENT OF ACCOUNT—ITEMIZED STATEMENT.

In an action in which a verified answer is filed denying the allegations of the petition, a sworn itemized statement of the items and credits composing the basis of the action, if properly objected to, is not admissible in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1279, 2899, 3729, 3730, 3735—3747; Dec. Dig. \Leftrightarrow 926; Pleading, Cent. Dig. §§ 908, 909; Dec. Dig. \Leftrightarrow 304.]

2. SALES \Leftrightarrow 359—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

The evidence examined, and found to sustain the judgment, except as to a clerical error therein in the sum of \$8.25.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 511, 1056—1059; Dec. Dig. \Leftrightarrow 359.]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by the West Publishing Company against H. T. Walker. Judgment for plaintiff, and defendant brings error. Modified and affirmed.

J. J. Bruce, of Muskogee, for plaintiff in error. E. H. Bispham, of Muskogee, for defendant in error.

COLLIER, C. This action was brought by defendant in error against plaintiff in error, based upon the following contract:

"In consideration of the shipment to me at the above address of the books named on the back of this contract (said books to belong to the West Publishing Company until paid for), I agree to pay to the West Publishing Company

the sum of \$336.00 as follows: \$41.00 cash; balance \$10.00 per month beginning May 1, 1909.

"Payable at St. Paul Minn., with interest at the rate of 6 per cent. per annum from maturity until paid.

"[Signed] H. T. Walker."

Defendant answered, admitting the execution of said contract, and that he was indebted to plaintiff, which he stated he was able and willing to pay, about \$120. Upon the trial, without objection or exception, a sworn statement of the cashier of plaintiff, based upon said contract was admitted in evidence showing that said defendant was indebted to plaintiff in the sum of \$173.75. Defendant in his own behalf testified that he had paid to plaintiff upon said contract, and for other books to the amount of \$42, the sum of \$258.55.

The case was tried to the court, and judgment rendered against defendant in the sum of \$173.75. Motion for new trial was filed, overruled, and excepted to. To reverse said judgment, this appeal is prosecuted.

Plaintiff in error in his brief, says:

"There are several assignments of error set up, but they raise only one question for the consideration of this court: Was the findings of the trial court sustained by sufficient evidence, and not excessive? If this question is answered in the affirmative, the judgment of the trial court should be affirmed."

"Ex parte affidavits rank in the scale of evidence in equal grade with hearsay testimony, and, in the absence of any statute or rule of court expressly authorizing it, such affidavits can never be admitted in evidence to prove the truth of facts directly in controversy, unless received by consent, or without opposition where such opposition might have been made. As to such matters, the testimony of witnesses must be taken in open court or upon deposition, so as to afford an opportunity for cross-examination." 2 Cyc. 35.

[1] If proper objection had been made, said itemized statement should have been excluded. There being no objection to the introduction of said itemized account, it must be presumed that the same was admitted by consent. Upon admitting the execution of the contract and pleading payment, the burden was shifted to defendant to prove payment.

[2] The instrument sued upon provided for the payment of interest on the deferred payments therein named, which payments, to the amount of \$10, matured each month. That plaintiff was entitled to charge such interest seems to have been entirely overlooked by defendant, and was doubtless considered by the trial court. When the interest stated in said itemized account is considered, it will be found that there is a very slight difference in the said statement and the testimony of defendant as to payments. Of course, while defendant should pay interest on the deferred payments, he was also entitled to be credited with interest on the partial payments made by him, and in said statement this matter was overlooked, as it

was also by the court. A careful computation of the credits to which defendant was entitled by reason of interest on the partial payments, interest being calculated for the entire deferred payments in said statement, we find to be \$8.25, and to this extent the judgment rendered is excessive. It follows that there is sufficient evidence to sustain the judgment, if said clerical error, caused by failure to credit defendant with interest on his partial payments, be corrected.

The judgment should be modified by reducing same \$8.25, and, as so modified, should be affirmed.

PER CURIAM. Adopted in whole.

(55 Okl. 208)

MEEK v. TILGHMAN et al. (No. 6418.)
(Supreme Court of Oklahoma. Feb. 1, 1916.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES \S 168 — ACTION ON OFFICIAL BOND—PERSON KILLED RESISTING ARREST — PLEADING — COLOR OF OFFICE.

Where a deputy sheriff killed a man, and his widow brought suit against the sheriff and his bondsmen for damage, alleging that the husband of the plaintiff had committed a misdemeanor in the presence of the deputy sheriff, who thereupon attempted to arrest him, and, upon the deceased resisting arrest, the deputy released his hold upon him, and stepped off a few steps, but returned to the deceased saying, "I will arrest you, anyhow," and shot the deceased, killing him, held, that the facts pleaded show this act was done while in the discharge of his official duty, and under the color of office, and that it was error to sustain a demurrer to the petition, on the theory that at the time of the shooting the deputy was only engaged in a personal encounter, and not acting under the color of office.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. \S 398-404; Dec. Dig. \S 168.]

2. SHERIFFS AND CONSTABLES \S 157—OFFICIAL ACTS—WHAT CONSTITUTE.

The mere fact that a peace officer in the discharge of his duty becomes angered does not rob his acts of their official character. Nor does the fact that he may have momentarily abandoned his effort to discharge this official duty render the resumption of it any the less an official act.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. \S 354-371; Dec. Dig. \S 157.]

3. SHERIFFS AND CONSTABLES \S 157 — WRONGFUL ACTS OF DEPUTY SHERIFF—LIABILITY ON OFFICIAL BOND.

Under the Constitution, the law cannot inflict the death penalty as punishment for a misdemeanor; and an officer certainly has no right to kill a person guilty of a misdemeanor to prevent him from escaping justice.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. \S 354-371; Dec. Dig. \S 157.]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by May Meek, administratrix, against J. B. Tilghman and others. Judge-

ment for defendants, and plaintiff brings error. Reversed and remanded.

W. S. Pendleton, of Shawnee, for plaintiff in error. T. G. Cutlip and McClain Taylor, both of Tecumseh, for defendants in error.

BRETT, C. This is an action on a sheriff's bond commenced in the superior court of Pottawatomie county by the plaintiff in error against the defendants, the sheriff of that county and his bondsmen, to recover damages for the alleged wrongful killing of her husband by a deputy sheriff. The parties will be referred to as plaintiff and defendants, as they appeared in the lower court.

[1] The petition, after alleging that the plaintiff is the administratrix of the estate of M. H. Meek, deceased, alleges that E. A. Pierce was the duly elected, qualified, and acting sheriff of Pottawatomie county, and that the defendants King, Green, Perry, and Wilson are his bondsmen, and charges that one J. B. Tilghman was a duly appointed, qualified, and acting deputy sheriff, and alleges, in substance, that on the 19th day of March, 1911, M. H. Meek, then living, was the husband of plaintiff; that he had a bottle of whisky on his person, and was conveying same from place to place in the city of Shawnee; that he, the said Meek, broke said bottle of whisky against a brick wall in the presence of said J. B. Tilghman; that said Tilghman attempted to arrest Meek; "that the said Meek then and there protested against said arrest, insisting that the said Tilghman had no right to arrest him without a warrant; the said Tilghman still insisted on holding the said Meek under arrest, dragging him some yards, but finally released his hold and walked away a short distance from the said Meek; that during this time the said M. H. Meek and the said officer were quarreling and calling each other hard names, when suddenly, in a fit of anger and rage, said Tilghman whirled around, drawing his revolver, and, walking back to the said Meek, said, "I will arrest you, anyhow," and fired at the said Meek several shots from the said revolver three of said shots taking effect in the body of the said Meek, killing him instantly." And the plaintiff asked for actual and also exemplary damages. No service of summons was had upon Tilghman, as it appears he had absconded. The sheriff and his bondsmen each filed general demurrers to the petition of plaintiff, which were sustained by the court. The plaintiff declined to amend her petition, and judgment was rendered against her for the costs, and from this judgment she appeals to this court.

The sole question is whether the petition stated a cause of action against the sheriff and his bondsmen. The defendants insist that it does not; for the reason that the petition does not allege facts sufficient to

show that at the time the wrong was committed Tilghman was acting in his official capacity, and in the discharge of his official duty. But they say, on the other hand, it shows that Tilghman had abandoned the arrest, and returned to engage in a personal encounter. But we cannot agree with this contention. While it is true that the petition is not a model, yet, as we have said before, there is a wide distinction between a defective statement of a good cause of action and the statement of a defective cause of action; and the petition, we think, is good, as against a general demurrer.

[2] The facts alleged are sufficient to show that the deceased was guilty of having committed a public offense in the presence of an officer (section 3605, Rev. Laws 1910), and section 5654, Rev. Laws 1910, made it the duty of the officer to arrest him without a warrant. The facts alleged show that he did this, but, owing to the resistance of deceased, released his hold on him and walked a short distance away, but walked back to the deceased, saying, "I will arrest you, anyhow," and fired the fatal shots. Under the statute, that it was his duty to arrest the deceased without a warrant is clear; and the facts pleaded show that he was persisting in his effort to discharge this duty at the time he fired the fatal shots. To ascribe any other meaning to the language he is alleged to have used on returning to the deceased would be strained. The mere fact that he became angered in the discharge of his official duty does not rob it of its official character. Nor does the fact that he may have momentarily abandoned the effort to discharge this official duty render the resumption of that effort any the less an official act.

The defendants cite numerous authorities to the effect, that a peace officer's bondsmen are not liable for extra-official acts, and that before the bondsmen can be held liable it is necessary to allege and prove that the unlawful act was done under the color of office and while acting in the general line of his official duties. That is, we think, the correct rule, and the one we have applied in testing the sufficiency of the facts pleaded in the petition under consideration. In *Brown v. Weaver*, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512, in a well-considered opinion the court quotes from *Murfree on Sheriffs* as follows:

"If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable; if it was not an official, but a personal, act, it is equally clear that he is not answerable. But an official act does not mean what the deputy might lawfully do in the execution of his office; if so, no action would ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office."

And the author then adds:

"To hold the deputy and his sureties liable to the sheriff on his bond, it is not necessary that the deputy should be acting under color of some writ, but, if he is acting under color of his office, and professing so to act, and inducing others interested to believe he is acting colore officii, he and his sureties will be bound by such acts. No other rule would be safe. Sureties are not needed on a sheriff's bonds, if they are only to be held when he acts legally. They vouch for his acts, and bind themselves to make good any damage he may cause to any one while acting under color of his office."

[3] This clearly distinguishes the acts of a deputy for which the sheriff and his bondsmen are liable from those for which they are not liable; and we think the pleader in the petition under consideration has pleaded facts which show this act was done under color of office. And it is well settled that a peace officer, in making an arrest, may only use such force as is necessary to overcome the resistance he encounters, and cannot take the life of the accused or inflict upon him great bodily harm, except to save his own life or to prevent a like harm to himself. And killing a man guilty of a misdemeanor in an effort to arrest him is inexcusable. In *Brown v. Weaver*, supra, the court says:

"A resort to a measure so extreme in cases of misdemeanor was never permitted by the common law. 1 East, P. G. 302. That law has not, it is believed, lost any of its humanity since the time of the writer we have just cited. * * * But without legislative authority the severity of a remote age ought not to be exceeded in dealing with those who are accused of smaller offenses. * * *

"It has been said that the officers of the law are clothed with its sanctity, and 'represent its majesty.' * * * But the lawmaking power itself could not, under the Constitution, inflict the death penalty as a punishment for a simple misdemeanor. * * * And it would ill become the 'majesty' of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender, who is often brought into court without arrest, and dismissed with a nominal fine."

We think the petition states facts sufficient to show that Tilghman killed deceased while acting in the general line of his official duties and under the color of office. This being true, section 1695, Revised Laws 1910, specifically makes the sheriff and his bondsmen liable for the "acts and omissions of his undersheriff, deputy sheriffs and persons deputed to do particular acts."

But there is no question that the petition wholly fails to state a cause of action for punitive or exemplary damages, as against the sheriff or his bondsmen.

We therefore recommend that the judgment be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PER CURIAM. Adopted in whole.

conveyed this land by warranty deed to said L. C. Wells, and on the 5th day of September, 1910, the said L. C. Wells conveyed the said land by warranty deed to F. M. Sutton, the defendant. However, said McGinnis and Wells, at all times the title remained in them, held the same by special arrangement with the defendant Sutton, for his use and benefit.

On the 29th day of August, 1910, the said Ethel Ross, while out of the possession of the premises, and while the same was occupied by the said tenants of McGinnis adversely, conveyed this land by warranty deed to the plaintiff, for the benefit of himself and one W. H. Bartlett. The said Bartlett made the transaction for the land, and at the time he did so he knew that the said S. L. and G. W. Tull, tenants of the said McGinnis, were in possession of the said premises, and it also appears from the evidence that at the time the said Ethel Ross executed the said warranty deed to the plaintiff she had not taken the rents and profits from said land for the space of one year prior to the time she executed said deed.

[1] The question presented for our determination is whether or not the deed from Ethel Ross to the plaintiff Denton is void as against the defendant Sutton, by reason of Section 2215, Comp. Laws of 1909 (section 2260, Revised Laws of Oklahoma of 1910); the statute being as follows:

"Any person who buys or sells, or in any manner procures, or makes or takes any promise or covenant to convey any pretended right or title to any lands or tenements, unless the grantor thereof, or the person making such promise or covenant has been in possession, or he and those by whom he claims have been in possession of the same, or of the reversion and remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise or covenant made, is guilty of a misdemeanor."

At the time the deed was executed to the plaintiff, the defendant, by and through the said Wells and tenants aforesaid, was in the adverse possession of the same. *Fleshor v. Callahan et al.*, 32 Okl. 283, 122 Pac. 489; *Vaughan et ux. v. Holder*, 41 Okl. 101, 137 Pac. 672. And this court, by a long line of decisions construing the foregoing statute, has laid down the rule that where the grantor, or those by whom he claims, have not been in possession or taken the rents and profits for the space of one year before such conveyance, that such conveyance is void as between the grantee and the person who was at the time of the conveyance in adverse possession of the conveyed premises. Therefore the trial court committed error in rendering judgment for the plaintiff. *Miller v. Fryer*, 35 Okl. 145, 128 Pac. 713; *Martin v. Cox et al.*, 31 Okl. 543, 122 Pac. 511; *Larney et al. v. Aldridge*, 31 Okl. 447, 122 Pac. 151; *Fleshor v. Callahan*, supra; *Vaughan v. Holder*, supra; *Gannon v. Johnston*, 40 Okl. 695, 140 Pac. 430, Ann. Cas. 1915D, 522; *Hus-*

ton v. Scott, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721; *Powers v. Van Dyke*, 27 Okl. 27, 111 Pac. 939, 36 L. R. A. (N. S.) 96; *Bell v. Cook (C. C.)* 192 Fed. 597; *Ruby v. Nunn*, 37 Okl. 389, 132 Pac. 128; *Phillips v. Byrd*, 43 Okl. 556, 143 Pac. 684; *Sims v. Brown*, 149 Pac. 876; *Jackson v. Lair*, 150 Pac. 162.

[2] There is no merit in the contention of the defendant that the enrollment records of the Commissioner to the Five Civilized Tribes are not competent evidence to establish the age of the allottee. This court has repeatedly held that such records are conclusive evidence as to the age of the allottee in transactions made subsequent to the time the Act of Congress of May 27, 1908 (35 Stat. L. c. 199, p. 812), went into effect. *Williams v. Joins*, 34 Okl. 733, 128 Pac. 1013; *Rice v. Ruble*, 39 Okl. 51, 134 Pac. 49; *Perkins v. Baker*, 41 Okl. 288, 137 Pac. 661; *Scott v. Brakel*, 43 Okl. 655, 143 Pac. 510; *Phillips v. Byrd*, supra; *Grayson v. Durant*, 43 Okl. 799, 144 Pac. 592; *Smith v. Bell*, 144 Pac. 1058; *Diamond v. Perry*, 148 Pac. 88; *Charles v. Thornburgh*, 144 Pac. 1033; *Malone v. Alderdice*, 212 Fed. 668, 129 C. C. A. 204; *Campbell v. McSpadden*, 143 Pac. 1138; *Miller v. Thompson*, 151 Pac. 192, recently decided but not yet officially reported.

For the reason assigned, the judgment of the trial court should be set aside, and the case reversed and remanded for a new trial.

It is so ordered.

PER CURIAM. Adopted in whole.

(55 Okl. 487)

KEISEL v. BALDOCK et al. (No. 6337.)
(Supreme Court of Oklahoma. Dec. 21, 1915.
Rehearing Denied Feb. 15, 1916.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 335, 342—PURCHASER WITH NOTICE OF INFIRMITIES—DEFENSES.

Where the purchaser of a promissory note has notice of its infirmities at the time of the purchase, he takes the same subject to such defenses as may be maintained by reason of such infirmities.

When a negotiable instrument bears on its face such marks of infirmity as would put an ordinarily prudent person upon inquiry, the indorsee of such instrument takes the same subject to such defenses as are maintainable by reason of its infirmities.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 817, 830-841; Dec. Dig. \S 335, 342.]

2. BILLS AND NOTES \S 171, 342, 346—SPECIAL INDORSEMENT—EFFECT AS NOTICE—LIABILITY OF PURCHASER.

The holder of three negotiable promissory notes for \$2,500 each purchased property of B. for \$6,000, and transferred these notes in payment, but retained an interest in one of the notes to the extent of the excess of the notes above the purchase price of the property, and in transferring one of the notes the special indorsement was preceded by the following memoranda: "Oklahoma City, November 16, 1910. On payment of the within note and interest

Mrs. N. E. Baldock is to receive \$1,530.00 and interest at 6 per cent." And these notes were transferred to C. prior to maturity and for value, and the amount of the notes and interest was collected by C. *Held*, that the above memoranda in effect destroyed the negotiability of the note, and it was sufficient to put the purchaser upon inquiry as to Mrs. Baldock's interest therein, and such purchaser was not a holder in due course, and was liable to Mrs. Baldock for the amount of her interest therein in an action for money had and received.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 415, 830-841, 869; Dec. Dig. §§ 171, 342, 346.]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Action by Nancy E. Baldock against Harry C. Keisel and others. Judgment for plaintiff, and the defendant named brings error. Affirmed.

Everest & Campbell, of Oklahoma City, for plaintiff in error. Burwell, Crockett & Johnson, of Oklahoma City, for defendant in error Baldock.

GALBRAITH, C. Nancy E. Baldock commenced this action in the trial court against the plaintiff in error and defendants in error Floyd H. Skirvin and W. B. Skirvin for money had and received. A jury was waived, and the cause was tried to the court, and a finding made in favor of the plaintiff, and judgment rendered for the amount claimed against the plaintiff in error. From that judgment an appeal has been prosecuted to this court by petition in error and case-made.

It appears from the record that the defendant in error Mrs. Baldock was the owner of three promissory notes for \$2,500 each, and secured by real estate mortgage; that she purchased some property from Floyd H. Skirvin for \$6,000, and gave in payment thereof these mortgage notes, after having indorsed the same; that the aggregate amount of the notes was in excess of the purchase price of the property in the sum of \$1,530; that Mrs. Baldock retained an interest in one of the notes for this amount; and that Skirvin also executed his promissory note to her for this amount, and on the back of one of the notes transferred to him was written this indorsement:

"Oklahoma City, November 16, 1910. On payment of within note and interest Mrs. Nancy E. Baldock is to receive \$1,530.00 and interest from date at 6 per cent. Pay to F. H. Skirvin or order. N. E. Baldock."

Payment of the note was also guaranteed by W. B. Skirvin by written indorsement on the back thereof. Prior to maturity, and for value, Skirvin transferred and indorsed the notes to the plaintiff in error, Keisel, and Keisel collected the notes at maturity, and claims to have been a bona fide holder of the notes, and that, since he acquired them prior to maturity and for value, he took them free from all equities or claims of Mrs. Baldock.

Oral testimony was admitted at the trial, over the objection of the plaintiff in error,

to the effect that it was understood between Skirvin and Mrs. Baldock at the time the notes were transferred to Skirvin that he should hold this note in which Mrs. Baldock claimed an interest, and that the same was to be placed in the bank and held until its maturity, and, when collected, the \$1,530, and interest, should be paid to Mrs. Baldock. The full amount of this note and interest was collected by Keisel, and this action was to recover the interest claimed in it by Mrs. Baldock to the extent of \$1,530, and interest at 6 per cent. Keisel's testimony as to how he purchased the notes is as follows:

"Q. Did you agree with Floyd H. Skirvin to purchase the notes? A. I did. Q. Did you have them in your hands? A. He came out to the house. I was in bed. I took a couple of the notes; presumed they were all right; just looked at them; saw that they were \$2,500 each, you know. I took up a couple of them; did not look them over. I did not see that indorsement on it. Q. You did not see the indorsement on there? A. No, sir. Q. What did you do then? A. I gave him a check and put the notes in my safe. I gave him the check. He said make it out to W. B. Skirvin. I made the note payable to W. B. Skirvin, or check, rather."

After Keisel discovered the memoranda on the note in regard to the interest of Mrs. Baldock therein, he went to W. B. Skirvin and had the payment guaranteed. Skirvin made a written guaranty on the back of the note as follows:

"On account of indorsement in favor of Mrs. Baldock I guarantee the full payment of \$2,500.00 and interest on this note to H. C. Keisel, or order. W. B. Skirvin."

The assignments of error as set out in the brief of plaintiff in error are as follows:

"The assignments of error may be all discussed under two headings: First, it was error for the trial court to admit evidence of the oral agreement and conversations between Mrs. Baldock and her attorney and the Skirvins at the time the note was delivered by Mrs. Baldock to Floyd H. Skirvin, on November 16, 1910; second, the transaction between Mrs. Baldock and Floyd H. Skirvin conferred absolute authority upon the latter to sell and dispose of the note barring the so-called restrictive and conditional indorsement, and under the undisputed evidence Keisel by the purchase of said note from Floyd H. Skirvin became the absolute owner thereof, and of all the proceeds thereof, and of the debt evidenced by said note, and the judgment of the trial court should have been in his favor on this account."

[1, 2] The oral testimony as to the understanding of Mrs. Baldock and Skirvin as to what should be done with the note at the time the same was transferred to Skirvin was not competent or relevant as to the plaintiff in error, Keisel, and he was not bound thereby, provided he was a holder of the note in due course. However, this testimony was competent and relevant to show the interest that Mrs. Baldock retained in this note, and the title that Floyd H. Skirvin had to the same since, if there was an infirmity in his title, and the note bore evidence of this infirmity, the same was passed to Keisel, and he was not a holder in due course. The fact that Keisel purchased the note for

value and before maturity did not make him a holder in due course, if at the time he purchased the note he had notice of any infirmity in the instrument or defect in the title of Skirvin thereto. Therefore the question is presented whether or not the indorsement on the back of the note relative to the interest of Mrs. Baldock therein was not sufficient notice to place Kelsel upon inquiry as to the character of title that Skirvin had, and to charge him with notice of the infirmity in Skirvin's title, and, in effect, to destroy the negotiability of the note and to make it subject to all the defenses in his hands that it would have been in the hands of Floyd H. Skirvin. Section 4102, Rev. Laws 1910, defines a "holder in due course" as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions: First: That it is complete and regular upon its face; Second. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; Third. That he took it in good faith and for value; Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

If Skirvin transferred the note to Kelsel "in breach of faith," as provided in section 4105, Rev. Laws 1910, with Mrs. Baldock, Kelsel's title to the note was defective and he was not a holder in due course. The general rule as announced by this court in *Jenkins v. Planters' & Merchants' Bank*, 34 Okl. 607, 128 Pac. 757, in the first paragraph of the syllabus, is as follows:

"Where the purchaser of a promissory note has notice of its infirmities at the time of the purchase, he takes same subject to such defenses as may be maintained by reason of such infirmities. When a negotiable instrument bears on its face such marks of infirmity as would put an ordinarily prudent person upon inquiry, the indorsee of such instrument takes same subject to such defenses as are maintainable by reason of its infirmities."

The note involved in that case was payable to a corporation. It was indorsed by the president of the corporation, and placed as collateral security to the bank to secure his individual debt. There was no evidence that the bank taking this note as collateral had any further notice of the note's infirmities than such as was disclosed by the note to the effect that Harper was pledging the company's note to secure his debt. The court held that that was sufficient notice to place the bank upon inquiry, and that they should have ascertained whether or not Harper had authority from the company to use this note as collateral for his own obligation, and, as it did not make that inquiry, it was not a holder in due course, and the same was subject to the same defenses in an action by the bank as it would have been in the hands of the corporation.

In the case of *Stein v. Rheinstrom*, 47 Minn. 476, 50 N. W. 827, the instrument involved was negotiable in form, a warehouse receipt for whisky, and contained the following phrase, "and deliver the same upon payment

for the whisky, the United States government and state tax, interest, and charges." The court, in discussing the question, said:

"Whether these words should be regarded as equivalent to the words 'upon payment for the whisky' or 'upon payment of the purchase price of the whisky,' or as equivalent to some other form of expressing the fact that a payment of some part of the price had to be made, is wholly immaterial for the proper disposition of the order appealed from, which must be affirmed. Strictly speaking, the receipts were not negotiable, for they carried upon their face a notice that the whisky would only be surrendered upon the payment of certain charges thereafter to be ascertained. If there was anything doubtful or ambiguous about the language used as to the nature, character, or extent of the claim or lien, a purchaser was put upon his guard, and cautioned to inquire. He was thereby notified of an infirmity which would affect him, and this notice was ample to prevent a purchase of the receipts by any person exercising ordinary business prudence and judgment without first investigating. Observing a clause in the receipts which was uncertain, he was bound to learn its meaning, or, failing so to do, to suffer the consequences. The words in question were indefinite, and of doubtful import, but palpably a prepayment of some character was required, in addition to United States government and state taxes, interest, and charges. It devolved upon the plaintiff, when purchasing, to discover what was intended by their use. The purchaser of what purports to be or is said to be negotiable paper must exercise ordinary prudence in respect to knowledge derived from an inspection of the paper. *Hall v. Hale*, 8 Conn. 336; *Ayer v. Hutchins*, 4 Mass. 370 [3 Am. Dec. 232]; see, also, *Bank v. Scott Co.*, 14 Minn. 77 (Gil. 59) [100 Am. Dec. 194]."

This case is in line with the great weight of authority, as will be seen by reference to *Mee v. Carlson*, 22 S. D. 365, 117 N. W. 1033, 29 L. R. A. (N. S.) 351, and the very full note accompanying said report.

We conclude from these authorities that the indorsement on the note in regard to the interest of Mrs. Baldock therein was sufficient to put a reasonably prudent man upon inquiry, and the inquiry would have disclosed the defect in Skirvin's title, and the fact that Kelsel bought the note without actual knowledge of this indorsement cannot affect the question; for he is charged with knowledge of this indorsement and everything it necessarily implied. It was certainly notice of the defect in Skirvin's title, and was sufficient to put Kelsel on inquiry to find out the interest of Mrs. Baldock, if any, in the note. The fact that he did not see or look for the indorsement before purchasing the note cannot excuse him. The fact that when he did discover this indorsement he carried the note to W. B. Skirvin and secured his guaranty of the payment is significant, at least, to show that the memoranda on the back of the note was sufficient to give notice that Mrs. Baldock had some interest in the note, and that there was a defect in his title. Kelsel having taken this note with the knowledge of the infirmity in Skirvin's title, he was not a holder in due course, and the same was subject to the same defenses in his hands that it would have been in the hands of Floyd H. Skirvin, and, he having collected the full amount of

the note and interest, he is liable to Mrs. Bal-dock for money had and received, to the extent of her interest as found by the trial court.

We therefore recommend that the judgment appealed from be affirmed.

PER CURIAM. Adopted in whole.

(12 Okl. Cr. 276)

MITCHELL v. STATE. (No. A-2407.)

(Criminal Court of Appeals of Oklahoma.
Feb. 19, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1159—APPEAL—VERDICT—EVIDENCE.

It is the exclusive province of the jury to pass upon the weight of the evidence and the credibility of the witnesses, and, where competent evidence has been introduced tending to prove all the material allegations of the information, its weight and sufficiency to sustain a conviction is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3074-3083; Dec. Dig. \S 1159.]

2. INTOXICATING LIQUORS \S 236—UNLAWFUL POSSESSION—SUFFICIENCY OF EVIDENCE.

Evidence considered, and held sufficient to sustain a conviction for unlawful possession of intoxicating liquor with intent to sell the same.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 300-322; Dec. Dig. \S 236.]

Appeal from County Court, Canadian County; W. H. Maurer, Judge.

A. J. Mitchell was convicted of violating the prohibitory law, and appeals. Affirmed.

J. I. Phelps, of El Reno, for plaintiff in error. R. McMillan, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was tried and convicted on an information charging the unlawful possession of intoxicating liquors, and was sentenced to pay a fine of \$50 and be confined in the county jail for 30 days. From that sentence and judgment, he appeals. The only noticeable assignment of error is that: "The evidence is not sufficient to justify or sustain the verdict of the jury."

[1, 2] The testimony of J. M. Carter, undersheriff, and P. G. Rowe, deputy sheriff, was, in substance, as follows: That the defendant was the keeper of a restaurant at Union City, and in serving a search warrant the officers found 63 pint bottles of beer. Part of it was in a refrigerator along with some soda, pop and other light drinks.

James Sanders, and Lacy Bennett testified to having bought beer from the defendant.

The defendant did not testify as a witness, but his wife testified that the beer was kept for the personal use of the family.

Under the statute questions of fact are to be decided by the jury (section 5873, Rev.

Laws), and, where competent evidence has been introduced tending to prove the material allegations of the information, its weight and sufficiency to sustain the conviction is for the jury.

Finding no error, the judgment of the lower court is affirmed.

(12 Okl. Cr. 277)

BALLARD v. STATE. (No. A-2171.)*

(Criminal Court of Appeals of Oklahoma.
Feb. 21, 1916.)

(Syllabus by the Court.)

1. HOMICIDE \S 307—DEGREES—INSTRUCTIONS—EVIDENCE.

While the jury has the right to determine the degree of crime committed in a homicide case, it is for the court to determine what degrees of homicide the evidence tends to establish, and it is the duty of the court to confine its charge to such degrees.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 638-641; Dec. Dig. \S 307.]

2. HOMICIDE \S 78—MANSLAUGHTER IN SECOND DEGREE.

Where the killing with a deadly weapon is admitted, and there is no pretense that the killing was accidental, and where the defense is justifiable homicide in self-defense, there can be no issue of manslaughter in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 104; Dec. Dig. \S 78.]

3. CRIMINAL LAW \S 1038, 1056—REVIEW—PRESENTATION BELOW—INSTRUCTIONS.

A defendant who has been convicted of manslaughter in the second degree cannot complain that the court charged the law of manslaughter in the second degree, and that the evidence did not justify such a charge, where the record shows no objection was made or exception taken to this part of the charge in the court below.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2646, 2668, 2670; Dec. Dig. \S 1038, 1056.]

Appeal from District Court, Grady County; Frank M. Bailey, Judge.

James Ballard was convicted of manslaughter in the second degree, and appeals. Affirmed.

Bond, Melton & Melton, of Chickasha, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, herein referred to as the defendant, was convicted of the crime of manslaughter in the second degree, and in accordance with the verdict of the jury was sentenced to imprisonment in the county jail of Grady county for the period of 12 months. The information charged that the defendant, James Ballard, did in Grady county, on or about the 5th day of July, 1913, kill and murder Arthur Goodnight, by shooting him with a shotgun. From the judgment and sentence he appeals to this court.

The evidence shows that the deceased, Arthur Goodnight, was a brother-in-law of the defendant, James Ballard, having married

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied March 25, 1916.

his sister. The defendant lived with his parents on a farm near Dutton post office, in Grady county, and the deceased with his wife and three children lived in the same neighborhood. On the 3d of July the deceased, with his wife and children, visited her parents, and stayed there that night. The next day the deceased assisted his father-in-law to save some alfalfa hay. When the deceased came to the house that evening, there was some family trouble. The evidence offered by the defendant was to the effect that the deceased became angry because the women folks did not save some of the Fourth of July ice cream and cake for him. However, the deceased left his wife there and returned home. On the next day, during the forenoon, the deceased returned in a buggy to his father-in-law's place, and took away his three year old daughter. No trouble occurred at that time. About mid-day, he passed by the house again, accompanied by his little girl. After passing the house the wife of the deceased waved to him, and he stopped down the road from the house a distance of more than 100 yards, saying to his wife that she would have to come down there if she wanted to talk to him. The wife of the deceased, with her baby in her arms, started to the place where he had stopped on the section line road. The defendant went to the house and reached behind the door and got his shotgun, saying to his sister that if she was going he would go along and protect her. They went on inside of the fence, and, when they reached the point where the deceased had stopped, the defendant stepped on the wire so his sister could cross. About this time the deceased got out of the buggy and started towards the fence, and then started back to the buggy.

According to the defendant's statements before the trial, he asked the deceased if he had a gun. The deceased said, No. The deceased then told him to go and put the gun up; that he did not need any gun. The deceased then started to cross over the fence, and the defendant hit him with the shotgun, and then fired a shot over his head. The defendant backed off 15 or 20 steps with the deceased following him up. He then fired the fatal shot; the charge entered the left breast above the heart. Death was almost instantaneous. The deceased did not have a weapon of any kind.

For the state Cecil Gatewood testified that he lived near the town of Dutton; that he was at the Ballard place on the day of the tragedy; that Arthur Goodnight lived a mile and a quarter west of the Ballard place; that he was standing about 75 yards northwest of the parties when the shooting occurred, and saw Jim Ballard fire the shot that killed Arthur Goodnight; that they were 5 or 6 steps apart when the fatal shot was fired; that he was "a great friend of Jim Ballard."

As a witness for the defendant Mrs. Bessie Goodnight testified that she was the widow of the deceased, Arthur Goodnight; that on Thursday, with her husband and children, she went to her father's house, and stayed there that night so that her husband could help her father spread his alfalfa the next day; that the next evening her husband came in from the hayfield for supper, and became angry because they did not save any ice cream for him, and said he was going home; that her mother asked him not to go, but he got into his buggy and told witness if she was going home with him to get in, and she went to get ready, and looked out and saw him driving away; that about 11 o'clock the next day he came and got the little girl off the porch; that he had his single-barrel shotgun leaning against the seat by his side in the buggy at that time; that about an hour or two later he drove down the road in the buggy with the child; that as he drove by she waived good-bye to him, and he stopped; that he had often made threats against the Ballards, and she had told her brother, Jim, about these threats; that when he stopped she asked him where he was going, and he said, "Come down here and talk to me;" that as she started to go she asked her brother, Jim, to go with her; that she was carrying her baby in her arms; when they reached the fence her husband said to Jim, "I will have you arrested before night for bringing that gun with you," and Jim said, "Go ahead; that's all right; we have an officer at the end of the road for you;" that her husband got out of the buggy and started towards her brother, and Jim told him to stand back, that he did not want to hurt him; "that he came over the wire and grabbed for Jim, and Jim knocked the lick off with the gun," and she told her husband to stand back and not get any closer to Jim; that when the second shot was fired they were four or five steps apart.

James Ballard, the defendant, testified that he was at Verden attending a Fourth of July picnic, and did not return home until about midnight that night; that his mother told him about Arthur Goodnight going away angry that evening, and told him about what his sister had said about their trouble, and that he had threatened to kill all of the Ballards; that he was working in the field the next day, and came to the house for water, and the folks said that Goodnight had been there and stole the little girl, and that he had his gun with him, and his sister, Mrs. Goodnight, told him about the threats her husband had made against "her, him, and all of us"; that when the deceased drove by Mrs. Goodnight waved her hand at him, and he stopped; that he told his sister not to go down there to him; that she started, and he took his gun and went along to protect her; that when they reached the fence the deceased asked him where he was going with that gun, and told him to go back, and he did

not make any answer; that the deceased said, "I will get you," and got out of the buggy and came at him; that as he was crossing the fence he struck him with the gun and shot over his head to scare him and try to keep him back; that he kept on coming, and witness kept backing from him, and he shot him. He further testified as follows:

"Q. How far were you from him the last time you shot? A. About the same distance when I first shot at him. Q. Did you shoot to kill that shot? A. Yes, sir. Q. State to the jury why you shot the last shot to kill. A. I run from him and back from him as long as I could, and I thought that was the only chance to save my life. Q. How large was he? A. Weighed more than 200 pounds and more than six foot tall."

On cross-examination he stated that he did not remember whether or not his sister asked him to go down there to the road with her.

In rebuttal, Dr. Messner testified that he lived at Dutton, and the Ballards lived about a mile west, and that Arthur Goodnight lived about 300 yards east; that he had a store there, and that Arthur Goodnight passed the store three times that day; that he talked with him about 10 o'clock that morning while he was sitting in his buggy, and that he did not have a shotgun, and he drove east, and about 25 minutes later he returned, going towards his home, with the little girl in the buggy with him; that Mr. Goodnight stopped, and he went out to his buggy with some lunch stuff and put it in the back part of the buggy, and he gave some candy to the little girl; that he did not see any gun in the buggy, and about an hour later he drove past the store, and the little girl was in the buggy with him.

Mrs. Dr. Messner testified that on the day of the tragedy the deceased stopped at their store three times; that the first time he was going towards Ballards, and stopped at the store to use the phone; that she saw his buggy plain, and did not see any gun; that the little girl was with him when he came back, and she stood by the buggy talking to him, and did not see any gun.

The errors assigned are predicated upon exceptions to the charge of the court. Only one of the instructions excepted to is complained of in the defendant's brief. It is contended that the testimony of the defendant and that of Mrs. Bessie Goodnight shows conclusively that the defendant abandoned

the conflict with the deceased and attempted to withdraw from the same, and that the deceased pursued the defendant after such withdrawal, and that under said testimony, conceding the instruction complained of to be the law, the court should have gone further and instructed the jury that from that time forward the defendant had the right to defend himself, and was entitled to the benefit of the law of self-defense.

[1-3] Under the law and the evidence in this case the issues to be determined by the jury were murder or manslaughter in the first degree, or justifiable homicide in self-defense. The action of the court in submitting to the jury the issue of manslaughter in the second degree is inexplicable. However, no objection was made or exception taken by the defendant to this part of the charge of the court. It is a sufficient answer to say that the rule is that, if the court commits error in instructing the jury upon the law applicable to a higher degree of such crime, and the jury renders a verdict of guilty of the lower degree, the defendant cannot complain, and a defendant who has been convicted of manslaughter in the second degree cannot complain that the court charged the law of manslaughter in the second degree, and that the evidence did not justify such a charge. *Weatherholt v. State*, 9 Okl. Cr. 161, 131 Pac. 185.

The jury has the right to determine the degree of the crime committed in a homicide case; yet its determination must be based upon evidence. It is for the court to determine what degree of homicide the evidence tends to establish, and it is the duty of the court to confine its charge to such degrees. Where the killing with a deadly weapon is admitted, and there is no pretense that the killing was accidental, and where the defense is justifiable homicide in self-defense, there can be no issue of manslaughter in the second degree.

Upon the undisputed facts and the testimony of the defendant in his own behalf, he was guilty at least of manslaughter in the first degree. However, upon the record before us, our duty is performed by an affirmation of the judgment. The judgment of the district court of Grady county is therefore affirmed.

FURMAN and ARMSTRONG, JJ., concur.

